FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BY/HMF/2022/0018 P**
Property	**:**	**15 Highgate Street, Edge Hill, Liverpool L7 3ET**
Applicants	**:**	**Katie Farrar** **Marie Pavey** **Rhian Kemp** **Katie Hughes** **Eloise Chester** **Matthew Morris** **Owain Roberts** **Deio Roberts** **Finlay Njie** **Arran Nicholl**
Representative of Applicants	**:**	**Katie Farrar**
Respondents	**:**	**West Village Liverpool Limited (1)** **Trophy Homes Limited (2)**
Type of Application	**:**	**Housing and Planning Act 2016 – Section 41(1)**
Tribunal	**:**	**Tribunal Judge W L Brown** **Mr W Reynolds MRICS**
Date of Determination	**:**	**9 May 2023**

DECISION

DECISION

(i) The Tribunal makes a rent repayment order in favour of each of the Applicants and the First Respondent is ordered to pay to each of the Applicants within 28 days of the date of issuing of this decision £1,685.88.

(ii) The First Respondent is also to reimburse the Applicants with the application fee in the sum of £100 within 28 days of the date of this decision.

REASONS

The Application

1. By their application dated 3 August 2022 (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 First Respondent is the landlord of the Property at the relevant time, the Second Respondent is the party to which the Applicants paid their rent. The Tribunal found no evidence to doubt that either Respondent was in control and/ or was responsible for management of the Property.

2. Directions were issued on 21 November 2022 and 15 March 2023 pursuant to which the Applicants through Ms Farrar made written submissions. There was no question that the Application was brought within the statutory timeframe to do so.

3. The Respondents did not engage in the proceedings. The Tribunal was satisfied that appropriate steps had been taken to ensure both were aware of the proceedings and directions, the Second Respondent having been joined and notified by the Tribunal of such on 21 November 2022.

4. No party objected to the appeal being decided without a hearing. Having considered the Tribunal bundle and the requirements of rules 2 and 31 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 the Tribunal was satisfied that it was able to decide the case in this way.

5. As to the Applicants, the Tribunal learned through Ms Farrar and had no reason to doubt, that Izabelle Murphy who is noted as a Tenant of the Property in the tenancy agreement did not occupy the Property under the terms of the tenancy agreement during any period of the tenancy agreement relied upon by the Applicants. The Tribunal found from the information from Ms Farrar and his own signed and dated statement that Arran Nicholl became the replacement tenant for Ms Murphy and occupied throughout the period replied upon by the Applicants.

From similar evidence we found that Mr Matthew Morris became an additional tenant and hence was accepted as an Applicant.

Applicants' Submissions

6. The basis for the Application was that the Applicants had rented accommodation at the Property from 16 July 2021 to 30 June 2022 and that Liverpool City Council (LCC) had confirmed the Property to have been unlicensed as a house in multiple occupation 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.

7. The Property was let to the Applicants as recorded in a signed assured shorthold tenancy agreement for the Property, prepared by House Management NW Ltd, between the First Respondent as landlord, and each of the Applicants, as tenants (subject to the point recorded at paragraph 4 above), at a rent per week per person of £98. An additional one-off up-front fee of £98 also was paid by each of the Applicants for utility and broadband charges. No deposit was paid. The Property is described in the Application as a 12 bedroom student townhouse.

8. The rent repayment sought is set out in the Application as totalling £4,802 for each of the Applicants for occupation between 1 July 2021 and 30 June 2022, who demonstrated with copy bank statements their respective payments.

9. The Applicants supplied copy emails dated 22 July and 5 December 2022 from Ms G Willis, Senior Enforcement Officer of LCC concerning enquiries being made about the Property and indicating how a RRO application could be pursued.

10. The Applicants' evidence was that the Property required a licence as a HMO, but no such licence was in place until 1 June 2022, in favour of Renovafix Limited, in evidence of which they presented a screenshot.

The Law

11. 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.

12. 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.

13. 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

14. In the absence of contrary evidence, or submissions from the Respondents, the Tribunal found

a) the Respondents both controlled and / or managed the Property;
b) the Property was an HMO which required to be licensed under the scheme administered by Liverpool City Council;
c) although the Applicants claimed a RR from 1 July 2022, the evidence of the commencement of the tenancy (from the tenancy agreement) was that it began on 16 July 2021 and that is the date found by the Tribunal as the start date for any RRO;
d) there was no licence in force for the Property from 16 July 2021 until 24 February 2022, being the date from when the Property became licenced (see paragraph 16);

15. 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.

16. Evidence before the Tribunal regarding when the appropriate licence application was made was via a copy of an undated (timed at 9.43) e-mail from Gillian Wills at LCC stating the licence application was made on 24 February 2022. Therefore, the Tribunal found that the statutory defence applied from 24 February 2022. The effect of that determination is that any Rent Repayment Order will be for a maximum period from 16 July 2021 to and including 23 February 2022.

17. Secondly, whether an excuse is reasonable or not is an objective question for the Tribunal to decide. The Respondent presented no evidence or submissions and nor did the Tribunal identify any relevant evidence to suggest a reasonable excuse applied to these matters.

18. 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 – there was no persuasive evidence that the Applicants were not tenants of the Property during the entire period 1 July 2021 to 31 May 2022. The Applicants were therefore entitled to make the Application.

The Tribunal is, therefore, satisfied beyond reasonable doubt that the Respondents 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 16 July 2021 to 23 February 2022 (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?

19. 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 16 July 2021 to 24 February 2022 (the RRO period).

20. From the evidence of bank statements the Tribunal found that each of the Applicants paid to or for the benefit of the Respondents for their occupation £4,802.00. For the RRO period:

£98 per week = £14 per day.

31 weeks, 6 days = 223 days x £14.00 = £3,122.00.

The Tribunal, therefore finds that the total rent paid for the period of any RRO is £3,122 per Applicant

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

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

22. There was no evidence that either Respondent was unreasonable or that the Property was in substantial disrepair or that there was tenant neglect. The Tribunal had no evidence regarding either Respondent's finances. We had before us no evidence of other housing-related convictions of either the Respondent.

23. 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".

24. 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".

25. 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.

26. 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.

27. 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).

28. In this case the Tribunal determined that the whole rent of the relevant period is £3,122 per Applicant. The Tribunal then considered the seriousness of the offence and the matters set out in S44(4) of the 2016 Act.

29. As to utilities, the tenancy agreement in this matter states that the Tenant will pay for Telephone, Council Tax and any charges for Water, Gas Electricity and Broadband "exceeding the energy allowances". Clause B4 of the tenancy agreement specifies that an allowance for energy (identified as Water, Gas, Electricity and Broadband) is included in the rental payment equivalent to 10% of the contracted

annual rental income The Tribunal found on a balance of probabilities that the total RRO sum should be reduced by 10% to take account of energy allowance included in the rent during the RRO period, i.e. £312.20, therefore the maximum amount per Applicant becomes £2,809.80.

30. As to the condition of the Property, the Tribunal had before it only a note dated 14 December 2022 attributed to Owain Roberts, stating that the local authority officer "….took notes of countless issues the property had, such as not having proper fire doors, heaters not connected to the walls and much more". However, there was no corroborative evidence , such as of complaints to the Respondents or the letting agent about the state of repair of the Property or the service of an Improvement Notice by the local authority and the Tribunal found the evidence to not be persuasive for us to find the Property was otherwise in a reasonable state of repair during the RRO period.

31. 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 Property was unlicensed throughout part of the period of the Applicants' occupation; (2) The Respondents ought reasonably to have known that the Property required a licence but no such application was made; (3) The Property was of reasonable letting standard; (4) There was no evidence submitted that either Respondent had previous convictions for an offence under Chapter 4 of the Housing & Planning Act 2016; (5) The offence only ended by the granting of an application for a licence to a third party.

32. Having regard to all the above, The Tribunal determines a level of 60% of the maximum amount – i.e. £1,685.88.

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

34. 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.

35. This is not a case which justifies an award of repayment of the whole of the rent for the relevant period. 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. On the evidence provided the Respondents did not meet that description, indeed the Tribunal concluded that there was no corroborated evidence that the Property was otherwise than in a reasonable state of repair. 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.

36. The Respondents simply failed to licence the HMO and thereby committed an offence.

37. 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" and the length of the offending against the limited mitigating circumstances found in favour of the Respondents.

38. The Tribunal determines that the rent repayment order should be £1,685.88 per Applicant.

39. As the Applicants have been successful with their Application for a RRO, the Tribunal considers it just that the First Respondent reimburse the Application fee totalling £100.00.

Decision

40. The Tribunal orders the First Respondent to pay each of the Applicants the sum totalling £1,685.88 by way of a rent repayment order and to reimburse the Applicants with the application fee in the sum of £100.00 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.