FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AZ/HMF/2024/0054**
Property	:	**1 Joseph Hardcastle Close, London, SE14 5RN**
Applicant	:	**Nathan Heape (1) Maxwell Bonnell (2), Elliot Rosier (3)**
Representative	:	**Mr Leacock of Justice for Tenants**
Respondent	:	**Christopher Evans (1) Arkadiusz Sadowski (2)**
Representative	:	**n/a**
Type of application	:	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	:	**Tribunal Judge O'Brien, Tribunal Member M Cairnes.**
Date of Decision	:	**8 October 2024**

DECISOIN

DECISION OF THE TRIBUNAL

(1) The Tribunal makes a rent repayment order against the First and Second Respondents in the following amounts:

(i) £4109.18 to be paid to the First Applicant
(ii) £4657.07 to be paid to the Second Applicant
(iii) £3835.23 to be paid to the Third Applicant

© CROWN COPYRIGHT

(2) The First and Second Respondent must refund the fees paid by the Applicants in the sum of £540.

(3) The above sums are to be paid within 28 days of this determination.

CASE SUMMARY

1. On 24th January 2024 the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (the 2016 Act) from the applicant tenants for a rent repayment order (RRO). The Tribunal sent the respondent landlords copies of the application with supporting documents by post and email to the addresses supplied by the Applicants in their application form. The Applicants assert that the landlords committed an offence of having control of or managing a house in multiple occupation that was required to be licensed pursuant to an additional licencing scheme but was not licenced. The Applicants sought a RRO for the period 5th April 2022 to 4th February 2023.

2. The Tribunal issued directions on 1 May 2024 listing this matter for a hearing on 4 October 2024. The Applicants complied with the directions. The Respondents have not complied with the directions nor have either of them corresponded with the Tribunal.

THE HEARING

3. The Applicants were represented by Mr Leacock of Justice for Tenants and all three Applicants personally attended the hearing. Neither the First or Second Respondent attended. We considered whether we should proceed in the absence of both Respondents. Pursuant to Rule 34 of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013 (The 2013 Rules) this required us to firstly consider whether the Respondents had been notified of the hearing or whether reasonable steps had been taken to notify the Respondents of the hearing. We noted that the postal address which the Applicants had given for the Respondents in their application form is the address of the premises. This is the address which the Land Registry records as the Respondents' address in respect of these premises. Additionally, we were told that the Applicants' representatives and the Tribunal had sent notice of the directions and the hearing to the email address which the First Respondent used to correspond with the Applicants throughout the tenancy. No notice of non-delivery was received by the Tribunal. Finally, both the Tribunal and the Applicants' representatives called the mobile number which the First Applicant had used to contact the First Respondent but there was no answer. The only other postal address which the Applicants had was a c/o address for the Second Respondent on the face of the tenancy agreement.

4. In the circumstances we considered that reasonable steps had been taken to notify both Respondents of the hearing and that given that all three Applicants had complied with the directions and attended the hearing, it would be in the interests of justice to proceed to hear the application.

5. The Tribunal was provided with a 321-page bundle prepared by the Applicants for the hearing. It contained the application form, full details of the offence alleged, witness statements of all three Applicants, proof of rental payments and a copy of the tenancy agreement. It also contained details of the London Borough of Lewisham's additional licencing scheme.

The Background

6. The Applicants entered into an assured shorthold tenancy agreement in respect of the premises on 27 November 2021 at a monthly rent of £2,300. The tenancy agreement named the Second Respondent as the landlord and all rental payments were made to a bank account in his name throughout the duration of the tenancy. The premises consist of a three-bedroom modern terraced house in a cul-de-sac location in the London Borough of Lewisham (LBL). The First and Second Respondent are the legal owners of the premises. It appears that throughout the tenancy the Applicants mainly communicated with the First Respondent by WhatsApp and email.

7. On 5 April 2022 LBL introduced an additional licencing scheme which applied borough-wide. It applied to all houses in multiple occupation (HMOs) which were not otherwise required by statute to be licenced. Included in the bundle at page 291 is a public notice published by LBL which confirmed that all houses in multiple occupation which met the standard test contained in s.254(2) of the Housing Act 2004 (the 2004 Act) were subject to an additional licencing scheme which applied from 5 April 2022 to 4 April 2027.

Has an Offence been Committed

8. In order to make a rent repayment order against a person under s.40 of the 2016 Act the Tribunal has to be satisfied to the criminal standard (beyond all reasonable doubt) that the person has committed a relevant offence (s.43 of the 2016 Act).

9. All three Applicants attended the hearing and gave oral evidence. We accepted their evidence as truthful. All three confirmed that the contents of their witness statements were true. All three Applicants confirmed that they moved into the premises on 27 November 2021 and moved out of the premises on 4 February 2023. They all confirmed that they were not related and formed more than one household and that the premises was their main residence. All three paid rent in respect of their occupation and they shared the use of a bathroom, kitchen and living room.

10. At page 281 of the bundle is an email from LBL dated 27 March 2023 which confirms that the premises were not and had not previously been licenced.

11. Consequently, we were satisfied beyond all reasonable doubt that the premises met the standard test set out in s254(2) of the 2004 Act and were required to be licenced from 5 April 2022 to 4 February 2023 and were not so licenced.

Are Both Respondents guilty of the Offence

12. In order to be satisfied that both named respondents are guilty of an offence under s72(1) of the 2004 we have to be satisfied that each had control of or managed the unlicenced HMO.

13. Section 72(1) of the HA 2004 provides:

"[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 263 of the HA 2004 provides :

"(1)In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2)In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3)In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—

(a)receives (whether directly or through an agent or trustee) rents or other payments from—

(i)in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii)in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b)would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

14. The First and Second Respondents are the joint legal owners of the premises and are the persons entitled to receive the rack-rent. Additionally, the Second Respondent is the named landlord on the face of the tenancy agreement and all payments were made to him. We noted that communication between the Applicants and the landlords was via the First Respondent's email address. Consequently we were satisfied that both Respondents had control of the unlicenced HMO and additionally the Second Respondent managed it within the meaning of s.236

15. Thus we are satisfied beyond all doubt that both the First and Second Respondent committed the offence of being in control of or managing a HMO that was not licenced and that was required to be licenced.

Reasonable Excuse

16. It is a defence to proceedings under s.72 if the person had a reasonable excuse for being in control of or managing an unlicenced HMO (s.72(5) of the 2004 Act). As the Tribunal has not received any evidence from the Respondents there is no basis upon which to find that the Respondents had a reasonable excuse for not licensing the property.

Quantifying the RRO

17. The leading authority on the correct approach to quantifying a RRO is ***Acheampong v Roman* [2022]**. The Upper Tribunal established a four-stage approach the Tribunal must adopt when assessing the amount of any order (at paragraph 20):

    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 is expected to make an informed estimate where appropriate.
    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 relative seriousness can be seen from the relevant maximum sentences on conviction) an 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 percentage of the total amount applied for is then the starting point (in the sense 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 the other factors set out in section 44(4)."

18. Section 44(4) of the 2016 Act provides;

    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.

19. In ***Newell v Abbot* [2024] UKUT 181 (LC)** considered an appeal which Mr Leacock submits has a number of similarities to the instant case. In that case the Upper Tribunal, having reviewed a number of recent authorities on the correct approach to quantification, observed at para 57

    "This brief review of recent decisions of this Tribunal in appeals involving licencing offences illustrates that the level of rent repayment orders varies widely depending on the circumstances of the case. Awards of up to 85% or 90% of the rent paid (net of services) are not unknown but are not the norm. Factors which have tended to result in higher penalties include that the offence was committed deliberately or by a commercial landlord or an individual with a larger property portfolio or whether the tenants have been exposed to poor or dangerous conditions which have been prolonged by the failure to licence. Factors which tend to justify lower penalties include inadvertence on the part of the smaller landlord, property in good condition such that a licence would have been granted without one being required and mitigating factors which go some way to explaining the offence without excusing it such as the failure of a letting agent to warn of the need for a licence or personal incapacity due to poor health"

20. In that case the Upper Tribunal noted that the landlord was not a professional landlord and that he had had committed the offence of controlling an unlicenced HMO through inadvertence rather than deliberately. The property was in reasonably good condition during the tenants' occupation. It made a RRO equating to 60% of the net rent paid.

21. Turning to the facts of this case. The applicants seek a RRO in respect of the whole of the rent paid in respect to the period over which the offence was being committed. The rent paid did not include payments for any additional utilities and none of the applicants were in receipt of Housing Benefit or Universal Credit. A schedule of payments is included in the bundle for each applicant. However, we noted that each applicant has

included a payment which was made prior to the 5 April 2022. In *Kowalek v Hassanian Ltd [2021] UKUT 143 (LC)* the Upper Tribunal confirmed that in order to be taken into consideration when calculating the maximum RRO, the payment must both relate to the period in which the offence was committed and be made at a time with the offence was committed. Consequently, the *maximum* RRO in respect of each applicant is;

(i) £6848.63 in respect of the First Applicant
(ii) £7761.78 in respect of the Second Applicant
(iii) £6392.05 in respect of the Third Applicant

22. We bear in mind that, as in *Newell v Hallett* this is a licencing offence. We have not had any evidence from the Respondents but given that the additional licencing scheme was introduced part way through the tenancy we consider that this was probably a case of inadvertence rather than deliberate flouting of the licencing requirements. We consider that the appropriate starting point in this case would be 60%.

23. As regards the fourth stage of the test and particularly matters of conduct. There was a delay of some months before the deposit was paid into an approved scheme. We also note that the third bedroom was slightly smaller than the minimum size permissible under the LBL additional licencing scheme, albeit the Third Applicant was not unduly concerned by this. We were told that the en-suite bathroom attached to the First Applicant's bedroom was affected by mould, however we also note that the Respondents were not notified of this issue until December 2022 and that shortly after notification repairs were carried out to the extractor fan. Additionally we consider that the photographs supplied of the that the property shows it to be a pleasant modern family home in good order. In our view the First Applicant has to bear some responsibility for the mould in the bathroom as he seems to have waited until the problem became acute before he alerted the Respondents.

24. In the circumstances we consider that an award of 60% of rent paid in the relevant period is appropriate for each Applicant. We do not consider that there are any conduct issues on either side which merit an increase or decrease to the starting point.

25. The Applicants have also requested an order that the Respondents do reimburse the hearing and application fees under rule 13(2) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013. As they have succeeded in their application we are satisfied that such an order is justified.

Name Judge N O'Brien Date 8 October 2024

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e., give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.