FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HB/HMG/2023/0006
Property	:	Unit 1.15 Paintworks. Arnos Vale, Bristol, BS4 3EH
Applicant	:	Gavin Van Lelyveld
Representative	:	Peter Eliot from Justice For Tenants
Respondent	:	Louisa Kate Gilbert
Representative	:	Mrs Anne Gilbert
Type of Application	:	Application for a Rent Repayment Order, Sections 40, 41, 43 and 44 of the Housing & Planning Act 2016
Tribunal Members	:	Judge N Jutton, Mr M J F Donaldson FRICS, Mr E Shaylor MCIEH
Date and Venue of Hearing	:	23 April 2024 Havant Justice Centre, The Court House, Elmleigh Road, Havant, Hampshire, PO9 2AL
Date of Decision	:	30 April 2024

DECISION

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1. **Background**

2. The Applicant, Gavin Van Lelyveld by an application dated 23 November 2023 applies pursuant to Section 41 of the Housing and Planning Act 2016 (the 2016 Act) for a Rent Repayment Order in respect of a tenancy enjoyed by him at Unit 1.15 Paintworks, Arnos Vale, Bristol, BS4 3EH (the Property). The Respondent, Louisa Kate Gilbert, is the owner of the Property. The Applicant moved into the Property on 8 January 2021. When his tenancy agreement expired he entered into a new assured shorthold tenancy agreement dated 4 January 2022. He vacated the Property on 7 January 2023. He seeks an order for the repayment of rent paid by him to the Respondent for the period 6 April 2022 to 7 January 2023 in the total sum of £14,958.49.

3. The Property is located within the Brislington West ward of Bristol. With effect from 6 April 2022 the City Council of Bristol designated Brislington West ward as part of an area subject to Selective Licensing under Part 3 section 80 (1)(b) of the Housing Act 2004 (the 2004 Act). Accordingly as from that date the Property being a property occupied under a tenancy that was not an exempt tenancy was required to be licensed (section 85 of the 2004 Act).

4. The Applicant says that the Property was not so licensed and accordingly the Respondent, being the person having control of or managing the Property committed an offence pursuant to Section 95(1) of the 2004 Act. That is one of the offences set out in the table at Section 40(3) of the 2016 Act in respect of which this Tribunal may make a Rent Repayment Order provided that it is satisfied beyond reasonable doubt that the offence has been committed.

5. There was before the Tribunal a bundle of documents prepared by the Applicant of 209 pages which included the application to the Tribunal, the Applicant's statement of case, witness statements, the Respondent's statement of case, the Applicants reply thereto, Directions made by the Tribunal and other documents. There was unfortunately an element of duplication in the bundle. Further, pages in the bundle were numbered both in the bottom left hand corner of the page and in some instances in the bottom right-hand corner of the page (the numbering being different). References in this decision to page numbers are references to the numbering in the bottom left-hand corner of the pages in the that bundle.

6. The hearing took place on 23 April 2024. The Applicant was in attendance and was represented by Peter Eliot of Justice for Tenants. The Respondent was represented by her mother Mrs Anne Gilbert. Also in attendance (purely as an observer) was Cameron Neilson of Justice for Tenants. All attended remotely by video hearing.

7. **The Law**

8. Chapter 4 of the Housing and Planning Act 2016 (the 2016 Act) enables the Tribunal to make a Rent Repayment Order in favour of a tenant if it is satisfied beyond reasonable doubt that the landlord has committed certain offences during the tenancy. Those offences are set out in section 40 of the 2016 Act.

9. They include an offence under section 95(1) of the 2004 Act. That provides as follows:

   95(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.

   Section 95(4) provides that in proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for having control of or managing the house in circumstances where the house was required to be licensed but was not so licensed.

10. If the Tribunal is satisfied beyond reasonable doubt that an offence has been committed and decides to make a Rent Repayment Order in favour of a tenant, the amount is to be determined in accordance with section 44 of the 2016 Act. The amount must relate to rent paid by the tenant in respect of a period not exceeding 12 months during which the landlord was committing the offence (section 44(2)). The amount that the landlord may be required to repay must not exceed the rent paid in that period less any relevant award of universal credit paid in respect of rent under the tenancy during that period (section 44(3). In determining the amount, the Tribunal must, in particular, take into account the matters listed in section 44(4) being; the conduct of the landlord and the tenant, the financial circumstances of the landlord and whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies.

11. **The Offence and The Reasonable Excuse Defence**

12. The Respondent accepts that by reason of the introduction of the Selective Licensing scheme by Bristol City Council the Property was required to be licensed with effect from 6 April 2022. The Respondent accepts that an application for a licence was not made until 13 January 2023 and thus that the Property was therefore during the latter part of the Applicant's occupation an unlicensed property. However the Respondent relies upon the defence of reasonable excuse afforded by section 95(4) of the 2004 Act.

13. The Respondent says that at the time that Bristol City Council decided to designate the Bedminster and Brislington West ward's for Selective Licensing she was living and working overseas. Mrs Gilbert explained, in

answer to questions put to her by Mr Eliot, that the Respondent thereafter only returned to the UK for a short period(s) of time and when she did so she stayed at Mrs Gilbert's home in Kent.

14. While the Respondent was abroad she asked her mother, Mrs Gilbert, to look after and to manage the Property for her. In 2020 the Respondent instructed one Lavinia Currie, a property manager based in Bristol, to find a tenant for the Property and to ensure that the 'right paperwork' was in place for the granting of a tenancy. Thereafter Ms Currie was retained on an ad hoc basis to assist with regard to maintenance issues at the Property not least because Ms Currie had contacts with a number of local plumbers, electricians and other contractors. There is a witness statement made by Ms Currie at page 195 of the bundle.

15. Mrs Gilbert, in answer to a question from Mr Eliot, said that Ms Currie was not instructed to keep the Respondent or Mrs Gilbert informed on an ongoing basis as to matters such as whether or not the Property might require a licence. Mrs Gilbert said she had no knowledge of the laws relating to the potential licensing of properties, she couldn't say whether or not Ms Currie did. She was nonetheless entrusted by her daughter, the Respondent, to look after the Property.

16. The Respondent says that she received no notification from Bristol City Council that the Property was to fall within area which was to be subject to Selective Licensing. As she was abroad she wouldn't have seen any local advertisements or notices that the Council may have placed in the local press. Nor, living in Kent, would Mrs Gilbert.

17. The Respondent says that she wasn't aware that the Property fell in the Brislington West ward because the word Brislington doesn't appear in the Property's address. Mrs Gilbert suggested that it may be helpful if the Council when giving notice of its intention to designate an area as subject to a Selective Licencing scheme made reference to postcodes rather than wards. That even if she had seen a notice from the Council because of the reference to wards as opposed to postcodes she would not necessary have realised that the Property fell within such an area.

18. The Respondent says that as soon as she came aware that the Property was required be licensed she made an application for a licence and that was granted. That the failure to licence the Property was simply because the Respondent wasn't aware of the requirement to have one, not because of any concern that a licence might not be granted.

19. Mr Eliot asked Mrs Gilbert whether the Respondent had asked her to keep the Respondent abreast of any ongoing legal obligations. Mrs Gilbert said that had not been discussed. That she was asked by her daughter to look after the Property and to ensure that the tenants were treated fairly and

properly. That neither the Respondent nor Mrs Gilbert were professional landlords. They weren't engaged in the management of any other properties. They did not rent out any other properties. In summary, Mr Eliot said, that lack of experience does not absolve a landlord of his or her legal obligations or remove the onus on them to find out what those obligations may be. The Respondent, he contended, had access to the Internet for some of the time when she was abroad and also when she did return to the country albeit for a relatively short period. That reliance upon an agent he said did not in itself provide the Respondent with a defence

20. In essence the Applicant says that ignorance of the need to apply for a licence does not afford the Respondent the defence of reasonable excuse. As it was put by Judge Rodger in **Thurrock Council v Daoudi (2020) UKUT 209 (LC)** at paragraph: '*It is also possible to imagine circumstances in which a landlord had a reasonable excuse for not appreciating that a property had come within a selective licensing regime (although it would be necessary for the landlord to have taken reasonable steps to keep informed)*'.

21. The Respondent placed reliance on Mrs Gilbert and Ms Currie to assist her in the day to day management and maintenance of the Property but that was as far as her instructions went. In **Aytan v Moore and others (2022) UKUT 27 (LC)** the Tribunal (Judge Cooke and Judge McGraph) said "*..... 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 upon 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 themselves of the licensing requirements without relying upon an agent, for example because the landlord lived abroad*".

22. The Tribunal has some sympathy with the Respondent's position. However it agrees with the Applicant. There was no evidence that the Respondent or Mrs Gilbert, or Ms Currie on her behalf, took steps to keep themselves informed as to legal obligations that might arise in respect of the Property such as the need to obtain a licence. Although the Respondent placed reliance upon Mrs Gilbert, and in turn Ms Currie, to assist with the management of the Property there was no evidence of a contractual obligation between the Respondent and Mrs Gilbert or Ms Currie to keep the Respondent informed of possible licensing requirements. Indeed Mrs Gilbert was clear that her daughter's instructions to her were simply to ensure that the Property was properly looked after and the tenants taken care of. That Ms Currie was retained to do no more find a tenant, complete the necessary paperwork on the

granting of the tenancy and to assist on an ad hoc basis with the maintenance and repair of the Property not least by securing the services of local contractors.

23. For those reasons the Tribunal determines that there is no basis upon which the Respondent can establish the defence of reasonable excuse.

24. The Respondent accepts that the Property was required to be licensed with effect from 6 April 2022, that an application for a licence was not made until 13 January 2023 and that it was not licenced until 7 April 2023. In the circumstances the Tribunal is satisfied beyond reasonable doubt that Respondent committed an offence under section 95(1) of the 2004 Act.

25. **The Rent Repayment Application**

26. **The Applicant's Case**

27. In his application the applicant sought repayment of the entirety of the rent paid by him from the date when the property became subject to the Selective Licensing scheme, 6 April 2022, until he vacated the property on 7 January 2023. That is a total sum of £14,958.49 (see page 136).

28. The Applicant accepts that part of the rent paid by him was in turn used by the Respondent to pay for utilities (save for electricity). The total amount paid per month by the Applicant to the Respondent was £1650 of which the Respondent says £150 was in respect of utilities (see the Respondent's statement of case at page 187). In his written submissions to the Tribunal the Applicant sought to argue that the Tribunal should not deduct a figure for utilities, however at the hearing Mr Eliot confirmed that was no longer the case and that the Applicant agreed that properly the sum of £150 per month should be deducted from the sum claimed by the Applicant leaving a balance of £13,598.64.

29. The Applicant says that the Tribunal must consider the seriousness of the offence, both by reference to the other types of offences in respect of which Rent Repayment Order may be made (section 40 2016 Act) and other examples of the same offence. The Applicant helpfully sets out a table of the offences in respect of which an RRO may be made and the maximum sentence on conviction for each offence in his Statement of Reasons (page 39). On conviction the sentence for an offence under section 95 (1) of the 2004 Act is a fine, not imprisonment. The Applicant accepts that under the hierarchy of offences set out in section 40 of the 2016 Act an offence under section 95 (1) of the 2004 Act is at the lower end. However the Applicant says that the offence committed by the Respondent in this case is particularly serious when compared to other examples of the same offence (relating to the control of unlicensed house).

30. In particular the Applicant refers to the Respondent's failure to keep abreast of her legal obligations; an alleged breach of the Housing Health and Safety Rating System in relation to excess cold at the Property; alleged disrepair and maintenance issues at the Property; a breach of the Selective Licensing standards applicable to the Property; the alleged service of invalid notice seeking possession of the Property under section 21 of the Housing Act 1988; and a failure to ensure that an adequate Energy Performance Certificate was in place.

31. Mr Eliot said that the Tribunal should also have regard to the length of the offence, the length of time in which the Property was unlicensed, in this case some nine months which he contended was excessive.

32. The said issues, the Applicant says are relevant to the conduct of the Respondent as landlord to which the Tribunal should have particular regard as required by Section 44(4)(a) of the 2016 Act.

33. The Applicant says that there was a particular problem with heating at the Property during the winter months. That there was delay on the part of the Respondent in addressing those problems. As a consequence during winter months part of the property were too cold to use.

34. The Applicant says that the shower at the Property stopped working (there were two showers so he was able to use the other shower - the Applicant was the only occupant of the Property) and that there was also unreasonable delay on the part of the Respondent to fix the broken shower.

35. The Applicant says that the Respondent served a notice on him dated 26 November 2022 (page 59) seeking possession of the Property under section 21 of the Housing Act 1988, and that was an attempted 'revenge' eviction. That the section 21 notice was in any event invalid by reason of the Property being unlicensed at the time that it was served. The Applicant says that he vacated the Property in January 2023 because of the Respondent's hostile attitude towards him (manifested in part by the service of the section 21 notice) and because of the maintenance issues in particular in relation to the heating at the Property. As he put it in his second witness statement (page 207) "*I wanted to live somewhere with a less hostile landlord that was warm*".

36. The Applicant says that the Energy Performance Certificate for the Property, wrongly in his view, was in respect of the entire building in which the Applicant's flat was situated (there are three flats in the building) when properly separate EPC's should have been issued, one for each flat.

37. Taken together the Applicant says that the above matters amount to misconduct on the part of the Respondent which would justify an order for the full amount or at least a significant proportion of the rent paid by him to be repaid.

38. In support of that submission Mr Eliot referred the Tribunal in particular to the decision in **Aytan & others v Moore & others**. The property in respect of the Aytan case was an unlicensed HMO. The period in which it was unlicensed was some two years. There was no suggestion of misconduct on the part of the tenants. There was no evidence of disrepair. The Upper Tribunal made an award of 85% of the rent paid. In the Wilson case the property was an unlicensed HMO for a period of 12 months. There was a requirement for fire safety works which had revealed a less than safe environment for tenants. The Upper Tribunal had made an award of 90% of the rent paid (after making deductions for utilities).

39. The purpose of an RRO the Applicant says is to punish offending landlords; to deter a particular landlord from further offences; to dissuade other landlords from breaching the law; and to remove from landlords the financial benefit of offending. Those policy objectives, the Applicant says, justified a substantial proportion of the rent paid being repaid.

40. **The Respondent's Case**

41. The Respondent doesn't dispute the amount of rent paid by the Applicant for the period 6 April 2022 to 7 January 2023. The Respondent agrees that as a starting point the sum of £150 for each month should be deducted in respect of utilities.

42. The Respondent says that this is an attractive property. It is a maisonette that is over two floors. It is part of a converted industrial unit. That the Property was in very good condition. (There are pictures of the property at pages 192-194 of the bundle).

43. The Property was, the Respondent says, at all material times well maintained. Mrs Gilbert made the point at the hearing that the Applicant had been happy to renew his tenancy in January 2022. That upon renewal there had been no increase in rent notwithstanding a significant increase in the cost of energy. The Respondent doesn't accept that there was undue or any delay on her part in addressing problems with the heating at the Property. Mrs Gilbert said that during previous winters the Applicant had made no complaint about the heating. This was, Mrs Gilbert told the Tribunal, a difficult property to heat. That was she said something which the Applicant was or should have been aware when he first occupied the Property. It was an old building with solid stone walls. There was no insulation to the roof. Mrs Gilbert suggested that the issue of heating was only raised by Applicant where she had started to address the possibility of

a new tenancy agreement at an increased rent when the current one expired (not least to reflect the increase in the price of gas).

44. Mrs Gilbert denied that she or anyone on her behalf or on behalf of the Respondent had harassed the Applicant. She accepted that the relationship with the Applicant, which had previously been good, had broken down towards the end of his occupancy of the Property. This was, Mrs Gilbert said, a nice place to live and that the Respondent took her obligations as a landlord extremely seriously. She accepted that there was a heating issue at the property in December 2022 when the weather was particularly cold. She accepted that there have been some difficulty with the underfloor heating. However that engineers have been instructed to try and rectify that.

45. Mrs Gilbert didn't dispute that there had been a problem with one of the showers at the Property which had taken quite some time to resolve not least because of the difficulty in finding a shower unit to replace the existing faulty unit without destroying what she described as the 'aesthetic' of the shower room. That she said had been explained to the Applicant. That she had been told by Applicant when he first reported that the shower wasn't working that the repair wasn't urgent as he had use of the other shower.

46. Mrs Gilbert referred the Tribunal to **Hallett v Parker & others (2022) UKUT 165 (LC)**. The property in that case was also an unlicensed HMO. It was unlicenced for a period of seven months. It was in good condition and there was no findings of adverse conduct on behalf of either party. The landlord was described as a 'small landlord letting out a single property'. The Upper Tribunal suggested that a small landlord who fails, through ignorance, to comply with a regulatory requirement might be thought to deserve some leeway. The Upper Tribunal awarded a sum of approximately 25% of the rent paid. In reply Mr Eliot submitted that there was no suggestion in Hallett of a breach of regulations' such as in respect of the provision of an EPC, there were no allegations in relation to heating and that the property had 'only' been unlicensed for a period of seven months.

47. The Respondent was not, Mrs Gilbert submitted, a professional landlord nor a rogue landlord. In answer to a question from the Tribunal Mrs Gilbert confirmed that the Respondent did not wish the Tribunal to take into account her financial circumstances in making its determination. Mrs Gilbert also confirmed that the Respondent had not been convicted of any of the offences that might give rise to a rent repayment order. That the Respondent was not and had never been the landlord of any other properties.

48. **The Tribunal's Decision**

49. The Tribunal reminds itself that the purpose of the Rent Repayment scheme is not compensatory. That the power to make Rent Repayment Orders should be exercised with the objective of deterring those who exploit their tenants by renting out substandard, overcrowded or dangerous accommodation. The purpose is to punish and to deter what have been described as 'rogue' landlords. That there is a '*... risk of injustice if orders are made which are harsher than is necessary to achieve the statutory objectives'* (para 26 - **Hallett v Parker** (2022) UKUT 165 (LC)).

50. The approach that the Tribunal should take was set out by the Upper Tribunal in **Acheampong v Roman** (2022) UKUT 239 (LC) by Judge Cooke as follows:

20. The following approach 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 payment 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 payment order may be made (and whose relative 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 that 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 other factors set out in section 44 (4).

21. I would add that step (c) above is part of what is required under section 44 (4)(a). It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence?

51. The whole of the rent for the relevant period is £14,958.49. There are no universal credit payments to deduct.

52. After deduction of £150 per month for utilities the balance is £13,598.64.

53. When compared to other types offence for which a RRO may be made this is not a particularly serious offence. It is punishable by a fine not by imprisonment. Nor in view of the Tribunal is it particularly serious when

compared to other examples of the same type of offence. The relevant period during which the Property was unlicensed was nine months. There were clearly some heating/hot water issues at the Property, certainly towards the latter part of the Applicant's occupation. From the written evidence before it and the submissions made to it at the hearing the Tribunal is not satisfied that there was undue delay in addressing those issues on the part of the Respondent. The Respondent may have taken some time to repair the faulty shower unit but the Applicant, the sole occupant of the Property, had the use of another shower throughout.

54. The Tribunal does not regard the service of a section 21 notice (albeit in the event an invalid notice) as conduct the part of the Respondent that it should take into account. The law allows a landlord to seek possession of their property on a no-fault basis. The Respondent was entitled to seek possession of the Property without giving a reason. Attempts by the parties to discuss the potential terms of a new tenancy agreement were not successful which perhaps explains (if an explanation were necessary) why the Respondent sought possession.

55. The fact that the EPC for the Property was for the entire building as opposed to one for each individual flat does not amount to conduct on the Respondent's part in the view of the Tribunal which would persuade it to increase the amount of a rent repayment order.

56. As to the conduct of the Applicant; he appears to have been a good tenant. He paid his rent in full and on time. It is noteworthy that the Applicant and the Respondent appeared to enjoy a good landlord and tenant relationship for the majority of the time that the Applicant occupied the Property.

57. In determining the amount of the RRO the Respondent does not wish the Tribunal to take into account her financial circumstances.

58. In fixing the amount of the RRO the Tribunal takes into account the following: the fact that the Respondent has not any time been convicted of an offence to which Chapter 4 of the 2016 Act applies; that as in Hallet the Respondent is a small landlord who failed through her ignorance of the regulatory requirement to obtain a licence and as such deserves some leeway; that the Respondent is not, as in Aytan a professional landlord; that the Respondent sought to ensure, in the view of the Tribunal, that the Property was well maintained and repaired; that generally this was a property in good condition; that notwithstanding some problems with the heating the Property could not in the view of the Tribunal be described as 'substandard'; that the Respondent could not in the view of the Tribunal be described as a 'rogue' landlord; that notwithstanding the limited instructions given by the Respondent to Mrs Gilbert, and in particular to Ms Currie, the Respondent might reasonably have expected Ms Currie as a

professional property manager to have advised her of the need to obtain a licence; that once the Respondent was aware of the need for a licence she applied promptly for one and that was granted (there is a copy of the licence at pages 197 and 198 -it is notable that the schedule of works attached to the licence contains only one requirement, which is to provide a satisfactory electrical installation condition report); that the offence is not of the most serious type; that the Respondent did however fail to take sufficient steps to inform herself of the regulatory requirements as regards the selective licensing regime.

59. Taking all of those matters into account the Tribunal determines that the appropriate order in this case is for a Rent Repayment Order of 20% of the net rent paid by the Applicant to the Respondent for the relevant period of £13,598.64 which equates to the sum of £2,719.73.

60. Accordingly the Tribunal determines that the appropriate order in this case is the repayment to the Applicant of the sum of **£2,719.73.**

61. The Applicant seeks an order under rule 13(2) of the Tribunal Procedure (first-tier Tribunal) (Property Chamber) Rules 2013 that the Respondent reimburse him the fees paid by him to the Tribunal of £300. Mrs Gilbert did not make any submissions in that regard. The Applicant has only been partially successful. After deductions in relation to utilities he sought 100% of the rent paid by him. He has achieved 20% of that sum. In the circumstances the Tribunal orders that the Respondent repay the Applicant 50% of the Tribunal fees paid by him; the sum of **£150.**

Dated this 30th day of April 2024

Judge N Jutton

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by

email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.