FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/HMG/2019/0023**
Property	**:**	**Flat 9, Bernhard Baron House, 71 Henriques Street, London E1 1LZ**
Applicant	**:**	**Ricky Emery and Roxane Girard**
Representative	**:**	**Mr Williams, LB Tower Hamlets**
Respondent	**:**	**Adam Rice**
Representative	**:**	**Dale Timson instructed by Waterstones**
Type of application	**:**	**Rent repayment order: Housing Act 2004, Housing and Planning Act 2016**
Tribunal member(s)	**:**	**Judge Hargreaves** **Luis Jarero BSc FRICS**
Date and venue of hearing	**:**	**27th January 2020 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**30th January 2020**

DECISION

The Respondent must repay the Applicant the sum of £1800 by way of a rent repayment order by 5pm 28th February 2020.

REASONS

1. The Applicants made an application to the Tribunal for a rent repayment order (RRO) on 12th September 2019, a few days before they left the property. The application is supported by Mr Williams, the responsible officer at LB Tower Hamlets.

2. There are two bundles to which reference is made, pre-fixed by A or R, as the case may be. The application is at R22-29.

3. Mr Williams provided a supporting statement (A1-3), an expanded statement in support of the application (A33-36), and Mr Emery has provided a statement at A37-38.[1] The substance of the Respondent's response is in a chronology at R7-11 and witness statement dated 21st November 2019 at R12 with attachments.

4. The starting position is that the Landlord committed an offence pursuant to *s95(1) Housing Act 2004* because he was *"a person in control of or managing a house which is required to be licensed* [under this Act] *but is not so licensed."* The property is in a selective licensing area in Tower Hamlets. We are satisfied beyond reasonable doubt that on the basis of all the evidence provided by both sides, the Landlord did not have a relevant licence from 1st November 2018-2nd August 2019, the date on which he successfully applied for a temporary exemption from the requirement to be licensed. The basic offence is therefore made out by the Applicant. By our calculations, and with the agreement of the parties, that is a period of 268 days. The daily rent we fixed after discussion with the parties at the hearing at the rate of £47.67 per day, which is the rate calculated by Mr Emery in pleadings he has issued in the County Court at Central London seeking damages for disrepair (which he has calculated in the claim form, including general damages and damages for stress and anxiety, at over £6000). So it was agreed to be a good starting point for calculating that 100% of the rent available for the RRO would be £12,775.56, and we proceed on that basis (various other schedules in the bundles produce different figures). In this case Mr Williams asserts that the Applicants are entitled to a 100% RRO and Mr Timson submits that nothing is payable.

5. The Respondent is far from a "rogue landlord" as Mr Williams, who is very experienced, accepted. This is not a case in which any penalty is required for deterrence purposes and the Respondent's mistake was accidental and based on ignorance. We accept that this is no defence but it goes to his conduct pursuant to *s44(3) HPA 2016*. The facts bear this out. The Respondent "inherited" the Applicants as tenants for reasons we explain, and did not intend to be a landlord at all. He and his wife (as she is now) wanted to buy the flat to live in. They made an offer in July 2018 but by the time the mortgage finance was arranged the vendor had let the flat on a 6 months AST to the Applicants and so at the date of completion, the Respondent acquired the property subject to that tenancy. The price paid as recorded on the office copy entries exhibited by the Applicant was £420,000, subject to an interest only repayment mortgage in favour of Barclays Bank UK PLC for £316,950. See A37 and following for the tenancy agreement, made on 13th September for 6 months at £1452 pcm payable in advance on 13th of every month. Neither the estate agents (KFH) nor the Respondent's conveyancing solicitors nor the vendor, who was in "real estate", referred to any licensing requirements. It is not disclosed by the local

[1] The "expanded statement" is a pro forma explanation of LBTH's position and adds little by way of hard or useful evidence to the application.

authority search results. The previous owner has indicated to the Respondent since the application was made that she was not aware of the licensing requirement. Mr Williams says he has chosen not to make an application against her because the period of time was relatively brief. It is also the case that Mr Emery was not aware of the licensing requirement until after he contacted LBTH on 13th June 2019 about alleged disrepairs and the responsible officer at LBTH raised the issue.

6. The Respondent and his now wife decided that they could deal with the property being tenanted as Ms Fernandez was in Costa Rica for family reasons and the Respondent, who is an accountant working on projects rather than in full time employment, was working in Switzerland. They also had alternative accommodation in Harlow. So they proceeded with the purchase. They were wholly inexperienced as landlords, and did not use a managing agent for all purposes (taking over as their predecessor had, though she appears to have had more experience than the Respondent).[2]

7. In very broad terms, the following is an overview of what happened next. This is relevant to deciding issues and allegations as to conduct on both sides. The evidence is complicated by not being presented chronologically in one bundle (emails in reverse order, text messages etc).

8. We accept that when the Respondent realised for the first time that he required a licence when he received a letter from LBTH dated 1st August (which was emailed to him), he made immediate contact with LBTH and obtained (as advised by LBTH he could) an exemption on 2nd August.[3] See R133-142. In a telling piece of oral evidence the Respondent said the LBTH letter "put the fear of God into him" and we accept that this was his response: it is also reflected in his immediate emailed response to LBTH at R138. This is not a landlord who would knowingly breach the law.

9. A number of issues arose with the flat shortly after completion. These were minor issues (see eg R188) and we conclude that they were dealt with satisfactorily by the Respondent's handyman. We can see that from various messages between the Applicants, the Respondent and "Eddie" between about 10th November 2018 and 12th December at R186-206. These show that issues were raised, sorted and paid for by the Respondent. In addition we accept the Respondent's clear evidence that so far as damp/water ingress has affected neighbouring properties, he is meeting all obligations to reimburse them. The flat is a one bedroomed conversion from a former school, on the raised ground floor.

[2] Felicity J. Lord seem to have been involved with the TDS and the renewal of the tenancy see eg R162

[3] We accept his evidence that this was the first time the licensing requirement came to his attention and that the letter posted by LBTH to his address at Flat 4, Riverside Court in Harlow dated 17th June 2019 (A exhibit 3) was not received. Had it been, we have no reason to believe his response would have been any different and he would either have acquired a licence or an exemption as appropriate.

10. The real problems between these parties started in about May 2019. It is relevant to note that Mr Emery was completing a law degree at City University and has been conscious of rights and obligations – on both sides. This imbued some of his communications with the Respondent with an air of formality and legalese which might have complicated relations. Since these are the main issues forming the basis of the Applicants' county court proceedings, we do not wish to make any findings which might interfere with those. Neither are we in a position to do so because the evidence before us is incomplete and fragmentary and more to do with allegation and response than providing us with the evidential basis on which to make firm findings of fact. But it works both ways: we cannot therefore approach this case on the basis that the Applicants have done anything more than launch proceedings for damages for disrepair etc, and we know they are defended. So far as we are concerned, the following matters are relevant in relation to the disrepair allegations so far as conduct is concerned for the purpose of this application.

11. Like many of these sort of things, the problems turned out worse than might be expected. The Applicants complained of damp on about 9th May. See A45. The Applicant could not recall the date of his first email to the Respondent about the damp (this being a later email to LBTH). By the end of May the Respondent's contractors had identified a source: a leaking washing machine, see R184. They fixed it. There may be an issue about whether the Applicants were to blame or not but we do not decide that because that was not the only thing which contributed to a water/damp problem (see eg R168-176). On 29th May the Respondent supplied the Applicants with a dehumidifier to help with the drying out process, it having affected the flooring through the flat.

12. The Applicant arranged a further inspection of the property because the Applicants were still complaining of damp and physical and mental health issues, indicating that they would not move out until repairs were carried out (R168-176). The further inspection report of Grange Construction (UK) Limited is at R108 (18th June). They found further problems. The Applicants instructed Grange to carry out remedial works, which they did, and the Respondent reimbursed the Applicants for the cost of these invoices (R208-211). Mr Emery complains that the temporary work was inadequate and that the Respondent should have carried out a full survey of the property. But he accepts that the temporary fix worked. The Respondent therefore acted on a report he paid for, and the ensuing recommended works. He also provided two more dehumidifiers by 29th June when he met the Applicants at the property: see his account at paragraph 28, R16. By then Mr Emery was indicating that repairs would have to be done room by room or they would have to be re-housed (see eg A(page indecipherable) email 12th June 2019). It is not alleged that prior to the further investigation by Grange that the Respondent or Applicants could have known the extent of the problems or at least the other source, due to the construction of

the bath/panels and the flooring (laminate on concrete). It does appear that the bath leak might have been caused by previous bad workmanship. This problem seems to have been exacerbated by a suggestion that it was aggravated by cleaning materials used by the Applicants. We are unable to resolve that issue. See paragraph 23 of the Respondent's statement at R16.

13. Without going into further detail, the Respondent's position is outlined at paragraphs 28-34 of his statement, dealing with the period between the end of June 2019 and the receipt of the letter from LBTH which prompted him to apply for a licence exemption. See R16-17. In our judgment, looking at this account (which is more detailed than the Applicants' shorter statement at A37-8) and reading the correspondence between the Applicants, the Respondent, and various contractors, the Respondent was doing his best to sort out the problems while juggling with what he thought was a basic inconsistency in the Applicants' position: if they were so unhappy, why not move out? By this time LBTH had somehow come to the conclusion that there was "penetrating" damp (which the Applicants and LBTH say was a mistake without explaining how that description came about though the Respondent believes the Applicants were responsible for the mis-description) and matters had escalated, partly as the result of LBTH's involvement, the Respondent being aggrieved at the suggestion that he was letting a flat with "penetrating damp". At the same time, the Respondent seemed to be doing his best to get matters sorted: see eg R144 (text message to contractor).

14. Matters deteriorated in terms of an easy relationship between the parties. The Respondent thought the Applicants had indicated they would move out in September, having taken a non-lawyerly attitude to various text messages with one of the Applicants in about March which did not really resolve the issue whether they had another 6 months or a continuing monthly periodic tenancy (as to which we do not need to make any findings ourselves). Mr Emery realised that until the Respondent either had a licence or an exemption, he could not serve a *s21* notice, and indicated he would not leave unless one was served: see eg R165, 169. It was clear from June that the Applicants were considering their legal options: see eg R167. It is also clear to us that the Respondent, who is an accountant, was grappling with the implications of a legal relationship which was somewhat out of his immediate expertise. Furthermore, the Applicants were anxious to avoid blame for any of the damage and were taking an offensive approach and threatening litigation at a comparatively early stage when remedial works were being discussed. See for example their email of 20th June 2019 at A(page indecipherable). In addition, Mr Emery believed that the Respondent would not be granted a licence "until he had fixed the flat": email to LBTH at A49 dated 16th August 2019. At this point, Mr Emery knew about the licence provisions and the prospect of an RRO. He accepted in cross examination that one of the reasons he contacted LBTH was because he did not believe the

Respondent would carry out the repairs, which is not supported by our analysis of the facts and evidence.

15. In the end, the Applicants found another flat and left on 15th or 16th September 2019. The Respondent and his wife moved in in October 2019.

16. In support of the application the Applicants take four points on the Respondent's conduct, as they are entitled to do under *s44*.

17. First, the Applicants say that the Respondent is in breach of his *s11* repair obligations in respect of the washing machine, and the bath leak (and adding a minor problem with the toilet cistern on which we have not spent time in this decision on the grounds that there was consensus as to this being a very minor issue), demonstrating a failure to respond to the Applicants' concerns. We disagree with this picture as being exaggerated for the reasons given above, but must leave it to the county court to determine the disrepair/*s11* claim. For the purposes of conduct supporting an RRO claim however, the evidence does not support the picture of a non-caring landlord as the Applicants claim, though of course he might still be liable for disrepair and damages as claimed by the Applicants. It would be premature to conclude, therefore, as submitted, that the Respondent is liable under this heading.

18. The second point on conduct relied upon by the Applicants is that the Respondent attempted to procure their exit from the flat early rather than repair it. Mr Emery says the email from the Respondent dated 3rd June at R174 is evidence of pressure to this effect. It starts *"If it is a serious health concern then you and Roxane must move out and we will terminate the tenancy. I will take vacant possession of the flat and get these things sorted out. I don't think I can deal with it with you two in there. Do you agree? How long will you need to move out?"*. It was a reply to an email from Mr Emery (R175) stating that their health concerns were serious. Mr Emery did not reply until 12th June when he affirmed his intention to remain while repairs were carried out or be provided with alternative accommodation. This exchange pre-dated the meeting on 29th June discussed above. It is wholly unrealistic to rely on this email as an attempt to seek their exit rather than repair the flat, as subsequent facts show (report by Grange, repairs by Grange, installation of two more dehumidifiers, three more months in the flat, leaving on their own terms).

19. The third point relied upon by the Applicants on conduct is that the Respondent failed to serve a *s21* notice to terminate the tenancy. As they left of their own accord, having made it clear that they required a notice, this point does not work. It might have weight if the evidence was that the Respondent unlawfully evicted them but he did not. Mr Emery said they found another flat and moved and the evidence is that they chose the date to suit themselves. Put another way, they surrendered their tenancy by handing back the keys and it ended that way.

20. The fourth point on conduct is that the Applicants claim that the Respondent pressurised them after bringing the RRO claim in relation to the recovery of their deposit: see R160, the Respondent's email dated 2nd October (after they left the flat). It states *"As you know, I made the offer that you could leave the flat without notice. But you rejected that. I'm still happy to leave your deposit unmolested or unchallenged. You can get that by the end of the week, I expect. But I don't want anymore surprises. As long as you agree by email that this tribunal doesn't get reinstated and there's no more threats of litigation or anything of that nature, then I'll tell Felicity J Lord to pay your whole deposit back asap."* Since this was written at a time when LBTH had (by mistake it appears) withdrawn the RRO claim (subsequently reinstated), we consider that this reads as a sensible attempt to draw the line. As it is, the application was reinstated, the TDS deposit dispute was resolved through usual channels (minor deductions for the Applicants), and the Respondent faces this claim plus another set. There was nothing threatening in this email and certainly nothing that threatened the Applicants, even to the extent that Mr Emery felt confident enough to reply by saying (i) the RRO had been withdrawn by mistake and (ii) although the TDS required negotiation, *"I cannot see us reaching an agreement."* There is no evidence that there was an attempt to coerce the Applicants apart from seeking to draw a line in the mistaken belief that the RRO was not proceeding.

21. In essence, we reject the substance of the Applicants' submissions on the Respondent's conduct. None of it was "coercive" as Mr Williams submitted. The worst thing the Respondent did was not take decent legal advice once Mr Emery indicated he intended to take every legal point he could (despite the Respondent referring to himself as inexperienced in emails), and as Mr Williams said, he failed to have a licence as required. As to that, the evidence is that his advisers overlooked the point as well, including Felicity J. Lord who managed the TDS aspect and raised the issue of the re-letting. We prefer Mr Timson's submissions on the Respondent's conduct, as indicated in our reasons and his skeleton argument.

22. Mr Timson alleges, on the contrary, that the Applicants' conduct should be taken into account as follows. He extracted from Mr Emery that they have no medical evidence to support their claims of damage to their physical and mental health resulting from conditions in the flat, and that he failed to reply to a number of emails from the Respondent seeking an answer to reasonable questions, as well as missing appointments with contractors. It is not the one-sided picture which the Applicants have tried to present, but a far more complex picture of a landlord seeking to rectify issues over a period when the causes were not all known, and the water damage greater than could have been realised until the end of June. As Mr Timson says with some justification, the word "hapless" is a useful description of the Respondent, who was plainly sometimes out of his depth knowing what to do for the best – for the Applicants, as the written messages

evidence. As we suggested to the Applicants, it seemed that sometimes they were suggesting the Respondent should just have been able to wave a magic wand to instantly transform the flat when the complication was that the concrete floor needed to dry out. Their expectations were arguably unreasonably high in terms of remedial works, length of time required etc. They have produced no evidence to support an alternative system or programme of works.

23. As to conduct therefore, the allegations of blameworthy conduct against the Respondent, such as might support evidence of aggravating behaviour, fail. The Applicants themselves have acted on occasions as to complicate what might have been a better relationship for the reasons outlined above. Both sides could have conducted themselves and the problems differently.

24. But on any view the Respondent is liable for an offence (though not convicted) and therefore we consider that a limited RRO is appropriate. As Mr Williams says, they exist for a purpose. Furthermore, although the Tribunal has a discretion whether or not to make an order, it would be rare not to make the order: see *London Borough of Newham v Harris* [2017] UKUT (LC) paras 27 onwards for a general overview of the jurisdiction.

25. The more critical issue is as to the amount to order by way of the RRO. It is determined by what we consider "*reasonable*". If it is a deterrent then one view would be that the Respondent's visible anxiety might justify a nil award, as indicated by his speed in responding to LBTH once he received a letter referring to licences. We consider overall, however, that it is appropriate in this case to look at the Respondent's "profit": see eg *Fallon v Wilson* [2014] UKUT 0300 (LC) at para 22. Furthermore, we are conscious that to award more than the "profit" approach might produce, would be falling into the trap of acceding to the Applicants' case on disrepair, as we do not consider the facts of this case to justify any more than a nominal award with profit as the starting point. In this case the best evidence we have of the "profit" from the letting for the Respondent, is the financial statement prepared by his accountant (though he is an accountant himself), at R147. We take into account that the figures themselves were not challenged by the Applicants and that they have been submitted by an independent accountant, and moreover, tax paid for the year 2018-2019 in the sum of £584. Although Mr Emery submitted that in considering the Respondent's "profit" he should not be allowed to deduct his mortgage repayments because they are not routinely deducted, relying on *Parker v Waller* [2012] UKUT 301, we conclude that the facts in *Parker* are distinguishable. We consider the mortgage repayments should be taken into account in calculating the Respondent's profit, because this is not a buy-to-let/investment property/one of many, but a property which was bought to live in, and which ended up being a purchase not with vacant possession but with AST tenants. Without the mortgage the purchase could not have proceeded. The mortgage is fixed rate at just under 2.5% for 5 years.

26. In addition, we are entitled to and do take into account the Respondent's financial position. His earnings are uncertain but he considers a rough working figure of £40,000 pa to be justified. He has not worked on a project since October and is therefore not earning at present. His wife's earnings at £4000 pa do not fall to be taken into account and would in our judgment make very little difference. The Respondent assists the third child of his first marriage with rent at university (£6000 pa) and pays his ex-wife £750 pcm maintenance. He has savings of around £10,000. He owns another property in Harlow and that is now rented at £600 pcm. The effect of an order in the maximum amount sought by the Applicants would be disproportionate to excessive, and wholly unreasonable on the facts of this case.

27. The question is what we consider to be "*reasonable*" in all the circumstances. The profit figure is a good starting point in this case because of the circumstances of acquisition. We consider that the profit figure at R147 of £2,254 should be adjusted by adding back in some deductions (£40 travel, £185 door handles, £135 decorating materials) to produce an adjusted figure of (say) £2600. We do not consider it reasonable to deprive him of the whole "profit" on the letting to the Applicants and have concluded that a reasonable amount is £1800, just over two-thirds of his realisable profit for the relevant period. In our judgment that provides a figure which goes some way to meeting the merits of both parties' cases.

Judge Hargreaves
Luis Jarero BSc FRICS
30th January 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).