FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/HMF/2024/0129**
Property	**:**	**Flat 29, Barry House, Rennie Estate, SE16 3PH**
Applicants	**:**	**Paul Dryburgh, (1) Alejandro Vanegas Meza, and (2) Benedict Nartey-Tokoli (3) (Represented by Justice For Tenants)**
Respondent	**:**	**Estateagentpower Limited, (1) Hubert Pakianather Ferdinand, and (2) Joyce Maureen(3)**
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** **Mel Cairns MCIEH**
Venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**7th November 2024**

DECISION

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1. The Tribunal has received an application under section 41 of the Housing and Planning Act 2016 (the Act) from the Applicants for a rent repayment order (RRO).

2. It is asserted in the application notice that the landlord committed an offence of having control of or managing a house in multiple occupation (HMO) that was required to be licensed but was not so licensed.

3. The Applicants in this case are Paul Dryburgh, Alejandro Vanegas Meza, and Benedict Nartey-Tokoli, (The Applicants).The Respondents are named as Estateagentpower Limited, Hubert Pakianather Ferdinand, and Joyce Maureen. In fact in became clear at the hearing that only the Second and Third Respondents were liable as they were the landlords. Estateagentpower were the manging agents. Hereafter in this decision the Second and Third Respondents will be referred to as "The Respondents".

4. The Applicants are seeking a Rent Repayment Order. They were all in occupation of premises at Flat 29, Barry House Rennie Estate, SE16 3PH (The premises). The premises was situated within an additional licensing area as designated by the London Borough of Southwark. The additional licensing scheme came into force on into force on 1st March 2022, and will cease to have effect on 1st March 2027. The additional licensing scheme has been implemented borough-wide. The premises met all the criteria to be licensed under the said designation and it does not qualify for any licensing exemptions according to the Applicants.

5. The Premises was a four-bedroom flat in a five-storey block of flats with a shared kitchen and bathrooms. During the relevant period of 23/08/2022 and 24/08/2023, the premises were occupied by at least three persons living in two or more separate households and occupying the property as their main residence.

6. The premises were occupied as follows:

    - Paul Dryburgh lived at the Property from 2nd December 2023 until 24th August 2023.
    - Benedict Nartey-Tokoli lived at the Property from 4th of October 2021 until 3rd October 2023.
    - Alejandro Vanegas Meza lived at the Property from 26th August 2022 until 14th August 2023.
    - Enzo lived at the Property from 21st September 2022 until late September 2023. •
    - Dimple Saraswat lived at the Property before Benedict Nartey-Tokoli moved in and moved out in September 2022.

- Mady Diabate and another student from France lived at the property after Benedict Nartey-Tokoli moved in until the summer of 2022.

7. As already indicated during the Applicants' occupation the premises were located in an area operating an additional licensing scheme. The appropriate HMO licence was not held during the relevant period, and no licence application was made at any point during the Applicants' tenancy. This is confirmed by an email from the council dated 8th November 2023.

8. We were shown evidence of the rent payments made by the Applicants in the relevant period.

    - Paul Dryburgh is seeking to recover the sum of £7,362.29 for the rent paid for the period between 02/12/2022 and 24/08/2023.
    - Alejandro Vanegas Meza is seeking to recover the sum of £9,092.87 for the rent paid for the period between 26/08/2022 and 14/08/2023.
    - Benedict Nartey-Tokoli is seeking to recover the sum of £12,538.81 for the rent paid for the period between 23/08/2022 and 24/08/2023.
    - None of the Applicants were in receipt of a housing element of Universal Credit or Housing Benefit.

9. At the hearing Jamie McGowan represented the Applicants and Alexander Bunzl the Second and Third Respondents. He accepted that the First Respondent was the managing agent and his clients were the correct party in relation to the Rent Repayment Order. His clients did not attend the hearing apparently due to ill health he was therefore unable to advance evidence on their behalf beyond what was in the Respondents' bundle.

10. He said that his clients had a reasonable excuse for not obtaining a license. The Second Respondent had made an application for a license on 16th February 2018 which was before the Additional License regime we were concerned with. He maintained however that because his clients had made an application and paid a fee which had not been dealt with by the local authority they were under the impression that everything was in order. The Second Respondent had followed this up with the local authority and he believed he could continue to rent the property. This contrasted with the landlord who did nothing.

11. Mr McGowan said that an application made under a previous scheme could not be an application duly made in accordance with s.72(4) of the Act. Moreover the Respondents had the evidential burden in relation to the Reasonable Excuse defence and they had not discharged it because there was no evidence to back up his claim. We did not even know if the original application was properly made. Under the test in Marigold v Wells [2023] UKUT 33 (LC) the reasonable excuse defence was not made out because there was insufficient evidence to

prove he had made the license application and he was not at the hearing to make that submission good. Whilst a previous application made six months before could perhaps provide a reasonable excuse that was not the case here. The application was six years before the hearing. Any reasonable excuse would have lapsed before that period had expired. Further the Applicant was aware of the need for a license as early as 2020 when he was dealing with the same issue on a different property.

12. In relation to utilities Mr Bunzl conceded that the only utility for which the Respondents were liable was the water bill and he had no details as to the amounts involved.

13. Although some allegations about unsatisfactory conditions had been raised by the Applicants these were not confirmed by any expert or other supportive evidence. Further, the Applicants confirmed that none of those matters had been raised with the landlord or agents. The parties agreed that, in the circumstances, a conduct neutral position was appropriate.

14. Mr Mcgowan said that whilst there may not have been a malicious breach there was not genuinely held ignorance. The Second Respondent was aware he may need a license by virtue of the other property he owned. Further he had been obtaining rent for the premises for six years after he purportedly attempted to obtain the license. There were no financial circumstances put forward by the Respondent. Mr Bunzl accepted this but did stress that his client had no previous convictions. He said 10-20 % of the rent penalty would be sufficient to send a message to his client. Mr McGowan on the other hand pitched his case at 75% relying on the decision in Newell v Abbott [2024] UKUT 181(LC).

The law on Rent Repayment Orders

The Housing Act 2004 ("the 2004 Act")

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

16. 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 states.

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.

17. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 prescribes those HMOs that require a licence under the mandatory licensing scheme. 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.

18. Section 56 Housing Act 2004 deals with the designation of Additional Licensing Schemes:

56 Designation of areas subject to additional licensing

(1) A local housing authority may designate either–

(a) the area of their district, or

(b) an area in their district,

as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

(2) The authority must consider that a significant proportion of the HMOs of that description in the area are being managed sufficiently ineffectively as to give rise, or to be likely to give rise, to one or more particular problems either for those occupying the HMOs or for members of the public.

(3) Before making a designation the authority must–

(a) take reasonable steps to consult persons who are likely to be affected by the designation; and

(b) consider any representations made in accordance with the consultation and not withdrawn.

(4) The power to make a designation under this section may be exercised in such a way that this Part applies to all HMOs in the area in question.

(5) In forming an opinion as to the matter mentioned in subsection (2), the authority must have regard to any information regarding the extent to which any codes of practice approved under section 233 have been complied with by persons managing HMOs in the area in question.

(6) Section 57 applies for the purposes of this section.

19. There is no dispute in the present case that the local authority were operating an additional licensing scheme and that for the period in question the premises should have been licensed but wasn't.

20. Section 263 of the Act 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")

21. 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.

22. 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.

23. 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."

24. 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."

25. 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.

26. 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.

27. 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)."

28. 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.

29. 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."

30. 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.

31. 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]).

32.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%).

33.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."

Determination

34. There was clearly a breach as the Respondents did not have a license for the relevant period. We do not believe that they had a reasonable excuse. The fact that they may have applied for a license under a previous regime does not absolve them from responsibility for obtaining a license under the current regime. They had dealings with the local authority over another property which ought to have alerted them to the fact that they would need a license for the present property. Further we did not have enough evidence to support the fact that the original license application was even valid. The Respondents had not attended to give evidence and their counsel was limited in the extent that he could advance a case of reasonable excuse. Accordingly we consider that liability is made out.

35. Turning to quantum and applying the *Acheompong* criteria: the total rent paid for the relevant period was the following: £28,891.82 for the period between 23/08/2022 and 24/08/2023

36. None of the Applicants were in receipt of a housing element of Universal Credit or Housing Benefit.

37. We make no deductions from the total rent for the cost of utilities. The tenants paid the energy bills and water charges would be relatively negligible and part of the rental's appeal.

38. The failure to license offence is serious but not as serious as other offences such as unlawful eviction. Further this was a conduct neutral case. We also take into account the fact that the Respondent has no previous convictions as far as we are aware. We consider that an award of 70% of the rental value is appropriate in this case. We use as guidance the decision in *Newell v Abbott* where the baseline figure for a conduct neutral case was stated to be 60%. Here the Respondent had been obtaining rent despite not having a license for a significant period therefore an addition to the baseline figure is appropriate.

39. Accordingly, we determine the following:

The Respondents should pay the Applicants £20225

40. In addition the Respondents should repay the Applicants their application and hearing fee of £320 in total.

Judge Shepherd

5th December 2024

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.