FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAL/HMF/2021/0162 and LON/OOAL/HMF/2021/0248**
Property	**:**	**4 Nassau Path, London SE288AN**
Applicant	**:**	**Abraham Iyoha and Mark Ohiku**
Respondent	**:**	**RK Bukoye**
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 Andrew Lewicki FRICS**
Venue of Hearing	**:**	**Tribunal - 10 Alfred Place**
Date of decision	**:**	**24th September 2023**

DECISION

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1. In this case the Applicants, Abraham Iyoha and ("The Applicants") are seeking a Rent Repayment Order against the Respondent, RK Bukoye ("The Respondent").

2. The Applicants were in occupation of premises at 4 Nassau Path, London SE288AN ("The premises") under separate assured shorthold tenancies.

3. The First Applicant says that his tenancy began on 1st September 2018. Initially his landlord was a man called Peter. From 3rd October 2018 the Respondent became his landlord. He paid £450 per month. He occupied the premises with 4 other occupiers in separate households. The Applicant said the premises were in a state of disrepair throughout much of the tenancy. The tenants were forced to use one toilet as the other one was out of repair. The washing machines could not be used. The toilet leaked causing foul odors in the premises. There was also a mice and cockroach infestation. The local authority were informed. On 2nd June 2021 the local authority, the London Borough of Greenwich wrote to the Respondent to say that the premises were being operated as an unlicensed HMO. In addition 29 hazards were identified.

4. The Second Applicant says that he answered an ad for the premises on 11th November 2019. He attended the viewing with his girlfriend when the Respondent introduced himself as a pastor. His tenancy began on 15th February 2019. The rent was £430 per month. He confirms that the premises were in disrepair for much of his tenancy. In addition he accused the Respondent of harassing him after he reported him to the local authority.

5. The Land Register identifies the freehold owners of the premises as Rasaq Bukoye and Oluyinka Bukoye with effect from 29th July 2010. Notwithstanding this the Respondent denied that he was the landlord because the tenancy agreements named the landlord as B.I.Y. UK Limited (" B.I.Y.").B.I.Y is the Respondent's company. He relies on the case of *Rakusen v Jepsen* [2023] UKSC 9 the decision of the Supreme Court. The Supreme Court were compelled by the statute to find that only direct landlords could be liable for Rent Repayment Orders. Superior landlords therefore avoid liability no matter how culpable they are. Until the law is changed by clarification this is the situation. The Respondent also relied on an Upper Tribunal case that followed *Rakusen* in the Court of Appeal, *Kazsowska v White* [2022] UKUT 11 (LC). In that case landlord, Camelot Guardian Management Ltd entered liquidation. The tenants who were seeking RROs sought to name a director of the company instead of Camelot. Martin Rodger QC rejected this because only

the landlord is potentially liable for an RRO.

6. The Respondent also argued that the Applicants had rent arrears post the date of the date of the relevant period of the RRO and that this went to their conduct. In fact the Respondent's argument went further than a conduct submission. He sought to argue that the Tribunal could set off the sums owed against any penalty awarded.

The hearing

7. The Applicants and the Respondent represented themselves at the hearing. The Respondent had previously obtained possession in the County Court. In those proceedings the Respondent was named in his personal capacity. The Applicants took the Tribunal through the payments made in the relevant periods. The First Applicant had paid £5400 between January 2020 and December 2020 ("The relevant period"). The Second Applicant had paid £5160 for the period May 2020- April 2021 ("The relevant period"). The First Applicant's application was made on 4th October 2021 and is not therefore time barred. The Second Applicant's application was dated 16th July 2021 and is also not time barred.

8. The Applicants said that they dealt at all times with the Respondent acting in a personal capacity. They went through the disrepair at the premises and showed the Tribunal compelling photographs of the state of the premises. There were six people in occupation during both of their relevant periods. They named the occupiers. This was not contested by the Respondent. They said they stopped paying rent when the premises became in such a state that they did not think the payment of rent was appropriate.

9. The Respondent told the Tribunal he was a professional landlord. He was the director of B.I.Y. He has three properties. He thought that the previous landlord had carried out repairs at the premises. He now has a license which was granted on 4th May 2022 in his name. Other than being a professional

landlord he is a civil servant and earns £32000 per annum. His wife works in health care and earns £45k per annum. The tenants paid for the services at the premises. He could not provide any evidence of letting the premises to B.I.Y. He said it was a verbal agreement.

The law on Rent Repayment Orders

The Housing Act 2004 ("the 2004 Act")

10. 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 provision was that either a local housing authority ("LHA") or an occupier could apply to a FTT for a RRO.

11. 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.

12. 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.

13. In addition under s.56 Housing Act 2004 the local authority can designate an area for additional licensing. This was the case here.

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 had been paid and satisfied the Tribunal beyond reasonable doubt that for the relevant period the premises should have been licensed but were not. They were believable witnesses who painted a picture of occupation of a very poor premises in which the Respondent had avoided his repairing responsibilities. The Tribunal accepts their account that they stopped paying rent when repairs were not being carried out.

29. In contrast the Respondent was an unimpressive witness. The fact that he had chosen to name the landlord on the tenancy agreements as B.I Y. did nothing to divert liability from himself although the Tribunal considers that this was his intention. To that extent naming the landlord as B.I.Y was a sham. The Respondent was the person that the Applicants dealt with, he was the person named in the previous possession proceedings and he had taken on the license when he eventually got one. He was the landlord and he is liable. He offered no reasonable excuse other than evasion. He is clearly a man of reasonable means. He ought to have got a license and properly repaired the premises before the council became involved and identified multiple hazards particularly as he was in his view a “professional landlord”. The Tribunal is satisfied beyond reasonable doubt that the offence has been committed. The premises were not licensed when they should have been.

Reasonable excuse

30. There was no proper reasonable excuse argument put forward.

Conduct

31. The Applicant were to all intents and purposes good tenants. However the Respondent failed in his duties as landlord and then compounded the failure by seeking to evade liability with a spurious argument claiming he was not the landlord.

32. This was a very serious offence of failure to license. The Applicants were exposed to a real period of risk. Applying the criteria in Acheampong above:

- The total rent paid for the relevant period was : £5400 (1st Applicant) and £5160 (2nd Applicant).
- There is no deduction to be made for utilities as the Applicants paid for these.

33. Applying the other criteria under the Act there was evidence of poor conduct by the Respondent as outlined above.

34. The financial circumstances of the Respondent offers no mitigation. A small deduction is appropriate to reflect the rent arrears although the Tribunal has sympathy with the Applicants' motives in withholding the rent. The Respondent was wrong to submit that the Tribunal could effectively allow a set off against the penalty. He has other remedies if he wants to chase the arrears owed.

35. In light of all of these matters we consider that an 90% award is appropriate.

36. The Respondent is required to pay the First Applicant £4860 and the Second Applicant £4644 in relation to the Rent Repayment Orders. He is also required to pay the Applicants their application and hearing fee of £300 each. The total sums of £5160 (1st Applicant) and £4944 (2nd Applicant) shall be paid within 28 days of receipt of this order.

Judge Shepherd

26th September 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.