



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : (1) BIR/00FY/HSH/2020/0002
(2) BIR/00FY/HSH/2020/0003

Subject Property : Flats A and B
30 Magdala Road
Nottingham
NG3 5DF

Applicant : Nottingham City Council

Representative : None

Respondent : Mr Dexter Blackstock

Representative : Cartwright King Solicitors

Type of Application : Application under sections 40, 41(1), 43 &
44 of the Housing and Planning Act 2016
for a rent repayment order

Tribunal Members : Graham Freckelton FRICS (Chairman)
A Lavender BSc (Hons) Dip Law Dip Surv

**Date and Place
of Hearing** : 5th November 2020. The matter was
dealt with by a paper determination

Date of Decision : 12th November 2020

DECISION

INTRODUCTION

1. This is a decision on an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 ('the 2016 Act').
2. Under section 80 of the Housing Act 2004 ('the 2004 Act'), Local Housing Authorities can introduce a Selective Licensing Scheme covering some or all of its area, whereby any rented dwelling will need to be licenced. Originally local housing authorities were permitted to designate areas within their district as subject to selective licensing for up to 5 years where the area suffered with problems of low demand or high levels of antisocial behaviour. In 2015, the conditions which could permit designation if the local authority considered they existed was extended to include poor property conditions, high levels of inward migration, high levels of deprivation and high levels of crime. Nottingham City Council introduced such a scheme on 1st August 2018 in respect of the area in which 30 Magdala Road, Nottingham NG3 5DF ('the subject property'), is located.
3. Section 95(1) of the Act provides that a person having control of or managing a house which is required to be licensed under this part (see Section 85(1) but is not so licensed commits an offence.
4. The criminal sanction for failing to obtain a licence is supplemented by the scheme of civil penalties known as rent repayment orders. Under section 96 of the 2004 Act, where a person who controls or manages an unlicensed property in an area designated for selective licensing has been convicted, the occupiers (or former occupiers) of the unlicensed property may apply to the First-tier Tribunal for rent repayment orders. A Local Housing Authority may also apply to the First-tier Tribunal for a rent repayment order in respect of any housing benefit paid.
5. However, from 6th April 2017, subject to transitional provisions, the 2016 Act has amended the provisions relating to rent repayment orders in England. Under section 41 (1) and section 43 of the 2016 Act the First-tier Tribunal may make a rent repayment order in favour of the occupiers (or former occupiers), or the Local Housing authority if it is satisfied beyond reasonable doubt that the landlord has committed an offence under section 95(1) of the 2004 Act, *whether or not the landlord has been convicted.*

BACKGROUND

6. The Applicant in both cases is Nottingham City Council.
7. The Respondent is the landlord of the subject property.
8. The Applications in respect of both flats were dated 18th June 2020 and received by the Tribunal on 22nd June 2020. The Applicant referred to above applied for a Rent Repayment Order under section 41 of the 2016 Act. The Applicant alleges that the property was unlicensed.
9. Directions were issued on 24th July 2020 following which submissions were made and copied to the other party.

10. It is apparent from the documentation received from the Applicant that both flats were occupied on Assured Shorthold Tenancies.
11. Flat A was occupied by Ms Samantha Cryar and Mr Michael Allen for an initial term of six months from 6th April 2015 at a rental of £563.00 per calendar month.
12. There was no tenancy agreement provided in respect of Flat B but the Application Form confirms it was let from 31st March 2015 and ended on 9th May 2019.
13. The Application infers that the Applicant is requesting a rent repayment for both flats as follows:

Flat A

The Sum of £4231.68 being the amount of Housing Benefit paid between 1st August 2018 (being the date Selective Licensing commenced) and 16th March 2019 (being the date the tenant vacated).

Flat B

The Sum of £4361.30 being the amount of Housing Benefit paid between 1st August 2018 (being the date Selective Licensing commenced) and 9th May 2019 (being the date the tenant vacated).

THE LAW

14. The relevant provisions of the 2016 Act, so far as this application is concerned, are as follows –

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or ...

(3) A reference to ‘an offence to which this Chapter applies’ is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

	Act	Section	General description of offence
1	Housing Act 2004	Section 95(1)	Houses to be Licenced by the Local Authority

41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if –

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if –

(a) the offence relates to housing in the authority’s area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

...

43 Making of rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with—

...

(b) section 45 (where the application is made by a local housing authority);

...

45 Amount of order: local housing authorities

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a local housing authority, the amount is to be determined in accordance with this section.

(2) The amount must relate to universal credit paid during the period mentioned in the table.

<i>In the order is made on the ground that the landlord has committed</i>	<i>The amount must relate to universal credit paid in respect of</i>
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6, or 7 of the table in section 40(3)	A period not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed the amount of universal credit received by the landlord received (directly or indirectly) in respect of rent under the tenancy for that period.

(4) In determining the amount the tribunal must, in particular, take into account –

(a) the conduct of the landlord

(b) the financial circumstances of the landlord, and

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

46 Amount of order following conviction

- (1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).
- (2) Condition 1 is that the order –
 - (a) is made against a landlord who has been convicted of the offence, or
 - (b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.
- (3) Condition 2 is that the order is made –
 - (a) in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or
 - (b) in favour of a local housing authority.
- (4)
- (5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable for the landlord to pay.

THE PROPERTY INSPECTION

15. Due to the Covid-19 Pandemic, in accordance with the revised Tribunal Regulations the Tribunal was unable to inspect the property. This was accepted and agreed by the parties.

THE SUBMISSIONS

16. Both parties provided written submissions. These are summarised as follows:

The Applicant's Submissions

17. The Applicant submitted that the Coach House was a semi-detached property converted into three self-contained flats and located within the Selective Designated Licensing Area of Nottingham City which came into force on 1st August 2018.
18. It was further submitted that on 17th October 2017 the Respondent was convicted of 12 offences under section 72 and section 95 of the 2004 Act. In deciding whether to apply for a Rent Repayment Order the Applicant had regard to the Guidance for Local Housing Authorities-Rent Repayment Orders under the Housing and Planning Act 2016 given by the Department for Communities and Local Government.
19. The Applicant further submitted that applying for a rent repayment order in this case was in the public interest as public funds had been used to pay the Respondent during the period that the property was unlicensed and a criminal offence committed.
20. The Applicant submitted that in accordance with section 42 of the 2016 Act it served two Notices of Intent to Apply for Rent Repayment Orders on 4th February 2020 in respect of the rent paid to the Respondent for the two properties. It provided copies of the relevant documentation.

21. It was submitted by the Applicant that the Notices outlined that it was seeking to recover £4,231.68 in respect of rent paid the Respondent for Flat A for the period 1st August 2018 to 16th March 2019, and £4,391.30 in respect of rent paid to the Respondent for Flat B for the period 1st August 2018 to 12th May 2019. These amounts had been calculated using summaries of payment provided by the Housing Benefit Department.
22. Following service of the Notices of Intent on 4th February 2020 the Respondent was invited to submit representations within 28 days. This period was subsequently extended and representations were received on 8th April 2020. The Applicant subsequently considered the representations made and sent a written response to the Respondent on 28th May 2020 advising the Respondent that an application for a Rent Repayment Order would be made.
23. The Applicant submitted that in accordance with the provisions of the 2016 Act a Rent Repayment Order should be made under section 43 for the amounts applied for because the conditions specified in section 46 had been met; in that the applications were in respect of two offences to which this Chapter applies and the order was in favour of a Local Housing Authority. The Applicant submitted that the amount specified in the application did not exceed the amounts of housing benefit that the Respondent received in respect of rent paid to him under the tenancies for that period.
24. In conclusion, the Applicant submitted that having considered the representations submitted by the Respondent the Applicant was of the opinion that there were no exceptional circumstances contained therein that should cause the Tribunal to determine that it would be unreasonable to require the landlord to make payment.

The Respondent's Submissions

25. The Respondent submitted through his Representative that he did not dispute that he was convicted of owning properties without the appropriate licence. He therefore acknowledged that some rents received should be repaid pursuant to a Rent Repayment Order. However, in the submission of the Respondent this was a case of exceptional circumstances where the full amount not be repaid.
26. The Respondent submitted that he was the owner of the subject properties and that at all material times they were managed by Mr P James of Harvey James Properties. The Respondent himself had very little to do with the properties.
27. It was submitted that neither Flat A nor Flat B are HMO's. However, from 1st August 2018 they were covered by Nottingham City Council's Selective Licensing Regime and the Respondent acknowledged that he should have obtained a Selective Licence. However, he was not advised by Mr James to do so. It appears that this was due to a misunderstanding on the part of Mr James as to what the requirements for a Selective Licence were.
28. It was further submitted that the Applicant made a number of attempts to contact Mr James who appeared to have ignored their approaches but they did not contact the Respondent until January 2019.
29. It was submitted that the Respondent was then prosecuted for his failure to licence the two flats between 1st August 2018 and 16th March 2019 in respect of Flat A and 1st August 2018 and 9th May 2019 in respect of Flat B together

with 10 other similar offences of failing to obtain Selective or HMO Licences under parts 2 and 3 of the 2004 Act. The Respondent pled guilty to all charges at the first available opportunity and was sentenced to pay a fine of £24,000.00 for all offences. Since then the Respondent had been on the receiving end of several RRO's.

30. The Respondent submitted that section 46 (5) of the 2016 act stated:

Nothing in this section requires the payment of any amounts that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable to require the landlord to pay.

The Respondent further submitted that there was limited guidance as to what could be considered exceptional circumstances within the meaning of section 46 but, in the opinion of the Respondent, it should be given its ordinary English meaning which the Oxford English dictionary (second edition 1989) defines as:

Of the nature of or forming an exception; out of the ordinary course, unusual, special.

31. The Respondent referred to the cases of *Parker-v-Waller [2012] UKUT 301 (LC) [26]*, *Fallon-v-Wilson [2014] UKUT 300 (LC)* and *Vadamalayan-v-Stewart [2020] UKUT 183 (LC)* but expressed the opinion that none of these dealt with “exceptional circumstances” or what was a “reasonable” amount in such cases.

32. It was further submitted that there had been three previous decisions in respect of rent repayment orders made against the Respondent by the Midland Tribunal where an allowance had been made having regard to the fine paid by the Respondent even though it was submitted that in those cases the Respondent had understated the amount of the fine, he had paid.

33. In conclusion, the Respondent submitted that any rent repayment order should be reduced to reflect the exceptional circumstances of this case:

(1) The Respondent had no prior convictions or penalties or any similar offences.

(2) The Respondent was not aware of any issues with the properties during the period.

(3) The Respondent was entirely reliant on, and misled by, Mr James. This was not a case where the Respondent decided to deliberately flout the rules to save money or avoid regulation, and indeed it appeared Mr James simply misunderstood the relevant requirements.

(4) The Respondent had taken responsibility for his actions, pleading guilty at the first opportunity and was only in breach of the legal requirements for seven months (Flat a) and nine months (Flat B). Whilst the Respondent did not seek to detract from the seriousness of the breach this was not a case where he had made a long-term business of flouting regulations.

34. The Respondent submitted that his disposable income from which he supported four school-age children was £1,000.00 per month and an immediate payment of over £8,500.00 would pose significant financial difficulties for him. The Tribunal was asked to note that similar proceedings

had been initiated against him and so far, the Respondent has been required to pay £4,922.18 excluding the Applicants Tribunal fees.

35. It was further submitted that this was not a conscious choice on the part of the Respondent who had since moved to a more reputable managing agent. As such, the chances of such behaviour being repeated were exceptionally small and when combined with the financial penalty already paid in criminal sanctions there was no need for the RRO to have a deterrent effect.
36. It was submitted that mitigating circumstances were recognised by the sentencing Judge at the criminal proceedings who imposed a relatively light sentence on the Respondent. The maximum level of fine the Respondent could have had was £5,000.00 per property equating to £60,000.00 for all 12 offences. The actual fine of £24,000.00 (£2,000.00 per property) was 40% of what could have been awarded. It was further submitted that these mitigating circumstances had been recognised by the First-tier Tribunal in the previous decisions before it.
37. It was therefore submitted by the Respondent that if the Tribunal was minded to take a similar view of the Respondent's actions to the criminal Judge, 40% of the sums over the period were £1,692.67 in respect of Flat A and £1,756.52 in respect of Flat B.

DETERMINATION OF THE TRIBUNAL

38. The Tribunal considered the application in four stages –
 - (i) Whether the Tribunal was satisfied beyond reasonable doubt that the Respondent had committed an offence under section 79(1) of the 2004 Act in that at the relevant time she was a person who controlled or managed a property that was required to be licensed but was not so licensed.
 - (ii) Whether the Applicants were entitled to apply to the Tribunal for a rent repayment order.
 - (iii) Whether the Tribunal should exercise its discretion to make a rent repayment order.
 - (iv) Determination of the amount of any order.

Offence under section 95(1) of the 2004 Act

39. In accordance with sections 43(1) of the 2016 Act, the Tribunal was satisfied beyond reasonable doubt that the Respondent, as landlord of the subject property, had committed an offence listed in section 40 of the 2016 Act, namely an offence under section 95(1) of the 2004 Act.
40. Throughout the period from 1st August 2018 to 16th March 2019 in respect of Flat A and 1st August 2018 to 9th May 2019 in respect of Flat B the subject property was subject to Selective Licensing.
 - (i) The subject property was not licensed.
 - (ii) The Respondent was the person having control and/or managing the subject property.

Entitlement of the Applicant to apply for a Rent Repayment Order

41. The Tribunal determined that the Applicant was entitled to apply for rent repayment orders pursuant to section 41(1) of the 2016 Act. In accordance with section 41(2), the Respondent was committing the relevant offence throughout the relevant period when the subject properties were let; and the offence was committed in the period of 12 months ending with the day on which the Applicant served notice on the Respondent under Section 42 of the 2016 Act (4th February 2020).

Discretion to make a Rent Repayment Order

42. The Tribunal was satisfied that there was no ground on which it could be argued that it was not appropriate to make a rent repayment order in the circumstances of the present case.

Amount of a Rent Repayment Order

43. In accordance with section 44 of the 2016 Act, first, the amount of an order must relate to Housing Benefit paid in a period, not exceeding 12 months during which the landlord was committing an offence under section 95(1) of the 2004 Act. The Applicants' claim satisfies that condition.

Second, the amount that the landlord is required to pay in respect of a period must not exceed the Housing Benefit paid in respect of that period. The Applicant claims Housing Benefit of:

(1) The sum of £4231.68 in respect of Flat A being the amount of Housing Benefit paid between 1st August 2018 (being the date Selective Licensing commenced) and 16th March 2019 (being the date the tenant vacated) and:

(2) The Sum of £4361.30 in respect of Flat B being the amount of Housing Benefit paid between 1st August 2018 (being the date Selective Licensing commenced) and 9th May 2019 (being the date the tenant vacated).

Third, in determining the amount of any rent repayment order, the Tribunal must, in particular, take into account the conduct of the parties, the financial circumstances of the landlord and whether the landlord has been convicted of any of the offences listed in section 40 of the 2016 Act.

44. In the first instance the Tribunal considered the period during which the property was required to be licensed
45. It was confirmed by the Applicants that Selective Licencing was due from 1st August 2018. Any Rent Repayment Order is therefore due from this date until 16th March 2019 in respect of Flat A and 9th May 2019 in respect of Flat B.
46. The amounts claimed were therefore £4,231.68 in respect of Flat A and £4,361.30 in respect of Flat B. The total amount claimed was therefore £8,592.98. No evidence was provided by the Respondent to contradict this.
47. The Tribunal determines that the maximum amount of any Rent Repayment Order is therefore the sum of £8,592.98.
48. The Respondent refers to the case of *Parker-v-Waller [2012] UKUT 301 (LC) [26]* and *Vadamalayan-v-Stewart and others (2020 UKUT 0183)* to support

his case. The following observations, contained in paragraph 26 of the decision in *Parker v Waller*, would appear to be relevant –

(iii) There is no presumption that the Rent Repayment Order (RRO) should be for the total amount received by the landlord during the relevant period unless there are good reasons why it should be. The Residential Property Tribunal (RPT) [now the First-tier Tribunal (Property Chamber)] must take an overall view of the circumstances in determining what amount would be reasonable.

(iv) [The 2004 Act] requires the RPT to take into account the total amount of rent received during any period during which it appears to it that the offence was being committed. It needs to do that because the RRO can only be made in respect of rent received during that period. It is limited to the period of 12 months ending with the date of the occupier's application. But the RPT ought also to have regard to the total length of time during which the offence was being committed, because this bears upon the seriousness of the offence.

(v) The fact that the tenant will have had the benefit of occupying the premises during the relevant period is not, in my judgment a material consideration or, if it is material, one to which any significant weight should be attached. This is because it is of the essence of an occupier's RRO that the rent should be repaid in respect of a period of his occupation. While the tenant might be viewed as the fortunate beneficiary of the sanction that is imposed on the landlord, it is only misconduct on his part that would in my view justify the reduction of a repayment amount that was otherwise reasonable.

(vi) Payments made as part of the rent for utility services count as part of the periodical payments in respect of which an RRO may be made. But since the landlord will not himself have benefited from these, it would only be in the most serious case that they should be included in the RRO.

(vii) [The Act] requires the RPT to take account of the conduct and financial circumstances of the landlord. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to register will obviously merit a larger RRO than instances of inadvertence – although all HMO landlords ought to know the law. A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.

49. However, that case has been superseded by the case of *Vadamalayan-v-Stewart and others* (2020 UKUT 0183) which concerned the calculation of a rent repayment order under section 44 of the 2016 Act. In that case Judge Elizabeth Cook held that:

18. ... under the current statute, in the absence of the provision of reasonableness, it is difficult to see a reason for deducting either a fine or a financial penalty, given Parliament's obvious intention that the landlord should be liable both (1) to pay a fine or civil penalty, and (2) to make a repayment of rent.

19. The only basis of deduction is section 44 itself and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up

the landlord expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence.

53. The provisions of the 2016 Act are rather more hard edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in Parker-v-Waller [2012 UKUT0301]. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances.

50. It is clear to the Tribunal that both the above cases refer to applications for rent repayment orders made by the tenants (or former tenants) of a property. In this case the application is made by the local housing authority so they are of limited assistance either to the parties or to the Tribunal.
51. In accordance with section 45 of the 2016 Act the Tribunal is obliged to take into account the personal circumstances of the Respondent.
52. The Respondent submits:
- 1) He believed his Agent was dealing with all matters concerning the property.
 - 2) His current disposable income is approximately £1,000.00 per month.
53. However, the Respondent has been convicted of an offence and in accordance with section 46 the Tribunal is only permitted to make any reduction in the amount of the rent repayment order due to 'exceptional circumstances'. The Respondent submits that in this case the exceptional circumstances are:
- 1) He has no prior convictions or penalties for any similar offence.
 - 2) He was not aware of any issues with the property during the period.
 - 3) He was entirely reliant on his agent.
 - 4) He has taken responsibility for his actions, pleading guilty at the first opportunity.
 - 5) He was only in breach of the legal requirement for 7 months in respect of Flat A and 9 months in respect of Flat B.
 - 6) His disposable income is only £1,000.00 per month.
 - 7) This was not a conscious choice of the Respondent. He has now moved to a reputable agent and the chances of such behaviour being repeated are exceptionally small. Having regard to the financial penalty already paid there is no need for the RRO to have a deterrent effect.
 - 8) Mitigating circumstances were recognised by the Judge in the criminal proceedings and the fine imposed was only 40% of what could have been levied.
 - 9) The mitigating circumstances had been recognised by the Tribunal in other Decisions where substantial reductions were made although the Respondent acknowledged that section 46 of the 2016 Act did not apply in those cases.

54. The Tribunal carefully considered the above submissions. The Tribunal has already determined that it is unable to take into account '*Personal Circumstances*' unless they are '*Exceptional*'. The Tribunal determined that the matters referred to by the Respondent could not be considered as '*Exceptional*'.
55. The Tribunal therefore determines that it will make a Rent Repayment Order as detailed in paragraph 46 above in the sum of £8,592.98.
56. The Tribunal therefore confirms the total amount of the Rent Repayment Order of £8,592.98 (Eight Thousand five Hundred and Ninety-Two Pounds Ninety-Eight Pence) Payment should be made in full within 28 days of the date of this decision.

APPEAL

57. Any appeal against this Decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal an aggrieved party must apply in writing to the First-tier Tribunal for permission to appeal within 28 days of the date of this Decision specified above stating the grounds on which that party intend to rely in the appeal.

Graham Freckelton FRICS
Chairman
First-tier Tribunal (Property Chamber) (Residential Property)