FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BY/HMG/2023/0007**
Property	**:**	**Flat 11, 171 Rice Lane, Liverpool L9 1AF**
Applicants	**:**	**Jonathan Fox and Stacey Davies**
Representative	**:**	**Justice for Tenants**
Respondent	**:**	**RJM Property NW Ltd**
Type of Application	**:**	**Housing and Planning Act 2016- Section 41(1)**
Tribunal Members	**:**	**Tribunal Judge J.E. Oliver Tribunal Member I. Jefferson**
Date of Determination	**:**	**8th November 2024**
Date of Decision	**:**	**3rd December 2024**

DECISION

Decision

1. The Tribunal makes a Rent Repayment Order in respect of which the Respondent is to repay to the Applicants £2734.52
2. The Respondent is to repay to the Applicants the Tribunal's application fee of £100.

Background

3. Jonathan Fox and Stacey Davies ("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") in respect of their tenancy of Flat 11, 171 Rice Lane, Liverpool ("the Property").
4. RJM Property NW Ltd ("the Respondent") is the Landlord of the Property.
5. 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.
6. The Respondent did not respond to the application and the matter was listed for a paper determination only on 8th November 2024.

The Law

7. 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.
8. 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.
9. 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.
10. 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).
11. 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."

12. 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.

13. 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."

14. 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."*

15. 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.
16. Section 46 of the 2016 Act states:

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be

the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2) Condition 1 is that the order-
  (a) Is made against a landlord who has been convicted of the offence, or
  (b) (b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.
(3) Condition 2 is that the order is made-
  (a) In favour of a tenant on the ground the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or
  (b) In favour of a local housing authority.
(4) For the purpose of subsection (2)(b) there is "no prospect of appeal" in relation to a penalty, when the period for appealing the penalty has expired and any appeal has been finally determined or withdrawn.
(5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable to require the landlord to pay.

17. Section 95(3) of the 2004 Act, provides that 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.

Submissions

18. The Applicants confirmed their original tenancy agreement for the Property was from 26th April 2022 to 25th December 2022 at a rent of £475 per calendar month for the first 3 months of the tenancy and thereafter £500 per calendar month. The Applicants left the Property on 24th November 2022 due to its condition. Their claim of rent for the period of their occupation was £3418.15.
19. The Respondent was named as the Landlord on the tenancy agreement.
20. Ryan John Melia acquired the leasehold interest in the Property on 22nd January 2021. The Applicants provided evidence that Mr Melia was the majority owner and director of the Respondent.
21. The Applicants' position was the Property was in an area of selective licensing. They provided documentation to show the area of Walton, Liverpool as one included within this area with effect from 1st April 2022 for a term of 5 years.
22. Justice for Tenants, representing the Applicants, contacted Liverpool City Council ("the Council") for confirmation the Property was licensed. The Council replied on 15th March 2023 that it was not, nor was there any current application for a licence.
23. The Tribunal was provided with details of a hearing before Liverpool Magistrates Court in 2018 where the Respondent had been found guilty of renting 12 properties without a licence. The Court had imposed a fine of £1800, costs of £1959.54 and a victim surcharge of £130.
24. The Applicants advised the deposit paid by them, when signing the tenancy agreement, had not been returned.
25. The Applicants further advised there had been issues with the condition of the Property. This included mould where there had been a leak from an

unoccupied upstairs flat. The Respondent had advised the Applicants to heat and ventilate the flat, despite only having provided one heater. A workman was later told to paint over the mould. It had had a detrimental effect on both the Applicants' belongings and health.

26. The Applicants stated there were of safety issues. An upstairs flat was occupied by a tenant where there was a frequent smell of marijuana. The police often came to the Property to see a tenant and there were concerns of two young girls waiting in the Property for a boy who was said by the Respondent not to be a tenant, despite the Applicants seeing him almost daily. It was said these were breaches of the conditions imposed by the Council in areas of selective licensing.
27. 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)."*

28. The Applicants claimed the rent paid for the relevant period was £3418.15. There should be no deduction for utilities because they paid them.

Determination

29. The Tribunal finds that for the period 26th April to 24th November 2022 the Property was unlicensed. The Applicants had provided confirmation for the Council there was no licence, nor was there any pending application. The Respondent has not filed any response to the application to refute this. Accordingly, the Tribunal determines an offence has been committed pursuant to section 72(1) of the Housing Act 2004 beyond reasonable doubt. It therefore follows a RRO can be made pursuant to section 41 of the 2016 Act.
30. There is a defence of reasonable excuse, but, here, none has been provided.

31. The Tribunal thereafter considered the four steps as established in **Acheampong v Roman.**
32. The Applicants claimed the repayment of rent of £3418.15. There were no deductions to be made from this amount for utilities paid by the Respondent, since there were none
33. The Applicant submitted that due to the seriousness of the offence, the failure to return the Applicants' deposit, combined with the breach of the Council's selective licensing standards, the starting point for the RRO should be the full amount or a large proportion of the amount claimed.
34. In **Parker v Waller and Others [2012] UKUT 301 (LC) and Fallon v Wilson and Others [2014] UKUT 300 (LC)** it was confirmed there is no presumption a RRO should be for the full amount claimed.
35. 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."

36. The Tribunal determined from the papers before it the tenancy commenced on 26th April 2022. The Selective Licensing area only came into force on 1st April 2022. There is nothing in the papers to confirm whether or not the Council notified Respondent of any requirements for this licensing regime, and in any event, the nexus of the dates is an important factor. The Tribunal therefore determines this a measure of mitigation on behalf of the Respondent and reduces the amount repayable to 80%. This figure may have been significantly lower had the Respondent not been a professional landlord.
37. In determining this amount, the Tribunal also noted the requirements of section 46 of the 2016 had not been met to give rise to the payment of the maximum amount. Whilst the Respondent had been convicted of offences relating to section 72(1) of the 2004 Act, this was in 2018 and did not relate to this matter. However, when considering the gravity of the offence in this application the Tribunal did find the previous conviction to be a relevant factor.
38. The Tribunal further noted the breaches of the conditions attached to the selective licensing scheme.
39. The Tribunal thereafter considered whether any further adjustments should be made when considering section 44(4) of the 2016 Act. There was no

information before the Tribunal to suggest the conduct of the Applicants was such to warrant any further reduction in the amount of the RRO. There was also no information provided to enable the Tribunal to consider the Respondent's financial circumstances such to find it could not afford to pay the RRO and costs.

40. The Tribunal makes a RRO in the sum of £2734.52.
41. The Respondent is also to the Applicants £100, being the application fee.