FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/OOCJ/HMF/2021/0006**
Property	**:**	**16 Harrison Place, Sandyford , Newcastle-upon-Tyne NE2 1DE**
Applicants	**:**	**Ms Amelia Browne, Ms Aimee Liversedge, Ms Charlotte Griffiths, Ms Erika Norman, Ms Evangeline Moss & Ms Grace Walker**
Representative	**:**	**Ms Grace Walker-Lead Applicant**
Respondent	**:**	**Clarus Limited**
Representative	**:**	**Mr. Phil Ternent**
Type of Application	**:**	**Housing and Planning Act 2016-Section 41(1)**
Tribunal Members	**:**	**Tribunal Judge J.E. Oliver** **Tribunal Member S.A Kendall**
Date of Determination	**:**	**4th May 2021**
Date of Decision	**:**	**27th May 2021**

DECISION

Decision

1. The Tribunal makes a rent repayment order in respect of which the Respondent is to repay rent to each of the Applicants in the sum of £869.67.

2. The Respondent is to repay to the Applicants the Tribunal application and hearing fees in the sum of £300.

Background

3. On 15th January 2021 Amelia Browne, Aimee Liversedge, Charlotte Griffiths, Erika Norman, Evangeline Moss and Grace Walker ("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"). It was agreed that Grace Walker would be the Lead Applicant within the proceedings.

4. The application relates to 16 Harrison Place, Sandyford Newcastle-upon-Tyne ("the Property")

5. Clarus Limited ("the Respondent") is the Landlord of the Property and in the application was represented by Mr Phil Ternent, a director and shareholder of the Respondent.

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 or hearing.

7. The application was listed for a hearing on 4th May 2021. Due to the restrictions imposed by Covid-19, the hearing was by way of a video hearing.

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 is that set out in Section 72(1) of the Housing Act 2004, ("the 2004 Act") namely, 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, in order to make the RRO, 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 **Parker v Waller & Others [2012] UKUT 301 (LC)**, the Upper Tribunal determined there was no presumption that the RRO should be the total amount of rent received by the landlord during the relevant period; the Tribunal should consider what might be reasonable. It followed from this, certain items, such as mortgage payments, utilities, costs of repairs and any fines imposed could be deducted from the RRO.

15. This decision was overturned in **Vandamalayan v Stewart & Others [2020] UKUT 0183 (LC)** where it was determined that in neither section 44 or 45 of the 2016 Act are there any provision for reasonableness and consequently, expenses incurred by the landlord should not be deducted from the RRO. The exception to this is utilities paid by the landlord. Judge Cook said:

"*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 Ms Grace Walker was the Lead Applicant for the Applicants and spoke on their behalf. Mr Ternent appeared on behalf of the Respondent. Neither party was represented.

19. At the outset it was agreed between the parties the Property was a HMO, being a property on three floors and occupied by six students. The HMO licence had expired on 17th July 2020 and the Respondent had reapplied for the licence on 12th November 2020.

20. The tenancy had commenced on 2nd July 2020 and was for a period of 12 months, expiring on 1st July 2021. The rent for the Property was in the total sum of £31200 per annum. The tenancy agreement stated the rent was £100 per week plus £14 per week for utilities, in the total sum f £2694.00 per month. The first month's rent was payable upon the signing of the tenancy agreement and the remainder by three equal payments due in September 20, January and April 2021.

21. In their written submissions to the Tribunal the Applicants sought a repayment of £1824 per Applicant. At the hearing the Applicants confirmed they also sought the repayment of their fees to the Tribunal of £300. Mr Ternent confirmed he agreed to the repayment of the fees but disputed the amount of rent claimed.

22. The Applicants submitted the Respondent was a professional landlord and should have known the HMO licence had expired. They were aware Mr Ternent had failed to licence other properties. The Applicants produced a copy of the unaudited accounts for the Respondent showing assets of the company valued at £1,005,242. It was therefore argued it could afford to repay the rent claimed.

23. The Applicants confirmed the Respondent was a good landlord and responded to their enquiries promptly. There was a WhatsApp group for the tenants, Mr Ternent and his handyman, Paul. Paul had been added to the group to ensure he could also be contacted should any repairs be required. There had been an incident where Charlotte Griffiths' foot had gone through the floor and whilst it had been repaired there were concerns this repair was inadequate. Consequently the Applicants were not using one of the doors into the kitchen. Mr Ternent stated he was unaware of this but advised would investigate the matter further.

24. The Applicants also referred to an issue with the central heating and that due to the age of Property the system needs draining annually. Charlotte Griffiths referred to an incident with the boiler but accepted this was dealt with promptly when it was found the air pump had failed.

25. The Applicants advised they had been notified by Mr McFall of Newcastle City Council the Property was unlicensed between 17th July and 12th November 2020 and that they could apply for a RRO. They had approached Mr Ternent to try and resolve the matter without issuing proceedings but found him to be aggressive. They said he had threatened to cancel the new tenancy to be taken out by three of the Applicants for the following academic year. This was followed by an offer to continue the tenancy for the next year but at half the rent. This was not acceptable to the other three tenants who would be leaving and would not benefit from this arrangement.

26. Mr Ternent made lengthy written submissions to the Tribunal, confirmed in oral evidence. He advised he, together with others, owned 13 HMO properties, either personally or through Clarus Ltd. He had been such a landlord since 2002, but only on a part time basis, having other businesses that occupied him on a day- to-day basis.

27. Mr Ternent explained that since the requirements of the HMO legislation, he had obtained the necessary licences for all the properties, but in 2020 had failed to licence four properties. He was now facing the RRO for the Property and one more. It had been customary for Newcastle City Council to issue reminders when HMO licences were due for renewal and it had done this since 2008. However, in 2020 no reminders were issued, despite the Council giving no warning of their intentions to change their systems regarding this. Mr Ternent confirmed he had no internal system for the renewal of the licences but relied entirely upon the Council's reminders. He likened it to the reminders sent for car insurance.

28. Mr Ternent received a warning letter regarding the licence for the Property whilst away on holiday, but after his return on 8th November 2020, he contacted Mr McFall of the HMO team at Newcastle City Council who confirmed the Council would not take any enforcement action. The HMO application for the Property was submitted on 12th November 2020.

29. Mr Ternent contacted Mr McFall on 12th January 2021 regarding the licence, having heard nothing in respect of his application and to clarify the licence would run from the expiry date, 16th July 2020. At this point Mr McFall advised it would not, but would run from the application date, 12th November 2020. He further advised the application had been made in the wrong form. Mr Ternent had applied for a renewal but because the licence had expired an application for a new licence would be required, at an additional cost. Accordingly, a new application was made on 14th January 2021. Despite this, Gwen Smith of Newcastle City Council confirmed, in a letter addressed to Mr Ternent dated 8th March 2021, the licence application had been made on 12th November 2020.

30. Mr Ternent argued Newcastle City Council had not behaved appropriately in their dealings regarding the licence. He had made enquiries with several other Councils through FOI requests all of whom confirmed their policy was to issue reminders for HMO licences. He accepted the Council had no legal obligation to provide reminders but had done so for at least 10 years and submitted they should not have changed their procedures without notification. He was aware

of several other landlords within the City who had were experiencing the same problems.

31. The Tribunal was provided with copy e-mails and correspondence between Mr Ternent and both Mr McFall and his manager Gwen Smith. In that correspondence Gwen Smith advised she was unable to confirm when the Council had changed their policy regarding the issue of reminders; it was the decision of a previous manager. However, in an e-mail dated 28th January 2021, she stated the Respondent had applied for a licence "*once you were notified that your licence had expired.*" Further, it was said "*I will however be able to advise you that in previous years we did provide landlords with a reminder letter and as such you would reasonably have been under the presumption that a reminder letter would have been sent in this instance*".

32. Mr Ternent submitted the Respondent was a good landlord; it promptly dealt with any issues relating to the Property.

33. In referring to the Applicants' allegations regarding his behaviour when he became aware of the RRO, Mr Ternent accepted he was upset because, at that stage, having undertaken some enquiries, believed he could be liable for criminal prosecution, a fine, legal fees, all in addition to the RRO. This was, potentially for four properties. He challenged that he had shouted or been aggressive but apologised if he had caused any stress. He had been unaware that some of the Applicants were taking exams at the time.

34. Mr Ternent confirmed that he would ask the Tribunal to deduct the expenses incurred by him for services provided for electricity, gas, TV licence, water rates and internet payments. This was in the sum of £833.26 for the period from 17th July to 12th November 2020. The Applicants confirmed this sum was agreed. Mr Ternent referred the Tribunal to **Parker v Waller & Others** but advised he did not seek to claim any other expenses for the relevant period.

Determination

35. The Tribunal finds that for the period 17th July to 12th November 2020 the Property did not have the required HMO. There is no dispute between the parties the Property is a HMO and the previous licence expired on 16th July 2020. The Tribunal is therefore satisfied beyond reasonable doubt the Respondent has committed the offence of being in control or management of an unlicensed HMO as set out in section 72(1) of the 2004 Act and as provided for in section 44 of the 2016 Act. Consequently, the Tribunal finds the Applicants are entitled to apply for a RRO as provided for by section 43 of the 2016 Act. The application was made within 12 months of the offence having been committed, the application having been made on 15th January 2021.

36. The amount of rent claimed by the Applicants, in the total sum of £10944, was not disputed by the Respondent, nor the amount claimed by it for services supplied in the sum of £833.26.

37. The Tribunal, when making the RRO must consider the matters referred to in section 44(4) of the Act, as referred to in paragraph 16 above.

38. The Tribunal heard evidence from both parties the Respondent is a good landlord and the Property is maintained in good condition. Whilst the Applicants raised an issue regarding the kitchen floor, the Tribunal accepted this was a matter Mr Ternent said would be investigated and was not one that prevented the Property being in an overall good condition.

39. The Tribunal noted from the financial information provided the Respondent had assets that would enable it to satisfy the RRO as claimed by the Applicants. Mr Ternent had not argued the Respondent would be unable to satisfy the RRO.

40. The Tribunal also noted the Respondent had not been convicted of any offence. Indeed, Mr McFall had confirmed to Mr Ternent that no enforcement action would be taken by the Council.

41. The Tribunal noted the circumstances surrounding the Respondent's failure to reapply for the HMO and determined, here, the Respondent did have a reasonable excuse with regards to its conduct. The Tribunal accepted the Respondent is a professional landlord; Mr Ternent and others have several properties and it could be expected that there would be an internal system for checking the renewal dates for licences. Despite this, Mr Ternent had relied upon Newcastle City Council issuing reminders for licence renewals for at least 10 years and that had stopped without any prior notice being given. The Council had accepted this was the case. The Respondent's failure to apply for a licence was an administrative error for which it should bear some responsibility; it is a professional landlord. However, some responsibility should also fall upon the Council who, whilst having no requirement to issue any reminders in respect of the licence renewal, should not have changed an established protocol without giving notice of its intention to do so.

42. The Tribunal noted the Respondent had no previous history of failing to licence its properties, the four incidents referred to by Mr Ternent arising in the same circumstances. The Tribunal did not consider this to be a situation where the RRO was in the same category as a landlord with a history of bad management, previous failures to apply for a HMO licence, nor one owning a property in a less than satisfactory state of repair. The Tribunal also took note the Council had not taken any enforcement proceedings.

43. The Tribunal considered the representations made by the Respondent regarding the cost of services provided to the Applicants during the claim period and determined the agreed amount of £833.26 would be deducted from the RRO. It further determined that whilst no other expenditure had been claimed by the Respondent., it would not be appropriate for anything further to be deducted, in any event, following the decision in **Vandamalayan v Stewart & Others.**

44. In considering all the factors referred to above and that no representations had been made to suggest the Tribunal should take the Applicants' conduct into account, the Tribunal determined the RRO should be reduced by 40% of the amount claimed, less the sum of £833.26 agreed for services. The Property was unlicensed for a period of 118 days and, at an annual rent of £31200, equates to a daily rate of £85.84. This totals £10086.84 for the period of claim. Once the reduction of 40% is made together with the deduction of £833.94 for services, the amount repayable is in the sum of £5218.05. Accordingly, the Respondent is to pay to each of the Applicants the sum of £869.67.

45. The Respondent is also to repay to the Applicants the sum of £300 being the application and hearing fees paid to the Tribunal.

J.E. Oliver
Tribunal Judge
27th May 2021