



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case Reference : **MAN/OOCJ/HMF/2021/0002**

Property : **9 Gladstone Terrace, Sandyford Newcastle-upon-Tyne NE2 1AY**

Applicants : **Ms Caitlin Wilcox, Ms Lucie Draper,
Ms Lucy Gun, Ms Imogen Bosanko,
Ms Lucy Stout and Ms Alexandra Potts**

Representative : **Ms Caitlin Wilcox - Lead Applicant**

Respondent : **P & K Ternent Property**
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 : **6th May 2021**

Date of Decision : **27th May 2021**

DECISION

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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 £939.34. One of the five payments is to be divided; a payment of £612.96 is to be made to Lucy Stout for the period 17th July 2020 to 1st October 2020 and the sum of £326.38 to Alexandra Potts for the period 2nd October 2020 to 12th November 2020.
2. The Respondent is to repay to the Applicants the Tribunal application and hearing fees in the sum of £300.

Background

3. On 29th December 2020 Caitlin Wilcox, Lucy Gun, Lucie Draper, Alexandra Potts, Imogen Bosanko and Lucy Stout (“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 Caitlin Wilcox would be the Lead Applicant within the proceedings.
4. The application relates to 9 Gladstone Terrace, Sandyford Newcastle-upon-Tyne (“the Property”).
5. P & K Ternent Property is the Landlord of the Property and in the application was represented by Mr Phil Ternent, one of the owners of the Property.
6. On 28th January 2021 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 6th 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. Ms Caitlin Wilcox, Lead Applicant, Lucy Gun and Lucie Draper attended on behalf of the Applicants. Mr Ternent appeared on behalf of the Respondent. Neither party was represented.
19. It was agreed between the parties the Property was a HMO, being a property on three floors and occupied by five students. The HMO licence had expired on 17th July 2020 and the Respondent had reapplied for the licence on 12th November 2020. There was an issue between the parties regarding the date of the licence application, the Applicants stating this to be 14th January 2021.
20. The tenancy commenced on 1st July 2020 and was for a period of 12 months, expiring on 30th June 2021. The rent for the Property was in the total sum of £27300 per annum. The tenancy agreement stated the rent was £91 per person per week plus £14 per week for utilities, in the total sum of £2275.00 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. Lucy Stout was a party to the original tenancy agreement but, with effect from 2nd October 2020, was replaced as a tenant of the Property by Alexandra Potts.
21. In their original application to the Tribunal the Applicants sought a repayment of £1770 per Applicant being the rent paid for the period 17th July to 12th November 2020. However, in later submissions the Applicants argued the Respondent had not reapplied for the HMO licence until 14th January 2021 and consequently the RRO was for a greater amount. 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. In his written submissions to the tribunal Mr Ternent confirmed he had received cautionary letters regarding this failure to apply for HMO licences for two other properties on 23rd October 2020, prior to the later one received for the Property. The Applicants submitted a diligent landlord would have then checked his records, when receiving those letters, to ensure no other licences had expired.
23. The Applicants confirmed the Respondent was a good landlord and responded to their enquiries promptly. There were some issues with the Property but confirmed they were, mainly, fixed promptly. The Applicants, Respondent and the Respondent's handyman Paul had a WhatsApp group where issues relating to the Property could be shared. They referred to a leak in Caitlin Wilcox's bedroom that had been repaired with a plastic sheet and that remained in place. Mr Ternent confirmed Paul repaired the leak that had occurred in snowy weather but had been unable to find its source. There had

been no further report of any leaks. The Applicants also referred to issues with the central heating, alarm and Wi-Fi. The problem with the Wi-Fi required the router to be moved. Mr Ternent confirmed he had paid the cost of this at £180. They had been difficulty resolving the issues with the supplier Virgin, but that was caused by the company being unwilling to talk to the Applicants because the account was in the Respondent's name. In turn, Mr Ternent confirmed he had authorised Virgin to talk with the tenants. There had also been an issue with wasps that had been dealt with, but Mr Ternent submitted that was an issue that could occur yearly and over which he had no control.

24. The Applicants referred to an issue with the central heating that had occurred on a Sunday. Mr Ternent confirmed he could not get a plumber to go out to do the repair on Sunday but it had been dealt with on the following day.
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. Mr McFall had provided them with the necessary links to make the current application and had been confident in their ability to pursue the claim.
26. The Applicants submitted that although the Respondent had stated the licence application had been made on 12th November 2020, they had been informed by Mr McFall the actual application date was 14th January 2021. This was because the original application was wrong, being a renewal whilst an application for a new licence was required. The new application had been made on the later date.
27. 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 a landlord since 2002, but only on a part time basis, having other businesses that occupied him on a day- to-day basis.
28. 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.
29. 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.

30. 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.
31. 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.
32. 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*".
33. Mr Ternent submitted the Respondent was a good landlord; it promptly dealt with any issues relating to the Property.
34. Mr Ternent confirmed that he would ask the Tribunal to deduct the expenses incurred by the Respondent for services provided for electricity, gas, TV licence, water rates and internet payments. This was in the sum of £598.40 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 considered the submissions made regarding the date of the licence application and that this should be 14th January 2021, rather than

the 12th November 2020. Here, the Tribunal determines the date of the licence application was 12th November 2020. This is for two reasons. Firstly, the Respondent made the application on 12th November 2020. It was made in good faith and had Mr Ternent not chased the Council about the application on 12th January 2021, it is unclear how long it would have been before the mistake came to light. It therefore follows that had it been found at a later date, which appears likely had Mr Ternent not made his own enquiries the Respondent would have been liable for an increased RRO, being over a longer period of time. The Tribunal considers this would be an unfair outcome. It would have been reasonable for the Respondent to expect that, had it made the wrong application, it would have been notified of this within a short time of the application being made. The second reason is that the Council acknowledged the application was made on 12th November 2020. This is evidenced in the letter sent by Gwen Smith to Mr Ternent on 8th March 2021.

36. The Tribunal is 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 for the period 17th July to 12th November 2020. The application was made within 12 months of the offence having been committed, the application having been made on 15th January 2021.
37. The amount of rent claimed by the Applicants, in the total sum of £8850, was not disputed by the Respondent, nor the amount claimed by it for services supplied in the sum of £598.40.
38. 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.
39. 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 issues regarding repairs, it was accepted the repairs were dealt with within a practicable period of time and the Applicants acknowledged the Respondent to be a good landlord.
40. The Respondent had not made any submissions to indicate it was not able to pay any RRO awarded by the Tribunal.
41. The Tribunal further 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.
42. 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.

43. 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 Respondent 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.
44. The Tribunal considered the representations made regarding the cost of services provided to the Applicants during the claim period and determined the agreed amount of £598.40 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.**
45. 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 £598.40 agreed for services. The Property was unlicensed for a period of 118 days and, at an annual rent of £27300, equates to a daily rate of £74.79. This totals £8825.22 for the period of claim. Once the reduction of 40% is made together with the deduction of £598.40 for services, the amount repayable is in the sum of £4696.73. Accordingly, the Respondent is to pay to each of the Applicants the sum of £939.34. In respect of the apportionment between Ms Lucy Stout and Ms Alexandra Potts, the sum of £612.96 is payable to the former and £326.38 to the latter.
46. 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