FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case Reference	**MAN/00CJ/HMF/2021/0022 FVH**
Property	**39 Queen's Terrace, Jesmond, Newcastle upon Tyne NE2 2PJ**
Applicants	**James Kidd** **Rosie Eldabe** **India Cannon** **Neave Croskery**
Respondent	**Mr Mahmood Sajawal**
Type of Application	**Housing and Planning Act 2016 Section 41(1)**
Tribunal	**Tribunal Judge W L Brown** **Mr C Snowball MRICS (Valuer Member)**
Date of Hearing	**1 December 2022**

DECISION

DECISION

The tribunal makes a rent repayment order in favour of each of the four Applicants within 28 days of the date of issuing of this decision as follows:

Applicant	Sum to be reimbursed by Respondent to each Applicant
James Kidd	£ 1,769.74
Rosie Eldabe	£ 2,051.29
India Cannon	£ 2,051.29
Neave Croskery	£ 2,051.29

The Respondent is also to reimburse the Applicants with the application fee in the sum of £400 (£100 each) and hearing fee of £200 (£50 each) within 28 days of the date of this decision.

REASONS

The Applications

1. By their application dated 17 March 2021 (the Application), the Applicants each seek a Rent Repayment Order pursuant to section 41(1) of the Housing and Planning Act 2016 (the 2016 Act) in relation to their tenancy of the Property. The Respondent is the person with control and management of the Property and the Applicants' former Landlord.

2. Directions were issued on 10 June 2021 pursuant to which the Applicants through Mr Kidd, and the Respondent, made written submissions. There was no question that the Application was brought within the statutory timeframe to do so.

3. A hearing of this matter took place as referred to above. This was a remote hearing by video which was not objected to by the parties. With the consent of the parties, the form of the hearing was by video using the Tribunal video platform (a Full Video Hearing – FVH). The Tribunal was satisfied that all relevant issues could be determined in a remote hearing. The documents that we were referred to are bundles from the parties, the contents of which we have recorded. (The parties were content with the process). The Tribunal considered it unnecessary in view of the matters in issue to conduct an inspection.

4. Mr Kidd attended the hearing, supported by his Father, Mr Nicholas Kidd, on behalf of all of the Applicants. The Respondent appeared in person.

Applicants' Submissions

5. The basis for the Application was that the Applicants had rented accommodation at the Property from 30 July 2020 to 29 July 2021 and that Newcastle City Council (NCC) had confirmed the Property to have been unlicensed from the start date of the tenancy, for its duration, meaning an offence had been committed by the Respondent under Section 72(1) of the 2004 Act.

6. The Applicants submitted a copy of an unsigned counterpart assured shorthold tenancy agreement for the Property, between the Respondent as landlord, and each of the Applicants, as tenants, at a rent person per week of £98, exclusive of utility and broadband payments. An additional amount was paid as a deposit (total £1698.66) to be held under the terms of an authorised tenancy deposit scheme. It was not in dispute that this document was evidence of the contractual arrangement for occupation of the Property by the Applicants (the Tenancy). The Property is described in the Application as a 4 bedroom terraced house.

7. The rent repayment sought is set out in the Application as totalling £21,004.66, against the total rent and deposit shown in the tenancy agreement of £21,690.66 for the whole term of the tenancy. It was explained that due to a standing order error the sum paid by Mr Kidd was short in the sum of £686.00. Evidence of payments to the Respondent through bank statements was provided by the Applicants.

8. The Applicants also supplied a copy of an email dated 12 March 2021 from Mr Thomas McFall, Senior Technician – HMO Licensing of NCC which set out "*This Property with 4 Occupants should have been licensed form the start of your tenancy as in April 2020 Additional Licensing was introduced in the city……We still have not received a licence application for this property from the landlord.*"

Respondent's Submission

9. The Respondent accepted he was in control and managing the Property throughout the duration of the Tenancy. He stated that it is owned by his son, Mr Amean Sajawal. At the hearing he stated that he manages 7 rented properties, but before the COVID-19 pandemic he managed more and has been engaged in property management since mid-1980s.

10. The Respondent accepted that the Property met the criteria for mandatory licensing, following changes introduced by the Licensing of Homes in Multiple Occupation (Prescribed Description) (England) Order 2018 and implementation of Additional Licensing by NCC. On 6 April 2021 the Respondent validly submitted an application for a licence, which ultimately was proposed to be granted on 26 May 2022 by NCC, documentary evidence of which he provided.

11. The Respondent set out that in January 2020 he began the process to seek an appropriate licence of the Property as he was aware of the NCC scheme beginning in April 2020, affecting it. The effects of the COVID-19 pandemic began in March 2020 and as he was a vulnerable person because of health issues he received written guidance from NHS to stay at home. He has diabetes and asthma. His Father, for whom he cares, lives with him and he also is diabetic and had a heart attack, which made visiting properties difficult as he would have to isolate from his Father. He accepted that he was reminded by NCC to complete his licensing application for the Property but needed to carry out room measurements to fill in on the form. He said that he had been unable to obtain this information and this was the reason for the delay in his application. His understanding was that NCC was relaxed about the delay.

12. In his written submission he recorded "*I Physically cannot afford to pay rent and fines esp. when I have done everything on my side and taking miscommunications from your side which has resulted to this, With covid and the recission I have suffered a lot*".

13. He provided a document dated 25 March 2021 from NCC to him setting out a formal allegation regarding the Property that "*On the 12th March 2021 you, as the [person having control of/person managing] the above mentioned property, which was required to be licenced, allowed the property to be occupied without a licence contrary to [Part 2, Section 72(1)/Part 3, Section 95(1)] of the Housing Act 2004*." The notice went on to record "*We have not received an application for a licence for the above property. It is therefore alleged that an offence has been committed under the Housing Act 2004. The City Council is now considering enforcement action against you, however in making this decision, we will consider any comments you may wish to make and give you an opportunity to provide an explanation*."

14. He provided a copy of his replies dated 7 April 2021 to a set of questions presented by NCC to him, under caution. In addition to confirming details referred to above he recorded "*I have been to* [sic] *scared to see my Doctor for my depression + anxiety and with gyms closed and not been* [sic] *able to see close family and friends alive and to funerals has made me shaking at night and not ready to do the HMO licences until everything changed…..*" Further, "*As soon as I get up I have to go to one of my Dads empty houses just to do paining [sic] or cleaning just for some normality for some reason I could not concentrate to do the paperwork.*"

15. During questioning at the hearing the Respondent indicated that he received a Penalty Notice amounting to £796 from NCC for committing the alleged offence. He also confirmed that whilst the Property belonged to his son, Amean Sajawal, the Respondent kept the rental income.

16. The Respondent did not dispute the payments made by the Applicants and he made no further submissions regarding their conduct or his own.

The Law

17. The relevant statutory provisions relating to Rent Repayment Orders are contained in sections 40, 41, 43 and 44 of the 2016 Act, extracts from which are set out in the Schedule.

18. Section 40 identifies the relevant offences, including an offence under Section 72(1) of the Housing Act 2004 (control or management of unlicensed HMO). Section 72(1) provides that an offence is committed if a person is a person having control of or managing an HMO required to be licensed which is not licensed. Subsection (5) provides that in proceedings against a person for such an offence it is a defence that he had a reasonable excuse for having control or managing the house in those circumstances. Subsection (4) also provides a defence where at the material time an application for a licence had been duly made. In this respect section 63(2) of the 2004 Act provides that an application must be made in accordance with such requirements as the authority may specify.

19. Section 44(4) lists considerations which the tribunal must 'in particular' take into account in determining the amount of any repayment - conduct of the landlord and tenant, financial circumstances of the landlord and whether the landlord has been convicted of an offence to which that chapter of the 2016 Act applied. The use of the words 'in particular' suggests that these are not the only considerations the tribunal is to take into account.

Findings and determination

20. During the course of the hearing it was accepted as common ground between the parties that

    a) the Respondent controlled and managed the Property
    b) the Property was an HMO which required to be licensed under the scheme administered by Newcastle City Council.
    c) there was no licence in force for the Property from 30 July 2020 until 6 April 2021, being the date from which the licence, which on 26 May 2022 was proposed to be issued, was valid.

21. The Offence under section 72(1) of the Housing Act 2004 is subject to potentially relevant statutory defences of (1) that at the material time an application for a licence had been duly made, and (2) a reasonable excuse.

22. Defence (1) seemingly applies to the circumstances of this case in that the application for a licence was made during the period of occupation by the Applicants. The Tribunal found that the statutory defence applies from 6 April 2021 through to the end of the Tenancy term, when the Applicants vacated the Property. The effect of that determination is that any Rent Repayment Order will be for a maximum period from 30 July 2020 to and including 5 April 2021.

23. Secondly, whether an excuse is reasonable or not is an objective question for the Tribunal to decide.

24. The Tribunal finds there were no reasonable grounds for the Respondent not applying in a timely manner for the licence so as to be compliant by the date the Applicants took up occupation. The Respondent is an experienced property manager, having managed residential properties since the mid 1980's and he currently manages 7 properties. He accepted that he was aware of the Additional Licensing requirements from at least January 2020 in anticipation of the licensing regime taking effect in April 2020.

25. The Respondent blamed the effect of COVID-19 preventing him obtaining the room measurements to complete his application for the Property, saying he had to stay away because of health concerns for himself and his Father. However, he confirmed that he had used the services of Groves to find the tenants, from which we found that he had access to an agent who could have implemented COVID-safe measures to assist him obtain the information. Further, Mr Kidd and the Respondent confirmed that there was a good relationship between the parties, and any of the Applicants could have been asked to provide the measurements. Also, we heard uncontradicted evidence from Mr Kidd that the Respondent had visited the Property during the occupation to fit fire

extinguishers and to replace a front door lock. While the Respondent indicated windows and doors had been kept open for fresh air on those occasions, we found he lacked credibility in seeking to justify the absence of a licence application because of inability to obtain room dimensions. We found that he could have taken reasonable steps to complete his application, had been issued with a Penalty Notice for the offence set out in paragraph 13 which was not appealed, and that no reasonable excuse defence applied to the offence under Section 72(1) of the Housing Act 2004.

26. Having determined that an offence under section 72(1) of the 2004 Act was committed, the Tribunal found that the requirements of section 41(1) of the Act have been met. The Tribunal finds also that the requirements of section 41(2) of the 2016 Act are met - it is common ground that the Applicants were tenants of the Property during the entire period 30 July 2020 to 5 April 2021. The Applicants were therefore entitled to make the Application.

The Tribunal is, therefore, satisfied beyond reasonable doubt that the Respondent committed the offence of a person having control of or managing a HMO which is required to be licensed but is not so licensed from 30 July 2020 to 5 April 2021 (inclusive) pursuant to section 72(1) of the 2004 Act.

What is the maximum amount that the Respondent can be ordered to pay under a RRO (section 44(3) of the 2016 Act?

27. The amount that can be ordered under a RRO must relate to a period not exceeding 12 months during which the landlord was committing the offence. The Tribunal has decided that the Respondent committed the offence from the 30 July 2020 to 5 April 2021.

28. Regarding the deposit paid of £1698.66, the parties confirmed and agreed that this had been refunded in full to each Applicant as to their respective proportions paid, save regarding Mr Kidd's share. He had underpaid rent in error and accepted the shortfall of £686.00, but there had been no formal action taken to address recoupment from the deposit of this amount. The Applicant has applied to the Tribunal for a Rent Repayment Order and the Tribunal has no jurisdiction under the Act to order the repayment of all or any part of the deposit. Consequently, we make no order in that regard.

29. Contractually, the Applicants were to pay to the Respondent for the full period of the Tenancy:

52 weeks x £98.00 = £4312.00 x 4 tenants = £20,384 i.e. £5,096 each.

However, due to a miscalculation by the letting agents, three of the Applicants paid a total for the contractual period of £4,998 each (being one payment of £539 and seven payments of £637), whilst Mr Kidd paid £4,312 (being eight payments of £539)

Mr Kidd acknowledged the underpayment of £686, which was due to a standing order error.

Therefore, rent paid in the period set out in paragraph 27 (35 weeks + 4 days)

By 3 of the 4 Applicants: £ 4,998 divided by 52 x 35.57 = £ 3,418.82

Mr Kidd: £ 4,312 divided by 52 x 35.57 = £ 2,949.57

The Tribunal, therefore finds that the maximum amount that the Respondent can be ordered to pay under an RRO is £ 13,206.03

What is the Amount that the Respondent should pay under a RRO?

30. In determining the amount, the Tribunal must, in particular, take into account the conduct and financial circumstances of the Respondent, whether at any time the Respondent had been convicted of a housing offence to which section 40 applies, and the conduct of the Applicants.

31. There was no evidence that the Respondent (or the landlord) were unreasonable or that the Property was in disrepair or that there was tenant neglect. We heard that the Respondent had responded positively to tenant requests. We were informed that the rent was exclusive of utility charges, which the Applicants paid themselves.

32. Regarding the Respondent's finances, we had before us as is recorded in paragraph 12, and the Tribunal found no material evidence on the point, other than he was managing 7 properties, but there was no information about his reward for doing so. In addition, the Respondent said in oral evidence that he had £3,000 of savings, no income other than the rent received for the letting of the subject Property. We were orally informed about the Penalty Notice fine (see paragraph 15) and we had no reason to doubt the veracity of the information provided by the Respondent about it. We had before us no evidence of other housing-related convictions of the Respondent, but in light of proposed grant to him of the relevant licence for the Property we found on a balance of probabilities that there are no other related offences for which he has been held responsible

33. The Tribunal found guidance on the amount of the RRO by considering the decision of the Upper Tribunal in *Mr Babu Rathinapandi Vadamalayan v Edward Stewart and others* [2020] UKUT 0183 (LC). Judge Cooke at [11] observed that there was no requirement that a payment in favour of Tenant in respect of RRO should be reasonable, and at [12] that this meant the starting point for determining the amount of rent is the maximum rent payable for the period in question. Judge Cooke went onto say at [14] and [15] that "*It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament's intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord's profits was – as the President acknowledged at his paragraph 26 –not the only purpose of a rent repayment order even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied.*

"That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord has spent on the property during the relevant period. That expenditure will have repaired or enhanced the landlord's own property, and will have enabled him to charge a rent for it. Much of the expenditure will have been incurred in meeting the landlord's obligations under the lease. The tenants will typically be entitled to have the structure of the property kept in repair and to have the property kept free of damp and pests. Often the tenancy will include a fridge, a cooker and so on. There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order".

34. Judge Cooke concluded at [19]

"The only basis for deduction is section 44 itself. and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence".

35. The 2016 Act extended the scope of rent repayments orders with an emphasis upon rogue landlords not benefiting from the letting of sub-standard accommodation and it also removed the requirement for the Tribunal to determine such amount as it considered reasonable for the eventual order.

36. The structure of the 2016 legislation requires the Tribunal to determine first the maximum amount payable under an RRO and then to decide the actual amount payable by taking into the circumstances of the case, having particular regard to the specific factors in section 44 of the 2016 Act.

37. The Tribunal also had regard to caselaw subsequent to the Vadamalayan case, Williams v Parmar [2021] UKUT 244 (LC) (confirming that it is wrong to calculate the amount of the RRO starting with the full rent claimed by the tenant) and Acheampong V Roman and others [2022] UKUT 239 (LC), in which the Tribunal at [21] stated that the Tribunal should:

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

b.) Subtract any element for utilities only benefitting the tenant;

c.) Consider how serious the offence was compared to other types of offence where a RRO was made and find what proportion of the rent (less deductions referred to in b.)) is a fair reflection of the seriousness of this offence;

d.) Consider any further adjustments in accordance with s. 44(4)

This approach was endorsed in Dowd v Matin and others [2022] UKUT 249 (LC).

38. In this case the Tribunal determined that the maximum amount payable by the Respondent under a RRO is £13,206.03, being the whole rent paid for the relevant period, exclusive of utility and broadband costs, as calculated in paragraph 29 above. The Tribunal then considered the seriousness of the offence and the matters set out in S44(4) of the 2016 Act.

39. The Tribunal considers that in comparison with the nature of all the possible offences detailed in S40(3) of the 2016 Act, the offence committed is reasonably serious, but not the most serious for which a RRO may be made. In relation to the Respondent's conduct The Tribunal finds that (1) The Respondent was a very experienced managing agent; (2) The Property was unlicensed throughout part of the period of the Applicants' occupation from 30 July 2020 to 5 April 2021, inclusive; (3) The Respondent knew that the Property required a licence but delayed making his application for reasons found not to amount to a reasonable excuse. Further, despite knowing the property should have a licence and despite beginning, but not completing the application, the Respondent made the conscious decision to let the property to four tenants on 30 July 2020; (4) The Property was of reasonable letting standard; (5) Apart from his failure to licence the property, the Respondent performed his duties as a landlord in a reasonable manner; (6) The Respondent was of good character and had no previous convictions known to the Tribunal; (7) The Respondent had suffered a Penalty Notice as a result of enforcement action against him by NCC in relation to the offence of having no licence.

40. Having regard to all the above, The Tribunal determines a level of 60% of the maximum amount.

41. In respect of the matters set out in S44(4) of the 2016 Act, The Tribunal then considered whether the findings on the Respondent's conduct and financial circumstances, and the Applicants' conduct, merit an adjustment to the amount payable. In addition to the Respondents conduct noted above, the Respondent adduced no pertinent evidence to suggest that he would experience undue financial hardship as a result of an RRO, and The Tribunal taking all these factors into account, makes no adjustment to the level of 60% determined.

42. Furthermore, in respect of the conduct of the Applicants, there was no evidence put before The Tribunal regarding their conduct which would merit any adjustment.

43. This is not a case which justifies an award of the maximum amount of £13,206.03. The Tribunal normally considers such an award where the evidence shows that the landlord was a rogue or criminal landlord who knowingly lets out dangerous and sub-standard accommodation. The Respondent did not meet that description, indeed the Tribunal concluded that the Respondent was responsible for a well-managed property, for which he responded in a timely fashion to the usual enquiries about repairs. We do not find that this is a case at the upper end of the scale of the sort referred to by Judge Cooke in Vadamalyan.

44. The Respondent simply failed to licence the HMO and thereby committed an offence. He corrected that omission during the term of the Tenancy.

45. Having regard to all the circumstances The Tribunal considers an order of 60% of the maximum sum is the appropriate sum balancing the objective of a "fiercely deterrent scheme", the status of experienced managing agent and the length of the offending against the mitigating circumstances found in favour of the Respondent.

46. The Tribunal determines that the rent repayment order should be 60% of the maximum amount of £ 13,206.03. Taking account of the figures set out in paragraph 29, the RRO will be:

    To Mr Kidd: £ 2,949.57 x 60% = £ 1,769.74

    To each of the other 3 Applicants: £ 3,418.82 x 60% = £ 2,051.29 44.

47. For the reasons given in paragraph 28, The Tribunal has disregarded the £424.66 of the deposit payment yet to be returned by the Respondent to Mr Kidd. Mr Kidd will need to take separate action to recover this amount should it not be forthcoming.

48. As the Applicants have been successful with their Application for a RRO, the Tribunal considers it just that the Respondent reimburses the Application fee totalling £400.00 (£100.00 per Applicant) and also the hearing fee of £200.00 (£50.00 per Applicant)

Decision

49. The Tribunal orders the Respondent to pay the Applicants the sum totalling £7,923.61 by way of a rent repayment order and to reimburse the Applicants with the application fee in the sum of £400.00 and hearing fee in the sum of £200.00 within 28 days from the date of this decision.

W L Brown
Tribunal Judge

Schedule

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, or (b).....

(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.

The table described in s40(3) includes at row 5 an offence contrary to s72(1) of the Housing Act 2004 "control or management of unlicensed HMO" Section 72(1) provides: (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 (see section 61(1)) but is not so licensed.

Section 41

(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-

(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 it is satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applied (whether or not the landlord has been convicted).

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.

The table provides that for an offence at row 5 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.

(3) The amount that the landlord may be required to pay 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.