FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BY/HMF/2023/0053-57**
Property	**:**	**Flats 3, 4, 9, 10 & 25 Newsham Drive, Liverpool, L6 7UG**
Applicants	**:**	**Padraig Breslin, Shannon McLaughlin, Danny Boardman and Declan Hillen**
Representative	**:**	**Mr B. Leacock, Justice for Tenants**
Respondent	**:**	**TLM Estates**
Representative		**Mr C. Larkin (Counsel) Ms Mansfield-Excello Law**
Type of Application	**:**	**Housing and Planning Act 2016- Section 41(1)**
Tribunal Members	**:**	**Tribunal Judge J.E. Oliver Tribunal Member a. Hossain B.Sc (Est Man), MRICS**
Date of Determination	**:**	**15th October 2024**
Date of Decision	**:**	**5th November 2024**

DECISION

Decision

1. The Tribunal makes a Rent Repayment Order in respect of which the Respondent is to repay the following amounts to each of the Applicants:

   Shannon McLaughlin-£1883.74

   Padraig Breslin -£1167.97

   Declan Hillen- £786.89

   Danny Boardman- £832.60

2. The Respondent is to repay to the Applicants the Tribunal's application and hearing fees in the sum of £720.

Background

3. On 2nd October 2023 Padraig Breslin, Shannon McLaughlin, Michael Worsley, Danny Boardman and Declan Hillen ("the Applicants") applied to the First-tier Tribunal for a rent repayment order ("RRO") pursuant to Section 41 (1) of the Housing and Planning Act 2016 ("the 2016 Act"). Micheal Worsley of Flat 7, 25 Newsham Drive Liverpool subsequently withdrew from the application.

4. The application relates to Flats 3, 4, 9, 10 & 25 Newsham Drive, Liverpool ("the Property")

5. TLM Estates Limited ("the Respondent") is the Landlord of the Property.

6. The Tribunal issued directions to the parties providing for the filing of statements, outlining how the Tribunal must approach the application and thereafter for the matter to be listed for a determination without the requirement for an inspection.

7. The application was listed for a video hearing on 15th October 2024.

The Law

8. A RRO is an order the Tribunal may make requiring a Landlord to repay rent paid by a tenant; for such an order to be made the Landlord must have committed one of the offences set out in Section 40(3) of the 2016 Act.

9. One of the offences set out in Section 72(1) of the Housing Act 2004 ("the 2004 Act") is controlling or managing an unlicensed property.

10. Section 41(2) of the 2016 Act provides a tenant may apply for a RRO only if:

(a) the offence related to housing that, at the time of the offence, was let to the tenant, and
(b) the offence was committed in the period 12 months ending with the day on which the application is made.

11. Section 43 of the 2016 Act provides that, for a RRO to be made, the Tribunal must be satisfied, beyond reasonable doubt, the Landlord has committed one of the offences specified in section 40(3) (whether or not the Landlord has been convicted).

12. There is the statutory defence of "reasonable excuse" for most of the offences, the standard of proof being that of the balance of probabilities. In **IR Management Services Limited v Salford City Council [2020] UKUT 81 (LC)** the Upper Tribunal said:

"The issue of reasonable excuse is one which may arise on the facts of a particular case without [a landlord] articulating it as a defence (especially where [the landlord] is unrepresented). Tribunals should consider whether any explanation given by a person …. amounts to a reasonable excuse whether or not the [landlord] refers to the statutory defence."

13. Section 44 of the 2016 Act thereafter provides that if the Tribunal determines the RRO should be made then it must calculate the amount as prescribed. If the offence is the Landlord has committed the offence of controlling or managing an unlicensed house, then the amount must relate to the rent paid by the tenant during a period, not exceeding 12 months, during which the Landlord was committing the offence. However, the amount to be repaid must not exceed the rent paid in that period, less any relevant awards of universal credit or housing benefit.

14. In **Vandamalayan v Stewart & Others [2020] UKUT 0183 (LC)** Judge Cooke determined that in neither Sections 44 or 45 of the 2016 Act are there any provision for reasonableness and consequently, the starting point for determining the amount of the RRO is the maximum rent for the relevant period: At paragraphs 14 and 15 of her judgement Judge Cooke said:

"*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 for the 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 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 obligations to comply with a rent repayment order."

15. The exception to this is utilities paid by the landlord. Judge Cook continued:

"16. *In cases where the landlord pays for utilities…. there is a case for deduction, because electricity for example is provided to the tenant by third parties and consumed at a rate the tenant chooses; in paying for utilities the landlord is not maintaining or enhancing his own property. So it would be unfair for a tenant paying a rent that includes utilities to get more by way of rent repayment than a tenant whose rent did not include utilities."*

16. Section 44(4) of the 2016 Act requires the Tribunal to consider the conduct of both the Landlord and tenant, the financial circumstances of the Landlord and whether the Landlord has been convicted of any of the specified offences.

17. Under section 95(3) of the 2004 Act, it is a defence if either a temporary exemption from licensing has been given (Section 62(1) or section 86(1)) or an application for a licence has been made under section 87.

The Hearing

18. At the hearing the Applicants were represented by Mr Leacock. The Respondent was represented by Mr Larkin, Counsel. Mr Ryan Thomas, the Respondent's Property Manager was in attendance.

19. The parties agreed the relevant period from the RRO was 1st November 2021 to 31st October 2022. It was conceded by the Respondent that during this period the Property was unlicensed, an offence had been committed and Section 41(2) of the Act was satisfied.

20. There was no dispute as to the amount of rent claimed by the Applicants. They all related to the period of 1st November 2021 to 31st October 2022, save for Declan Hillen where his claim was for the period 18th February to 31st October 2022:

    (1) Shannon McLaughlin-£5708.60.
    (2) Padraig Breslin-£4515.65.
    (3) Declan Hillen £3100.
    (4) Danny Boardman-£3856.70,

21. Mr Larkin submitted the Respondent believed the Property was licensed for the relevant period, having thought when the licence was originally granted on 3rd October 2018, it was for 5 years, being the usual duration of a licence and not 3 years. It expired on 2nd October 2021 whilst the Respondent believed it to expire in 2023.

22. The Respondent further explained the issue with the licence came to light when it contacted Liverpool City Council in 2022 making enquiries about its renewal. It was then that the Council advised the licence had expired. An application for a further licence was made on 1st November 2022. One was granted on 28th November 2022 for a period of 1 year and thereafter a further licence was granted on 30th May 2024 for a period of 5 years.

23. Mr Larkin argued the Respondent had a reasonable excuse for its failure to apply for the licence. It had acted proactively in enquiring with the Council about the renewal of the licence and making an immediate application for one when it became aware the licence had expired.

24. The Applicants submitted there was no reasonable excuse. There was strict liability for the offence and referred the Tribunal to ***R (Mohamed) v London Borough of Waltham Forest*** **[2020] EWHC 1083** where it was held a breach of Section 72(1) of the Act was a strict liability offence where no mens rea was required. The Tribunal was also referred to ***Thurrock Council v Khalid Daoudi*** **[2020] UKUT 209 (LC)** at [27] where it was said:

"*No matter how genuine a person's ignorance of the need to obtain a licence, unless their failure was reasonable in all the circumstances, their ignorance cannot provide a complete defence".*

25. Upon the issue of quantum the Applicants submitted the approach to adopt was set out in **Acheampong v Roman [2022] UKUT 239 (LC)** at [20]**.** Here the Upper Tribunal set out a 4 stage approach the Tribunal should adopt when assessing the amount of the RRO:

"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 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) 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 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 out in the light of the other factors set out in section 44(4)."*

26. The Applicants claimed the rent paid was in the sum of £17180.95. This figure was not in dispute.

27. The Respondent provided the Tribunal with details of the utilities it claimed should be deducted from the RRO. The amounts paid were said to be as follows:

    a. An invoice dated 24th September 2024, for cleaning windows in the sum of £190 but this referred to 8 Croxteth Road Liverpool and not the Property.
    b. An invoice dated 11th June 2023 for grounds maintenance in May 23 and said to be "x2", in the sum of £120. The invoice did not specify which property this related to.
    c. An invoice dated 4th December 2022, for pest control. The invoice, in the sum of £180 stated this was for a first visit on 22nd November 2022. There was a further invoice, dated 15th December 2022, describing a charge of £180 for a third visit to the Property
    d. Bank statements providing details of the payments made for gas and electricity, for the relevant period.
    e. Virgin Media - £768.
    f. Water Rates - £1068.60
    g. Council Tax -£2460.

28. In his statement to the Tribunal Mr Thomas stated the cost of the utilities claimed by the Respondent, including the charges for window cleaning, gardening and pest control, totalled £29488.86 for a year. When apportioned between the 10 tenants in the Property, this equalled £2948.88 per tenant. He thereafter calculated the amount claimed by the Applicants and advised they totalled £12381.60 when allowing for pro rata periods.

29. The Applicants argued the amount claimed for utilities was not adequately broken down. The Tribunal did have the discretion to put forward amounts it considered reasonable for the costs of services that solely benefited the tenants of the Property

30. The Applicants submitted the starting point for the RRO should be 75% of the rent paid.

31. The Applicants referred the Tribunal to **Newell v Abbot [2024] UKUT 181 (LC).** Here the starting point of the RRO was 60% of the rent paid after considering the following:

    (1) The Respondent was an amateur landlord and not a professional one.
    (2) The breach was inadvertent.
    (3) The property was in good condition; and
    (4) A licensing offence was committed (section 95(1) of the Housing Act 2004.

32. The position here was different and more serious, there being the breaches of the 2016 Regulations.

33. The Applicants alleged there had been a breach of Regulation 7 due to the Respondent failing to provide sufficient waste bins outside the Property causing rats to be present both inside and outside the Property.

34. There was a breach of Regulation 8. There was evidence of damp and mould in the bedrooms of Shannon McLaughlin and Declan Hillen and although reported to the Respondent in April 2023, no action was taken to remedy it until November 2023.

35. Shannon McLaughlin, in her statement to the Tribunal, stated no testing of fire alarms had taken place, despite letters being received indicating such testing would be undertaken. There were also issues with gas safety. A gas leak was reported to the National Gas Emergency Service and although one was found, work could not be completed because the gas meter was a commercial one. Defects were noted to the pipework and boiler and, although reported to the Respondent, it was not investigated. A subsequent visit by a contractor appointed by the Respondent found no gas leak.

36. When the rat problem became evident the Respondent advised the tenants to contact the local authority. The local authority advised this was the responsibility of the Respondent. It did not act to remedy this issue within a reasonable amount of time, taking from July 2022 to November 2022 to address the issue.

37. Mr Larkin submitted the Respondent had dealt with property issues appropriately. Here, there was no strict liability and the appropriate test was (a) was the fault actionable, (b), had the Respondent had notice of the repair and (c) has the Respondent taken action within a reasonable period?

38. It was submitted the evidence before the Tribunal indicated the Respondent had responded to the Property issues within a reasonable amount of time. Further, the photographic evidence supplied to the witness statement of Shannon McLaughlin showed 2 photographs of defects of damage caused by a water leak. It was said no expert evidence had been called regarding the condition of the Property nor was there evidence of any complaints to the local authority or the service of an Improvement Notice. This indicated any issues had been resolved.

39. It was noted Shannon McLaughlin had been in continuous occupation of the Property since 2020 despite her concerns regarding its maintenance.

40. An application was made for the Respondent to pay the costs of the application and hearing in the sum of £300.

Determination

41. The Tribunal finds that for the period 2nd October 2021 to 1st November 2022 the Property was unlicensed. This is not contested by the Respondent, but that it had a reasonable excuse for failing to apply for the licence.

42. The Tribunal noted the circumstances surrounding the Respondent's failure to apply for a licence. This was due to the Respondent's assumption the licence granted in 2018 was for a period of 3 and not 5 years. The Tribunal accepted the Respondent was being responsible and proactive in contacting the local authority in 2022 to check the requirements for renewal. However, this did not excuse the failure by the Respondent to renew the licence at the 3 year renewal date. The Respondent is a professional landlord. It is to be expected there is or should be in place an internal system for checking the dates for licence renewals. The Tribunal therefore rejects the Respondent's defence of reasonable excuse and determines an offence of having control of, or managing an unlicensed HMO or house has been committed pursuant to section 72(1) of the 2004 Act. It therefore follows a RRO can be made pursuant to section 41 of the 2016 Act.

43. The Tribunal thereafter considered the four steps as established in **Acheampong v Roman.**

44. It was accepted by the parties the amount of rent claimed was in the total sum £17180.95, apportioned between the Applicants as referred to in paragraph 20 above.

45. There is then to be subtracted from that sum the amount for utilities that have only benefited the tenant. The Respondent advised the amount for this item, apportioned to the Applicants was £12381.60. This sum included utilities including pest control, window cleaning and gardening.

46. The Tribunal considered the total amount claimed for utilities appeared high and no exact breakdown was provided. It did not, however, consider the items claimed for internet, water rates and council tax to be unreasonable, accepting they were utilities provided by the Respondent, although no invoices were produced. The Respondent provided bank statements to confirm the amounts paid for gas and electricity and these showed the total paid for the year of claim to be £20164.32.

47. The Tribunal found the invoices provided for pest control post-dated the period of claim. The first visit was said to be 4th December 2022 and there were 3 in total at a cost of £540. This amount is therefore excluded.

48. The Tribunal noted that whilst the invoices produced for gardening and window cleaning were not for the Property nor for the period of claim, the Applicants did not deny these services were performed. The Tribunal considered the amount to be allowed for these items would be £420 and £720 respectively. The former figure was based on one visit per month for 7 months at £60 per visit. The cost for window cleaning is based on one visit per month also at a cost of £60 per visit.

49. The amount allowed for utilities for the year of claim is £25600.32.

50. The Applicant has submitted that due to the seriousness of the offence combined with the breaches of the 2006 Regulations, the starting point for the RRO should be 75% of the amount claimed.

51. In **Acheampong v Roman** HHJ Cooke gave examples of the degrees of seriousness that can be considered:

"*So in a case where the landlord of several properties had no HMO licence and whose eventual application for a licence was rejected on the basis of the fire hazards at the property, and who nevertheless failed to remedy those defects for over a year, the Tribunal ordered the repayment of 90% of the rent. (Wilson v Arrow and others [2022] UKUT 27(LC); in a case where a landlord was letting just one property through an agent, and might reasonably have expected the agent to warn him that a licence was required, and the condition of the property was satisfactory, the Tribunal ordered repayment of 25% of the rent (Hallett v Parker [2022] UKUT 165 (LC).*

There are no rules as to the amount to be repaid; there is no rate card. But it is safe to say that if a landlord is ordered to pay the whole of the rent (after deduction of any payment for utilities), without consideration of the seriousness of the offence, or in a case that is far from the most serious of its kind, it is likely that something has gone wrong and the FTT has failed to take into account a relevant factor."

52. The Tribunal did not accept the Applicants' contention the breach was sufficient to justify a starting point of 75% for the RRO. The Tribunal determined the appropriate amount, before deduction for utilities, was 60%.

53. In determining this amount, the Tribunal noted the Respondent had no reasonable excuse for failing to obtain a licence but had taken immediate steps to rectify the position once it became aware of it. A licence was granted for a year and a further licence has also been granted for 5 years. There were no significant conditions attached to the licence when granted. Despite the complaints by the Applicants of the breaches of the 2006 Regulations, there was no evidence before the Tribunal to show concerns had been raised with the local authority to give rise to any interventions or for any Improvement Notice to be served. There was evidence, in the e-mail exchanges with the Applicants of a willingness to send contractors to deal with the issues within a reasonable period of time.

54. The Tribunal thereafter considered whether any further adjustments should be made when considering section 44(4) of the 2016 Act and determined none were required. There had been no evidence of conduct by either party to justify any amendment, nor was evidence produced to suggest the Respondent's financial position was such that it could not afford the RRO.

55. The amounts to be paid by the Respondent to each of the Applicants, when taking the rent paid for the relevant period of their tenancy and the apportioned utilities, is shown in the table below:

Applicants	Rent paid	Share of utilities-	Net amount before adjustment	Amount payable-60%
Shannon McLaughlin	£5708.60	£2569.03	£3139.57	£1883.74
Padraig Breslin	£4515.65	£2569.03	£1946.62	£1167.97
Declan Hillen	£3100	£1788.52	£1311.48	£786.89
Danny Boardman	£3956.70	£2569.03	£1387.67	£832.60

56. The Respondent is also to repay to the Applicants the sum of £720 being the application and hearing fees paid to the Tribunal.