FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HA/HMF/2020/0005
Property	:	9 Audley Grove, Bath, Somerset BA1 3BS
Applicants	:	Callum Peel, Danny Bragg, Tyler Gould, Kian Fox
Representative	:	
Respondent	:	Diane Brandreth
Representative	:	
Type of Application	:	**Application for a rent repayment order by tenant** Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016
Tribunal Member(s)	:	Judge Tildesley OBE
Date and venue of the Hearing	:	Determination on the papers
Date of Decision	:	19 June 2020

DECISION

Summary of Decision

1. The Tribunal orders the Respondent to pay the Applicants the sum of £3,040.00 by way of a rent repayment order and to reimburse the Applicants with the application fee in the sum of £100.00 within 28 days from the date of this decision.

Background

2. On 13 February 2020 the Applicant applied under section 41 of the Housing and Planning Act 2016 for a rent repayment order (RRO) in the sum of £4,400.00 plus reimbursement of costs of £100.00. The rent claimed of £4,400.00 was equivalent to two months rent for the period from 22 August 2019 when the tenancy commenced to 18 October 2019 when a valid application for an HMO licence was made.

3. The Applicants occupied the property at 9 Audley Grove, Bath , Somerset BA1 3BS under the terms of assured shorthold tenancy which was for a fixed term of one year from 22 August 2019 to 21 August 2020. Under the tenancy the Applicants were required to pay the Respondent rent of £2,200.00 per calendar month in advance. The property was managed on the Respondent's behalf by Romans Letting Agents based in Bath.

The Dispute

4. The Applicants alleged that the Respondent had committed an offence of controlling or managing an HMO which was not licensed for the period of 22 August 2019 to 17 October 2019 contrary to section 72(1) of the Housing Act 2004.

5. The Respondent accepted that the house did not have a HMO Licence for the said period alleged. The Respondent asserted that she had tried her utmost and in good faith to obtain a HMO licence prior to the Applicants commencing the tenancy on 22 August 2019. The Respondent expressed regret that the property was not issued with an HMO Licence but she believed it was a genuine misunderstanding on her part which gave rise to mitigating circumstances. The Respondent considered the Applicants' refund request of two months excessive.

6. The dispute between the parties is primarily about the amount of a rent repayment order.

The Proceedings

7. On 2 March 2020 Judge Tildesley OBE directed the parties to exchange their statements of case and fixed a hearing for the 12 May 2020 at a venue to be notified.

8. On the 23 March 2020 Mr Banfield FRICS vacated the hearing due to the Coronavirus Public Health Emergency. Mr Banfield determined that the application would proceed on the papers without a hearing unless a party objected in writing by email to the Tribunal by 13 April 2020. No objections were received. The Tribunal received the Applicants' case on 24 March 2020, the Respondent's case on 4 May 2020, and the Applicants' reply on 11 May 2020.

Consideration

9. The Housing Act 2004 introduced RROs as an additional measure to penalise landlords managing or letting unlicensed properties. Under the Housing and Planning Act 2016 (2016 Act) Parliament extended the powers to make RRO's to a wider range of "housing offences". The rationale for the expansion was that Government wished to support good landlords who provided decent well maintained homes but to crack down on a small number of rogue or criminal landlords who knowingly rent out unsafe and substandard accommodation.

10. Sections 40 to 47 of the 2016 Act sets out the matters that the Tribunal is required to consider before making a RRO.

11. The Tribunal is satisfied that the Applicants met the requirements for making an application under section 41 of the Act. The Applicants alleged that the Respondent had committed an offence of control or management of an HMO without a licence contrary to section 72(1) of the Housing Act 2004 whilst the property was let to them. An offence under section 72(1) falls within the description of offences for which a RRO can be made under section 40 of the 2016 Act. The alleged offence was committed from 22 August 2019 to 17 October 2019 which was in the period of 12 months ending on the day in which the Applicants made their application on 13 February 2020.

12. The Tribunal turns now to those issues that it must be satisfied about before making a RRO.

Has the Respondent committed a specified offence?

13. The Tribunal must first be satisfied beyond reasonable doubt that the Respondent has committed one or more of seven specified offences. The relevant offence in this case is under section 72(1) of the Housing Act 2004, "control or management of an HMO without a licence".

14. The Applicant produced a witness statement from Rachael Locke, an Environmental Health Officer for the Housing Standards and Improvement Team, employed by Bath and North East Somerset Council dated 7 January 2020.

15. Ms Locke said that on 5 September 2018 the Council designated the whole of Bath City as an Additional HMO Licensing Area. The property was within the designated area.

16. Ms Locke undertook an inspection of the property on the 10 October 2019 and found the property to be occupied by four persons from four households which met the standard test of a house in multiple occupation. Ms Locke confirmed with the letting agent that the property had been occupied by four persons in four separate households since the 22 August 2019. According to Ms Locke the property required an HMO Licence from 22 August 2019, and was operating without one on that date.

17. Ms Locke said that an HMO application was received on 11 October 2019, however, the application was invalid. Following receipt of outstanding paperwork the application was declared valid on the 18 October 2019. The HMO Licence came into force on 29 November 2019.

18. The Respondent said that she had first attempted to obtain a licence on 15 February 2019 when she applied online for credit and DBS checks. The Respondent stated that the online application form for HMO licence was completed and submitted at the end of February 2019. According to the Respondent, she received a reply to the application from "noreply@idoxds.com on 31 March 2019 stating that the submission had been deleted. On receipt of this email the Respondent contacted the letting agent who said that there was nothing to worry about and that the letting agent had experienced similar problems from applications submitted by the letting agent. The Respondent said that she had assumed that everything had been accepted and that there had been an administrative error or a glitch in the application process on Bath and North East Somerset Council's electronic system. The Respondent said that on a visit to Bath on 11 May 2019 she had called in on the letting agent and was reassured by the letting agent that there was nothing to be worried about.

19. The Respondent referred to a letter from Ms Locke to the Letting Agent dated 29 October 2019 informing the Agent that in the Council's opinion that an offence of having no HMO licence had been committed. Ms Locke, however, went to state that they had agreed that there were some mitigating factors involved in that there appeared to be genuine misunderstanding regarding the Council's online HMO application system. Ms Locke then said that it was not in the public interest to pursue a prosecution but the Council had informed the tenants of their right to apply for a RRO.

20. The Respondent said that being a landlord she truly recognised the extreme importance of providing safe and secure accommodation for tenants. The Respondent asserted that she had always been more than happy to comply with both the licence application and

the works noted at the inspection. The Respondent insisted that at no point was she trying to avoid the works or delay them. In her view it was genuine error on her part.

21. The Applicants acknowledged that there might have been been some form of misunderstanding between the Respondent and the letting agents. The Applicants, however, failed to see how this was relevant as grounds for appeal to a violation of the Housing Act 2004.

22. The Offence of failing to comply with section 72(1) of the Housing Act is one of strict liability subject to the statutory defences of (1) that at the material time an application for a licence had been duly made, and (2) a reasonable excuse.

23. The Respondent accepts that for whatever reason the application for a licence had not been duly made in February 2019, and that a valid application was only submitted on the 18 October 2019.

24. The Respondent acknowledged that she knew about the requirement to licence the property which was demonstrated by her actions in February 2019. Her reason for not applying for a licence subsequently was that she had assumed that her application in February 2019 had been accepted after checking the position with her letting agent. Although the Tribunal accepts that she may have honestly believed that to be situation, the Tribunal is satisfied that there were no reasonable grounds for holding that belief. The Respondent knew that the February 2019 application had been deleted. In those circumstances the Respondent should have made enquiries of the Council and not simply relied assurances from the letting agent. Also the incident happened some five months before the letting of the property to the Applicant, a prudent landlord would have made sure that everything was in place before the property was let. The Tribunal is satisfied that the Respondent did not have a reasonable excuse for the offence.

25. The Tribunal now turns to the original question: Has the Respondent committed the offence of managing or controlling an HMO without a licence pursuant to section 72(1) of the 2004 Act? The Tribunal finds that the property was an HMO which required to be licenced under the Additional Licensing Scheme introduced by the Council on 5 September 2018. The Respondent knew that the property required an HMO licence. There was no licence in force for the property when the tenancy commenced on 22 August 2019. The Respondent did not make a valid application for a licence until 18 October 2019. The offence was one of strict liability. The Tribunal has found that the Respondent did not have a reasonable excuse.

26. The Tribunal is, therefore, satisfied beyond reasonable doubt that the Respondent committed the offence of a person having control of or managing a HMO which is required to be licensed but is not so licensed from 22 August 2019 to 17 October 2019 (inclusive) pursuant to section 72(1) of the 2004 Act.

What is the maximum amount that the Respondent can be ordered to pay under a RRO (section 44(3) of the 2017 Act?

27. The amount that can be ordered under a RRO must relate to a period not exceeding 12 months during which the landlord was committing the offence. The Tribunal has decided that the Respondent committed the offence from the 22 August 2019 to 17 October 2019 (inclusive), a period of 56 days.

28. The Applicants paid the Respondent rent of £2,200.00 per calendar month. The daily rate for the rent works out at £72.33. The maximum amount payable under a RRO by the Respondent is £4,050.48 (56 days x £72.33).

What is the Amount that the Respondent should pay under a RRO?

29. In determining the amount, the Tribunal must, in particular, take into account the conduct and financial circumstances of the Respondent in her capacity as landlord, whether at any time the Respondent had been convicted of a housing offence to which section 40 applies, and the conduct of the Applicants.

30. The Applicants in their application said that when Ms Locke of the Council inspected the property she identified that the property did not meet some of the standards for a licensed HMO. These included the lack of heat and smoke detectors in bedrooms and kitchen, no fire doors, insulation issues under the stairs, unblocking the waste water gulley outside and obtaining gas and electrical reports.

31. The Applicants in their reply said that when they moved in there were two mattresses and one bed frame to accommodate four tenants in the property, there were no curtains and a broken curtain pole on the floor. The Applicants stated there was no hot water for two weeks due to a broken boiler. Further the back door did not work and there was a no back fence/ gate, and the kitchen door did not lock. The Applicants stated that both front and back gardens were overgrown and not easily walkable until eventually the front and back gardens were cleared by them using borrowed equipment. The Applicants stated they were informed that there was no mandatory house clean performed prior to their move-in. Finally the Applicants pointed out that it was not until Christmas 2019 that the mandatory fire doors and smoke alarms were actually installed.

32. The Tribunal is primarily concerned about whether the property when it was let complied with the safety standards expected from licensed HMOs. The Applicants raised their concerns about the safety standards in the application form which meant that the Respondent had an opportunity to respond to those concerns. The other matters raised by the Applicants about the condition of the property were not mentioned until their reply which gave no opportunity for the Respondent to put her view. In those circumstances the Tribunal has disregarded the Applicants' comments about the general condition of the property but in any event if true they would have been marginal to the Tribunal's decision on the amount.

33. The Respondent did not fully address the Applicants' complaints about non-compliance with HMO standards. The Respondent supplied a copy of Domestic electrical Installation Condition Report dated 22 November 2018 which recorded that the overall assessment of the installation at the property was satisfactory. In addition she provided a copy of a Domestic/Landlord Gas Safety Record dated 1 October 2019. The Respondent acknowledged in her reply that works needed to be done following the inspection by Ms Locke.

34. The Respondent provided no detailed information on her financial circumstances and on whether she owned other properties for letting. The Respondent described herself as a landlord from which the Tribunal infers that she let the property as a business. The Respondent supplied a copy of the Letting Agents' Statement for the property which showed that the Respondent was paying a fee of 10.8 per cent plus VAT per month, that contractors had invoiced for the cleaning and the gardening, and that furniture had been purchased.

35. The Tribunal starts its determination on the size of the RRO by considering the decision of the Upper Tribunal in *Parker v Waller* [2012] UKUT 301. The then President of the Upper Tribunal referred to Hansard to discover the purpose of the legislation for introducing RROs in favour of tenants. The President decided that the RROs have a number of purposes, namely:

> "to enable a penalty in the form of a civil sanction to be imposed in addition to the fine payable for the criminal offence of operating an unlicensed HMO; to help prevent a landlord from profiting from renting properties illegally; and to resolve the problems arising from the withholding of rent by tenants".

36. The President identified the following factors that were relevant to the amount. The citation below is a summary of the main points:

> "That the amount ordered had to be considered in the context of the identified purposes. The following points were among

> those that should be borne in mind. A tribunal should have regard to the total amount that the landlord would have to pay by way of a fine and under an RRO. There was no presumption that the RRO should be for the total amount received by the landlord during the relevant period; the tribunal had to take an overall view of the circumstances in determining what amount would be reasonable. An RRO was limited to the period of 12 months ending with the date of the occupier's application, but the tribunal ought also to have regard to the total length of time during which the offence was being committed. The fact that the tenant would have had the benefit of occupying the premises during the relevant period was not a material consideration or, if it was, one to which no significant weight should be attached. Payments made as part of the rent for utility services counted as part of the periodical payments in respect of which an RRO could be made, but as the landlord would not himself have benefited from them, it would only be in the most serious case that they should be included in the RRO. Section 74(6)(d) required the tribunal to take account of the landlord's conduct and financial circumstances. The circumstances in which the offence was committed were always likely to be material. A deliberate flouting of the requirement to register would obviously merit a larger RRO than instances of inadvertence. A landlord who was engaged professionally in letting was likely to be more harshly dealt with than the non-professional".

37. The 2016 Act extended the scope of rent repayments orders with an emphasis upon rogue landlords not benefiting from the letting of sub-standard accommodation and it also removed the requirement for the Tribunal to determine such amount as it considered reasonable for the eventual order. In this regard the decision in *Parker* is indicative of the factors that the Tribunal should have regard to when fixing the amount.

38. The structure of the 2016 legislation requires the Tribunal to determine first the maximum amount payable under an RRO and then to decide the actual amount payable by taking into the circumstances of the case, having particular regard to specific factors.

39. The Tribunal finds in relation to the Respondent's conduct and financial circumstances that (1) the Respondent was a professional landlord in the sense that she was the letting the property as a business. The Tribunal had no evidence of whether the Respondent owned other properties for let.(2) The Respondent engaged an established letting agent to manage the property and in that respect the Respondent adopted a responsible approach to her obligations as a landlord (3) At the time the property was let it did not meet the standards for a licensed HMO property (4) The Respondent knew the property required to be licensed but made inadequate enquiries to establish whether in fact it was licenced (5) The property was unlicensed for a period of two months but it was the visit of Ms

Locke to the property that prompted the Respondent to apply for a licence (6) The Council decided not to prosecute the Respondent for the offence of no HMO licence because the Council considered that the Respondent had some mitigating factors involved in that there appeared to be genuine misunderstanding regarding the Council's online HMO application system.

40. The Tribunal is satisfied that the Applicants did not by their conduct contribute to the offence. The Respondent suggested that the Tribunal should have regard to the fact that the Applicants had use of a commercially viable asset since 22 August 2019 upon which rent was payable. The decision in *Parker* said that the Tribunal should give no or little weight to the fact the tenants received a benefit from occupying the premises. This Tribunal would go further and state that the Respondent's assertion was incorrect. It was not a commercially viable asset because the Respondent broke the law by receiving rent for a licensed HMO which did not have a licence. In short the property should not have been let until a valid licence application had been submitted.

41. In this case the Tribunal determines that the maximum amount payable by the Respondent under a RRO is £4,050.48. The Tribunal then has to consider whether the findings on the Respondent's conduct and financial circumstances, and the Applicants' conduct merit a reduction in the maximum amount payable.

42. The Tribunal holds that the Respondent was a professional landlord who let sub-standard accommodation, and was only prompted to make a valid application for a licence after a visit from the Council's Environmental Health Officer. These facts together with the finding that the Applicants did not by their conduct contribute to the offence are weighed against the facts that the Respondent engaged and paid for a professional agent, the Respondent had no previous convictions for housing offences and that the Respondent may have had a genuine misunderstanding of the Council's online HMO application system. The Tribunal decides that the aggravating features outweigh by some margin the mitigating factors. The Tribunal determines that the rent repayment order should be £3,040.00 which equates to about 75 per cent of the maximum amount payable.

43. As the Applicants have been successful with their Application for a RRO, the Tribunal considers it just that the Respondent reimburses the Application fee totalling £100.00

Decision

44. The Tribunal orders the Respondent to pay the Applicants the sum of £3,040.00 by way of a rent repayment order and to reimburse

the Applicants with the application fee in the sum of £100.00 within 28 days from the date of this decision.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case. The application must be sent by email to rpsouthern@justice.gov.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.