FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FY/HMK/2022/0015**
Property	**:**	**15 St Judes Avenue, Nottingham NG3 5FG**
Applicant's	**:**	**Mr S Aidow and Mrs Z Aidow**
Representative	**:**	**Justice for Tenants**
Respondent's	**:**	**Mrs C French**
Representative	**:**	**None**
Type of application	**:**	**Application by Tenant for a Rent Repayment Order**
Tribunal member	**:**	**Mr G S Freckelton FRICS (Chairman)** **Mr A McMurdo MSc, MCIEH**
Date and place of hearing	**:**	**16th November 2022 by video hearing**
Date of decision		**3rd January 2023**

DECISION

Background

1. By application dated 10th May 2022 Mr & Mrs S Aidow ("the Applicants") applied for a rent repayment order against Mrs C French ("the Respondent") under the Housing and Planning Act 2016 ("the Act"). The application was received by the Tribunal on 21st July 2022.

2. The grounds of the application were that the Respondent had control of a house which was required to be licensed but was not so licensed, under section 95 of the Housing Act 2004 ("the 2004 Act"), and that she had therefore committed one of the offences listed in section 40(3) of the Housing and Planning Act 2016 ("the 2016 Act") and that the Tribunal were therefore permitted to make a rent repayment order in their favour.

3. Directions were issued by the Tribunal on 4th August 2022 following which submissions were made by both parties.

4. The case was listed for oral hearing by video link. The hearing took place on 16th November 2022. This decision states the outcome of the application and the reasons for the order the Tribunal makes on it.

The Law

5. The relevant provisions of Part 3 of the 2004 Act, so far as this application is concerned are as follows-

79 Licensing of houses to which this Part applies

(1) This Part provides for houses to be licensed by local housing authorities where—

(a) they are houses to which this Part applies (see subsection (2)), and

(b) they are required to be licensed under this Part (see section 85(1)).

(2) This Part applies to a house if—

(a) it is in an area that is for the time being designated under section 80 as subject to selective licensing, and

(b) the whole of it is occupied either—

(i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4)…

85 Requirement for Part 3 houses to be licensed

(1) Every Part 3 house must be licensed under this Part unless—

(a) it is an HMO to which Part 2 applies (see section 55(2)), or

(b) a temporary exemption notice is in force in relation to it under section 86, or…

(c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.

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) 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 be effective (see subsection (7)).

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

…

(b) an application for a licence had been duly made in respect of house under section 87,

and that … application was still effective.

(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.

6. 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
6	Housing Act 2004	Section 95(1)	control or management of unlicensed house

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.

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 ...6... 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.

Applicant's Submissions

Proving an offence under section 95 of the 2004 Act and calculating the maximum amount of rent paid that may be the subject of a rent repayment order

7. In their written submissions and at the hearing the Applicants, through their Representative, Mr Nielsen of Justice for Tenants, submitted that the Respondent had conceded in their submission that the property was required to have a selective license and that it did not have one.

8. The Applicants further submitted that the property was not licensed at any point during the Applicants period of claim. This satisfied all elements of the offence of having control of, or managing, an unlicensed property under Part 3, section 95(1) of the Housing Act 2004 which is an offence under section 40 (3) of the Housing and Planning Act 2016.

9. The Applicants described the Property to the Tribunal. They said it comprised of a three-storey semi-detached house with entrance porch, hallway with staircase off to the first floor and access to the cellar, lounge, separate dining room and kitchen. On the first floor the landing leads to three bedrooms, bathroom and separate W.C. A staircase from the landing leads to the second-floor attic bedroom 4. The property has double glazing and gas fired central heating (but no central heating to the second floor).

10. The property has gardens to the front and rear. There is no garage or garage space. The Respondent confirmed her agreement to the Applicant's description.

11. The Applicants submitted a copy of an email to Nottingham City Council Selective Licensing Team dated 11th January 2022 which stated that they had been tenants in the property since 2017 and that they believed that the landlords were aware of the licensing requirement. At that time the Applicants submitted that they were in their notice period as they had purchased a property elsewhere and had only just discovered that the subject property had not been licensed since the requirements for selective licensing came into force. On the same day the City Council confirmed that an application for a license had not been received by them.

12. It was further submitted that it appeared that the Respondent was seeking to rely on her ignorance of her licensing obligations as a defence or mitigation but that the Upper Tribunal in *Thurrock v Daoud [2020] UKUT 209 (LC)* held that failure to appreciate that the property had come within a selective licensing regime could not constitute an excuse for failing to obtain a license unless the Respondent had taken reasonable steps to keep informed of their licensing obligations. The Applicants submitted that same logic would apply to the Respondent's failure to appreciate that the property met the conditions for a selective license.

13. The Applicants submitted that although the Respondent had used a letting agency to find the tenants, she had failed to provide any contracts between the letting agency and herself to show the scope of the agreement between the parties. As such, it was submitted that there was no reason to believe that the letting agency had a contractual obligation to keep the Respondent abreast of her duty to comply with the licensing obligations.

14. The Applicants further submitted that throughout the relevant period, the rent for the premises was paid directly to the Respondent and as such, it was believed that the letting agency was instructed on a let only basis with the Respondent being responsible for the management thereafter.

15. It was submitted by the Applicants that the property satisfied the conditions for a selective license with the commencement of the licensing scheme on 1st August 2018 until 26th January 2022 (being the date the Applicants vacated the property). This, in the opinion of the Applicants, evidenced the Respondent's failure to take reasonable steps to keep herself informed of her licensing obligations. The Respondent had not therefore demonstrated the proactive approach to such obligations to be reasonably expected of a landlord *(Chan v Bilkhu & Anor (2020) UKUT 289(LC))*.

16. The Applicants submitted that the Respondent's claims that she was not a professional landlord should also be disregarded as a potential mitigation of an award following the Upper Tribunal decision in *Moore v Wilson* where the landlord, renting out a single property which used to be his home was still considered a professional landlord. Therefore, in the submission of the Applicants, the Respondent was a professional landlord who should be aware of her responsibilities.

17. When questioned by the Tribunal the Applicants stated that they informed the Respondent that a selective licence was required on 27th July 2021 when they received the copy of the Homebuyer Report they had commissioned due to their interest in buying the house. They had sent a copy of this report to the Respondent.

18. With regards to the award sought the Applicants confirmed in their application form that they were seeking a rent repayment order the sum of £12,946.00 for the period 12th of January 2021 to 11th January 2022. Copies of bank statements were provided from which the Tribunal understands the following rental payments were made and submitted by the Applicants as being within the relevant period.

Date	Amount (£)
11 January 2021	925
19 January 2021	175
11 February 2021	1,100
11 March 2021	1,100
12 April 2021	1,100
11 May 2021	1,100
11 June 2021	1,100
12 July 2021	1,100
11 August 2021	1,100
13 September 2021	1,100
11 October 2021	846
11 November 2021	1,100
13 December 2021	1,100
Total	**12,946.00**

19. It was submitted that a reduced payment was agreed between the parties for October 2021 as the Applicants moved out briefly while building works were carried out.

20. With regard to the financial circumstances of the Respondent, the Applicants submitted that as detailed evidence of her financial circumstances had not been disclosed (but only alluded to in one unsubstantiated paragraph of her written submissions) it could be inferred that the financial circumstances of the Respondent was not as significant as to justify consideration by the Tribunal in mitigating the award.

21. With regard to the conduct of the Applicants it was submitted that they:

    a) Paid all their rent.
    b) Not had any complaints made about their conduct at any time during their tenancy.
    c) Been professional and polite in their correspondence.

22. The Applicants submitted in respect of the conduct of the Respondent that in *Aytan* it was determined that there was no evidence of any breach of management regulations, no evidence of any failure to comply with deposit protection law, no evidence of any breaches of any fire safety regulations and no evidence of any significant disrepair or poor conditions. This led to an award of 85% of the rent.

23. In *Wilson* it was submitted that the landlord who was renting out a single home they used to live in and for which they did not rely on the income was found to be a professional landlord and to have breached fire safety regulations albeit for a relatively short duration and caused by ignorance. This led to an award of 90% rent

24. In the submission of the Applicants the Respondent in this case had breached licensing rules for almost 3½ years. During this period the property has had a recurring damp issue in the kitchen, the polystyrene tiles in the cellar posed a fire risk, a property surveyor stated that the property would not have passed the fire safety inspection as part of the licensing requirement and failed to ensure that a gas safety certificate was obtained and provided to the occupants in breach of section 36 of The Gas Safety (Installation and Use) Regulations 1998.

25. In *Wilson* there was an absence of important fire safety features, in particular fire doors and alarms, which gave rise to a dangerous situation for the tenants throughout the time they lived in the property which the Upper Tribunal regarded as a very serious matter. The Upper Tribunal awarded 90% of the rent even though the landlord only had one rental property, accepted that he had done wrong, took responsibility and had only committed a breach for a period of a few months before rectifying it. As such, in the submission of the Applicants an award of 100% or very close to it was an appropriate amount as in this case as the offence was serious and took place over a number of years.

26. In summary, the Applicants submitted that the Respondents were professional landlords renting a property which required a selective licence and who did not even seek to remedy the breach. At the same time,

they avoided the costs of bringing the property up to a minimum legal standard and placed their tenants at an increased risk of harm and breached multiple parts of the housing legislation. In particular they submitted:

a) The Respondent was the person in control of the property.
b) There was no reasonable excuse for not having a licence as the Respondent had control for some 41 months and did not apply for a licence.
c) There was no evidence of a contractual arrangement between the Respondent and either the letting agents or the maintenance contractor to keep them appraised of licensing requirements. In particular the Maintenance contractor (Graham Scott) was not qualified to deal with the management on an ongoing basis to arrange either a licence or obtain gas and electrical safety certificates.
d) That there were no deductions to be made in respect of utilities for the benefit of the Applicants as the Applicants paid all the outgoings on the property during their occupation.
e) That the offence was serious although they accepted that there were more serious offences such as harassment and unlawful eviction.
f) That the Respondent had shown a lack of process for keeping updated on legal obligations including licensing.
g) That the Applicants informed the Respondent that a licence was required in July 2021.
h) That the polystyrene tiles in the cellar were a fire hazard, there was evidence of ongoing damp, there was damage to the floor in the kitchen and a leak to the bay window roof.
i) There was a failure to supply gas and electric safety certificates during the tenancy and these additional failures compounded the lack of process for the proper management of the property.
j) That the Respondent unreasonably withheld the deposit at the end of the tenancy and allegedly gave the Applicants 30 days' notice in July 2021.

Based on the above the Applicants submitted that a starting point of 85% of the maximum rent claimed would be appropriate.

27. Following on from the above the Applicants also submitted that:

a) The Respondent had not been convicted of an offence but this should be balanced against the fact that there were generally a low number of prosecutions.

28. With regard to conduct the Applicants submitted that there was limited evidence of good or bad conduct on either side but that, in their opinion mere compliance does not make a landlord into a good landlord.

29. For the Applicants part:

a) They had paid their rent.
b) They had complied with the tenancy agreement.

c) The question over whether they had changed a lock without consent and left the garden in an untidy state was disputed as was the allegation of damage to the garden shed.
d) With regard to the allegation that they had failed to report the damage to the floor in the kitchen had the Respondents arranged for regular inspections this would have been noted earlier.

30. Based on the above the Applicants submitted that there was no justification for a further deduction to the repayment order.

31. With regard to the financial circumstances of the Respondent the Applicants submitted that the Respondent had not submitted any financial details in accordance with the Tribunals Directions except a brief statement. As such, it was submitted that no further deduction should be considered.

32. The Applicants also requested reimbursement of the hearing and application fee in the sum of £300.00 under rule 13 (2) as this cost would not have been incurred but for the criminal offence committed by the Respondent.

Respondent's Submissions

33. By written submission and at the hearing the Respondent Submitted that she had never been convicted of any offences and that this was the only property she had ever rented out. The reason for renting the property was due to Mr French having an employment transfer to the USA.

34. The Respondent submitted that at her cost she engaged a professional letting agency, Countrywide Property Management to act as her advisers in finding a tenant for the property including conducting background checks and providing the necessary documentation.

35. The Respondent further submitted that when she let the property in July 2017 there was no requirement to have a licence. It was admitted that the Applicants occupied the property between July 2017 and January 2022 but during this period the property was never re-marketed as after the original contract period had expired both parties agreed to continue the rental on a rolling contract from July 2018 through to the end of the tenancy in January 2022.

36. The Respondent confirmed that she was satisfied with the Applicants as tenants and that based on their continued wish to rent the property beyond the original one-year contract, assumed they (the Applicants) were satisfied with the condition of the property and with the Respondent as their landlord. The Respondent also confirmed that she accepted that ignorance was not a defence. However, it was further submitted that she did not knowingly disobey the law.

37. It was further confirmed that the Respondent understood that the purpose of selective licensing was to prevent unscrupulous landlords offering poor

quality accommodation. In the submission of the Respondent the property was of a high standard and the Applicants never made any complaints stating otherwise. The property was the family home of the Respondent, her husband and children and prior to renting had been professionally cleaned, fitted with new carpets, new blinds, was decorated and generally maintained to an excellent standard. In support of this submission the Respondent submitted a copy of the Property Inventory Schedule of Condition signed by the Applicants which included numerous photographs taken immediately prior to the commencement of the tenancy.

38. In addition to the above in 2014 new double-glazed windows were fitted across the entire ground floor, and a Worcester Bosch combination boiler with an eight-year warranty was installed together with new radiators throughout. The boiler was fitted by a CORGI qualified gas safety engineer and serviced prior to the commencement of the tenancy. It was subsequently serviced again in 2019 and 2020.

39. The Respondent submitted that she had several new appliances installed and included in the rental including a fridge freezer, Bosch washer/dryer, Bosch dishwasher, a dehumidifier and pressure washer. In addition to this, at the Applicants request she also replaced the gas cooker and hob with a new Neff unit within the first few months of the tenancy which she did.

40. The Respondent further submitted that as part of the purchase of the property in 2014 she had obtained an electrical safety inspection certificate. She had further electrical work carried out in 2015 including new LED lights to the kitchen and new electrical power sockets. An intruder alarm system was also installed and, for additional security all the ground floor windows were either lockable or could not be opened. High security five-point locking/deadbolts were in place on all external doors and fire and CO2 detectors were fitted on all floors. Throughout the tenancy the property was insured with a residential landlord insurance policy.

41. The Respondent submitted that the rent received each month was used to pay the mortgage which remained in place throughout the tenancy following the mortgage providers approval that the property could be rented. She had acted in good faith throughout the rental period and paid on a monthly basis for a third party 24-hour on-call general maintenance service (Graham Scott) until she returned to the country in 2020 when she again assumed the emergency first point of contact.

42. Throughout the tenancy the rental had not been increased despite there being multiple opportunities to do so. The Respondent submitted that she was aware that market conditions would have justified a rental increase.

43. The Respondent further submitted that there was wear and tear to the property some of which was to be expected including to the paintwork and soft furnishings. However, a repair bill of £4,478.00 was incurred for

repairs to the floor and underlying joists in kitchen due to water damage which was not typical or expected. Despite the obligation to report damage as stated in the rental agreement at clause 3.16.1 the Respondent was not informed by the Applicants that the floor had begun to visibly sag and warp and only discovered this during a periodic inspection in July 2021. As the Applicants confirmed in their witness statement that they noted the floor was damaged it was disappointing that they did not report it so that it could be rectified. The Respondent did not pursue any claim for compensation but believed that failure to report this damage in a timely fashion significantly increased the cost of the repair work.

44. It was further submitted that the garden was left in a poor state in comparison to its condition when the tenancy commenced. It was accepted that the garden had not been abused but it had been neglected. This resulted in additional costs for putting it into good condition in preparation for the eventual sale. There were also other more minor breaches of the contract. For example, the Applicants changed the locks and failed to notify the Respondents in contravention of the tenancy agreement.

45. During the period of the tenancy the deposit was protected by a third-party deposit protection provider and at the end of the tenancy the deposit was refunded in full. The Respondent submitted that she absorbed all the above-mentioned costs herself. The Applicants had stated that the Respondent did not respond to a formal request to release the deposit. However, according to the deposit scheme structure this was not necessary and as they did not dispute the release, the deposit was automatically refunded in full after a short period of time. Although some discussions took place regarding various issues and the Applicants acknowledged damaging the garden shed, due to its age the Respondent did not raise a dispute with the protection scheme to block the release of the deposit. In the opinion of the Respondent an unscrupulous landlord would not have done this.

46. In due course the Respondent discussed with the Applicants their intention to sell the property and wanted to give them an opportunity to place an offer on the house without listing it and failing that, allow them several months to find somewhere else to live. As the Applicants had confirmed, they did express an interest in buying the property but ultimately did not make a formal offer as there was no agreement in respect of price. However, discussions took place because the Respondent knew that the Applicants, liked the house and it was an opportunity for both parties to avoid unnecessary time and cost to list on the open market.

47. The Respondent submitted that she needed to sell the property on her return to the UK as she needed the equity to purchase a new family home which she and her husband had since done. During this period, they stayed with family and were not in a position to obtain a new mortgage until Mr French's six-month probation period with a new employer was past. It was disputed that a 30-day notice was going to be served following a visit in July 2021 and at that time the Respondent was attempting to

work with the Applicants to agree a mutually agreeable date to end the tenancy. The Applicants did not actually leave the house for a further six months and only served their notice after they had completed the purchase of another property. It was therefore the Respondent's submission that the Applicants were not given any notice to vacate.

48. It was further submitted that in the supporting email to Nottingham City Council Selective Licensing Team dated 11th January 2022 the Applicants stated that they were in dispute regarding the final rental payment amount due and wished to understand whether the tenancy agreement was enforceable if the property was not licensed.

49. In the opinion of the Respondent, she was entitled to an additional month's rent after the Applicants issued their notice to vacate. However, following a protracted negotiation the Respondent accepted the request to end the tenancy agreement early which had cost her half a month's rent plus council tax and utility bills. In return for this the Applicants agreed to facilitate the sale process but they should have done this in any event under clause 3.20.1 of the tenancy agreement. Regardless of this the Applicant had already initiated the RRO process when the concession was made. The Respondent therefore concluded that the RRO application was made in retaliation for requesting that the Applicants adhere to the notice period in the tenancy agreement.

50. In summary and in the main hearing the Respondent submitted:

    a) That she did not know there was a problem with the kitchen floor until just prior to Applicants leaving although they said they noticed a problem two months into the tenancy.
    b) She received a copy of the Homebuyer Report in July 2021 but did not read it as it was regarded as only being a negotiating tool to enable the Applicants to negotiate a reduced purchase price. As such she did not know the property was in an area covered by selective licensing.
    c) That she had no knowledge of the selective licensing requirement until she received the paperwork regarding the RRO application.
    d) That she was not a member of any landlord body and had only sought professional help for the initial letting and from Graham Scott for ongoing repairs/maintenance. She had not received any emails or letters from Nottingham City Council regarding the need to obtain a licence.
    e) That she relied on Graham Scott to arrange the relevant gas and electrical safety certificates to be provided and that the lack of certificates was an oversight.
    f) That she was not a professional landlord and that her experience in residential lettings was limited to just this property. She accepted that she took no action to obtain a licence (as she did not understand she needed one) and took no action in respect of the polystyrene tiles or possible 'Weevil' infestation to the cellar timbers.
    g) That the polystyrene tiles covered no more than one third of the cellar ceiling area. There was a door from the hallway to the cellar and an alarm/smoke detector immediately outside the cellar door in the

hallway. Therefore, in the unlikely event of a fire starting in the cellar, the occupants would be alerted quickly.

h) It was accepted that there was some damp in the property which was a 115-year-old house but she had obtained an earlier report from Midland Preservation who indicated that the damp was not serious and to be expected in a property of this age. A copy of this report was not shown to the Tribunal.

The Respondent's financial position

51. In her written submission and at the hearing the Respondent submitted that she was not working and that she and her husband were a single income household with three young children aged seven, five and two. As such she would be unable to repay the amount requested of £12,946.00 being a whole year's rent in full. She and her husband had made no provision for the possibility of the RRO when they purchased their new home in May 2022. It was also submitted that the amount of the repayment requested in the sum of £12,946.00 was neither commensurate with the offence or fair given the circumstances.

52. The Tribunal questioned the Respondent (and Mr French) further regarding her personal financial circumstances and were informed that the Respondent is not in employment and receives no state paid benefits. All the household expenses therefore fell on Mr French (although he is not the Respondent and therefore his income cannot be taken into consideration in respect of any award made). The Respondent confirmed that she did have a savings account which had a credit of less than £2000.00.

53. A bank statement was provided by the Respondent with her written submissions indicating several joint accounts with her husband all of which had relatively limited amounts in credit. These were noted as being two current accounts totalling £387.18 and two savings accounts being noted as an 'Emergency Account' and a 'Holiday Account'. These total £3,200.49. In the Respondent's own name there are two accounts totalling £2,015.33. The account statement is dated 21st November 2021 and the Tribunal understands from her evidence that the Respondent's financial situation has not altered materially, one way or the other. We fully accept this position having regard to the Respondent's circumstances of not being in employment and having three young children living at home.

Discussion and Determination

54. On this application for a rent repayment order, the first issue for the Tribunal is to decide whether the Respondent has committed an offence under section 95 of the 2004 Act, namely whether the Respondent has had control of or management of a property which requires to be licensed, but which is not so licensed. No rent repayment order can be made unless this offence is established beyond reasonable doubt.

55. There are 6 elements to the offence:

    a. That the Property must be a "house";
    b. That the Property must be in area which the local authority has designated as an area of selective licensing;
    c. That the Property is let under a single tenancy or licence that is not an exempt tenancy or licence;
    d. That the Property is not licensed;
    e. That the Respondent is "a person having control" of the Property;
    f. That there is no reasonable excuse for the Respondent having control of the Property without it being licensed (which has to be proved by the Respondent on the balance of probabilities).

56. The first five elements of the offence are not seriously in doubt. The Property is a building, consisting of a dwelling, which therefore falls under the definition of "house" in section 99 of the 2004 Act. The Tribunal accepts the evidence from Nottingham City Council which is admitted by the Respondent that the Property was both within a selective licensing area as from 1st August 2018, and that no application for a license was made. The copy tenancy agreement provided to us in the bundle of documents confirms that the property is let under a single tenancy. The Respondent receives the rack rent, meaning that by virtue of section 263 of the Act she is the person in control of the Property.

57. There is, though, an issue concerning whether the Respondent has a reasonable excuse for failing to licence the Property. The submission she made is that she was unaware of the need to licence it until around February 2022 prior to which the Applicants had left the property. However, the Respondent accepted that she received a copy of the Homebuyer Report in July 2021 which notes in Section G1 *'…. the house should have been registered with Nottingham City Council for selective licensing purposes.'* It appears to the Tribunal that the Applicants were therefore not aware of the requirement to licence until that time. There is no doubt that the Respondent should have read the Homebuyer Report and could then have acted on it. That she chose not to read it on the basis that it was merely for 'negotiating purposes' in connection with the proposed sale is unfortunate.

58. We find as a matter of fact that there was no agreement between the letting agent (who only found the tenant) and the Respondent to notify the Respondent of the need to obtain a selective licence. The same is true of the employment of Graham Scott for repairs and maintenance. Although much is made of this by the Applicants in their submission, at no point does the Respondent offer this as an excuse.

59. Following the letting of the property the Respondent moved to the USA, returning in 2020. It is therefore accepted by the Tribunal that she could

not easily have known that the property required a license in August 2018 when she was not in the country. She returned in 2020 but was not living in the area so it is difficult to envisage how she could have been informed that a licence was needed.

60. We consider that the earliest she could have realistically been informed that the property required a selective licence was in July 2021 (when she was sent a copy of the Homebuyer Report). The Respondent submitted that the earliest she knew that the Property was in an area of selective licensing was in early 2022 but that as the Applicants had moved out, we assume she thought nothing further of it.

61. The question is whether the Respondent's lack of awareness of the need to licence the Property can be regarded as a reasonable excuse. Although this question was not specifically raised by the Respondent, Tribunals are exhorted to be live to the issue and to explore it in appropriate cases (see paragraph 30 in *I R Management Services v Salford Council* [2020] UKUT 81)).

62. In the recent Upper Tribunal case of *Aytan v Moore* [2022] UKUT 27 (LC), the Upper Tribunal said:

"*40. We would add that a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themself of the licensing requirements without relying upon an agent, for example because the landlord lived abroad.*"

63. However, in this case, there is no evidence of any reliance by the Respondent on her agent for anything other than finding a tenant for the property. As such we find that the earliest date that she could have found out about the need for a selective license was in July 2021. However, this does not lessen the offence that a licence was required from 1st August 2018.

64. With some reluctance, our conclusion is that having been made aware of the existence of selective licensing schemes in general, a landlord, acting reasonably, should have realised that these schemes may be designated in any local authority area and should have kept a check on the situation via the local authority website. Had the Respondent used the Nottingham City Council website checker she would have realised that the property was in an area where there was a selective licensing scheme in place. We therefore find that there was no reasonable excuse for failure to licence the property after July 2021 at the latest.

65. Our conclusion on the first issue is that the Respondent did commit an offence under section 95 of the 2004 Act between 1st August 2018 and 26th January 2022 (when the tenancy ended) although it is accepted that she could not readily have been aware that the property required a license until 27th July 2021 when she was sent a copy of the Homebuyer Report by the Applicants.

66. The second question for us is to determine is the maximum possible award we could make as a rent repayment order. It cannot be higher that the rent that was paid in a period, not exceeding 12 months, during which the landlord was committing the offence (see section 44(2) and 44(3)(a) of the 2016 Act).

67. The offence ceased in this case when the Applicants moved out. An application for a license was never made. The Applicants seek a rent repayment order for the period 12th January 2021 – 11th January 2022, and we have to identify both the rent paid *during* that period and the rent payable *in respect of* that period (see *Kowalek v Hassanein Ltd* [2021] UKUT 143 (LC)).

68. In *Acheampong v Roman* [2022] UKUT 239 the Upper Tribunal set out the following guidance on how to quantify the amount of a rent repayment order which, it said, will ensure consistency with the authorities:

    a) Ascertain the whole of the rent for the relevant period;

    b) Subtract any element of that sum that represents payments for utilities that only benefited the tenant, for example gas, electricity and Internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate;

    c) Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relevant seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that the term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step;

    d) Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44 (4).

69. The evidence was (see paragraph 18 above) that the sum of £12,946.00 was paid as rent during the period 12th January 2021 and 11th January

2022. However, the Tribunal is only able to take account of the rental payments actually made during the period of the Application. In this case one of the payments (£925.00) was made on 11th January 2021 which is outside the period claimed. We therefore deduct one days rent in respect of 11th January 2021. We calculate this at £36.16 (£13,200.00 per annum ÷365 = £36.16). Therefore, the maximum award we can make is £12,909.84 (£12,946.00 - £36.16).

70. The third question for us is to determine the amount we are willing to order, taking into account the factors we are obliged to consider contained in section 44(4) of the 2016 Act. We may also take into account any other factors we consider are relevant (see paragraph 50 of *Williams v Parmar* [2021] UKUT 0244 (LC)).

71. We heard evidence from both parties as summarised above. Where their evidence of fact diverged, we are not asked to determine which evidence we prefer and we do not do so but take the submissions of both parties on face value and give them due consideration in the overall context of the case.

72. Having regard to *Acheampong v Roman* we therefore take into account the following:

a. This is the Respondent's first offence;

b. From the evidence, and notwithstanding the Homebuyer Report provided to the Applicants, the Property is in generally good condition commensurate with its age and type as evidenced by the photographs taken prior to the letting and by the lack of any serious complaints in respect of condition by the Applicants to the Respondents during the tenancy which were not actioned;

c. We note the leak to the bay roof apparently caused by leaves blocking the gutter which is a general maintenance item and the polystyrene tiles to part of the cellar. Although polystyrene tiles are a potential hazard, they are not themselves generally combustible but when subjected to fire they give off a toxic gas. They are located in the cellar and it is difficult to envisage there being much chance of a fire starting there. In any event there is a door between the cellar and hallway of the house and a fire/smoke detector adjacent to that door in the hallway. It is therefore unlikely that a tenant would not be quickly alerted to a fire in the cellar area;

d. We have evidence that the Respondent has not complied with all statutory requirements to ensure the health and safety of the Applicants. In particular the provision of gas and electrical safety certificates in a timely manner. We do however know from later certificates provided that there were no problems with either the gas or electrical systems to the property so although the certificates

were not provided the Applicants were not at any risk. We do not consider that the bay roof is anything other than an ongoing maintenance issue.

e. Although the gas safety certification was not kept up to date, this would not necessarily have had an adverse effect on a selective licence being granted for the property. It is not realistically possible for local authorities to inspect all properties before granting a licence and there is no requirement in the legislation requiring a landlord to provide copies of gas and electrical safety certificates at the outset. It is often the practice for local authorities to grant a licence, conditional on copies of the necessary certificates being provided at a later date. We do not accept that the electrical safety certificate was out of date as since the original certificate was provided in 2014, further electrical work had been undertaken by qualified contractors as evidenced by the later certificate dated 22nd January 2022. This confirmed that there were no dangerous or potentially dangerous matters requiring attention. Therefore, at no time during their tenancy were the Applicants living in a property which put them at any particular risk.

f. That the property was the Respondent's family home and not purchased as an investment. The Respondent does not appear to be a professional landlord in the broader sense; indeed, it might be said she is somewhat naïve about the technicalities of property letting and management and only let the property due to having to move to the USA for her husband's employment purposes.

g. The Respondent took all reasonable steps to let the property through a professional agent, carried out improvements/repairs as required and even set up a 24-hour third-party service so the Applicants could obtain repairs during their absence, only cancelling this on their return to the UK. They then carried out periodic inspections.

h. That as a matter of fact, the Respondent did not know that she had to licence the Property until early 2022 by which time the Applicants had vacated. However, she was made aware in July 2021 when the Homebuyer Report was sent to her and she should have read it which would have alerted her to the necessity of obtaining a licence;

i. It is clear from *Ayton* and other Upper Tribunal cases that the intention of Parliament with this legislation was to target "rogue" landlords and the Respondent clearly does not fall within that description

j. The Property would appear to have been being let at below market rent at least for some of the tenancy;

k. The Respondent's financial circumstances. We are satisfied that the Respondent is unable to afford the full amount of the rent repayment order sought. At the hearing the Applicants submitted that the Respondent had not submitted any meaningful financial details and that as the Directions had instructed her to do so, no further submissions could be made. The Tribunal disagrees. The written submissions explained the Respondent's financial circumstances, supported by details of various bank accounts held with Barclays Bank PLC. The Tribunal is acting within its jurisdiction to seek further details at the hearing, notwithstanding the Directions. Indeed, not to do so would not be in the interest of fairness or justice and would not enable the Tribunal to have full regard of the Respondent's financial circumstances as it is obliged to do under section 44(4)(b) of the Act;

l. The Applicants breached the tenancy agreement in changing the locks without consent and in not reporting the repairs needed to the kitchen floor and bay window to the Respondent;

m. The Applicants further caused damage to the garden shed. We note the conflicting evidence in respect of the condition of the garden;

n. The Respondent failed to put in place adequate provision for the proper management of the property during her absence from the country. Neither was she a member of any landlord's association.

73. We do not give any weight to the following factors:

a. The Applicant's allegations of being given 30 days' notice in July 2021;

b. The Applicants referred to a loose gas pipe in the cellar. The Respondent says this was disconnected. In any event it was not referred to in the later gas safety certificate which it would have been if it had been a hazard;

c. The alleged late repayment of the deposit which is disputed by the parties.

d. Any effect upon the amount of any order we make as a result of the Respondent's financial circumstances. We are satisfied that the Respondent is able to afford the amount of rent repayment that we order, and neither so wealthy as to justify an enhanced amount, or so poor as to justify a further reduced amount;

e. The fact that any rent repayment ordered may be considered by some to be an underserved windfall for the tenant. This is not a factor we are able to take into account.

74. We therefore follow the decision in *Acheampong v Roman*. Our view is that it would be unjust not to make a discount to the maximum sum we can order as a rent repayment balancing all the factors listed above.

75. As we have previously determined the maximum amount, we can award is £12,909.84. The Applicants submitted that we should look to make an award of 85% of this amount (although they also submitted the larger maximum of £12,946.00). If we follow their submission as to amount our maximum award would be £10,973.36.

76. However, we do not accept that this is an appropriate starting point and balancing all the factors listed above, our view is that 60% of this amount (£12,909.86) is appropriate. This gives a maximum potential award of £7,745.90. We determine that the offence of not having a selective license is not unduly serious on its own when taking account of the range of potential offences such a harassment or unlawful eviction and given the circumstances of this case determine that a 40% deduction is appropriate.

77. We are also concerned that Nottingham City Council appears to have imposed a selective licensing regime over a substantial part of its area rather than targeting particular areas where problems of poor housing, anti-social behaviour etc. are found. We are concerned that local authorities adopting this approach may be tempted to regard the licensing regulations as being a regular source of income rather than dealing with the issues for which they were intended.

78. Although there are alleged matters of personal conduct on both sides, we do not consider that our overall award should be adjusted further to reflect this.

79. We then take into account the Respondent's financial circumstances. It is submitted to us (and we fully accept) that the Respondent is not in employment and that her only access to immediate cash comprises a savings account containing less than £2,000.00. The purpose of a rent repayment order is to deter landlords from unlawful action and to prevent repeat offences. In this case it is evident to us that the Respondent only had one property let for some 41 months and only let it due to a move to the USA for her husband's work. As such she is not letting property at the moment and there is little chance that she will do so in the foreseeable future. She does not have access to large cash reserves and our view therefore, is that a discount of 90% is appropriate.

80. We order that the Respondent must make a rent repayment order to the Applicants in the sum of £774.59.

81. The Applicants also seek reimbursement of the hearing and application fee in the sum of £300.00 under rule 13(2) as this cost would not have been incurred but for the offence committed by the Respondent.

82. We agree with the Applicants and order that the Respondent must reimburse the hearing and application fee of £300.00 to the Applicants.

Appeal

83. 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.

Graham Freckelton FRICS
Chairman
First-tier Tribunal (Property Chamber)