



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

Case Reference : **BIR/OOFY/HMF/2021/0001**

Subject Property : **123 Porchester Road
Nottingham
NG3 6LE**

Applicant : **Mr & Mrs S Scargill**

Representative : **None**

Respondent : **Mr D Spencer**

Representative : **None**

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)
Robert Chumley-Roberts MCIEH, J.P**

**Date and Place
of Hearing** : **28th September 2021. The matter was dealt with
by a Video Hearing**

Date of Decision : **12th October 2021**

DECISION

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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 and based on the Application the Tribunal understands that this includes the area in which 123 Porchester Road, Nottingham, NG3 6LE ('the subject property'), is located.
3. Section 95(1) of the 2004 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 Applicants in this case are the tenants of the subject property.
7. The Respondent is the landlord of the subject property.
8. The Application was dated 21st May 2021 and was received by the Tribunal on 25th May 2021. The Applicants referred to above applied for a Rent Repayment Order under section 41 of the 2016 Act. The Applicants allege that the property was unlicensed.
9. Directions were issued on 26th May 2021 following which submissions were made and copied to the other party.

10. It is apparent from the documentation received from the Applicants that the house was occupied by them on an Assured Shorthold Tenancy.
11. The Shorthold Tenancy Agreement was dated 13th March 2016 for a period of six months from that date and expiring on 12th September 2016 at a rental of £650.00 per calendar month.
12. The Tribunal infers from the application that the Applicants are still tenants at the property and that the rent remains at £650.00 per calendar month. This was confirmed as being correct by the Applicants at the hearing. The Tribunal understands that the rent includes no outgoings such as gas, electricity and council tax.
13. The Application infers that the Applicants are requesting a rent repayment of £7,800.00 for the period of 13/04/2020 – 12/04/2021. The Tribunal calculates this period to be twelve months.

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.

...

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—

(a) section 44 (where the application is made by a tenant);

...

44 Amount of order: tenants

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

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

<i>If the order is made on the ground that the landlord has committed an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)</i>	<i>the amount must relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence</i>
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(3) The amount that the landlord may be required to repay in respect of a period must not exceed—

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount, the Tribunal must, in particular, take into account—

(a) the conduct of the landlord and the tenant,

(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.

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. The submissions made by both parties in writing and at the hearing on 28th September 2021 are summarised as follows:

The Applicants Submissions

17. The Applicants submitted that the property lacked the legally required licence and there was a concern that it was not insured by the Respondent. Apparently, this was because the Respondent alleged that the property was being used for commercial purposes (which the Applicants denied).

18. The Applicants provided copies of bank transaction statements to support the rental payments made and submitted that rent was paid as and when due (there were however some arrears from April 2020 – May 2021 which had been brought up to date).
19. The Applicants submitted that they had kept the property in good condition and had never received any complaints from the Respondent about either the property or gardens.
20. The Applicants further submitted that it was incorrect for the Respondent to say that he was unaware of the selective licensing in respect of private rented properties as they had received a letter from the local authority in August 2018 informing them that the local authority was bringing in such a scheme. The Applicants discussed this with the Respondent a few weeks later when he informed them that the cost would be £800.00 and that he had been told that he could pass this onto the tenant which was the opposite of what it stated in the letter to the Applicants from the local authority.
21. The question of selective licensing had not been raised again until 31st May 2021 during a conversation between the Applicants, the Respondent and a gas engineer when the Respondent informed the gas engineer that the local authority were bringing the scheme into Carlton where he owned another property and that he was not going to get a licence because of the cost and his belief that the local authority was just trying to get rid of small-time landlords.
22. However, the Applicants further submitted that the Respondent had applied for a licence on the same date that he would have received notification of the RRO application.
23. The Applicants further submitted that the Respondent was aware that they were self-employed when they moved in and that if this was the reason that the Respondent could not obtain insurance then they felt there may not have been any property insurance for the previous five years.
24. The Applicants submitted both in the written submissions and at the hearing that they did not have clients coming to the property and did not have any commercial waste streams. There were also no signs outside the house and no industrial noise. The Applicants understood that the reason the Respondent had not been able to get a licence was because he could not obtain insurance on the property but this was not as a result of their actions.
25. The Applicants also submitted that they did grow vegetables in the garden and that on the odd occasions they had seen a rat, they used a rat killer and rodents had never therefore been a problem.
26. With regard to the Applicant's own plants and timber structures they confirmed that when they moved out, they would be taking these with them.
27. The Applicants further submitted that they had never owned a dog or any animal since living at the property and had not had any family members or visitors to the house who owned dogs or any other animals.
28. In the submission of the Applicants when they moved into the property the carpets were not new and the smell in the carpet in the back room could not be removed after four attempts with a professional carpet cleaner and they were forced in the end to remove it. This was in the first few weeks of the commencement of the tenancy and the Respondent had never mentioned it prior to the submissions for this hearing.

29. The submission of the Applicants was that the only neglect to the property arose as a result of the Respondent's disregard for carrying out repairs such as the hole to the kitchen ceiling caused by the bath overflow leaking which they had asked the Respondent to repair on several occasions.
30. Other items of disrepair included a rotten single glazed window to the dining room, a broken window to a bedroom, damp from the loft, a gap in the front door which let the wind through and a gap around the new garage door which was now letting in water. There was also a rotten side gate which the Applicants submitted they had repaired to the best of their ability. However, due to the neglect of the Respondent in maintaining the property the Applicants had to spend over budget on their heating costs through the winter months.
31. The Applicants provided photographs in support of their submissions.

The Respondent's Submissions

32. The Respondent submitted that in his opinion the conduct of the tenants had been poor as they had broken multiple aspects of the tenancy agreement.
33. In particular the interior of the property had been neglected with the carpets having animal damage as well as the carpet in the rear room being missing which was new at the commencement of the tenancy. In the submission of the Respondent this was in contravention of the tenancy agreement as there was a 'no animal' policy and the Applicants had never contacted him asking permission to keep pets at the house. However, he had been informed that the damage was from a dog which belonged to another family member who visited the property.
34. On 2nd June 2020, the Respondent inspected the property with his son and was met with abuse and aggression from the tenants who cut the inspection short. At this time the Respondent took the opportunity to give the Applicants notice to terminate the tenancy.
35. The Respondent submitted that the following works were required to put the property back to a reasonable condition:
 - a) The rear garden will need to be cleared and excavated with a replacement lawn laid.
 - b) The hedges need to be cut down to a manageable size and replaced with mature bushes where there are gaps.
 - c) The site needs to be cleared of rubbish.
 - d) Replacement carpets are required to the rear dining room and landing.
 - e) There is an unauthorised structure at the rear of the property which needs to be removed.
 - f) There is potential for pest control being required if the rats noted at the property are still a problem.
36. The Respondent submitted that he was unaware about selective licensing but had supplied copies of the relevant certificates at the commencement of the tenancy and the required current copies of the gas safety certificate and insurance for the property were submitted to the Tribunal.
37. The Respondent provided photographs in support of his submissions.

38. At the hearing the Respondent confirmed that:

- 1) He now accepted the property required a selective licence.
- 2) The property did not have the required licence.
- 3) The Applicants had a tenancy and that they paid rental as stated.

39. In conclusion the Respondent submitted that he had not increased the rent since the Applicants moved in and that he had not made any money out of the letting of the property.

DETERMINATION OF THE TRIBUNAL

40. 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 he 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

41. 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.

42. Throughout the period from 13th April 2020 – 12th April 2021 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

43. The Tribunal determined that the Applicant was entitled to apply for a rent repayment order 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 property was 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 (21st May 2021).

Amount of a Rent Repayment Order

44. In accordance with section 44 of the 2016 Act, first, the amount of an order must relate to rent 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 does not claim any Housing Benefit in this case.

The Applicants therefore claim:

The sum of £7,800.00 being the amount of rent paid between 13th April 2020 and 12th April 2021 (being twelve months) and:

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.

45. In the first instance the Tribunal considered the period during which the property was required to be licensed.
46. It was submitted by the Applicants and accepted by the Tribunal that Selective Licensing came into effect from 1st August 2018. As the tenancy commenced on 13th April 2016 any Rent Repayment Order is therefore due from any date after 1st August 2018 for a period not exceeding 12 months and being committed in the period of 12 months ending with the day on which the application is made.
47. The amount claimed was therefore £7,800.00. No evidence was provided by the Respondent to contradict this (indeed it was confirmed by the Respondent that rent had been paid) and it was accepted by the Tribunal.
48. The Tribunal determines that the maximum amount of any Rent Repayment Order is therefore the sum of £7,800.00.
49. The Tribunal considers that the relevant case is *Vadamalayan-v-Stewart and others* (2020 UKUT 0183).
50. This 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 or 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.*

Discretion to make a Rent Repayment Order

51. The Tribunal considered that there were no circumstances where it would be inappropriate to make a Rent Repayment Order in this case.
52. The Respondent in this case can be described as a semi-professional landlord. By his own admission he owns the subject property and also owns a 50% share in another property. The Tribunal therefore determined that he should have been aware of his potential responsibilities and sought to confirm the licensing position with Nottingham City Council.
53. In accordance with section 45 of the 2016 Act the Tribunal is obliged to take into account the personal circumstances of the Respondent.
54. The Respondent submits:
- 1) That his only income comprises the rental from the subject property and 50% of the rental from another residential property.
 - 2) That he was now unable to work and his current disposable income is less than £10,000.00 per annum.
 - 3) That the property he resides in is mortgaged with mortgage payments of £500.00 per month. It is currently on the market and when sold he expects to have equity in the region of £40,000.00. However, it had been on the market since July 2018.
55. When questioned by the Tribunal the Respondent submitted that:
- 1) He had owned the subject property for some 30 years and that it was mortgage free. If he was able to sell the property it was worth in the region of £180,000.00 - £200,000.00.
 - 2) He had no savings as he had used what he had to pay off the mortgage on the subject property.
56. The Applicants submitted that in their opinion the value of the subject property was in the region of £150,000.00 and that the higher value suggested by the Respondent was only likely to be achieved following upgrading and improvement works.
57. The Tribunal carefully considered the above submissions and determines that the personal circumstances of the Respondent are such that an allowance should be made against the potential of the maximum rent repayment order of £7,800.00 as detailed in paragraph 49 above.
58. The Tribunal determines that it will make an allowance to take account of the Respondent's personal circumstances of 40% of the maximum amount that could be determined and therefore a Rent Repayment Order in the sum of £4,680.00 is appropriate.
59. This is calculated as follows:
- | | |
|---|-----------------|
| Maximum rent repayment order | 7,800.00 |
| <u>Less 40% allowance to reflect personal circumstances</u> | <u>3,120.00</u> |
| Amount of rent repayment order | £4,680.00 |
60. The Tribunal therefore confirms the total amount of the Rent Repayment Order of £4,680.00. Payment should be made in full within 28 days of the date of this decision.

APPEAL

61. 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)