FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AB/HMG/2023/0018**
HMCTS Code	**:**	**Face to Face hearing**
Property	**:**	**51 Orchard Road, Dagenham, Essex, RM10 9PT**
Applicants	**:**	**Roma Pranaitiene** **Kazimieras Pranaitis**
Representative	**:**	**Cameron Neilson (Justice for Tenants)**
Respondent	**:**	**Anthony Joseph Devitt**
Representative	**:**	**No appearance**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Andrew Lewicki FRICS**
Date and Venue of Hearing	**:**	**6 October 2023 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**13 October 2023**

DECISION

Decision of the Tribunal

1. The Tribunal makes Rent Repayment Orders against the Respondent in the sum of £8,100. The said sum shall be paid by 3 November 2023.

2. The Tribunal determines that the Respondent shall also pay the Applicants £300 by 3 November in respect of the tribunal fees which they have paid.

The Application

1. By an application, dated 26 April 2023, the Applicants, seek a Rent Repayment Order ("RRO") in the sum of £16,200 against the Respondent pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act") in respect of the rent which they paid between 9 April 2021 and 8 April 2022. The application relates to 51 Orchard Road, Dagenham, Essex, RM10 9PT ("the Property"). The Applicants seek RROs in respect of the offence of control or management of an unlicenced house.

2. On 7 July 2023, the Tribunal gave Directions. The Applicants have provided a Bundle of Documents of 151 pages in support of their application. By 29 August 2023, the Respondent was directed to file the Bundle of Documents upon which he sought to rely. The Respondent failed to comply with this Direction. Indeed, he has elected to play no part in these proceedings.

3. On 30 August 2023, the Applicants applied for a debarring order. On 5 September 2203, the Tribunal issued a Notice of Intention to Debar. The Applicants subsequently applied for the debarring order to be made. On 2 October, the Tribunal notified the parties that Judge Vance saw no purpose in making a debarring order as the Applicants would need to prove their case in any event.

4. The Tribunal is satisfied that the Respondent has been given notice of these proceedings and has made an informed decision not to engage. The Applicants gave two addresses for the Respondent in the application form, namely (i) 482 Gale Street, Dagenham, RM9 4NU – this is the address specified on the tenancy agreement for the service of any notice; and (ii) 51 Orchard Road, Dagenham, Essex, RM10 9TP – this is the address given by the Respondent at the Land Registry. The Tribunal notes that 482 Gale Street is the business address of Carter & Willow, the agents who have been acting on behalf of the Respondent. The Tribunal has sent the following correspondence to both these addresses: (i) the application form on 22 May 2023; (ii) the Directions on 11 July; (iii) the notification of the hearing date on 17 August; (iv) a Notice of Intention to debar on 5 September; and (vi) the letter of 2 October.

The Hearing

5. Mr Cameron Neilson, from Justice for Tenants, appeared for the Applicants. He was accompanied by both applicants who are from Lithuania. Mr Pranaitis is a builder, whilst Mrs Pranaitiene is a cleaner. Both gave evidence. They were assisted by an interpreter. However, both applicants had a basic understanding of English, and the interpreter only needed to assist on a small number of occasions.

6. There was no appearance from the Respondent.

The Housing Act 2004 ("the 2004 Act")

7. The 2004 Act introduced a new system of assessing housing conditions and enforcing housing standards. Part 2 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 remedy was that either a local housing authority ("LHA") or an occupier could apply to a FTT for a RRO.

8. By section 80, a local housing authority ("LHA") may designate a selective licencing area. Section 95 specifies a number of offences in relation to the licencing of houses. The material part provides (emphasis added):

> "(1) A person commits an offence if he is a person <u>having control of</u> or <u>managing a house</u> which is required to be licensed under this Part (see section 85 (1)) but is not so licensed.

9. Section 95(3)(b) provides a defence where an application has been made for a licence and that application has neither been determined nor withdrawn.

10. Section 263 provides:

> "(1) In this Act "<u>person having control</u>", in relation to premises, means (unless the context otherwise requires) the person <u>who receives the rack-rent of the premises</u> (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.
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> (3) In this Act "<u>person managing</u>" means, in relation to premises, the person who, being an owner or lessee of the premises–

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

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

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

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

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

11. It is to be noted that there may be more than one person who may commit an offence under section 95 as having "control of" or "managing" a house. In such circumstances, it will be for the LHA to determine who is the appropriate person to hold a licence. However, when it comes to the making of a RRO, this can only be made against the "landlord".

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

12. 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.

13. 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. In the recent decision of *Kowelek v Hassanein [2022] EWCA Civ 1041; [2022] 1 WLR 4558,* Newey LJ summarised the legislative intent in these terms (at [23]):

"It appears to me, moreover, that the Deputy President's interpretation of section 44 is in keeping with the policy underlying the legislation. Consistently with the heading to part 2, chapter 4 of part 2 of the 2016 Act, in which section 44 is found, has in mind "rogue landlords" and, as was recognised in *Jepsen v Rakusen* [2021] EWCA Civ 1150, [2022] 1 WLR 324, "is intended to deter

landlords from committing the specified offences" and reflects a "policy of requiring landlords to comply with their obligations or leave the sector": see paragraphs 36, 39 and 40. "[T]he main object of the provisions", as the Deputy President had observed in the UT (*Rakusen v Jepsen* [2020] UKUT 298 (LC), [2021] HLR 18, at paragraph 64; reversed on other grounds), "is deterrence rather than compensation". In fact, the offence for which a rent repayment order is made need not have occasioned the tenant any loss or even inconvenience (as the Deputy President said in *Rakusen v Jepsen*, at paragraph 64, "an unlicensed HMO may be a perfectly satisfactory place to live") and, supposing damage to have been caused in some way (for example, as a result of a failure to repair), the tenant may be able to recover compensation for it in other proceedings. Parliament's principal concern was thus not to ensure that a tenant could recoup any particular amount of rent by way of recompense, but to incentivise landlords. The 2016 Act serves that objective as construed by the Deputy President. It conveys the message, "a landlord who commits one of the offences listed in section 40(3) is liable to forfeit every penny he receives for a 12-month period". Further, a landlord is encouraged to put matters right since he will know that, once he does so, there will be no danger of his being ordered to repay future rental payments."

14. 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.
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> (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—
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> (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."

15. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". The seven offences include the offence of "control or management of unlicenced house contrary to section 95(1) of the 2004 Act.

16. 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.

17. 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)."

18. 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.

19. 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."

20. Section 47(1) provides that an amount payable to a tenant under a RRO is recoverable as a debt.

The Background

21. The Property at 51 Orchard Road is a three bedroom terraced house with two floors and a loft. There are three bedrooms and a bathroom on the

first floor. There are two living rooms on the ground floor with a kitchen in an extension. This extension was apparently built without planning permission.

22. The Applicants found the Property on Rightmove. They contacted the agency (Carter & Willow) about the Property and arranged a viewing. On 30 March 2019, the agents showed the Applicants around the Property. The Applicants decided to accept the property as it was the best fit for them and was affordable. It was also close to a train station. They occupied the Property with their son, Justaf, who is now aged 23 and works as an electrician.

23. The Applicants signed a tenancy agreement for the Property, dated 8 April 2019. They were granted an assured shorthold tenancy for a term of 12 months from 9 April 2019 at a rent of £1,350 per month. They paid a deposit of £1,350. Clause 3 stated that the deposit would be held by the Deposit Protection Service. It was not placed in a rent deposit scheme. When the Applicants vacated the Property on 8 Mary 2022, the deposit was not returned to them.

24. Carter & Willow provided the Applicants with an EPC and a copy of the "How to Rent Guide". Clause 42.1 of the tenancy agreement specified the address of Carter & Willow as the address at which any notices should be served, pursuant to section 48 of the Landlord and Tenants Act 1987. However, the Applicants were not provided with the address of the landlord (his place of residence or business) as required by section 47.

25. The Applicants complained of two items of disrepair. When they moved into occupation, the washing machine was not working properly. It was a problem relating to the manner in which the water supply had been plumbed into the kitchen sink. They complained to Carter & Willow who did not repair it. After a few days, the Applicants arranged for a plumber to repair it at a cost of £200. Carter & Willow refused to refund this.

26. After some six months, there was a problem of water penetration. The cause seemed to be a defect where the flat roof of the kitchen extension joined the main house. They complained. Mr Devitt attended on one occasion and applied some mastic. This did not resolve the problem. Mr Pranaitiene, a builder, felt unable to remedy it himself as he was concerned about the stability of the kitchen roof. They made further complaints, but no further works were executed. This was an inconvenience. Mrs Pranaitiene referred to only one occasion when it was necessary to put out a bucket to collect rainwater.

27. The Applicants were generally happy with the house. Indeed, they put in an offer to purchase it. However, they were unable to secure a mortgage because there was no planning permission for the extension. They vacated the Property on 8 May 2022, having purchased their current accommodation.

28. The Applicants state that they do not recall being given an electrical safety certificate. However, the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020, only applied to "existing specified tenancies" from 1 April 2021. The landlord should have obtained a report and provided a copy to the tenants. It seems that he did not do so.

29. The Applicants have provided bank statements confirming that they paid their rent monthly in advance up to the end of the tenancy. Carter & Willow refused to return their deposit. When they approached the Deposit Protection Scheme, they were told that the deposit was not protected and they were referred to Justice for Tenants.

30. The Applicants discovered that on 1 September 2019, the London Borough of Barking and Dagenham had introduced a selective licencing scheme which applied to the area where the Property is situated. It seems that this scheme replaced a previous one. Justice for Tenants contacted the local authority. In response to the question: "Does the Property listed above currently have a licence under any of the licensing scheme currently operating in the London Borough of Barking and Dagenham", the answer supplied was "No application has been submitted for the current scheme which began in 2019".

31. The Applicants apply for a RRO in the sum of £16,200 in respect of the rent which they paid between 9 April 2021 and 8 April 2022.

Has an Offence been Committed?

32. The Tribunal is satisfied beyond reasonable doubt that an offence has been committed under section 95(1) of the 2004 Act:

(i) On 1 September 2019, the London Borough of Barking and Dagenham introduced a selective licencing scheme which applied to the area where the Property is situated.

(ii) The local authority has confirmed that no licence has been granted under the current scheme.

(iii) The offence was committed from 1 September 2019 to 8 May 2022 when the Applicants vacated the Property.

33. The Tribunal notes that there is some ambiguity in the local authority's letter, dated 5 September 2022. There is some suggestion that an application may have been submitted on 21 June 2019 under a previous scheme. However, there is no evidence as to what happened to this application. It is for the Respondent to raise the evidential burden that a valid application has been issued which affords a statutory defence. Mr Devitt has failed to do so.

34. The offence is committed by the person(s) who had “control of” and/or had been “managing” the unlicenced house (see section 263 of the Act at [17] above). The Tribunal is satisfied beyond reasonable doubt that the Respondent is the "person managing" the Property, in that he received rent through an agent from persons in occupation of the Flat.

The Assessment of the RRO

35. The 2016 Act gives the Tribunal a discretion as to whether to make an RRO, and if so, the amount of the order. We are satisfied that this is an appropriate case for a RRO to be made.

36. Section 44 provides that the period of the RRO may not exceed a period of 12 months during which the landlord was committing the offence. The amount must not exceed the rent paid by the tenant during this period, less any award of universal credit.

37. Having determined the maximum award, section 44(4) of the 2016 Act requires us to take into account the following factors:

(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.

38. However, before applying the statute, we are now required to apply the judicial gloss applied to it by the Upper Tribunal in *Acheapong v Roman* [2022] UKUT 239 (LC); [2022] HLR 44. In a number of recent decisions, the Upper Tribunal has caused uncertainty for both tribunal judges and the parties who appear before this tribunal which this tribunal discussed in *965 Fulham Road, SW6 5JJ* (LON/HMG/2022/0018). Until the matter is reviewed by the Court of Appeal, we are obliged to have regard to the guidance provided by Judge Elizabeth Cooke at [18] to [21]:

> "18. It is easy to say what the FTT should not do: it should not take the whole rent (less any payments for utilities) and regard that as the starting point subject only to deductions made in light of the factors in section 44(4) of the 2016 Act.
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> 19. What should it do instead?
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> 20. The following approach will ensure consistency with the authorities:
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> 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."

39. In the recent decisions of *Simpson House 3 Ltd v Osserman* [2022] UKUT 164 (LC) and *Hallett v Parker* [2022] UKUT 165 (LC), the Deputy President distinguished 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 (25%). Mr Neilson also referred the tribunal to *Dowd v Martins* [2022] UKUT 249 (LC). He suggested that a RRO should be made in the sum of 65% of the rent.

40. The Applicants paid rent of £16,200 during the twelve month period for which they are claiming a RRO. The Applicants were responsible for utility bills and council tax. The Applicants have provided bank statements confirming their payments of rent. Neither was in receipt of universal credit or any other benefits.

41. We have decided to make a RRO in the sum of £8,100, namely 50% of the rent of £16,200. In adopting this figure of 50%, we have regard to the following:

(i) We assess the seriousness of this offence at the lower end of the scale. This was an unlicenced house. The risks to the health and safety of the occupants were substantially less than those associated with an unlicenced

HMO. However, any licencing offence is a serious matter. The legislation has been passed to ensure that the private rented sector is properly regulated.

(ii) There is no criticism of the conduct of the Applicants.

(iii) The conduct of the landlord: There were some items of disrepair. We also take into account the fact that the landlord failed to protect the deposit in a Deposit Protection Scheme. We note that the Respondent appointed agents to let the property. However, a RRO can only be made against the landlord. If there was any negligence by the agent, this is a matter for the Respondent to take up with the agent.

(iv) No evidence has been adduced as to the financial circumstances of the Respondent.

(v) There is no evidence that the Respondent has been convicted of any offence. However, we give limited weight to this. LHAs are under considerable financial pressures and are only able to take action in limited cases. A conviction would rather have been an aggravating factor.

42. The Applicants have paid tribunal fees of £300. We are satisfied that this sum should be refunded to the Applicants by the Respondent.

Robert Latham
13 October 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.