**FIRST-TIER TRIBUNAL**

**PROPERTY CHAMBER (RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | **LON/OOBJ/HMF/2022/0148** |
| **HMCTS** | : | **V: CVPREMOTE** |
| **Property** | : | **45A Longley Road, London, SW179LA** |
| **Applicants** | : | **Chloe Britland- Whiting**<br>**Nathan Brown**<br>**Amitabh Purgass**<br>**Ryan Lewendon**<br>**Parina Patel** |
| **Representative** | : | **Justice For Tenants – Cameron Neilson** |
| **Respondent** | : | **Abiy Hailu**<br>**Yeshihareg Abraham** |
| **Representative** | : | **Philip Taylor of Counsel** |
| **Type of Application** | : | **Application for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016** |

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| **Tribunal Member** | **:** | **Judge Shepherd**<br>**Sue Coughlin MCIEH** |
| **Venue of Hearing** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | **:** | **19th April 2023** |

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**DECISION**

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**Covid-19 pandemic: description of hearing**

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing

1. In this case the Applicants, Chloe Britland Whiting, Nathan Brown, Amitabh Purcass, Ryan Lewendon and Parina Patel (The Applicants) are seeking a Rent Repayment Order against the Respondents, Abiy Hailu and Yeshihareg Abraham (The Respondents).

2. The Applicants were in occupation of premises at 45A Longley Road, London SW179LA (The premises). The Applicants were represented by Cameron Neilson and the Respondents by Philip Hall.

3. It was the Applicants' case that the Respondents had failed to license the premises which fell under the mandatory licensing requirement. The Respondents accepted that they had failed to license when they should have done but argued they had a reasonable excuse for this failure.

4. The Rent Repayment Order application was made pursuant to section 41 of the Housing and Planning Act 2016. The premises consist of a 5 bedroom, 2

storey semi-detached house with a shared kitchen and bathrooms. The Applicants argued and indeed it was common ground that premises were occupied by at least 5 people at all points during the relevant period which was 14/8/20- 13/8/21. Each tenant occupied their own room. The tenants shared a joint tenancy, the rent being £2375 per month There was communal cooking , toilet and washing facilities. There was interchange between different tenants but the key fact was that there were five tenants in occupation throughout the relevant period.

5. The Respondents failed to apply for a license for the premises throughout the relevant period and in fact it was only on 23rd August 2021 that a temporary exemption notice (TEN) was applied for.

6. The Applicants claim Rent Repayment Orders as follows:

   a) Chloe Britland – Whiting - £5700 for the period 14/8/20- 13/8/21
   b) Nathan Brown -£5700 for the period 14/8/20 -13/8/21
   c) Parina Patel - £5700 for the period 14/8/20-13/8/21
   d) Ryan Lewendon - £5700 for the period 14/8/20-13/8/21
   e) Amitabh Purgass - £5700 for the period 14/8/20 – 13/8/21

7. The Applicants argued that there were insufficient fire safety precautions at the premises, fire alarms had been removed or were inoperable., there were no fire safety doors or fire escape routes. A fire risk assessment carried out on 3rd July 2020 bears some of these complaints out although there is also criticism of the occupiers themselves and their failure to keep the premises clear of possessions and tidy. They also argued that there were persistent drainage issues with drains often blocked. In addition they argued there was some disrepair. They complained of damp and mould growth throughout the premises. This was borne out by photographs seen by the Tribunal showing severe damp and mould growth. A report by Cliff Fuller Associates dated August 2021 attributed the damp and water ingress to a number of different causes. Whilst the drying of clothes by occupiers was one factor it was

certainly not the principal one. There were a number of external defects identified and remedial works specified. After the Applicants left the premises extensive work was carried out by the Respondents.

***The Respondents circumstances***

8. The Respondents purchased the premises in November 1996. In 2002 they moved to Ethiopia. Since then Ms Abraham has been practicing as a dentist in Ethiopia and owned a property there. Mr Hailu had been living in Djibouti but moved back to Ethiopia in 2011. On 1st June 2013 the Respondents signed a full management service agreement with Ludlow Thompson. This continued until Mr Hailu took back management in 2022. In early 2017 Mr Hailu moved to Nairobi, Kenya where he rents a flat. Mr Hailu has been unwell and suffered injury falling a fall and a car accident.

9. In June 2018 Mr Hailu received an email from Ludlow Thompson telling him he needed to license the premises. He says he did not see the email until March 2022 because he de-prioritised it or it went into his spam folder. He blames Ludlow Thompson for not raising it with him again when he visited the premises later in 2018. In February 2020 Ludlow Thompson emailed him again asking for an update regarding the license. He started to fill the application form in but did not complete it deciding instead to complete it when he next came to the UK. This was not until October 2021. He applied for a TEN within 3 months after arrival.

10. Mr Hailu blames the agent Ludlow Thompson for letting the property when it needed a license. He also blames the tenants for causing the damp and mould in the premises and damaging the premises generally. He says Parina Patel was running a carpentry business in a shed in the garden of the premises- this was denied by Ms Patel. Overall, he says that the Applicants have exaggerated their case.

*The law on Rent Repayment Orders*

**The Housing Act 2004 ("the 2004 Act")**

11. The 2004 Act introduced a new system of assessing housing conditions and enforcing housing standards. Part 2 of the Act relates to the licencing of Houses in Multiple Occupation ("HMOs") whilst Part 3 relates to the selective licensing of other residential accommodation. The Act creates offences under section 72(1) of having control and management of an unlicenced HMO and under section 95(1) of having control or management of an unlicenced house. On summary conviction, a person who commits an offence is liable to a fine. An additional reedy was that either a local housing authority ("LHA") or an occupier could apply to a FTT for a RRO.

12. Part 2 of the 2004 Act relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed. HMOs are defined by section 254 which includes a number of "tests". Section 254(2) provides that a building or a part of a building meets the "standard test" if:

    "(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

    (b) the living accommodation is occupied by persons who do not form a single household (see section 258);

    (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

    (d) their occupation of the living accommodation constitutes the only use of that accommodation;

    (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

    (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

13. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 prescribes those HMOs that require a licence. Article 4 provides that an HMO is of a prescribed description 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 the standard test under section 254(2) of the 2004 Act.

14. Section 263 provides:

"(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."

**The Housing and Planning Act 2016 ("the 2016 Act")**

15. Part 2 of the 2016 Act introduced a raft of new measures to deal with "rogue landlords and property agents in England". Chapter 2 allows a banning order to be made against a landlord who has been convicted of a banning order offence and Chapter 3 for a data base of rogue landlords and property agents to be established. Section 126 amended the 2004 Act by adding new provisions permitting LHAs to impose Financial Penalties of up to £30,000 for a number of offences as an alternative to prosecution.

16. Chapter 4 introduces a new set of provisions relating to RROs. An additional five offences have been added in respect of which a RRO may now be sought. The maximum award that can be made is the rent paid over a period of 12 months during which the landlord was committing the offence. However, section 46 provides that a tribunal must make the maximum award in specified circumstances. Further, the phrase "such amount as the tribunal considers reasonable in the circumstances" which had appeared in section 74(5) of the 2004 Act, does not appear in the new provisions. It has therefore been accepted that the case law relating to the assessment of a RRO under the 2004 Act is no longer relevant to the 2016 Act.

17. In the Upper Tribunal (reported at [2012] UKUT 298 (LC)), Martin Rodger KC, the Deputy President, had considered the policy of Part 2 of the 2016. He noted (at [64]) that "the policy of the whole of Part 2 of the 2016 Act is clearly to deter the commission of housing offences and to discourage the activities of

"rogue landlords" in the residential sector by the imposition of stringent penalties. Despite its irregular status, an unlicensed HMO may be a perfectly satisfactory place to live. The "main object of the provisions is deterrence rather than compensation."

18. Section 40 provides (emphasis added):

"(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

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy."

19. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". The five additional offences are: (i) violence for securing entry contrary to section 6(1) of the Criminal Law Act; (ii) eviction or harassment of occupiers contrary to sections 1(2), (3) or (3A) of the Protection from Eviction Act 1977; (iii) failure to comply with an improvement notice contrary to section 30(1) of the 2004 Act; (iv) failure to comply with prohibition order etc contrary to section 32(1) of the Act; and (v) breach of a banning order contrary to section 21 of the 2004 Act. There is a criminal sanction in respect of some of these offences which may result in imprisonment. In other cases, the local housing authority might be expected to take action in the more serious case. However, recognising that the enforcement action taken by local authorities was been too low, the 2016 Act

was enacted to provide additional protection for vulnerable tenants against rogue landlords.

20. Section 41 deals with applications for RROs. The material parts provide:

"(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.

21. Section 43 provides for the making of RROs:

"(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)."

22. Section 44 is concerned with the amount payable under a RRO made in favour of tenants. By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which then follows. The table provides for repayment of rent paid by the tenant in respect of a maximum period of 12 months. Section 44(3) provides (emphasis added):

"(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.

23. Section 44(4) provides:

"(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."

24. Section 46 specifies a number of situations in which a FTT is required, subject to exceptional circumstances, to make a RRO in the maximum sum. These relate to the five additional offences which have been added by the 2016 Act where the landlord has been convicted of the offence or where the LHA has imposed a Financial Penalty.

25. In Williams v Parmar [2021] UKUT 244 (LC); [2022] HLR 8, the Chamber President, Fancourt J, gave guidance on the approach that should be adopted by FTTs in applying section 44:

> (i) A RRO is not limited to the amount of the profit derived by the unlawful activity during the period in question (at [26]);
>
> (ii) Whilst a FTT may make an award of the maximum amount, there is no presumption that it should do so (at [40]);
>
> (iii) The factors that a FTT may take into account are not limited by those mentioned in section 44(4), though these are the main factors which are likely to be relevant in the majority of cases (at [40]).

(iv) A FTT may in an appropriate case order a sum lower than the maximum sum, if what the landlord did or failed to do in committing the offence is relatively low in the scale of seriousness ([41]).

(v) In determining the reduction that should be made, a FTT should have regard to the "purposes intended to be served by the jurisdiction to make a RRO" (at [41] and [43]).

26.The Deputy Chamber President, Martin Rodger KC, has subsequently given guidance of the level of award in his decisions Simpson House 3 Ltd v Osserman [2022] UKUT 164 (LC); [2022] HLR 37 and Hallett v Parker [2022] UKUT 165 (LC); [2022] HLR 46. Thus, a FTT should distinguish between the professional "rogue" landlord, against whom a RRO should be made at the higher end of the scale (80%) and the landlord whose failure was to take sufficient steps to inform himself of the regulatory requirements (the lower end of the scale being 25%).

27.In Acheampong v Roman [2022] HLR 44, Judge Cooke has now stated that FTTs should adopt the following approach:

*"20. The following approach will ensure consistency with the authorities:*

*a. Ascertain the whole of the rent for the relevant period;*

*b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.*

*c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty*

*in the absence of any other factors but it may be higher or lower in light of the final step:*

*d. Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).*

*21. I would add that step (c) above is part of what is required under section 44(4)(a). It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked."*

**Application to the present case**

28.The Applicants provided evidence of the rent that they had paid and satisfied the Tribunal that for the relevant period the premises should have been licensed but were not. The Tribunal were also satisfied with the evidence that we heard about the disrepair at the premises. The Respondents failed to rectify the issue and the premises became more inhospitable as time went on. It was not reasonable or realistic (despite extensive cross examination on the point) to suggest that the Applicants had caused the extensive disrepair in the premises by drying their clothes. The fire risk assessment was essentially neutral as to the causes of risks in the premises although it is clear the premises did not meet the proper standards for an HMO. In August 2021 the Local authority Wandsworth London Borough became involved in the property and served an Improvement notice in relation to category 1 and 2 hazards at the property. They also served a Civil Penalty Notice for £2000.

***Reasonable excuse***

29.Mr Hailu put forward a reasonable excuse defence on two bases. Firstly, he was ignorant of the requirements for a license and secondly he relied on his agents. Neither excuse constitutes a reasonable excuse in these circumstances.

30.He was not ignorant of the need to license because he was told by the agents that he needed to license as early as 2018. He didn't do so because he de-prioritised this despite its importance. Alternatively, the email from the agents went into his spam

email. The email was received nonetheless, and it was for him to check his spam email. In any event he had been renting out the premises since 2002. It was his responsibility to keep abreast of changes in legislation.

31.He could not blame his agents because they told him to license the premises. The obligation was on him and he failed to comply with the obligation. He may have suffered illness whilst abroad but this did not excuse his failure to license the premises.

32.The Tribunal therefore rejects the reasonable excuse defence.

***Quantum***

33.This was a serious offence of failure to license. Applying the criteria in Acheampong above:

- The total rent paid for the relevant period was £28500
- There was no deduction for utilities as the tenants were responsible for these costs.
- As already indicated, this was a serious licensing breach although compared to other types of offence such as unlawful eviction it was not as serious. Nonetheless, the fact that the premises were not licensed meant that the Applicants were necessarily put at risk because the premises did not comply with the regulations in relation to HMOs.

34.Applying the other criteria under the Act there was evidence of poor conduct by the Respondents in particular in relation to disrepair at the premises which they sought to blame on the tenants. There was also however some evidence, in the fire safety reports and the damp report that the tenants were not keeping the premises in a good condition themselves.

35.The financial circumstances of the Respondents were not straightforward. There were rent statements showing large transfers of cash into Mr Hailu's account. He appeared unclear in his explanation for this. Mr Taylor wisely made no submissions on his client's circumstances. Although the Respondents were not professional landlords the failure to license was inexcusable in the light of the information provided by the agents.

36.In light of all of these matters we consider that an 80% award is appropriate which equates to **£22800**.

Judge Shepherd

24th April 2023

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.