FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FY/HSE/2020/0001**
Properties	**:**	**40 Laurie Avenue, Nottingham NG7 6PN**
Applicant	**:**	**Nottingham City Council**
Representative	**:**	**None**
Respondent	**:**	**Mr Michael Convery**
Representative	**:**	**None**
Type of application	**:**	**Application for a rent repayment order under the Housing and Planning Act 2016**
Tribunal member	**:**	**Judge C Goodall** **Regional Surveyor V Ward FRICS**
Date and place of hearing	**:**	**Paper determination**
Date of decision	**:**	**25 January 2021**

DECISION

Decision

The Tribunal orders that the Respondent should repay the Applicant the sum of £5,644.98 by way of a rent repayment order, pursuant to section 43 of the Housing and Planning Act 2016, for the reasons set out below.

Background

1. This an application by Nottingham City Council ("the Applicant") for a rent repayment order. They claim that between 1 August 2018 and 31 July 2019 Mr Michael Convery ("the Respondent") was the landlord of 40 Laurie Avenue, Nottingham, during which time he was committing an offence of controlling an unlicensed house under section 95(1) of the Housing Act 2004 ("the 2004 Act"). They ask for repayment of universal credit paid by them to the Respondent during that period of £5,675.81.

2. The application was dated 14 September 2020. On 21 October 2020, Regional Surveyor V Ward issued procedural directions. The Respondent was required to provide a statement of case by 4 December 2020, but he failed to do so. Consequently, and following appropriate notices, an order dated 5 January 2021 was made by the Tribunal barring the Respondent from taking any further part in these proceedings.

3. The Applicant has provided the Tribunal with a statement of case and attached documents in support of its application. It indicated that it was content for the Tribunal to make its determination on the basis of the papers, and without a hearing. There has been no inspection.

4. The Tribunal has considered the application and supporting evidence. This document sets out our decision and the reasons for it.

Law

5. An application for a rent repayment order is made under section 41 of the Housing and Planning Act 2016 ("the 2016 Act"), the material provisions of which are:

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

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

(b) the authority has complied with section 42.

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

6. The phrase "an offence to which this Chapter applies" is defined in section 40(3) of the 2016 Act by listing in a table seven offences to which the Chapter applies, one of which is an offence under section 95(1) of the 2004 Act. That offence is in row 6 of the table.

7. Section 42 of the 2016 Act provides:

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and

(c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

8. A Tribunal in receipt of an application for a rent repayment order is given power to make an order under section 43 of the 2016 Act which provides:

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);

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

(c) section 46 (in certain cases where the landlord has been convicted etc).

9. The amount the Tribunal can order to repay is governed by section 45 of the 2016 Act, which provides:

45 Amount of order: local housing authorities

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

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

If the order is made on the ground that the landlord has committed	***the amount must relate to universal credit paid 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 the amount of universal credit that the landlord received (directly or indirectly) in respect of rent under the tenancy for that period.

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

(a) the conduct of the landlord,

(b) the financial circumstances of the landlord, and

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

10. Section 46 of the 2016 Act provides that if a rent repayment order is made against a landlord who has been convicted of the offence justifying a rent repayment order application, or a financial penalty has been issued in relation to that offence, the amount of the rent repayment order must be the maximum sum that can be ordered, disregarding section 45(4).

11. Section 51 of the 2016 Act provides that references to universal credit includes payments of housing benefit.

12. Section 95 of the 2004 Act provides as follows:

95 Offences in relation to licensing of houses under this Part

(1) A person commits an offence if he is 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.

(2) A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and

(b) he fails to comply with any condition of the licence.

(3) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1) or 86(1), or

(b) an application for a licence had been duly made in respect of the house under section 87, and that notification or application was still effective (see subsection (7)).

(4) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for failing to comply with the condition, as the case may be.

13. The standard of proof is "beyond reasonable doubt" (see section 43 of the 2016 Act above). It is not that the offence has to be proved beyond any doubt at all (see *Opara v Olasemo [2020] UKUT 0096 (LC)*).

14. In the case of *Vadamalayan v Stewart [2020] UKUT 0183 (LC)* ("*Vadamalayan*") (a case brought by a private tenant rather than a local authority), the Upper Tribunal decided that the starting point for fixing the amount of a rent repayment order is the rent itself, in full. There is no justification for reducing the amount ordered to be repaid by deducting landlords expenses, or mortgage costs, or for ordering repayment of only the landlords profit.

15. To summarise these provisions, on an application for a rent repayment order by a local authority as a result of an allegation of the commission of an offence under section 95(1) of the 2004 Act, a Tribunal will need to be satisfied of the following:

    a. That an offence under section 95(1) allows an application for a rent repayment order to be made;

    b. That, beyond reasonable doubt, the Respondent had control of or managed the Property during a period when it required a licence, but it was not so licensed, or that no licence application had been duly made (i.e. that the requirements for an offence under section 95(1) have been established);

    c. That there was no reasonable excuse for managing or being in control of an unlicenced property;

    d. That the Applicant has served a notice on the Respondent complying with the requirements of section 42 of the 2016 Act;

    e. That the application for a rent repayment order cannot be made until after the expiry of the period for representations contained in the section 42 notice;

    f. That the amount sought is limited to the amount of universal credit paid to the Applicant during a period not exceeding 12 months during which the Respondent was committing the offence under section 95(1);

    g. Whether (if the above requirements have been satisfied) there are grounds for taking into account the conduct, history of convictions, and financial circumstances of the Respondent when assessing the amount to be paid.

Facts

16. We find the following facts from the documentary evidence provided to us:

    a. The Property is a two storey, 2 bedroom mid terraced house in Nottingham, built c 1919;

    b. The Respondent is the freehold proprietor of the Property, and he has been so since 29 September 2006. Barclays Bank hold a mortgage over the Property;

    c. On 5 March 2012 the Property was let to Ms Tina Lavender on an assured shorthold tenancy at an initial rent of £450 per calendar month, and it has been occupied by Ms Lavender as her home since then, including during the period 1 August 2018 until 7 January 2020;

    d. On 1 August 2018, an order made by the Applicant (and confirmed by the Secretary of State) designated the area in which the Property is located as a selective licensing area under section 80 of the 2004 Act. This had the effect of making the obtaining of a licence compulsory if a house is occupied under a single tenancy which is not an exempt tenancy (see section 79(2) of the 2004 Act);

    e. The Respondent did not make an application for a licence until 8 January 2020;

    f. We do not have full details of rent increases, but by December 2019, the rent had risen to £510 per calendar month. This was funded in whole or in part by housing benefit payments from the Applicant;

    g. On 14 July 2020, the Applicant served a notice of intended proceedings under section 42 of the 2016 Act on the Respondent. The notice informed the Respondent that the Applicant was proposing to apply for a rent repayment order, stated the amount sought was £5,675.81, and invited the Respondent to make representation within a period of 28 days from the date of the notice;

    h. The application for a rent repayment order (made on 14 September 2020) was made more than 28 days after the date of the section 42 notice;

    i. The Applicant paid the Respondent the housing benefit element of universal credit at a rate of £433.04 every four weeks (or £108.26 per week / £15.46 per day) before, after, and during the period of 1 August 2018 to 7 January 2020;

j. The Applicant considered whether to bring proceedings in the magistrates court, or whether instead to issue a financial penalty against the Respondent in relation to the alleged section 95(1) offence, but decided not to do so, instead issuing a formal warning, by letter dated 14 July 2020.

Discussion

17. The first issue for us is whether an application for a rent repayment order can be made if the Respondent has failed to licence the Property in breach of section 95(1) of the 2004 Act. This is clear from sections 40 and 41 of the 2016 Act. Such an offence, listed in line 6 of the table to section 40, brings the option of applying for a rent repayment order into play;

18. Our second issue is whether the Respondent has committed an offence under section 95(1) of the 2004 Act. We have found that a selective licensing order was made by the Applicant which came into force on 1 August 2018. We have found that the Property was occupied by a single tenant for the whole of the period 1 August 2018 to 7 January 2020. We have found that the Respondent was the freehold owner and therefore he had control of the Property for that period, and we have found that no licence application was made until 8 January 2020. As a result of these four findings, we determine that the Applicant should have licenced the Property from 1 August 2018, but he did not.

19. It is a defence to have a reasonable excuse for failure to licence. It is for the Respondent to offer any excuse he may have. As the Respondent has not participated in these proceedings, we do not have any basis for determining that there is a reasonable excuse.

20. We therefore determine that the Respondent was committing an offence under section 95(1) for a continuous period between 1 August 2018 and 7 January 2020.

21. Our third issue is whether a valid notice was served under section 42 of the 2016 Act. We found, above, that a notice had been served on 14 July 2020 which complied with section 42. We also have to be satisfied that the notice was served within "the period of 12 months beginning with the day on which the landlord committed the offence to which it relates". In this case there was a continuous offence between 1 August 2018 and 7 Jan 2020. We interpret the requirement to mean that we have to be satisfied the notice was served within 12 months of <u>any</u> day on which the offence was being committed. We so determine. A valid section 42 notice was served.

22. The fourth issue is whether the application has been made after expiry of the consultation period in the section 42 notice. We are satisfied it has been based on our findings above.

23. The fifth issue is whether the amount sought is limited to the amount of universal credit paid to the Applicant during a period not exceeding 12 months during which the Respondent was committing the offence under section 95(1).

24. The Applicant has calculated the claimed sum of £5,675.81 in the following way. It has counted the number of 4 weekly payments of £433.04 made between 30 July 2018 and 25 August 2019 to be 14 payments, totalling £6,062.56 (for 56 weeks). This is a longer period than 12 months, so it then gave credit for 25 days at a rate of £15.47 per day and deducted £386.75 from £6,062,56 (though this deduction is shown incorrectly on page 64 of the bundle) to give a claimed sum of £5,675.81.

25. We do not agree that the sum claimed is the correct sum. The Applicant may only claim for a period "not exceeding 12 months". Using its own methodology, the Applicant gave credit for too few days outside the period. 30 and 31 July 2018 and 1 August 2019 are not included in the 12 month period 1 August 2018 to 31 July 2019, which is the period for which the Applicant may claim. So credit for 27 days rather than 25 days outside the period should have been allowed.

26. In our view the calculation should use a daily rate of £15.4657 (£433.04 divided by 28) for 365 days. This gives a sum of £5,644.98. This is the maximum sum we may order to be repaid.

27. The final issue for us to consider is the amount of the order. We are not obliged by section 46 of the 2016 Act to award the maximum sum permissible as there has been no conviction or financial penalty levied against the Respondent.

28. Despite the apparent discretion given to the Tribunal to determine such amount as it sees fit to award in sections 43 and 45 of the 2016 Act ("may make a rent repayment order" and "where the FTT decides to make"), *Vadamalayan* does clarify that our discretion is limited, and the starting point is the whole amount (i.e. the maximum amount) of the sum claimed. We see no reason to depart from that general principle in this case even though it is a local authority application rather than an application from a private tenant. Our starting point is therefore the maximum sum of £5,644.98.

29. We also need to consider the Respondents conduct, his financial circumstances, and whether he has been convicted of any offence (see section 45(4) of the 2016 Act). There is only any purpose in doing so however if our consideration may result in a reduction of the amount of rent ordered to be repaid, as if our starting point is the maximum sum that might be ordered to be repaid, any endeavour to persuade us to take into further account factors that are adverse for the Respondent would have no impact upon the amount repayable.

30. There is one factual dispute that may have had a bearing on our consideration of the section 45(4) factors. The Applicant has told us that the Respondent is the landlord of 79 properties in total. The Respondent however states in his licensing application that he has no other properties. We might have taken a different view of the Respondent's conduct had it been established that he owned only one property than we would had he been the owner of multiple properties, who we would have expected to have professional standard policies and procedures. However, where a party has been barred from defending a case, the Tribunal should work on the basis that the Applicant's evidence is to be preferred. We therefore make our decision on the basis that the Respondent does have multiple properties, or at least may be involved in the management of multiple properties, and so he should have conducted himself in a manner that befits a professional landlord.

31. Of course, we have no additional information from the Respondent. In our view there is therefore no evidence on which we can determine that the section 45(4) factors should justify any reduction in the amount of any rent repayment order we make.

Decision

32. In the light of the above discussion, the Tribunal orders that the Respondent should repay the Applicant the sum of £5,644.98 by way of a rent repayment order, pursuant to section 43 of the Housing and Planning Act 2016.

Appeal

33. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)