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

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| **Case Reference** | **:** | **LON/00AG/HMK/2019/0045** |
| **Property** | **:** | **Flat C, 302 Kilburn High Road, London NW6 2DB** |
| **Applicant** | **:** | **Mr Syed Juber Ali** |
| **Representative** | **:** | **In person and also supported by Mr Syed Joshim Ali (his brother)** |
| **Respondent** | **:** | **Mr James O'Reilly** |
| **Representative** | **:** | **In person and also supported by Mr Richard Holland (a friend)** |
| **Type of Application** | **:** | **Application for Rent Repayment Order under the Housing and Planning Act 2016** |
| **Tribunal Members** | **:** | **Judge P Korn**<br>**Mr M Cairns MCIEH** |
| **Date and venue of Hearing** | **:** | **26th July 2019 at 10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | **:** | **2nd August 2019** |

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**DECISION**

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## Decisions of the tribunal

(1) The tribunal orders the Respondent to repay to the Applicant the sum of £2,166.43.

(2) The tribunal also makes an order under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 requiring the Respondent to reimburse to the Applicant the application fee of £100.00 and the hearing fee of £200.00 paid by him in respect of this application.

## Introduction

1. The Applicant has applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("**the 2016 Act**").

2. The Applicant entered into an assured shorthold tenancy agreement with the Respondent on 3rd October 2016 relating to the Property, and a copy of the tenancy agreement is in the hearing bundle.

3. The basis for the application is that, according to the Applicant, the Respondent was controlling an unlicensed house in multiple occupation which was required to be licensed at a time when the Property was let to the Applicant. The Property was required to be licensed because it met the requirements of section 257 of the Housing Act 2004.

4. The claim is for repayment of rent paid during the 12 months between January and December 2018 totalling £8,665.71 in aggregate.

## Agreed points

5. At the hearing, the Respondent accepted:-

(a) that the Property had required a licence since 2015 (when the local housing authority made a selective licensing scheme including section 257 HMOs) and continued to require a licence throughout the period of the rent repayment claim, i.e. the calendar year 2018;

(b) that the Property had not been so licensed;

(c) that he had committed an offence by being a person in control of or managing an unlicensed HMO which was required to be licensed; and

(d) that the Applicant's rental calculations were correct, i.e. that the Applicant had paid him the aggregate sum of £8,665.71 by way of rent

in 2018 and that none of that rent constituted universal credit (previously known as housing benefit) or payment for utilities.

These points are therefore not in dispute, and in any event we are satisfied that they are accurate on the basis of the evidence before us.

**Applicant's case**

6. In the light of the above admissions on the part of the Respondent, the focus of the hearing was on those factors relevant to the question of how much rent (if any) should be ordered to be repaid.

7. In written submissions the Applicant complains of various issues in addition to the failure to license, including shattered glass shards in the communal staircase from two dropped lightbulbs, no lighting on the communal staircase, a mouldy and leaking bedroom ceiling, leaking bedroom walls, improper fitting of window blinds leading to a health hazard, mouse infestation, crumbling brickwork, cracks in internal wall plaster, a dirty and unstable washing machine, a faulty electrical cooker, an uncleaned communal staircase carpet, an insecure communal front entrance, illegal entry to the Property by the Respondent's builders and a non-working intercom system which had broken because it was situated too near to a doorway. Not all of these points have been substantiated in detail in the Applicant's submissions.

8. The Applicant has also provided a witness statement from Mr Polash Polash, the tenant of Flat A. It describes an unacceptable failure on the part of the Respondent to manage the building and is very complimentary towards the Applicant.

9. In relation to the lighting of the common parts, the Applicant said at the hearing (and played a video to show) that the light would only come on very briefly and then the common areas would be plunged into darkness before the Applicant and his family could reach their flat. The Applicant also played video clips to show a damp patch on a bedroom ceiling and glass on the floor from smashed lightbulbs. The Respondent's handyman had refused to remove the glass and it had not been cleared up for 3 months, consequently injuring the foot of one of the Applicant's children. When asked by the tribunal why he could not have removed the glass himself using a dustpan and brush he said that he was worried that he would not be able to remove the more powdery elements of glass. The Applicant also reiterated his concerns about mouse infestation.

10. The Applicant also said that there was no evidence of the Respondent having obtained an Energy Performance Certificate or electrical safety certificate and that the Respondent had been late in supplying evidence

of a gas certificate. There was also no evidence of any gas certificate for the 13 month period up to July 2018.

11. The Applicant further argued that the Respondent should have known about his legal responsibility to obtain a licence for the Property as, for example, the Council had sent him a document which included a website link to enable him to obtain further information.

12. The Applicant had no particular points to make regarding the financial circumstances of either party.

**Respondent's case**

13. In written submissions the Respondent states that at the beginning of the Applicant's tenancy the Council requested a gas safety certificate, electrical, EPC certification and proof of ownership, all of which he supplied.

14. The Respondent also states that the Applicant has suffered no loss financially or otherwise as a result of the Respondent's failure to obtain an HMO licence. He regards the claim as opportunistic, and has provided copies of a number of signed letters from tenants of properties owned by him and from councils including Camden which in his submission show him to be a good and caring landlord.

15. He states that the Applicant has been rude and abusive throughout his tenancy, in particular to the Respondent's handyman who as a direct result has left the Respondent's employment and returned to Kosovo. Whilst the Respondent has endeavoured to carry out repairs, the Applicant has made it awkward for builders by requesting that they only come on Sundays and late evening, and consequently some builders have refused to attend. He has also interfered with the process of work by complaining about everything and frustrating the builders. Recent maintenance was hampered by the Applicant's insistence that the scaffolding must not remain in place for more than a week. By contrast, there are no problems with any of the other tenants in the building.

16. The Respondent disputes the accuracy of the Applicant's various allegations. The intercom had been in the same position for 30 years and no other tenants had ever complained about its position near a doorway. However, despite the Applicant having broken the intercom himself the Respondent replaced it at his own cost. Regarding the damp ceiling, each time the Applicant reported a leak the Respondent sent a builder to repair the roof. As noted above, the Applicant made it difficult to carry out repairs by requesting that builders only come outside business hours. Regarding the window blinds, the Respondent

accepts that the blinds were longer than required but not that this constituted a health hazard.

17. Regarding the mouse infestation, when the Respondent was made aware that there was a problem with mice he sent in his pest control expert, Abacus Homecare Pest Control, to deal with it. The Applicant claims that the problem has re-occurred but does not say when and admits that he has not brought the alleged re-occurrence to the Respondent's attention.

18. The Respondent said at the hearing that he accepted that he should have obtained an HMO licence. He told the tribunal that he had failed to license the building because it comprised self-contained flats and he had thought that this arrangement did not constitute an HMO without there being shared amenities. However, having been made aware that a licence was required he had then made a late licence application. When the Council had come to inspect the building in response to his late licence application it had not found any defects or deficiencies and had agreed to grant the licence without taking any enforcement action.

19. As regards the alleged problems with mice, there had been a problem but the Respondent had dealt with it, as was evidenced by the correspondence from Abacus Pest Control in the hearing bundle.

20. Regarding the broken glass, he said – as per his written submissions – that the handyman and the Applicant did not 'see eye to eye' and that the handyman did not like the Applicant's attitude. He was therefore not surprised that the handyman was less co-operative than he might have been.

21. Regarding the lighting, he said that there was a timer switch on each landing and that therefore the problem being complained of by the Applicant was not real. The Respondent's handyman had managed to walk all the way up and down without being plunged into darkness.

22. Regarding the gas certificate, there was a certificate for the missing year but it had not seemed necessary to include it in the hearing bundle. There were slight gaps in dates between the expiry of the old certificate and the date of the new certificate but the gap was a very short one and the delay in renewing the certificate was actually caused by the Applicant's own delay in responding when required.

23. As a general point, the Respondent reiterated that according to his understanding the building conforms to the relevant legislation and to the Council's licensing requirements and that the Applicant has not actually suffered any loss. The Respondent applied for a licence as soon as he knew that he had to do so.

24. The Respondent added that the Applicant had recently upset the Respondent's builders and caused them to take longer on the job which they had been contracted to carry out, and this in turn had increased the overall cost.

25. As regards financial circumstances, the Applicant was in a healthy financial position, as he and his wife both had reasonable jobs.

26. As regards the letter from Mr Polash, in the Respondent's view it was likely that it had been written by the Applicant himself simply because Mr Polash's English was not good enough to have written such a letter.

## Relevant statutory provisions

27. Housing and Planning Act 2016

Section 40

(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 …

(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 | Criminal Law Act 1977 | section 6(1) | violence for securing entry |
| 2 | Protection from Eviction Act 1977 | section 1(2), (3) or (3A) | eviction or harassment of occupiers |
| 3 | Housing Act 2004 | section 30(1) | failure to comply with improvement notice |

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| 4 | | section 32(1) | failure to comply with prohibition order etc |
| 5 | | section 72(1) | control or management of unlicensed HMO |
| 6 | | section 95(1) | control or management of unlicensed house |
| 7 | This Act | section 21 | breach of banning order |

Section 41

(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.

Section 43

(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 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) …

Section 44

(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.

| ***If the order is made on the ground that the landlord has committed*** | ***the amount must relate to rent paid by the tenant in respect of*** |
|---|---|
| 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 – (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.

Housing Act 2004

Section 72

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part … but is not so licensed.

Section 257

(1) For the purposes of this section a "converted block of flats" means a building or part of a building which – (a) has been converted into, and (b) consists of, self-contained flats.

(2) This section applies to a converted block of flats if – (a) building work undertaken in connection with the conversion did not comply with the appropriate building standards and still does not comply with them; and (b) less than two-thirds of the self-contained flats are owner-occupied.

(3) In subsection (2) "appropriate building standards" means – (a) in the case of a converted block of flats – (i) on which building work was completed before 1st June 1992 or which is dealt with by regulation 20 of the Building Regulations 1991 (SI 1991/2768), and (ii) which would not have been exempt under those Regulations, building standards equivalent to those imposed, in relation to a building or part of a building to which those Regulations applied, by those Regulations as they had effect on 1st June 1992; and (b) in the case of any other converted block of flats, the requirements imposed at the time in relation to it by regulations under section 1 of the Building Act 1984 (c 55).

(4) For the purposes of subsection (2) a flat is "owner-occupied" if it is occupied – (a) by a person who has a lease of the flat which has been granted for a term of more than 21 years, (b) by a person who has the freehold estate in the converted block of flats, or (c) by a member of the household of a person within paragraph (a) or (b).

(5) The fact that this section applies to a converted block of flats (with the result that it is a house in multiple occupation under section 254(1)(e)), does not affect the status of any flat in the block as a house in multiple occupation.

(6) In this section "self-contained flat" has the same meaning as in section 254.

## Tribunal's analysis

28. The Applicant has provided evidence that the building required a licence throughout the period in respect of which he is claiming a rent repayment and that it was not so licensed. After some initial confusion on the Respondent's part as to whether it was only the common parts which required a licence, the Respondent now accepts that at the relevant time the building was an HMO which required a licence but

was not so licensed throughout the abovementioned period. In addition, the Respondent does not dispute the fact that the Applicant had a tenancy agreement and that he paid to the Respondent as rent the sums now claimed by the Applicant by way of rent repayment. The Respondent also accepts that he was the Applicant's landlord.

29. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. The offence of having control of or managing an unlicensed HMO is one of the offences listed in that table.

30. Under section 41(2), a tenant may apply for a rent repayment order only if the offence relates to housing that, at the time of the offence, was let to the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made. It is common ground that an offence has been committed by the Respondent, that the Property was let to the Applicant at the time of the offence and that the offence was being committed within the 12 month period immediately prior to the date of the application.

31. Under section 43, the First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence listed in the table in sub-section 40(3). We are satisfied beyond reasonable doubt that the Respondent has committed such an offence.

Amount of rent to be ordered to be repaid

32. Based on the above findings, we have the power to make a rent repayment order against the Respondent.

33. The amount of rent to be ordered to be repaid is governed by section 44 of the 2016 Act. Under sub-section 44(2), 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. Under sub-section 44(3), the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of universal credit paid in respect of rent under the tenancy during that period.

34. In this case, the claim does relate to a period not exceeding 12 months during which the landlord was committing the offence, and there is no evidence of any universal credit having been paid. Therefore, the maximum amount repayable is the whole of the amount claimed, i.e. £8,665.71.

35. Under sub-section 44(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 the relevant part of the 2016 Act applies.

36. The Upper Tribunal decision in *Parker v Waller and others (2012) UKUT 301 (LC)* is a leading authority on how a tribunal should approach the question of the amount that it should order to be repaid under a rent repayment order if satisfied that an order should be made. The case was decided before the coming into force of the 2016 Act but in our view the basic principles that it lays down apply equally to rent repayment orders under the 2016 Act, subject obviously to any relevant differences in the statutory wording.

37. In his analysis, based in that case on section 74 of the 2004 Act, the then President of the Upper Tribunal, George Bartlett QC, discussed the purpose of rent repayment orders in favour of occupiers. Under section 74 the amount payable is "such amount as the tribunal considers reasonable in the circumstances" and section 74 goes on to specify five matters in particular that should be taken into account, including the conduct of the parties and the financial circumstances of the landlord. This contrasts with rent repayment orders in favour of a local authority in respect of housing benefit under the 2004 Act, where an order for the full amount of housing benefit must be made unless by reason of exceptional circumstances this would be unreasonable. There are therefore different policy considerations under the 2004 Act depending on whether the order is in favour of an occupier or in favour of a local authority.

38. The President of the Upper Tribunal went on to state that in the case of a rent repayment order in favour of occupier there is no presumption that the order should be for the total amount of rent received by the landlord. The tribunal must take an overall view of the circumstances.

39. Section 44 of the 2016 Act, by contrast, does not state that the amount repayable to an occupier should be such amount as the tribunal considers reasonable in the circumstances, but neither does it contain a presumption that the full amount will be repayable.

40. Starting with the specific matters listed in section 44, the tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence. We will take these in turn.

Conduct of the parties

41. We have considered the written and oral evidence presented to us, and we find the Respondent's evidence significantly more persuasive than that of the Applicant. Having read through the Applicant's submissions and the copy correspondence relied on by him and having questioned him about the concerns which he has expressed, our view is that his approach to the relationship with his landlord and to the rent repayment application itself has been both disproportionate and unreasonable.

42. The Applicant's analysis at the hearing of the Respondent's alleged failure to comply with the Council's requirements was in our view largely manufactured (aside, obviously, from the failure to obtain the HMO licence itself). The episode with the shattered glass, including the fact that the Applicant saw fit to engage in long correspondence and to leave glass lying around for weeks rather than take the obvious approach of clearing it up with a dustpan and brush, shows the Applicant in a particularly poor light. His claims regarding the lighting of the common parts have been disputed and we do not accept them. The fact that there was a mouse problem is not a proper basis for criticising the Respondent's conduct given that the evidence shows that on becoming aware of the problem the Respondent dealt with it. Similarly, the complaints about the ceiling, the intercom and other items were not accompanied by credible evidence that the Respondent had not acted in a proper and responsible manner on becoming aware of the relevant problem.

43. The complaints about the blinds seem to be wildly exaggerated and, like the Respondent, we are mystified as to how the Applicant by his own admission could have allowed his children to experience repeated problems without himself taking more effective action. In addition, his comments, particularly at the hearing, as to whether the Respondent could demonstrate that he had a valid gas certificate for every single day said more about his determination to present the Respondent in as unflattering way as possible than about any genuine safety concerns.

44. The Respondent has provided a range of impressive references from tenants and local authorities, the veracity of which the Applicant has not disputed. At one point the Applicant tried to suggest that a small loan made by the Respondent to one of his tenants was evidence of bribery, but the Applicant dropped this baseless claim when challenged by the tribunal. As for the witness evidence from Mr Polash, the Respondent claims that Mr Polash could not have written the witness statement himself as his English is not good enough to have done so. Whilst we agree that it has been written in quite sophisticated English we are not in a position to make a finding as to whether it was written by Mr Polash or not, as Mr Polash did not make himself available for cross-examination. However, what we can say is that as Mr Polash was

not available to be cross-examined on his evidence that reduces the weight that can be placed on that evidence.

45. In addition, the Respondent has in our view provided credible evidence that the Applicant himself has been a difficult tenant and has caused problems for the handyman and for the builders.

46. In our view the Respondent himself generally came across well. After making the initial error of playing down the significance of his failure to obtain a licence, the Respondent was commendably open at the hearing and accepted that he had committed an offence, that he had received all of the rent in respect of which the rent repayment application was being made and that no part of it constituted universal credit (housing benefit) or payment for utilities.

Financial circumstances of the landlord

47. We have not been provided with any specific information as to the Respondent's financial circumstances, although it appears that he owns a number of properties.

Whether the landlord has at any time been convicted of a relevant offence

48. There is no evidence that the Respondent has been convicted of a relevant offence.

Other factors and continuation of analysis

49. It is clear from applying the principles set out in the decision in *Parker v Waller* and from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal "must, **in particular**, take into account" the specified factors. One factor identified by the Upper Tribunal in *Parker v Waller* as being something to take into account in all but the most serious cases is the inclusion within the rent of the cost of utility services, but it is common ground in the present case that the rental payments do not include any charges for utilities. On the facts of this case we do not consider that there are any other specific factors which should be taken into account in determining the amount of rent to order to be repaid. Therefore, all that remains is to determine the amount that should be paid based on the above factors.

50. The first point to emphasise is that, notwithstanding our comments above regarding the parties' conduct, it remains the case that the Respondent has committed a criminal offence. He is an experienced landlord and did not obtain an HMO licence for this building despite now acknowledging that it needed a licence since 2015. There has been

quite a lot of publicity about HMO licensing and it is surprising that the Respondent was sufficiently ignorant of the position that he failed even to check properly whether the building needed a licence.

51. The Respondent has argued that the Applicant has suffered no loss and that therefore a rent repayment order would represent a windfall for the Applicant. To some extent this is true, but it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If landlords, even experienced landlords, can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show that they have suffered actual loss, then this will significantly undermine the deterrence value of the legislation. As noted above, there has been much publicity about HMO licensing, and landlords need to ensure that they are aware of their responsibilities and do not commit criminal offences.

52. Therefore, a significant amount of rent needs to be ordered to be repaid regardless of whether the Applicant personally deserves to receive the money. At the same time, we need to take into account our factual finding that the Applicant's conduct has been poor and that the Respondent's conduct (aside from his failure to obtain a licence) has been good, as well as the fact that the Respondent has not at any time been convicted of a relevant offence and that we have no specific relevant information regarding the Respondent's financial circumstances other than the ability to draw an inference that the Respondent is not struggling financially.

53. Taking all of the above circumstances into account, we consider in this case that it is appropriate to order the repayment of 25% of the amount sought by the Applicant. The tribunal has discretion as to the amount payable, and we consider that this is the appropriate amount in the circumstances. The amount of rent to be repaid is therefore £2,166.43.

## Cost applications

54. The Applicant has applied for an order under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that the Respondent be required to reimburse to the Applicant the application fee of £100.00 and the hearing fee of £200.00 paid by him in respect of this application.

55. As noted above, we have not been impressed by the Applicant's conduct in connection with this application. However, the Applicant was perfectly within his rights to apply for a rent repayment order regardless of any loss suffered by him personally. The making of a rent repayment order is an established legislative tool to punish landlords for committing the criminal offence of failing to obtain a licence (in this case a section 257 HMO licence) where one is legally required.

56. Therefore, although we have serious reservations concerning the **manner** in which the Applicant has pursued this application, he has successfully demonstrated that the Respondent committed a criminal offence and that he was entitled to apply for a rent repayment order. In the circumstances, we consider it appropriate that the Respondent should be required to reimburse the application and hearing fees as well as making a rent repayment.

**Name:** Judge P Korn **Date:** 2nd August 2019

**RIGHTS OF APPEAL**

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.