FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**MAN/00CJ/HMG/2023/0003 FVH**
Property	**62 Tosson Terrace, Newcastle, NE6 6LW**
Applicant	**Callum McDonnell**
Respondent	**Ning Li**
Type of Application	**Housing and Planning Act 2016 (2016 Act) Section 41(1)**
Tribunal	**Tribunal Judge W L Brown** **Mr I R Harris MBE FRICS (Valuer Member)**
Date of Hearing	**11 December 2023**

DECISION

REASONS
The Application
1. By application dated 22 May 2023 (the Application), Mr Callum McDonnell sought a Rent Repayment Order (RRO) pursuant to section 41(1) of the Housing and Planning Act 2016 (the 2016 Act) in relation to their tenancy of the Property. The Respondent is the person with control and management of the Property and the former landlord of the Applicant.

2. Directions were issued on 4 September 2023 pursuant to which the Applicant and the Respondent made written submissions. There was no question that the Application was brought within the statutory timeframe to do so.

3. A hearing of this matter took place as referred to above. This was a remote hearing by video which was not objected to by the parties. With the consent of the parties, the form of the hearing was by video using the Tribunal video platform (a Full Video Hearing – FVH). The Tribunal was satisfied that all relevant issues could be determined in a remote hearing. The documents that we were referred to are bundles from the parties, the contents of which we have recorded. (The parties were content with the process). The Tribunal considered it unnecessary in view of the matters in issue to conduct an inspection.

4. Both parties attended the hearing.

Applicant's Submissions

5. The basis for the Application was that the Applicant had rented the Property as residential accommodation during 15 January 2022 to 24 January 2023 (and other periods) and that Newcastle City Council (NCC) had confirmed the Property to have been unlicensed throughout the period of occupation, meaning an offence had been committed by the Respondent under Section 95(1) of the Housing Act 2004 (2004 Act).

6. The parties submitted copy assured shorthold tenancy agreements for the Property each of 12 months duration, between the Respondent as landlord and the Applicant as Tenant, from 25 November 2019, at various monthly rents. It was not in dispute that these documents were evidence of the contractual arrangement for occupation of the Property by the Applicant.

7. The Property is described in the Application as a lower floor 2 bedroom flat in a terraced premises.

8. The rent repayment requested totalled £7,100, for rent paid to the Respondent for the relevant period of the tenancy. Evidence of payments to the Respondent through bank statements was provided by the Applicant – about which, see later.

9. The Respondent supplied a copy of a letter dated 12 January 2023 from Mr Thomas McFall, Senior Technician – Public Protection & Neighbourhoods Team of NCC which set out that a licence was required for the Property. In her statement dated 24 November 2023 the Respondent accepted that the Property had required a selective licence throughout the period for which the RRO was requested.

10. The Respondent's evidence was that she had no prior knowledge of the need for the Property to be licensed until Mr McFall telephoned her on 2 February 2023. She subsequently received as a copy by email of his letter of 12 January 2023, stating that the Applicant had failed to forwarded it from the Property address to which it had been directed. She made application for the due licence, which was granted, effective from 21 March 2023 to 5 April 2025. In her statement she set out her understanding that selective licensing affecting the Property began in April 2020.

11. The Respondent alleged that the Applicant had not left the Property in a reasonable condition, causing her expense before re-letting could take place. The

Applicant denied the allegations. Ultimately the Applicant's tenancy deposit was returned to him by the Respondent without deduction.

The Law

12. The relevant statutory provisions relating to Rent Repayment Orders are contained in sections 40, 41, 43 and 44 of the 2016 Act, extracts from which are set out in the Schedule.

13. Section 40 identifies the relevant offences, including an offence under Section 95(1) of the 2004 Act (control or management of unlicensed premises). Subsection (4) provides that in proceedings against a person for such an offence it is a defence that he had a reasonable excuse for having control or managing the house in those circumstances.

14. Section 44(4) lists considerations which the tribunal must 'in particular' take into account in determining the amount of any repayment - conduct of the landlord and tenant, financial circumstances of the landlord and whether the landlord has been convicted of an offence to which that chapter of the 2016 Act applied. The use of the words 'in particular' suggests that these are not the only considerations the tribunal is to take into account.

Findings and determination

15. During the course of the hearing it was accepted as common ground between the parties that

a) the Respondent controlled and managed the Property in the period to which the Application related;
b) the Property was within the area of mandatory licensing and was required to be licensed under the scheme administered by NCC;
c) there was no licence in force for the Property between 25 January 2022 and 24 January 2023, being the date when the Applicant vacated the Property.

16. The offence under section 95(1) of having control or management of unlicensed premises, where a licence is required, is subject to a potentially relevant statutory defence of a reasonable excuse.

17. Whether an excuse is reasonable or not is an objective question for the Tribunal to decide.

18. There was no definitive evidence before the Tribunal of the date on which selective licensing became effective for the Property, but we accepted the Respondent's understanding that it began in April 2020. The Respondent stated she was unaware of the mandatory licensing requirements in place affecting the Property, she presented "*First of all, I did not have any channel to learn about this new legal requirement. Secondly, the fact of not applying for the license on time did not create any adverse consequence to the tenant – his case here is more about seeking a cash windfall.*" She denied any notification from NCC before it implemented selective licensing and stated "*Even now, the clear information about 62 Tosson Terrace being covered in the selective licensing area is only available from website:……., which is dated back to November 2021 – long after the legal requirement released in April 2020.*"

19. The Respondent indicated she owned 2 additional residential properties let out, both in NCC area, but having checked after learning about the consequences of having no licence for the Property, she understood neither required a licence.

20. She explained that "Wright Residential", whose details appear on some of the tenancy agreements, was a lettings agent, not a manager acting or advising her. She "self-managed" her lettings. She was not a member of a landlords association.

21. The Respondent produced a copy of an email to her dated 23 October 2022 from the Information Commissioner's Office regarding payment of a data protection fee regarding processing of data under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018. She explained that it was necessary because of data she held regarding her tenants and the registration had been in place since 2021.

22. At the hearing, the Respondent accepted she was at fault in failing to have a relevant licence in the period for the claim. The Tribunal found there were no reasonable grounds for the Respondent not applying in a timely manner for the licence, so as to be compliant by 25 January 2022 and while she had been alert to GDPR requirements, she had not kept abreast of all legal responsibilities. We did not accept her representation that she "*.....did not have any channel to learn about this new legal requirement"* as she provided no evidence of how she would ensure compliance with legal requirements from time to time. While we accepted no intention on her part in the omission here, we found she did not take the steps which a prudent landlord would, to ensure monitoring of legal responsibilities regarding the residential letting of the Property.

23. There was no evidence before us that any proceedings had been taken against the Respondents regarding the absence of a licence, but we found no reasonable excuse defence applied to the offence under Section 95(1).

24. Having determined that a relevant offence was committed, the Tribunal found that the requirements of section 41(1) of the Act have been met. The Tribunal finds also that the requirements of section 41(2) of the 2016 Act are met - it is common ground that the Applicant was the tenant of the Property during the entire period at issue. The Applicant was therefore entitled to make the Application.

The Tribunal is, therefore, satisfied beyond reasonable doubt that the Respondents committed the offence of a person having control of or managing a premises which is required to be licensed but is not so licensed from 25 January 2022 to 24 January 2023 (inclusive) pursuant to section 95(1) of the 2004 Act.

What is the maximum amount that the Respondent can be ordered to pay under a RRO (section 44(3) of the 2016 Act?

25. The amount that can be ordered under a RRO must relate to a period not exceeding 12 months during which the landlord was committing the offence. The Tribunal has decided that the Respondents committed the offence from the date when selective licensing became compulsory for the Property, which was some 5 months after the Applicant became her tenant and continued until 24 January 2023 when the tenant left the Property. We found that the Applicant is entitled to pursue the Application for the period 25 January 2022 to 24 January 2023.

26. The Respondent asserted and the Applicant accepted that for two months there had been a co-occupier at the Property, who paid 50% of the rent for January and February 2022. Considering the copy tenancy agreements and bank statements provided by the Applicant, the Tribunal calculated that the maximum amount of the RRO would be: £325 x 2 (January and February 2022, when the rent was £6500 per month) + £580 (the rent sum altered) x 10 months thereafter = £6,450.

What is the Amount that the Respondents should pay under a RRO?

27. In determining the amount, the Tribunal must, in particular, take into account the conduct and financial circumstances of the Respondent, whether at any time the Respondent had been convicted of a housing offence to which section 40 applies, and the conduct of the Applicant.

28. There was no evidence that the Respondent was unreasonable. While the parties each raised allegations about each other – for example, that the boiler was defective, that the Property was not adequately ventilated, causing mould to grow - on the question of whether the Property was in disrepair, or that there was tenant neglect, we found that these were not material matters relevant to affect the RRO amount. We understood that the rent was exclusive of utility charges, which the Applicants paid themselves.

29. Regarding the Respondents' finances, we had no documentary evidence, other than of the income of the rent received for the letting of the Property and related mortgage payments. In her statement of 24 November 2023 she stated *"….my husband was diagnosed with lung cancer at the beginning of Oct 2023, and he just had a major operation and in the process of recovering. However, there is uncertainty whether he can go back to work full time. Also, I have two children who are financially dependent on us. All the properties I own, including 62 Tosson Terrace, have mortgages to pay. I am currently facing enormous financial pressure and will be struggled to pay such a big amount as requested. Again, the lack of license in the unattended period did not create any adverse consequence to the tenant."*

30. We had before us no evidence of any housing-related convictions of the Respondent.

31. Ms Li made representations concerning the conduct of the Applicant. She alleged that he had failed to forward important letters, including that of 12 January 2023 from NCC and delayed access for a gas safety check for 2 months in Autumn 2022. In addition, she alleged that he had "*…failed to keep the property in an acceptable shape….",* in support of which she presented an email dated 13 March 2023 from her letting agent, recording on that issue *"The flat is not in good enough state to do further viewings. The tenant is not clean or tidy and also the bathroom is very mouldy and the tiles all need re grouting*." We found no further persuasive evidence of specific failure by the Applicant to behave in a reasonable manner – for example, there was no specific persuasive evidence connecting the Applicant to the flat needing to be cleaned, the garden needing to be cut back and the yard tidied, before re-letting. Ms Li provided invoices for certain works in connection with reletting, but from questioning of the parties at the hearing we found that repairs to a wall in the bathroom, for example, were not due to tenant default, but had existed before the letting to the Applicant. Taking a broad brush view we accepted that the Property needed cleaning after the Applicant left, but that no material costs could be taken in to account in adjusting the RRO.

32. The Tribunal found guidance on the amount of the RRO by considering the decision of the Upper Tribunal in *Mr Babu Rathinapandi Vadamalayan v Edward*

Stewart and others [2020] UKUT 0183 (LC). Judge Cooke at [11] observed that there was no requirement that a payment in favour of Tenant in respect of RRO should be reasonable, and at [12] that this meant the starting point for determining the amount of rent is the maximum rent payable for the period in question. Judge Cooke went onto say at [14] and [15] that

> "*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 the only 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 kept 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 obligation to comply with a rent repayment order".*

33. Judge Cooke concluded at [19]

> *"The only basis for deduction is section 44 itself. and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence".*

34. The 2016 Act extended the scope of rent repayments orders with an emphasis upon rogue landlords not benefiting from the letting of sub-standard accommodation and it also removed the requirement for the Tribunal to determine such amount as it considered reasonable for the eventual order.

35. The structure of the 2016 legislation requires the Tribunal to determine first the maximum amount payable under an RRO and then to decide the actual amount payable by taking into the circumstances of the case, having particular regard to the specific factors in section 44 of the 2016 Act.

36. The Tribunal also had regard to caselaw subsequent to the Vadamalayan case, Williams v Parmar [2021] UKUT 244 (LC) (confirming that it is wrong to calculate the amount of the RRO starting with the full rent claimed by the tenant) and Acheampong V

Roman and others [2022] UKUT 239 (LC), in which the Tribunal at [21] stated that the Tribunal should:

a.) Ascertain the whole of the rent for the relevant period;
b.) Subtract any element for utilities only benefitting the tenant;
c.) Consider how serious the offence was compared to other types of offence where a RRO was made and find what proportion of the rent (less deductions referred to in b.)) is a fair reflection of the seriousness of this offence;
d.) Consider any further adjustments in accordance with s. 44(4)

This approach was endorsed in Dowd v Martins and others [2022] UKUT 249 (LC).

37. In this case the Tribunal determined that the maximum amount payable by the Respondent under a RRO is £6,450, being the whole rent paid for the relevant period, exclusive of utility costs, as calculated in paragraph 31 above. The Tribunal then considered the seriousness of the offence and the matters set out in S44(4) of the 2016 Act.

38. The Tribunal considered that in comparison with the nature of all the possible offences detailed in S40(3) of the 2016 Act, the offence committed is serious, but not the most serious for which a RRO may be made. In relation to the Respondent's conduct the Tribunal found that (1) The Respondent was only moderately experienced in management of residential property; (2) The Property was unlicensed throughout the period at issue; (3) The Respondent knew or ought reasonably to have known that the Property required a licence, but did not make an application for reasons found not to amount to a reasonable excuse; (4) The Property was of a fair letting standard; (5) Apart from the failure to licence the property, the Respondent performed her duties as a landlord in a reasonable manner; (6) The Respondent was of good character and had no previous housing-related convictions known to the Tribunal; (7) The Respondent had no enforcement action taken against her by NCC in relation to the offence of having no licence.

39. Having regard to all the above, The Tribunal determined a level of one-half of the maximum amount was appropriate.

40. In respect of the matters set out in S44(4) of the 2016 Act, the Tribunal then considered whether the findings on the Respondent's conduct and financial circumstances, and the Applicant's conduct, merited an adjustment to the amount payable. In addition to the Respondent's conduct noted above, we took account of her representation, but without supporting documentary evidence, suggesting that she would experience undue financial hardship as a result of a RRO. However, the Tribunal taking all these factors into account, made no adjustment to the level of 50% of the maximum determined.

41. Furthermore, in respect of the conduct of the Applicant, there was no evidence put before the Tribunal regarding their conduct which would merit any adjustment.

42. This is not a case which justifies an award of the maximum amount. The Tribunal normally considers such an award where the evidence shows that the landlord was a rogue or criminal landlord who knowingly lets out dangerous and sub-standard accommodation. The Respondent did not meet that description. We do not find that this is a case at the upper end of the scale of the sort referred to by Judge Cooke in Vadamalyan.

43. The Respondent simply failed to licence the Property and thereby committed an offence, but did so while assisting the Applicants have accommodation during a period of in excess of 3 years.

44. Having regard to all the circumstances the Tribunal considered an order of 50% of the maximum sum is the appropriate amount, balancing the objective of a "fiercely deterrent scheme", the status of a relatively inexperienced property manager and the length of the offending against the mitigating circumstances found in favour of the Respondent.

45. The Tribunal determined that the rent repayment order should be £3,225.

46. The Applicant did not apply for reimbursement of the Application or hearing fees and the Tribunal made no order regarding those fees.

Decision

47. The Tribunal orders the Respondent to pay the Applicant the sum of £3,225 by way of a rent repayment order and makes no order as to the fees of the Application.

W L Brown
Tribunal Judge

Schedule

Housing and Planning Act 2016
Section 40

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—
(a) repay an amount of rent paid by a tenant, or (b).....

(3) A reference to "an offence to which this Chapter applies" is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

The table described in s40(3) includes at row 6 an offence contrary to s95(1) of the Housing Act 2004" control or management of unlicensed house"

Section 41
(1) A tenant.....may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
(2) A tenant may apply for a rent repayment order only if-
(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
b) the offence was committed in the period of 12 months ending with the day on which the application is made.

Section 43
(1) The First-tier Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applied (whether or not the landlord has been convicted).

Section 44
(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in the table.
The table provides that for an offence at row 6 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.

(3) The amount that the landlord may be required to pay in respect of a period must not exceed-
(a) the rent paid in respect of that period, less
(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) 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.

Section 56 confirms
“housing” means a building, or part of a building, occupied or intended to be occupied as a dwelling or as more than one dwelling;