FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/44UD/HMK/2020/0020**
Property	**:**	**157 Murray Road, Rugby, CV21 3JR**
Applicant	**:**	**Gabrielle Vella**
Respondents	**:**	**(1) Guy Rendall** **(2) Newman Property Services Limited** **(3) Dawn Ernestine Rendall**
Type of application	**:**	**An application for a Rent Repayment Order under section 41 of the Housing and Planning Act 2016.**
Tribunal members	**:**	**V Ward BSc Hons FRICS** **Judge M Gandham** **R Chumley - Roberts MCIEH, J.P**
Date of Decision	**:**	**4 November 2021**
Date Decision Issued	**:**	**5 November 2021**

DECISION

Decision

1) The Respondent, Dawn Ernestine Rendall is to repay to the Applicant the sum of £1,527.68 (One thousand, five hundred and twenty seven pounds, sixty eight pence).

Reasons for Decision

Background

2) By an application dated 6 May 2020, the Applicant, Gabrielle Vella, sought a Rent Repayment Order (RRO) for the period 1 July 2018 to 7 June 2019 when she occupied 157 Murray Road, Rugby CV21 3JR ("the Property"), as she submitted that the Landlord had committed an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act") for having control of or managing a House in Multiple Occupation (HMO) which was required to be licensed, but was not so licensed.

3) Section 41(1) of the Housing and Planning Act 2016 ("the 2016 Act") provides that a tenant or former tenant of a property where the Landlord has committed an offence under section 72(1) of the Housing Act 2004 may apply for a Rent Repayment Order whether or not the landlord has been convicted of that offence.

4) The application was originally determined by this (the First-tier) tribunal by a decision dated 21 August 2020 but the decision was successfully appealed to the Upper Tribunal who, on 17 Feb 2021, ordered that the original decision be set aside and the application be reheard with an oral hearing.

5) The matter was first reheard at a hearing on 26 April 2021. From the evidence presented, it became apparent that the owner of the Property, and the recipient of the rent during the period for which the Applicant sought an Order, was Dawn Ernestine Rendall.

6) By a Directions Order dated 5 May 2021, the Tribunal asked the Applicant to confirm whether she required the Tribunal to make a direction, to amend the respondents named in the application.

7) On 14 May 2021, the Tribunal received a submission from the Applicant confirming that she wished Dawn Ernestine Rendall to be added as a Respondent. The Tribunal received no comments from the original Respondents, Guy Rendall and Newman Property Services Limited, in relation to the request. Accordingly, the Tribunal added Dawn Ernestine Rendall as a respondent to the application on 15 June 2021.

8) The Tribunal did not carry out an inspection of the Property but from the information provided it appeared to be a town house within walking distance of Rugby Town Centre with 6 letting rooms arranged on 3 floors.

The Law

9) Section 40 of the 2016 Act provides that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent which has been paid by a tenant.

Section 41 of the Act provides:

> ***41 Application for rent repayment order***
>
> *(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 of the Act provides:

> ***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.*

The relevant offences are detailed in the table in section 40(3) of the Act as follows:

	Act	*section*	*general description of offence*
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

Section 44 of the Act provides:

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.

If the order is made on the ground that the landlord has committed	the amount must relate to rent paid by the tenant in respect of
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(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.

9) Section 72 of the Housing Act 2004 ('the 2004 Act') provides:

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

…

(4) 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

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

…

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either—

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

…

10) Section 263 of the 2004 Act defines a "person having control" and a "person managing" for the purposes of section 72. It provides:

263 Meaning of "person having control" and "person managing" etc.

(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—

(a) receives (whether directly or through an agent or trustee) rents or other payments from—

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

11) Article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 SI 2018/221 altered the description of HMOs subject to mandatory licensing, with effect from 1 October 2018, by removing the requirement for three storeys to be present. It provides:

Description of HMOs prescribed by the Secretary of State

4. *An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act if it—*

(a) is occupied by five or more persons;

(b) is occupied by persons living in two or more separate households; and

(c) meets—

(i) the standard test under section 254(2) of the Act;

(ii) the self-contained flat test under section 254(3) of the Act but is not a purpose-built flat situated in a block comprising three or more self-contained flats; or

(iii) the converted building test under section 254(4) of the Act.

The Hearing

10) A further hearing was held by video platform on 5 October 2021. Participants were the Applicant and the Respondents: Guy Rendall, Dawn Ernestine Rendall and Caroline Newman of Newman Property Services Limited ("Newmans"), who were during the relevant period the letting and managing agents for the Property.

The Submissions of the Parties

The Applicant

11) The Applicant initially set out the background to her occupation of the Property and the circumstances that lead to the application for an RRO. The Applicant lived in Room 6, the attic room within the Property, from 1 July 2018 to 7 June 2019, initially under an assured shorthold tenancy for a period of 6 months. The rent was £433.00 per calendar month plus utility charges and Wi-Fi.

12) Ms Vella explained that on Friday 3 May 2019, Community Safety Wardens from Rugby Borough Council carried out an inspection of the Property and advised her and her fellow housemates, that the landlord and agents for the house, did not have an HMO licence for it. They also advised the occupiers of other issues relating to the Property, including the following:

Room 6 had no fire exit
The fire alarm was not interlinked
There were no fire blankets, fire extinguishers or fire exits within the Property

13) The Wardens advised Ms Vella not to stay in Room 6 and, accordingly, she moved into a housemate's room for the weekend. On 7 May 2021, Rugby Borough Council issued an Emergency Prohibition Order (dated 4 May 2019) which prohibited the use of the second floor (attic) room identified as room 6 for the use as sleeping/living accommodation.

14) During this week, presumably as a result of the Prohibition Order, Newmans advised Ms Vella to move out of room 6 and despite a mix up concerning keys

she ultimately moved into room 3. However, following these events, Ms Vella decided to move out of the Property.

The Respondents

15) Following the events above, Ms Newman explained that the remedial works specified in the Prohibition Order were quickly carried out and, as a result of advice from the Local Authority, confirmed that an application for an HMO Licence was made on 14 May 2019 which was subsequently granted on 21 June 2019. Ms Newman attended an interview under caution at Rugby Borough Council on 6 July 2019 in connection with the offence of letting a "licensable" HMO without the required licence, although she was advised on 26 September 2021 that the Local Authority would not be issuing a Civil Penalty in respect of the failure to licence.

16) At the hearing, the Tribunal concentrated on the key issues and asked the parties to comment in respect of the same with reference to their submissions.

Was there an HMO Licence in place prior to the application on 14 May 2019?

17) The parties, and specifically the Respondents, confirmed that there was no licence in place prior to 14 May 2019.

When was the Property occupied by 5 or more persons from 2 or more households?

18) Newmans had provided details of the occupation of each room within the Property during the relevant period. From this, the Tribunal calculated that the Property was occupied by 5 or more persons from 2 or more households during the period 9 November 2018 to 3 May 2019. This was agreed by the parties.

Was there a reasonable excuse for a failure to license - Section 72 (5) of the 2004 Act?

19) Section 72 (5) of the 2004 Act provides as follows:

> *In proceedings against a person for an offence under subsection (1), (2) or (3) 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 permitting the person to occupy the house, or*
> *(c)for failing to comply with the condition,*
> *as the case may be.*

The Tribunal asked Mr and Mrs Rendall the reason why the Property had not been licensed? Mr Rendall explained that it was originally decided to convert the Property, Mrs Rendall's former family home, in order to provide her with a source of income. In line with this proposal, he sought building regulation approval for the conversion works from the Building Control department of Rugby Borough Council. Mr Rendall stated that on his first meeting with a building control officer at the Property, he asked if building regulation approval was the only certification required to run an HMO to which the officer replied "yes". At the end of the renovation, upon meeting a further Building Control officer on site, Mr Rendall posed the same question which produced the same response. Carrying out a further check, prior to listing with an agent, Mr Rendall said that he telephoned the Local Authority and explaining that he had a certificate from Building Control enquired whether any other registration was required, to which he was advised, by an unnamed officer, that "no" he was free to carry on. Mr Rendall, during the hearing, stated that as far as he was aware, he had done everything he needed to do. Mrs Rendall corroborated this statement.

The Respondents considered that this situation had arisen due to poor advice from the Local Authority and also due to the fact that one Local Authority department – Building Control - had not communicated with another, in this respect the Environmental Health Private Sector Housing section.

The Conduct of the Parties – section 44 (4) (a) of the 2016 Act

20) Section 44 (4) (a) of the 2016 Act allows the Tribunal to take into account the conduct of the landlord and tenant in determining the amount of any Order.

The Respondents stated that they had no issues with the conduct of Ms Vella. They further confirmed the evidence in Ms Vella's statement to the effect that she had paid rent at the rate of £433.00 per calendar month.

In her submissions, Ms Vella explained that she had experienced problems during her occupation of the Property including leaks from the bathroom into the kitchen. Initially, the leak stopped of its own accord but when it came back Newmans sent a tradesman to deal with the problem without giving 24 hours' notice. There was a further issue with a mirror, which was resolved by the landlord within a few days, and the kitchen taps and hot water, which the Landlord also dealt with himself. Of more concern to Ms Vella, was an issue with the fire alarms and the fact they were not interlinked. This was not rectified until after a lengthy delay. Ms Newman said that unfortunately the delays in sorting this problem out had been due to communication problems with Mr Rendall who is a farmer with poor phone signal and internet connectivity in his locality.

Whom should the order be against – section 263 of the 2004 Act.

21) During the hearing, Mrs Rendall confirmed that she was the owner of the Property during the relevant period and received the rental which was paid into a bank account in her sole name.

The Personal Circumstances of the Landlord.

22) During the hearing, the Tribunal asked Mrs Rendall if she had any personal circumstances, she would like the Tribunal to take into account if an Order were to be made. She explained that she and Mr Rendall lived on a small holding of 23 acres which was run on a no profit basis effectively for self-sufficiency. Continuing, she stated that she had no other income. When questioned by the Tribunal, she thought there was approximately £100,000 equity in the Property which was held in trust to her children under her Will. In previous submissions, Mr Rendall had confirmed that the Property had been placed on the market and, at the hearing, he confirmed that it had not yet been sold. Mr Rendall added that, when they needed to raise money, they sold livestock off. In previous submissions he stated that, due to financial hardship, he had been forced to take his private pension early, this amounted to approximately £115 per week.

Utility and Wi-Fi Costs.

23) The Respondents had provided details of these costs within their written submissions and confirmed the same at the hearing:

Gas	£284.57 per quarter
Water	£181.54 per quarter
Wi-Fi	£25.00 per month

The electricity costs quoted were £28.63 per quarter and when questioned, Mr Rendall said that he thought this charge was for the period prior to the occupation of the Property. Whilst occupied he thought that the cost was approximately £100.00 per month. These sums were not disputed by Ms Vella.

The Tribunal's deliberations

24) In reaching its determination the Tribunal considered the relevant law, in addition to all of the evidence submitted and briefly summarised above.

Was an offence committed and if so for what period?

25) It was agreed during the hearing that the Property was occupied by 5 or more persons from 2 or more households during the period 9 November 2018 to 3 May 2019, a period of 176 days. This is the period of the offence against section 72 (1) of the Act. Section 43(1) of the Act confirms that a rent repayment order can only be made if the Tribunal is satisfied, beyond reasonable doubt, that an offence, as detailed in section 40(3) of the Act has been committed by the landlord.

26) The Tribunal is satisfied that Property should have been licensed during the period above and, as such, an offence under section 72 (1) of the 2004 Act was being committed during this period.

Was there a reasonable excuse for a failure to license - Section 72 (5) of the 2004 Act?

27) It is accepted that Mr Rendall, during the refurbishment, verbally enquired of the Local Authority officers he encountered, if he had done everything necessary to let the Property as an HMO, to which he received an affirmative response. However, the Tribunal considers the acceptance of the same somewhat naïve, as the only documentation he received from the Local Authority in this regard was the Building Control Completion Certificate which confirmed compliance with building regulations. There was no reference in it to any future letting of the Property as an HMO or any wording to suggest that it was a HMO licence. It would be logical to assume that if Mr Rendall were asking the question to Building Control officers, the answer would be in a building control context.

28) The 2004 Act introduced the requirement for local housing authorities to ensure the licensing of certain HMOs from April 2006 and the subject Property would have been caught by the initial definition of the same, not merely the October 2018 revision which removed the three storey criteria. This, therefore, is not new legislation and even a cursory internet search would have revealed the need for a licence. The Tribunal accepts Ms Newman's comments that as an agency they do not deal with the letting and management of HMOs but, after taking this instruction, a basic level of due diligence should have led them to making appropriate enquiries.

29) In addition, it is disingenuous to suggest that one department of a Local Authority should pass information to another for action. The Building Control department would not know when the Property was due to be let or if it was to be sold. Newmans must have extensive dealings with Rugby Borough Council and they must appreciate that it is completely impractical for information to flow between the respective departments of a Local Authority in a perfect fashion.

30) In short, it is the responsibility of the person managing the HMO to make diligent and reasonable enquiries as to whether a licence is required. In the opinion of the Tribunal, those enquiries weren't made here and there is no reasonable excuse for a failure to licence.

Whom should the order be against – section 263 of the 2004 Act.

31) Based on the evidence before it, the Tribunal is satisfied beyond reasonable doubt that Dawn Ernestine Rendall was the person managing the Property for the purposes of section 263(3) of the 2004 Act.

The Order and the Amount to be Repaid

32) The recent Upper Tribunal case of *Williams v Parmar & Others* (2021) UKUT 244 (LC) provides guidance as to the amount of the order. In that decision, the Honourable Mr Justice Fancourt (Chamber President) agreed with the observations made by the Deputy President of the Chamber, Judge Martin Rodger QC, in the decision *Ficcara v James* [2021] UKUT 38 (LC) regarding the interpretation of the earlier decision of the Upper Tribunal in *Vadamalayan v Stewart* [2020] UKUT 183 (LC).

33) Mr Justice Fancourt, in paragraph 26, confirmed that the decision in *Vadamalayan* was authority for the proposition that a RRO was not limited to the landlord's profit, however, it was not authority for the proposition that a RRO should be for the maximum amount of rent paid by the tenant, subject only to any adjustment under section 44(4) of the 2016 Act. In paragraph 50, he went on to states as follows:

> *……..A tribunal should address specifically what proportion of the maximum amount of rent paid in the relevant period, or reduction from that amount, or a combination of both, is appropriate in all the circumstances, bearing in mind the purpose of the legislative provisions. A tribunal must have particular regard to the conduct of both parties (which includes the seriousness of the offence committed), the financial circumstances of the landlord and whether the landlord has at any time been convicted of a relevant offence. The tribunal should also take into account any other factors that appear to be relevant.*

34) After allowing an adjustment for utility charges in *Williams*, the Upper Tribunal allowed a further deduction of 20% to the majority of tenants after taking into account the circumstances set out in paragraph 52:

> *In this case, the landlord is, on the evidence, a first offender, with no relevant convictions. That is obviously in her favour. She was, however, a*

professional landlord who must be taken to have known the requirements for licensing an HMO. The failure to apply for a licence is unexplained in evidence, save that the landlord said that she overlooked it. There is nothing in her financial circumstances or her conduct to justify reducing the amount of the RROs. The landlord only applied for a licence after an environmental health officer had visited and itemised deficiencies of the Property and the absence of a licence. The Property would not have obtained a licence without further substantial works, had the landlord applied for one, and her February 2020 application was in due course refused because the works had not been done. The inference to be drawn is that the landlord wanted to be able to derive rental income from the Property before she was in a position to do the further works that were necessary to enable her to obtain an HMO licence. There were serious deficiencies in the condition of the Property, which affected the comfort of all the tenants, and the undersized bedroom affected Ms Susans particularly.

35) Following this reasoning and the provisions of section 44(4) of the 2016 Act, the salient considerations in this matter are as follows:

a) In relation to the conduct of the Applicant, there were no matters to take into account. In respect of the conduct of the Respondents, the Tribunal notes that, with the exception of the fire alarm matter, the issues raised by Ms Vella were dealt with within reasonable timescales. The fire alarm matter is more concerning and the delay on the face of it was unreasonable, particularly for an HMO of this type. However, the Tribunal notes that the Respondents had provided a copy of a satisfactory Electrical Installation Condition Report that was carried out following the refurbishment during 2017, which indicates that the Respondents had sought to ensure that in this regard the Property was in good order. The Tribunal further notes that Rugby Borough Council had not sought to prosecute the landlord for the offence of managing or controlling an unlicensed HMO (Section 72 (1)) and that they had not imposed a Financial Penalty as an alternative. In addition, an application for the appropriate HMO licence was made to Rugby Borough Council on 14 May 2019 and was granted on 21 June 2019, indicating that the Council were satisfied with any works by that date;
b) Although the Respondents referred to financial hardship, upon questioning, it was established that there was substantial equity in the Property. The Property did still belong to Mrs Rendall as, based on the information given to the Tribunal, it would only go into trust upon her death under the terms of her Will;
c) From the evidence provided, Ms Rendall is a first offender;
d) Ms Rendall is not a professional landlord;

e) A professional firm was instructed to act in the letting and management and they might reasonably have been expected to have advised Ms Rendall of the requirement to licence;
f) A licence was only applied for following intervention of the Local Authority;
g) Once works were identified by the Local Authority, they were put in hand without any undue delay; and
h) There was no indication of deficiencies in the condition of the Property as per *Williams* that affected the Applicant's beneficial occupation of the same.

36) If a 20% deduction was made in *Williams,* then considering the above, the Tribunal considers that a greater reduction is appropriate in this matter, which in the opinion of the Tribunal is fairly represented by 30%.

37) The Tribunal calculates that the total paid by the Applicant over the period the offence was being committed was as follows:

Rental at £433.00 per month x 12 months = £5,196.00

£5,196.00 divided by 365 days = £14.24 per day.

Period of offence during Ms Vella's occupancy was 176 days @ £14.24 per day = £2,506.24

38) The Tribunal calculates the annual costs of the utilities and Wi-Fi to be £3,364.44. Apportioned on a daily basis and allowing for 5 occupants (during the period of the offence) indicates a cost of £1.84 per day in respect of the Applicant's share. Therefore, for the period of the offence, the amount attributable to the Applicant was £323.84

Balance after deduction of utilities and Wi-Fi

£2506.24 - £323.84 = £2,182.40

39) The allowance for a *Williams* discretionary adjustment of 30% is as follows:

30% of £2,182.40 = £654.72

Balance £2,182.40 - £654.72 = £1,527.68

40) Therefore, the Tribunal determines that an amount of £1,527.68 (One thousand, five hundred and twenty seven pounds, sixty eight pence) is to be repaid by Dawn Ernestine Rendall to the Applicant.

Appeal

41) If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

V Ward