FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AN/HMG/2024/0008**
Property	**:**	**Raised Ground Floor Flat, 47 Uxbridge Road, London, W12 8LA**
Applicants	**:**	**Francesca Heiberg-Gibbons** **Jessica Thomas**
Representative	**:**	**Mr Laycock of Justice for Tenants**
Respondent	**:**	**Ms Felicity Pendred**
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 S Wheeler MCIEH, CEnvH.**
Date of Hearing	**:**	**8 November 2024**
Date of Decision	**:**	**12 November 2024**

DECISION

DECISION OF THE TRIBUNAL

(1) The Tribunal makes a Rent Repayment Order in the sum of £7812.63 to be paid to the First and Second Applicants.

(1) The Respondent must refund the fees paid by the Applicants in the sum of £320.

(2) The Respondent must pay the above sums within 28 days of receipt of this determination.

BACKGROUND

1. The Respondent is the leasehold owner of the premises known as Raised Ground Floor Flat 47 Uxbridge Road W12 8LA (the Flat) a 2-bedroom flat in a converted Victorian terraced house. The Flat is located within the London Borough of Hammersmith and Fulham (LBHF). The First Applicant moved into the Flat on 26 July 2021 with her then boyfriend, a Mr Max Brewer. Both were named as tenants on the assured shorthold tenancy agreement. Mr Brewer moved out in October 2021. The Second Applicant moved in on 19 February 2022, having seen an advert for the second bedroom placed on Spareroom.com by the First Applicant. On 19 February 2022 the Respondent and the two Applicants signed an agreement which on its face records their intention for the Second Applicant would be substituted as tenant in the place of Mr Brewer on the original tenancy. The Applicants both moved out of the flat on 8 July 2023 following service of a s.21 notice of seeking possession by the Respondent's agent.

THE PROCEEDINGS

2. On 24 November the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (HPA 2016) from the Applicants for a rent repayment order (RRO) in respect of the rent paid by the Applicants to the Respondent from 19 February 2022 to 30 November 2022. The Applicants assert that the Respondent committed an offence of having control of or managing a house that was required to be licensed pursuant to Part 3 of the Housing Act 2004 (HA 2004) but was not licenced. In the context of Part 3 of the Housing Act 2004 the word 'house' means building or part of a building occupied or intended to be occupied as a separate dwelling (Section 99 HA 2004). Thus it encompasses both flats and houses.

3. The Tribunal issued directions on 6 March 2024. The Respondent did not comply with the directions. The matter was listed for a face-to-face hearing on 18 July 2024. On 17th July 2024 the Respondent emailed the tribunal to request that the hearing be adjourned because she had only recently became aware of the proceedings. In her email she explained that she suffered from anxiety and depression and did not as a rule use emails to communicate as she had no usable computer at home. She said that she had only received a hard copy of the Applicant's documents 2 weeks prior to the hearing. She included medical evidence with her email which confirmed that she was under the care of her GP for anxiety and depression. The Tribunal adjourned the hearing and relisted it on 8 November 2024 with directions which provided for a revised timetable. The directions, which included the hearing date, were sent by the Case Officer by post to the Respondent. She later requested an extension of time for filing her bundle. This request was granted but in the event no bundle was filed. Other than her request for an adjournment of the hearing and of an extension of time for filing her bundle, the Respondent has not engaged with these proceedings.

THE HEARING

4. The Applicants attended the hearing and were represented by Mr Laycock of Justice for Tenants. The Respondent did not attend and was not represented.

5. The Tribunal was provided with a 214 -page bundle prepared by the Applicants for the hearing, In addition, we considered a skeleton argument filed on behalf of the Applicants.

6. At the start of the hearing we considered whether we should proceed in the absence of the Respondent. A Tribunal may proceed in the absence of a party only if it is satisfied that reasonable steps have been taken to ensure that they are aware of the hearing and that it is in the interests of justice to do so (Rule 34 of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013 (the Tribunal Rules). Having considered the history of the matter set out in paragraph 3 above we concluded that reasonable steps had been taken to advise the Respondent of the details of the hearing, and that as the Applicants had attended for a second time, it would be in the interests of justice to proceed.

Has an Offence been Committed?

7. 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). A relevant offence includes being a person in control of or managing a house which is required to be licenced pursuant to a selective licencing scheme but which is not so licenced. This is an offence by virtue of s95(1) HA 2004.

8. Part 3 of the HA 2004 gives local housing authorities the power to designate specific areas as Selective Licencing Areas. The effect of such a designation is any privately rented house or flat in that area must be licenced pursuant to a Selective Licencing Scheme. The Applicants have included 2 public notices published by LBHF dated 13 December 2017 and 6 December 2021 respectively in their bundle. The notices confirm that Uxbridge Road in the LBHF was a designated selective licencing area from 5 June 2017 to 4 June 2027. Thus any privately rented house or flat in Uxbridge Road was required to be licenced under that scheme.

9. Also included in the bundle is an email from a Mr Oliver Williams dated 22 March 2023. In his email signature he is described as a private housing licencing officer in LBHF's Environment Department. He confirmed that the subject property was not licenced during the period of claim. He confirmed that an application for a licence had been made on 1 December 2022 and that the licence was granted on 13 February 2023.

10. The Applicants assert that the Respondent was a person who was in control of or managing the unlicenced house. She was the registered owner of the leasehold estate and was thus the person entitled to the rack rent and is deemed to be a person with control of the premises by virtue of s263(1) HA 2004.

11. Consequently we are satisfied beyond reasonable doubt that the Respondent was a person in control of an unlicenced house which was required to be licenced at all time during the relevant period by virtue of the Selective Licencing Scheme in operation in LBHF and was not so licenced. Consequently and is guilty of an offence under s.72(1) of the HA 2004. The offence ceased on the day she applied for a licence under the scheme (s72(4) HA 2004).

Reasonable Excuse

12. It is a defence to proceedings under s.95(1) if the person had a reasonable excuse for being in control of or managing an unlicenced house (s.95(4) of the 2004 Act). The Respondent has not filed any evidence or statement of case in these proceedings and so we find there was no reasonable excuse.

Quantifying the RRO

13. The remaining issues which we therefore have to determine are;
    (i) The maximum RRO for the applicants;
    (ii) The appropriate percentage in this case.

14. Section 44(2) of the HPA 2016 provides that the RRO must relate to a period not exceeding 12 months during which the Landlord was committing the offence. Section 44(3) provides that the RRO must not exceed the rent paid during that 12-month period less any relevant award of universal credit paid to the tenant during that period.

15. The leading authority on the correct approach to quantifying a RRO is ***Acheampong v Roman* [2022]**. The Upper Tribunal established a four-stage approach which this 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)."

16. 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.

17. 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.

18. In *Newell v Abbot [2024] UKUT 181 (LC)* 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"

19. He observed further at paragraph 61

> *"The tribunal has said in the past that it is not possible to be prescriptive about the sort of conduct which might potentially be relevant under section 44(4). But that should not be taken as an invitation to landlords and tenants to identify every possible example of less than perfect behaviour to add to the tribunal scales in the hope of increasing or reducing the penalty. When parliament enacted Part 2 of the 2016 Act it cannot have intended tribunals to conduct an audit of the occasional defaults and inconsequential lapses which are typical of most landlord and tenant relationships. The purpose of rent repayment orders is to punish and deter criminal behaviour. They are a blunt instrument not susceptible to fine tuning to take account of relatively trivial matters. Yet, increasingly, the evidence in rent repayment cases especially those prepared with professional, or semi-professional assistance has come to focus disproportionately on allegations of misconduct. The tribunal should not feel that they are required to treat every allegation with equal seriousness or to make findings of fact on them all. The focus should be on conduct with serious or potentially serious consequences in keeping with the objectives of the legislation. Conduct which even if proven would not be sufficiently serious to move the dial one way or the other can be dealt with summarily and disposed of in a sentence or two."*

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. The offence had been committed over a 6-year period. It made a RRO equating to 60% of the net rent paid. It recorded that had the offence been committed over a shorter duration it would have reduced the RRO to 50% of the maximum.

21. Turning to the facts of this case; the Applicants seek a Rent Repayment Order for £14,204.79 which they paid from 19 February 2022, which is the date that the Second Respondent moved in until 30 November 2022 which was the day before the Respondent applied for a licence. They have provided a schedule of payments showing the dates that the payments were made and the rental periods they relate to. We are satisfied that all those payments were made when, and relate to a period when, the relevant offence was being committed. All payments were made from the First Applicant's account. The Applicants explain that the Second Applicant paid her share of the rent to the First Applicant who then paid the Respondent's agent. As it was the intention of all parties that the First and Second Applicants would be joint tenants, they both were jointly liable for the rent.

22. Neither Applicant was in receipt of Universal Credit. None of the rent was used to pay for utilities.

23. Thus we are satisfied that the maximum RRO which we can make in favour of the Applicants is £14204.79.

24. As regards the seriousness of the offence, we note that this is precisely the same offence as was under consideration in *Newell* which was being in control of or managing an unlicenced house which ought to have been licenced under a selective licencing scheme. It appears that the offence was being committed for a 17-month period i.e. from July 2021 when the First Applicant moved in with her then boyfriend until 1 December 2022 when the Respondent applied for a licence. We see no reason to depart from the starting point of 50%

25. As to matters of conduct, the Applicants assert that there were matters of repair in the flat which the Respondent failed to address or was slow to address. The First Applicant in her statement states that the window to her bedroom was defective in that there was a gap in the frame which meant her room was cold. She asserts that there was mould in the bathroom. Unfortunately there are no photographs of these defects included in the bundle, so while we accept her evidence as to the defects, we have no evidence of their severity. She also states that the boiler performed poorly for some time and dropped pressure. The Respondent always attended each time an issue with the boiler arose but did not address the underlying problem until the boiler ceased working altogether. At that stage the Applicants accept that the Respondent engaged the services of a plumber who fixed the issue. She also complained that the blinds in the living room were defective but in her evidence accepted that the Respondent had no obligation to replace the blinds under the terms of the tenancy. She stated that the Respondent, who lived next door, was in the habit of attending the property to discuss tenancy related matters, but at times stayed longer then perhaps was necessary. They complained that the flat only had one fire alarm but as this flat at no stage fulfilled the statutory definition of a house in multiple occupation (HMO), Mr Laycock accepted that this was not a breach of any legal obligation.

26. In February 2023 the Respondent sought to increase the rent but the parties were unable to agree. Consequently the Respondent served a s21 notice on the tenants and they left the property in July 2023.

27. The applicants both told the Tribunal that the issue of licencing came to light in 2022 when the tenants of another flat in the building which was also owned by the Respondent had an issue with their boiler. We note that this was the year that the Respondent applied for a licence and that the licence was granted shortly thereafter. Thus it would appear that the Respondent applied for a licence shortly after she was made aware that she needed one.

28. Of all the matters of conduct relied on we consider that only the matters relating to the mould and the defective window are relevant matters of conduct, and they are not the most serious. The issues with the boiler were attended to as an when they arose albeit it eventually required professional repair. We bear in mind the fact that this offence was committed over a relatively short period of time and it appears that the Respondent made the appropriate application when the requirement for a licence became clear. We

make a RRO in the sum of £7812.63 or 55% of the rent paid over the relevant period.

29. The Applicants have also requested an order that the Respondent 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: 12 November 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.