**FIRST-TIER TRIBUNAL**

**PROPERTY CHAMBER (RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **LON/00AU/HMF/2022/0229** |
| **HMCTS** | **:** | **V: CVPREMOTE** |
| **Property** | **:** | **Flat 1 & Flat 6, 36 Upper Street , London, N1 OPN** |
| **Applicants** | **:** | **Eleonore CABY and Katherine Ryan** |
| **Respondent** | **:** | **Safety Estate Agency** |
| **Type of Application** | **:** | **Application for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016** |
| **Tribunal Member** | **:** | **Judge Shepherd**<br>**Sue Coughlin MCIEH** |
| **Venue of Hearing** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | **:** | **28th 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, Eleonore Caby and Katherine Ryan (The Applicants) are seeking a Rent Repayment Order against the Respondents, Safety Estate Agency (The Respondents).

2. The Applicants were in occupation of premises at Flat 1 & Flat 6, 36 Upper Street , London, N1 OPN (The premises). The Applicants represented themselves. The Respondent company was represented by Dr.Nihat Donmez director of the company

3. By an Order of the Tribunal dated 8 February 2023 the Respondent had been debarred from taking any part in the proceedings following a failure to comply with the directions and failure to respond to Tribunal correspondence. Dr Donmez claimed that there had been miscommunication between them and in the later stages he had been in Turkey following the earthquake. The Tribunal has on its record email correspondence with a Mr Stoyko a manager at the company and so it is clear that the company was in receipt of the initial application and directions. The earthquake in Turkey occurred after the bundles should have been submitted. The Tribunal indicated that the Respondents would not be allowed to make reference to the assorted documents which had been sent to the Tribunal in the last few days however they would be allowed to make submissions as this was in the interests of justice.

4. It was the Applicants' case that the Respondents had failed to license the premises which fell under the local authority's licensing scheme.

5. The premises consist of a commercial building in which the Applicants alleged that the Respondents had built 8 unauthorized self-contained flats to rent to

private tenants as their home. The self-contained studio flats are built in the upper floors of the commercial building. The local authority, Islington had confirmed that the building constituted an HMO pursuant to s.257 Housing Act 2004 ( see below). The local authority confirmed that no planning permission had been sought for the residential units. In addition a Senior Environmental Health Officer from Islington had visited the building and found defects in fire safety and falls on the stair hazards. There are compelling photographs in the bundle of loose wiring, damp walls, a badly positioned electrical fuse-box, a toilet overflowing and a shower tray filled with sewage. The Applicants also alleged that the Respondents had deliberately left Ms Caby without a water supply and electricity supply. The Respondents had not protected either Applicants' deposit. The Applicants also complained of harassment and threats to evict.

6. An application for a Rent Repayment Order was submitted on 20/10/2022.The Applicants occupied the property and applied for rent to be repaid as follows:

    - Katherine Ryan rented "flat 1" from 9th of April 2022 for 6 months until the 8th of October 2022 . She paid rent of £1300 per month making a total claim of £7800

    - Eleonore Caby rented "flat 6" from 16th of February 2022 for 10 months (left the property on the 10th of December). She paid a rent of £1300 per month making a total of £13000.

    - The Applicants say that no deduction was due for services. All bills were included under their tenancy agreements. At one point the Respondent had tried to foist responsibility for the payment of bills onto Ms Caby. Further the Respondent had not been paying the gas bills.

7. The Rent Repayment Order application was made pursuant to section 41 of the Housing and Planning Act 2016.

***8.*** The Respondents failed to apply for a license for the premises throughout the relevant periods.

9. At the hearing the Applicants told us that they needed a key to exit the building. The flats were small with a small ensuite showerroom. There was a steep stairwell and there was no signage indicating what should be done in case of fire save for a small arrow. They detailed the occupants who numbered 8 households. They said that the Respondent let himself into the flats – he confirmed he kept a key. On one occasion the bathroom had been covered in sewage. They said the flat doors were badly fitted and light could be seen underneath. There were no self -closers on the doors.

10. The Respondent said when he bought the building in 2021 it had already been converted. He said he didn't check if planning approval or building control approval had been given. He denied the building was in a poor condition and said he had improved it. He said there was a thumb turn lock on the main door and he had all the correct certificates in place. He said he was told by the council that planning permission was not required. He made several allegations against the tenants. He said that Ms Caby had used a small roof area outside her window to sit out on and that this was dangerous. Ms Caby said that she had been invited to use this when she first came to see the flat but had stopped using it when Dr.Donmez objected. He said that Ms Caby had pulled an electric cable out. She denied this.
11. An email from William Wallas an EHO at Islington dated 15/12/22 confirms in his opinion that the premises were a s.257 HMO (see below) because the building had been converted, there were self contained flats, the building work did not comply with Building Regs and less that two thirds of the flats were owner occupied.

12. A previous email from Mr Wallas dated 8th December 2022 listed deficiencies he had found at the premises : the space standards were inadequate; there were no fire doors; there were inadequate smoke alarms; the communal lighting was inadequate and the front door had to be opened with a key.

13. There is written evidence that Dr.Donmez suggested that the tenants could leave if they were not happy with the property conditions. He also asked them to agree to pay the unexpectedly high power bills although this was included in the rent according to the tenancy agreement. When they refused he asked them to leave the property. Although he took a deposit from the Applicants he refused to secure it as he said it was a commercial letting and the requirements did not apply to a commercial letting.

*The law on Rent Repayment Orders*

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

14. 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.

15. 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" including s.257.

*254 Meaning of "house in multiple occupation"*

*(1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if–*

*(a) it meets the conditions in subsection (2) ("the standard test");*

*(b) it meets the conditions in subsection (3) ("the self-contained flat test");*

*(c) it meets the conditions in subsection (4) ("the converted building test");*

*(d) an HMO declaration is in force in respect of it under section 255; or*

*(e) it is a converted block of flats to which section 257 applies.*

16. Section 257 states the following:

*257 HMOs: certain converted blocks of flats*

*(1) For the purposes of this section a "converted block of flats" means a building or part of a building which–*

*(a) has been converted into, and*

*(b) consists of,*

*self-contained flats.*

*(2) This section applies to a converted block of flats if–*

*(a) building work undertaken in connection with the conversion did not comply with the appropriate building standards and still does not comply with them; and*

*(b) less than two-thirds of the self-contained flats are owner-occupied.*

*(3) In subsection (2) "appropriate building standards" means–*

*(a) in the case of a converted block of flats–*

*(i) on which building work was completed before 1st June 1992 or which is dealt with by regulation 20 of the Building Regulations 1991 (S.I. 1991/2768), and*

*(ii) which would not have been exempt under those Regulations,*

*building standards equivalent to those imposed, in relation to a building or part of a building to which those Regulations applied, by those Regulations as they had effect on 1st June 1992; and*

*(b) in the case of any other converted block of flats, the requirements imposed at the time in relation to it by regulations under section 1 of the Building Act 1984 (c. 55).*

*(4) For the purposes of subsection (2) a flat is "owner-occupied" if it is occupied–*

*(a) by a person who has a lease of the flat which has been granted for a term of more than 21 years,*

*(b) by a person who has the freehold estate in the converted block of flats, or*

*(c) by a member of the household of a person within paragraph (a) or (b).*

*(5) The fact that this section applies to a converted block of flats (with the result that it is a house in multiple occupation under section 254(1)(e)), does not affect the status of any flat in the block as a house in multiple occupation.*

*(6) In this section "self-contained flat" has the same meaning as in section 254.*

17. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 prescribes those HMOs that require a licence:

*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.*

18. 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")**

19. 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.

20. 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.

21. 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."

22. 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."

23. 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.

24. 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.

25. 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)."

26. 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.

27. 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."

28. 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.

29. 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]).

30. 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%).

31. 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**

32. 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 building met the criteria in s.257 of the Act and as such was required to be licensed by the Local Authority It was a converted block of flats, the building work did not comply with the appropriate building standards ( as confirmed by the Local Authority) and none of the flats were owner occupied – they were all rented.

33. It is of some concern that the Respondent sought to distance himself from responsibility by arguing firstly that he had bought the building post conversion and secondly that he had been told that no planning or building control was required to carry out the work. He did however admit, as the hearing progressed ,that he had bought a lease on the building in 2021. At that time it was a shop on the ground floor and offices above. He had then converted the offices into 7 flatlets and at a later stage had decided that he could build a further flatlet on a flat roof at the rear of the building. He had

thought that planning permission was not required as it was a Permitted Development. He had not submitted any Building Notice and no one from Building Control had inspected the work. The Tribunal finds that the Respondent carried out the conversion and sought to conceal it from the Local Authority because he knew it would not be up to standard. The Tribunal finds that the flats occupied by the Applicants were in a hazardous condition without proper fire safety measures. Due to the poor condition of the wiring this was a very serious matter. The Tribunal also finds that the Respondent deliberately cut off services in Ms Caby's flat to try and get her to leave. He also sought to foist the cost of services onto the Applicants when it was his responsibility to pay them.

***Reasonable excuse***

34. There was no discernible argument of reasonable excuse put forward by the Respondent. He simply did not bother to find out what his legal responsibilities were as a landlord. s already indicated he sought to evade responsibility by distancing himself from the works until later in the hearing. Even if he had not carried out the conversion work this would not represent a reasonable excuse for failing to get a license.

**Conduct**

35. The Applicants to all intents and purposes were good tenants. We do not accept any of the allegations made by the landlord as to bad conduct. The Respondent on the other hand was a bad landlord or "rogue" landlord. He had scant regard for the welfare of the Applicants and put them and the other occupiers at real risk. He concealed work from the local authority and lied to the Tribunal.

***Quantum***

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

- The total rent paid for the relevant period was £13000 by Eleanor Caby and £7800 by Katherine Ryan.

- There is no deduction to be made for utilities because the Respondent provided no evidence of this.
- As already indicated, this was a serious licensing breach with a risk to health and safety and harassment of the Applicants.

37. Applying the other criteria under the Act there was evidence of very poor conduct by the Respondent as detailed above.

38. The financial circumstances of the Respondents were unknown and he gave no further evidence on that.

39. In light of all of these matters we consider that an 100% award is appropriate.

40. The Respondent is required to pay £13000 to Ms Caby and £7800 to Ms Ryan. He is also required to pay the Applicants their application and hearing fee ( £300).

Judge Shepherd

3rd May 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.