FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : **CHI/00ML/HMK/2019/0015**

Property : **24, The Drove, Brighton BN1 5AF**

Applicant : **Lance Bolton**
Simon Cullen
Sarah Byrne

Representative :

Respondent : **Julie Habben**

Representative :

Type of Application : **Tenants' application for a Rent Repayment Order**

Tribunal Members : **Judge D Agnew**
Mr P Turner-Powell FRICS
Ms J Dalal

Date and venue of Hearing : **24th October 2019**

Date of decision : **31st October 2019**

DECISION

The Application and Background

1.By an application dated 20th July 2019 the Applicant, Lance Bolton applied to the Tribunal under section 41 of the Housing and Planning Act 2016 for a Rent Repayment Order against the Respondent in respect of rent which he and two other co-tenants of the property at 24 The Drove, Brighton BN1 5AF had paid to their Landlord, the Respondent. Subsequently, those two other co-tenants requested to join in the application as Applicants with Lance Bolton representing them.

2. Directions were issued on 21st August 2019. One of the Directions provided that if the Applicants sought a refund of fees they were required to make a request for this by 4th September 2019. No such request was received.

3. The application came before the Tribunal for hearing on 24th October 2019. The Tribunal had before it the application form and statements from the Applicants as well as a statement of case and a bundle of documents referred to therein by the Respondent.

The applicable law

4. By section 41 of the Housing and Planning Act 2016 ("the 2016 Act"):-

"(1) A tenant….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-

(i) the offence relates to housing which at the time of the offence was let to the tenant, and

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

5. By section 43 of the 2016 Act:-

"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))."

6. By section 44 of the 2016 Act:-

"(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 the rent paid during the period mentioned in the table."

In this case the period shown in the table is "a period not exceeding 12 months, during which the landlord was committing the offence"

7. By 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

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

8. By section 40(3) of the 2016 Act a reference to "an offence to which this Chapter applies" is to an offence of a description specified in the Table below which includes an offence under section 72(1) of the Housing Act 2004 (control or management of an unlicensed HMO).

The Applicants' case

4. In his application form Mr Bolton said that he was applying for a Rent Repayment Order for the following reasons:-
1) The property should have been a licensed HMO and was not at the time the Applicants occupied the property
2) The property was without a Gas Safety Certificate for the last 6 months of the tenancy
3) The landlady should not have been able to evict [the tenants] without there being an HMO licence in place.

5. The total sum of rent repayment sought by the Applicants was £17,700 for the period of October 2017 to October 2018. At the hearing Mr Bolton accepted that the maximum sum that could be ordered was £10,450 being payments made during the period from 1st March 2018 (the date from which the property was required to be licensed) to 5th October 2018 (when the tenants vacated the property).

6. At the hearing, Mr Bolton expanded on his reasons for applying for the order. He said that the tenants had paid £30,000 in rent during their period of occupation. For that money they were entitled to expect a certain level of service from the landlord. This included compliance with the various Health and Safety Regulations. By failing to obtain a HMO Licence when required and by failing to renew the Gas Safety Certificate in March 2018 he considered that the tenants had not received the level of service to which they were entitled.

Has the Respondent committed an offence?

7. Having heard from Mr Bolton as to the grounds upon which he seeks a Rent Repayment Order, the Tribunal was required to consider whether, beyond reasonable doubt, the Respondent had committed the alleged offence.

8. In her statement of case and at the hearing the Respondent candidly accepted that the property was required to be licensed as a HMO from 1st March 2018, and that there was no such licence applied for until late October/early November 2018. She wished, however, to put forward a defence of reasonable excuse, the Tribunal having explained to the parties that if the Respondent had a reasonable excuse in law for having failed to obtain the required licence then no offence had been committed and a Rent Repayment Order could not be made.

9. The reasonable excuse put forward by the Respondent was as follows:-
The initial tenancy to the Applicants was granted in April 2017 for 12 months. At that time no HMO Licence was required for the property. This changed on 1st March 2018 when additional licensing was extended to cover the whole of Brighton and Hove. When the tenancy came up for renewal in April 2018 the

Respondent specifically asked her letting agent as to whether a licence was required and she was told, "No". Additional or selective licensing applied to some wards but not to hers. The Tribunal perceives that if this indeed was what happened the letting agents were wrong as there is clear evidence from Brighton Council in the form of a letter to the Respondent dated 11th September 2019, shortly after she had been notified of this application, that additional licensing was extended to all wards as from 1st March 2018. The Respondent says that she was totally unaware of this until she made enquiries of the council following receipt of this application. Indeed, when she came to relet the property after the Applicants had vacated she did apply for a licence but that was because the letting agents had informed her that she required a licence from 1st October 2018.

10. The Respondent referred the Tribunal to a copy of her contract with the letting agency, Spencer and Leigh who had been her agents for some time and whom she trusted. She accepted that this was not a management contract but a contract solely for the letting of her property. The contract states that if the property is managed (which in this case it is not) "we will advise you of any requirements that may arise during the tenancy however it is your obligation to deal with this matter during the tenancy if it is not fully managed by us. Two paragraphs on, however, it states that "We will be able to advise you on any licensing requirements that may apply and on the requirements for you to be granted that licence…" The two paragraphs appear to be contradictory. Ms Habben says that she understood the latter paragraph to mean that she would be notified by the letting agents of any regulatory requirements and that, even if the latter paragraph of the contract was meant to mean that this applied only to fully managed properties the fact that she specifically asked and was clearly told that she did not require a licence indicates either that the clause did apply to her or alternatively that the letting agents held themselves out as being responsible for giving the advice which Ms Habben was likely to rely on.

11. The Tribunal does not have jurisdiction to determine whether or not the letting agents were in breach of contract to Ms Habben or negligent and cannot make any findings in that regard, not least because Spencer and Leigh are not before the Tribunal to defend themselves. That is a matter for Ms Habben to pursue with them if she wishes after receipt of this order. The question for the Tribunal to determine is whether the matters advanced by Ms Habben as a defence amount to a reasonable excuse for not having a HMO licence for the property from 1st March 2018 to 5th October 2018. The Tribunal determines that this defence boils down to an assertion that for one reason or another Ms Habben was unaware of the requirement for a licence. Ignorance of the law is rarely if ever an excuse in law. The Tribunal therefore rejects her defence and finds beyond reasonable doubt that the offence was committed. However, Ms Habben's defence is nevertheless relevant to mitigation of the penalty to be imposed and this will be referred to further hereafter.

Other requirements for an order to be made

12.The Tribunal finds, and it was not contended otherwise by the Respondent, that the application was made within 12 months of the offence being committed and that the maximum order the Tribunal can impose is £10,450, the rent paid

being £1450 per month from 1st March 2018 to 18th March 2018 and £1500 per month from April 2018 to October 2018 (the last payment being in September 2018).

The amount of the order

12.The Respondent asked the following factors to be taken into account:-
a) She is not a professional landlord. The property used to be her own home which she purchased with her share of a divorce settlement. She lived there with her two children. She loves the house and is anxious to keep it maintained.
b) She has always had a good relationship with her tenants. She is not a rogue landlord and has concern for her tenants' safety and well being.
c) The Applicants were all happy to live at the property. They renewed the tenancy in April 2018 after one year there. She did not give Mr Cullen and Miss Byrne notice to quit: they gave notice to her to operate the break clause because they were wanting to buy a house together. That left Mr Bolton on his own. Mr Habben gave him the chance to find two other tenants to share with him
as Miss Byrne said that he was keen to stay on. When he was unable to do so, she had no alternative but to serve a two month notice to bring the tenancy to an end on the break date. They parted on amicable terms as an email contained in the hearing bundle demonstrates.
d) Had she been aware in March 2018 that she was required to apply for a licence she would have had to bring the initial tenancy to an end in April 2018 as she could not have afforded the cost of a licence application, so the Applicants would have had to move elsewhere and the offence would not have been committed (or, at most, for one month).
e) This was not a case of deliberately disregarding the law. She relied on the advice of her letting agent and trusted them completely. Even when she queried their advice in October 2018 they were still of the opinion that she only needed a licence from 1st October 2018.
f) In and around March/April 2018 she was occupied in looking after her elderly mother in Manchester following an operation
g) The Respondent is not wealthy. She works full time at a call centre earning approximately ££24,700 per annum gross. Her bank account is overdrawn to the extent of approximately £1100. Her expenditure is modest. She says she has what she describes as a "huge" credit card debt which she is paying off at the minimum amount each month.
h) She is supporting one son going through university. He works hard part time to finance his studies and she would like to support him more but she is unable to do so.

13 She produced copies of her bank statements and a tax return. After deduction of expenses she makes a profit of approximately £5500 per annum from letting her property.

The Tribunal's decision

14. The Tribunal took account of the fact that the maximum Order it could make was £10,450. On the scale of culpability, however, the Tribunal considered that the Respondent's conduct was at the lower end. She was not a rogue landlord. There was no suggestion that the Respondent had previously committed any

offence. The Tribunal accepted that the offence was committed out of inadvertence and a reliance upon advice from her letting agent rather than any deliberate attempt to operate a HMO without a licence.

15. The Tribunal accepted the mitigation put forward by the Respondent as noted in paragraph 12 above in full. The Tribunal considered that there would need to be a significant discount from the maximum figure in order to do justice in this case. Having said that Rent Repayment Orders are designed to be punitive and a significant deterrent from evading the legislation that is intended to promote standards in the residential letting stock.

16. Having taken all these factors into consideration the Tribunal decided that the Respondent should pay a Rent Repayment Order of £666.66 to each of the three Applicants (total £1999.98). Although Mr Bolton paid slightly less rent than his co-tenants, he has had the task of putting the application together and attending the hearing, hence the equal division of the Order.

17. The Order is enforceable as a debt. The Tribunal is aware that it is likely to cause the Respondent considerable hardship. The Tribunal expresses the hope that the parties will be able to come to some agreement as to how the debt is to be paid without any further proceedings being necessary.

18. With regard to the reference to lack of a Gas Safety Certificate, this is not in itself a ground for applying for a Rent Repayment Order but from what Mr Bolton said at the hearing this was one of the main drivers for him applying for the order. He agreed that a Gas Safety Certificate had been in place at the start of the first tenancy to the Applicants in May 2017. Ms Habben explained that she had overlooked the annual renewal but had applied for a certificate as soon as it had come to her attention. Again, she referred to her contract with her letting agent where she confirmed that she wanted the letting agents to obtain, inter alia, a gas safety record prior to prior to the commencement of a tenancy. However, the next paragraph of the contract states that she confirms that she will obtain the gas safety record. The two paragraphs appear to be contradictory. It may be that there is clarification in other documentation from the letting agents that the Tribunal has not seen. The Tribunal has taken into account the failure to renew the Gas Safety Certificate before the second letting to the Applicants as part of the Respondent's conduct when arriving at the amount of the Order set out in paragraph 16 above.

19. The Tribunal has not taken into account Mr Bolton's assertion that absent a Gas Safety Certificate at the commencement of the second tenancy that the Respondent would have been unable to serve a valid section 21 notice for the following reasons. First, no section 21 notice was served on Mr Cullen and Ms Byrne because it was they who gave notice bringing the second tenancy to an end. Although Mr Bolton expressed a wish, via Ms Byrne, that he wished to stay at 24 The Drove, there was never any suggestion in the evidence given that he would have been able to pay the whole of the rent on his own and he failed to find others with whom to share the rent. On a balance of probabilities the Tribunal finds that Mr Bolton would have been unable to remain at the property after 5th October 2018 in any event.

Summary of the Tribunal's decision

20. The Tribunal makes a Rent Repayment Order against the Respondent requiring her to pay £666.66 to each of the Applicants. There will be no order for re-imbursement of fees as no application was made in accordance with directions.

Dated the 31st day of October 2019

Judge D. Agnew (Chairman)

Appeals

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.

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