



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

Case Reference : **BIR/OOFY/HMJ/2021/0010**

Subject Property : **16 Conisborough Terrace,
Nottingham, NG2 2PF**

Applicant : **Ms L Curt**

Representative : **None**

Respondents : **Mr D Payne & Mr R Payne**

Representative : **None**

Type of Application : **Application under sections 40, 41(1), 43 &
44 of the Housing and Planning Act 2016 for a
Rent Repayment Order**

Tribunal Members : **Judge C Payne (Chairman)
Mr R Chumley-Roberts MCIEH, J.P
Judge C Goodall**

**Date and Place
of Hearing** : **28th March 2022 by Video Hearing**

Date of Decision : **28th June 2022**

DECISION

INTRODUCTION

1. This is a decision on an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 ('the 2016 Act').
2. Under section 80 of the Housing Act 2004 ('the 2004 Act'), Local Housing Authorities can introduce a Selective Licensing Scheme covering some or all of its area, whereby any rented dwelling will need to be licenced. Originally local housing authorities were permitted to designate areas within their district as subject to selective licensing for up to 5 years. Nottingham City Council introduced such a scheme on 1 August 2018 and, based on the evidence submitted with the Application, the Tribunal understands that this includes the area in which 16 Conisborough Terrace, Nottingham, NG2 2PF ('the subject property'), is located.
3. Section 95(1) of the 2004 Act provides that a person having control of or managing a house which is required to be licensed under this part (see Section 85(1)) but is not so licensed commits an offence.
4. The criminal sanction for failing to obtain a licence is supplemented by the scheme of civil penalties known as rent repayment orders. Under section 96 of the 2004 Act, where a person who controls or manages an unlicensed property in an area designated for selective licensing has been convicted of this offence, the occupiers (or former occupiers) of the unlicensed property may apply to the First-tier Tribunal for a Rent Repayment Order. A Local Housing Authority may also apply to the First-tier Tribunal for a Rent Repayment Order in respect of any housing benefit paid.
5. However, from 6 April 2017, subject to transitional provisions, the 2016 Act has amended the provisions relating to rent repayment orders in England. Under section 41 (1) and section 43 of the 2016 Act the First-tier Tribunal may make a rent repayment order in favour of the occupiers (or former occupiers), or the Local Housing authority if it is satisfied beyond reasonable doubt that the landlord has committed an offence under section 95(1) of the 2004 Act, *whether or not the landlord has been convicted*.

BACKGROUND

6. The Applicant in this case is the tenant of the subject property.
7. The Respondents are the landlords of the subject property.
8. The Application was dated 9 November 2021 and was received by the Tribunal on 18 November 2021. The Applicant applied for a rent repayment order under section 41 of the 2016 Act on the basis that until 28 October 2021 (being the date of submission of an application for a licence by the Respondents), an offence was being committed under section 95 of the 2004 Act.
9. Directions were issued on 19 November 2021, following which both parties provided submissions, which were copied to each other in accordance with those directions.
10. The Assured Shorthold Tenancy Agreement provided to the Tribunal is dated 1 February 2019 for a period of six months from that date and expiring on 31 August 2019 at a rental

of £510.00 per calendar month. This tenancy was a renewal of a tenancy dated 1 February 2003 to the Applicant at the same rent. Payments were made in arrears towards the end of the month. The parties agreed that the tenant is holding over on a periodic basis under this Tenancy Agreement. The parties also agreed that prior to the current tenancy another tenancy on the same terms had been in place from 1 February 2003.

11. The parties agree that the Applicant is still a tenant at the property and that the rent remains at £510.00 per calendar month. It was also agreed that the rent does not include any other outgoings for other services such as gas, electricity or council tax. No deposit was paid.
12. An application for a licence was submitted to the local authority on 28 October 2021. The Application infers that the Applicant is seeking a rent repayment of £6,120 for the period of 28 October 2020 – 27 October 2021. The Tribunal calculates this period to be twelve months.

THE LAW

13. The relevant provisions of the 2004 Act, so far as this application is concerned are as follows-

79 Licensing of houses to which this Part applies

- (1) This Part provides for houses to be licensed by local housing authorities where—
 - (a) they are houses to which this Part applies (see subsection (2)), and
 - (b) they are required to be licensed under this Part (see section 85(1)).
- (2) This Part applies to a house if—
 - (a) it is in an area that is for the time being designated under section 80 as subject to selective licensing, and
 - (b) the whole of it is occupied either—
 - (i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4)...

85 Requirement for Part 3 houses to be licensed

- (1) Every Part 3 house must be licensed under this Part unless—
 - (a) it is an HMO to which Part 2 applies (see section 55(2)), or
 - (b) a temporary exemption notice is in force in relation to it under section 86, or...
 - (c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.

95 Offences in relation to licensing of houses under this Part

(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.

(2) A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and

(b) he fails to comply with any condition of the licence.

(3) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1) or 86(1), or

(b) an application for a licence had been duly made in respect of the house under section 87,

and that notification or application was still effective (see subsection (7)).

(4) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for failing to comply with the condition,

as the case may be.

14. The relevant provisions of the 2016 Act, so far as this application is concerned, are as follows –

40 Introduction and key definitions

(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 ...

(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.

	Act	Section	General description of offence
6	Housing Act 2004	Section 95(1)	control or management of unlicensed house

41 Application for rent repayment order

(1) A tenant or a local housing authority 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.

43 Making of rent repayment order

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

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with—

(a) section 44 (where the application is made by a tenant); ...

44 Amount of order: tenants

(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.

an offence mentioned in row 3, 4, 5,	a period, not exceeding 12 months,
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6 or 7 of the table in section 40(3)	during which the landlord was committing the offence
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(3) The amount that the landlord may be required to repay 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.

51 Housing benefit: inclusion pending abolition

(1) In this Chapter a reference to universal credit or a relevant award of universal credit includes housing benefit under Part 7 of the Social Security Contributions and Benefits Act 1992.

THE SUBMISSIONS

15. The submissions made by both parties in writing and at the hearing on 28 March 2022 are summarised as follows:

The Applicants Submissions

16. The Applicant submitted that for the period from 28 October 2020 – 27 October 2021 the subject property was not licensed.

17. The Respondents had provided a Schedule of payments showing arrears going back to 2017 and arrears of £5,145 as at the 28 October 2021. The Applicant accepted the majority of that document as an accurate record of payments made, save that she said she had made payments of the full £510 in March 2017, October 2017, February 2018, April 2019, November 2020 and September 2021, so the arrears were, in her view, overstated.

18. At the hearing the Applicant stated that the first 4 of these payments were made in cash and that there was no evidence available of the payments being made. She stated that she would take cash out in varying amounts and use some of it to pay towards rent. As such, the withdrawals would not show clearly what was rent or other expenses.

19. The Applicant stated that the November 2020 payment was made in full via bank transfer and confirmed that from February 2019 onwards payments were made by bank

transfer. She did not have a copy of her bank statement to hand, as they were deposited with the law centre advisor who had been assisting her, but that she could make that statement available within the next week. On inspection of the updated Schedule of Payments presented with the Respondent's bundle, the Applicant noted that the September 2021 payment had been accounted for by the Respondents.

20. The Applicant was directed to provide the bank statement showing the November 2020 payment within 7 days of the hearing. The Applicant emailed the Tribunal on 1 April 2022 stating, 'I'm unable to get a bank statement for this November 2020 as I believe it was made in cash as I didn't start paying through the bank until Dec 2020/Jan 2021'.
21. The Applicant provided a Statement of Housing Benefit Receipts showing the total Housing Benefit received towards the rent from 28 October 2020 - 27 October 2021 was £1,613.67.
22. The Applicant acknowledged that a notice under Section 8 of Housing Act 1988 had been served on her on the basis of the significant arrears, a possession claim had been issued and was due to be heard imminently. She asserted verbally at the hearing that there were various wants of repair at the property. However, the repairs were not particularised in her submissions, no evidence was provided to support the assertions.

The Respondent's Submissions

23. The Respondents rent out 3 properties in the local authority area, which they manage personally. One property is let to a family member and the other two are let for profit to provide income to the Respondents.
24. The Respondents received notification from the local authority that licenses were required in respect of the two let for profit properties in March 2020. The Respondents confirmed that they understood at that time that a licence was required and that it was a criminal offence not to have one.
25. At that time gas and electrical safety certificates were required for the properties and, due to the Pandemic, there was a delay in obtaining them. The certificates were obtained in August 2021. The explanation for the delay up to August 2021 was that the Pandemic had made it difficult to arrange for the property to be inspected. The application for the licence for both properties was then not made until October 2021. No explanation was provided to the Tribunal for this further delay.
26. The Respondents provided a copy of a Notice from Nottingham City Council stating they accepted the application for a Selective Licence on 28 October 2021. Therefore, the relevant period is 29 October 2020 – 28 October 2021.
27. The Respondents admit that they were letting properties without the appropriate licences in place for a significant period of time.
28. The Respondents provided a Schedule of payments showing arrears going back to 2017. The Tribunal were advised by Mrs Payne that she would collect rent from the Applicant on an ad-hoc basis and then record the collection in a note book. Payments up until 2019 were made in cash. The cash was not paid into any account. It was used for household expenses by the Respondents, with the note books being the only record. From the

renewal of the Assured Shorthold Tenancy with the Applicant in February 2019 onwards, the Respondents position was that payments were made by bank transfer.

29. In 2019 the historical notebooks were lost in a flood. The Respondents have a notebook from 2019 onwards but a copy of the relevant page was not provided to the Tribunal. The Respondents confirmed they had transcribed the details from the notebook into the Schedule of Payments presented to the Tribunal. It is the Respondents position that, as at the 28 October 2021, the Applicant had accrued arrears of £5,145.
30. The Respondents confirmed that all payments received between 29 October 2020 – 28 October 2021 were applied to arrears first.
31. Further to the Applicant failing to provide the copy of her bank statement on 1 April 2021, in response, the Respondents provided redacted copies of their bank statements. They were not directed to do so, and the Tribunal decided it should not consider this evidence as the Applicant did not have an opportunity to challenge it.
32. The Respondents advised the Tribunal that they have modest savings, which the majority of their retirement investment being in the properties they own. As well as the income from the Properties, they also receive income from Mr Payne's salary. They confirmed that, if an order were made, they would be able to pay it without it causing significant financial difficulties.
33. The Respondents submitted that they had been reasonable and patient with the tenant, allowing flexible payments to be made historically. In addition to the substantial rent arrears, they asserted that the Applicant had made gaining access to the property difficult and caused the property to become damp by storing mattresses up against an external wall. The Respondents denied that the property was in disrepair. No evidence to support these points was provided to the Tribunal by the Respondents. They asked the Tribunal to note that they had not been convicted of any offence previously.

DETERMINATION OF THE TRIBUNAL

34. The Tribunal considered the application in four stages –
 - 34.1. Whether the Tribunal was satisfied beyond reasonable doubt that the Respondents had committed an offence under section 95(1) of the 2004 Act in that at the relevant time they were the persons who controlled or managed a property that was required to be licensed but was not so licensed.
 - 34.2. Whether the Applicant was entitled to apply to the Tribunal for a rent repayment order.
 - 34.3. Whether the Tribunal should exercise its discretion to make a rent repayment order.
 - 34.4. Determination of the amount of any order.

Offence under section 95(1) of the 2004 Act

35. The Respondents acknowledged that throughout the period from 29 October 2020 – 28

October 2021 the subject property was subject to Selective Licensing, and:

- 35.1. The subject property was not licensed.
- 35.2. The Respondents were the persons having control and/or managing the subject property.
36. The Respondents acknowledged that they were aware from March 2020, when the local authority wrote to them, that the subject property required a licence and that it was a criminal offence not to obtain one. While a short delay in providing safety certificates may have occurred initially due to the Pandemic, it was perfectly possible to arrange such inspections over the summer of 2020 and to have made an application for a licence before October 2020. No reasonable explanation was provided to the Tribunal of why it took until August 2021 for them to obtain gas and electrical safety certificates for their properties or why there was then a further delay before an application was made. As such, the Tribunal finds that the Respondents were letting the subject property from 29 October 2020 – 28 October 2021 without a licence, during which time they knew that they should have a licence and that it was an offence not to have one. In our view, the Respondents did not have a reasonable excuse for failure to licence the subject property by 28 October 2020.
37. Further, the Respondents own two other properties that they rent out or could rent out. They should be keeping up to date with the requirements regarding the letting of those properties, which includes ensuring they have the appropriate licences in place and that the safety certificates for each property are in place and up to date. A landlord would also be expected to keep comprehensive records of the sums being received in respect of the letting of their properties. Where landlords feel unable to undertake the necessary steps to ensure they are compliant in what is a heavily regulated industry, it is open to them to appoint professional agents to assist them in the proper management of their portfolio.
38. In conclusion, in accordance with sections 43(1) of the 2016 Act, the Tribunal was satisfied beyond reasonable doubt that the Respondents, as landlords of the subject property, had committed an offence listed in section 40 of the 2016 Act, namely an offence under section 95(1) of the 2004 Act.

Entitlement of the Applicant to apply for a Rent Repayment Order

39. The Tribunal determined that the Applicant was entitled to apply for a rent repayment order pursuant to section 41(1) of the 2016 Act. In accordance with section 41(2), from 1 August 2018, the Respondent was committing the relevant offence throughout the relevant period when the subject property was let; and the offence was committed in the period of 12 months ending with the day on which the Applicant served notice on the Respondent under Section 42 of the 2016 Act (9 November 2021).
40. The Tribunal considered that there were no circumstances where it would be inappropriate to make a Rent Repayment Order in this case.

Amount of the Rent Repayment Order

41. In accordance with section 44 of the 2016 Act, first, the amount of an order must relate to rent paid in a period, not exceeding 12 months during which the landlord was

committing an offence under section 95(1) of the 2004 Act.

42. The Tribunal then considered how much rent had been paid during the relevant period. The rent under the tenancy agreement was £6,120 (12 x £510). However, rent was not paid in full by the Applicant. The Schedule presented by the Respondent sets out that payments of £5,400 (nine payments of £510, one payment of £610 and one payment of £200) were received during the relevant period but also that there were arrears of £4,425 at the start of that period.
43. Given the limited evidence provided by both parties, it is impossible to ascertain with certainty what payments were made. The Schedule produced by the Respondents was accepted by the Applicant as an accurate reflection of payments save that she asserted that payments of £510 were also made for in March 2017, October 2017, February 2018, April 2019 and November 2020, with a further payment of £510 in September 2021. During the hearing it was established that the payment for September 2021 had been included in the Respondent's Schedule with a typographical error suggesting it was paid on 27 August 2021, rather than 27 September 2021. Her case was therefore that the arrears were overstated by £2,550.
44. The burden is on the Applicant to prove what rent was paid during the relevant period. Given the fact that varying amounts of cash were paid ad-hoc by the Applicant to the Respondent prior to 2019, without any proper records being kept, the only evidence before the Tribunal was that the Applicant said she had made those payments and the Respondents said she had not.
45. In respect of the November 2020 payment, the Applicant gave clear evidence at the hearing that payment had been made by bank transfer from the point the renewal tenancy agreement was put in place in February 2019 and that she had paid the November 2020 payment via bank transfer. When asked to substantiate this evidence, the Applicant was unable to provide the bank statement showing this payment had been made and stated that she was mistaken and had not made payment by bank transfer until at least December 2020.
46. The Tribunal notes the following points:
 - 46.1. The Applicant had been mistaken about the payment in November 2020;
 - 46.2. The Applicant was unable to provide any proof of payments being made in March 2017, October 2017, February 2018 and April 2019; and
 - 46.3. The Applicant accepted the remainder of the Schedule of Payments presented by the Respondents as being accurate, which included an acceptance of other significant arrears.

Taking those points into consideration, the Applicant was unable to persuade the Tribunal, on the balance of probabilities, that the disputed payments were made in March 2017, October 2017, February 2018 and April 2019.

47. Therefore, the Tribunal finds that the total payments made in the relevant period by the Applicant are £5,400 and that arrears of £5,145 were owed at the end of that period. The

Respondents being entitled to apply payments received to the arrears first, the Tribunal finds that the total paid by the applicant towards the rent due in the relevant period is £255.

48. The Tribunal must then consider that housing benefit must be deducted from the amount that the landlord may be required to pay by way of Rent Repayment. The Applicant provided a schedule of Housing Benefit payments, which showed that she received Housing Benefit between 28 October 2020 – 27 October 2021 in the sum of £1,613.67.

49. Therefore, the maximum that the Tribunal might award in these circumstances is:

Rent:	£5,400.00
Less Arrears to 28 October 2021 of	<u>£5,145.00</u>
Total	£255.00
Less Housing Benefit of	<u>£1,613.67</u>
Total: -	(£1,358.67)
Total Award Available:	£0

50. Normally the Tribunal would, when determining the amount of any rent repayment order, take into account the conduct of the parties, the financial circumstances of the landlord and whether the landlord has been convicted of any of the offences listed in section 40 of the 2016 Act (section 43(4) 2016 Act). However, given that the total award the Tribunal would be able to make was £0, further consideration was not required on this occasion. However, if the Tribunal is wrong to deduct historical arrears from the rent actually paid in the relevant period, we would have determined that the conduct of the Applicant in accumulating such substantial rent arrears was conduct that we would have taken into account. We would have reduced the amount of any Rent Repayment Order to nil as a result of this conduct as we take the view that it would be wrong to order repayment of rent that has not in fact been paid.

Discretion to make a Rent Repayment Order

51. Had the total award available been more than £0, the Tribunal would have made a Rent Repayment Order with a reduction to take into account the Respondent's circumstances, in particular that they have not previously been convicted.

DECISION

The Tribunal finds that;

1. The Respondents committed an offence under section 95(1) of the 2004 Act in that at the relevant time they were the persons who controlled or managed a property that was required to be licensed but was not so licensed.
2. The Applicant was entitled to make an application for a Rent Repayment Order.
3. No Rent Repayment Order is made, the maximum amount the Tribunal being able to order being £0, as a result of the deduction of the Applicant's arrears and the Housing Benefit payments being taken into account.

APPEAL

Any appeal against this Decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal an aggrieved party must apply in writing to the First-tier Tribunal for permission to appeal within 28 days of the date of this Decision specified above stating the grounds on which that party intends to rely in the appeal.

Judge C Payne
Chairman
First-tier Tribunal (Property Chamber) (Residential Property)