FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BB/HMG/2021/0009**
HMCTS code (paper, video, audio)	:	**V: CVPREMOTE**
Property	:	**Flat 61 Adriatic Apartments 20 Western Gateway London E16 1BT**
Applicant	:	**Ms Sabah Chaudhary**
Representative	:	**Justice for Tenants**
Respondent	:	**Mr Abayomi Abiola Ojetunde**
Representative	:	**Mr Olubode Akodu TKD solicitors**
Type of application	:	**Application for a Rent Repayment Order by the tenant**
Tribunal members	:	**Mrs E Flint FRICS** **Ms S Coughlin MCIEH**
Venue and date of hearing	:	**Remote video hearing on 9 November 2021**
Date of decision	:	**9 December 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in two bundles, the contents of which we have noted. The order made is described below.

Decision of the tribunal

(1) The tribunal makes a Rent Repayment Order against the Respondent in the sum of £10,335, the Tribunal being satisfied beyond reasonable doubt that the respondent has committed an offence pursuant to s41 of the Housing Act 2004, namely that he is a person having control of a house which is required to be licensed under s95(1) of the 2004 Act but was not so licensed. Under section 99 of the 2004 Act "house" means a building or part of a building consisting of one or more dwelling.

(2) The tribunal determines that there be an order for the refund of the application and hearing fees in the sum of £300 pursuant to Rule 13(2) of the Tribunal Rules.

The application

1. By an application dated 17 February 2021 the tenant sought a Rent Repayment Order (RRO) in the sum of £15,900 being the rent paid for the twelve months commencing 15 December 2019, against the Respondent pursuant to s.41 of the Housing and Planning Act 2016. The Respondent is the long lessee of the subject flat.

2. It was alleged that the respondent was a person having control of, or managing, an unlicensed house, under s.95(1) Housing Act 2004: A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part but is not so licensed; it is an offence under s40(3) of the Housing and Planning Act 2016.

3. The Housing Act 2004 Section 80(1) permits local authorities to designate the area of their district or an area within their district as subject to selective licensing provided that certain criteria are met. The rented property was situated within a selective licensing area as designated by Newham. The selective licensing scheme came into force on 01/03/2018.

The hearing

4. The Applicant tenant was represented by Ms Clara Sharratt of Justice for Tenants and the Respondent was represented by Mr Olubode Akodu of TKD solicitors.

The background

5. The property which is the subject of this application is a third floor one bedroom flat in a modern purpose built block. Neither party requested an inspection and the tribunal did not consider that one was necessary.

6. The parties agreed that the flat was in a selective area of licensing within the London Borough of Newham. It was not disputed that at the relevant dates the respondent was a person having control of the premises and that he did not hold the requisite licence. The amount of rent paid and the period of the offence, namely the twelve months of the tenancy, were not disputed. The only issue to be determined was the amount of the RRO.

The Evidence

7. The application is for the period of the tenant's occupation, namely 15 December 2019 to 14 December 2020.

8. On behalf of the Applicant, it was stated that prior to the Applicant moving in it had been agreed that the sofa and dining chairs in the living room would be replaced together with the mattress for the double bed. However, none of these items had been replaced when she took possession of the flat. Moreover, the managing agents had not arranged for the old furniture to be removed when the new items were delivered causing an inconvenience to the tenant.

9. The tenant had not been able to use the grill and oven at the beginning of the tenancy: it was discovered that this was due to the clock not having been set. The tenant confirmed that there were no instructions as to the operation of the cooker. Furthermore, when the tenant reported a dripping tap in the kitchen it took 17 days for it to be replaced. In addition, there had been problems with a malfunctioning fridge/freezer, there were a number of attempts to solve the issue. The fridge/freezer was replaced and later during the summer it leaked refrigerant and had to be replaced again under the guarantee. It had been difficult to store food during this time. In total there were two months when the fridge/freezer was not working.

10. During cross examination Ms Chaudhary agreed that prior to leaving the flat she had emailed the landlord stating that she had "a nice stay" and that the area and property were nice. She explained this was because she wished to ensure that her deposit would be returned. She

had however also pointed out that she was not impressed with the managing agent.

11. When asked if the landlord had dealt with any issues raised directly with him Ms Chaudhary said that it had taken several days for a replacement fridge/freezer to be delivered. She did not accept that all the delays were the fault of the managing agent.

12. The Respondent had mentioned that he intended to sell the flat. There was one viewing but nothing further materialised.

13. The managing agent had not protected her deposit. The county court decision was that the managing agent pay one month's rent and the landlord and agent jointly pay another month's rent. Ms Chaudhary confirmed that the landlord had complied with the court order however the managing agent had not done so.

14. Mr Akodu called Mr Ojetunde to give evidence who confirmed that when Ms Chaudhary viewed the flat, she had requested that the mattress and sofa be replaced. He said that the new furniture was not in situ at the beginning of the tenancy because Ms Chaudhary had wanted to move in quickly, before the new furniture arrived. He had left the managing agent to organise the delivery of the new and removal of the old furniture.

15. He was surprised when Ms Chaudhary called him regarding the fridge freezer as the managing agent had not informed him that there was a problem. Once she had his mobile number they had spoken regularly. He had allowed her to choose the replacement fridge/freezer.

16. Mr Ojetunde explained that the flat had been licensed however the managing agent had not informed him that it had expired. He had used the same managing agents for about ten years and had no problems until the previous letting. He had been considering changing agents because the previous tenant left with rent arrears but before doing so Rentigo told him that Ms Chaudhary wanted to move in as soon as possible. He no longer used the agents and confirmed that this is his only residential investment.

17. He accepted that he had relied upon the agents to ensure that he complied with his legal obligations. The flat had previously been licensed in 2015 but that licence had expired in 2017. He had now obtained a new 5 year licence: he had applied for it as soon as he became aware that the old licence had expired; the council did not require any works to be carried out before the licence was issued. The flat had remained vacant until the new licence was in place. Rentigo had obtained the previous licence on his behalf.

18. Mr Ojetunde said that the licence was displayed on the wall in the hall of the flat. Therefore, Ms Chaudhary would have known that the licence had expired throughout the tenancy. He had dealt with any complaints promptly once he was informed of any problems. The furniture was already on order when Ms Chaudhary viewed the flat. She could have delayed moving in. The oven and grill were working when she moved in, he did not know why they stopped working.

19. He agreed that the managing agents were not allowed to incur any expenditure without his agreement. Once authorised the managing agents organised the workmen.

20. There was a dispute as to whether Mr Ojetunde had entered the flat at the beginning of the tenancy and would have been aware of the condition of the furniture. Ms Chaudhary said that she met both the landlord and the agent in the flat but Mr Ojetunde said that he had not been in the flat for 5 years and had met her in the lobby of the building.

21. Mr Akodu said it was for the tribunal to decide upon the culpability of his client and whether the full amount of rent should be refunded. His client had acted honourably: he had admitted the offence but had been let down by the managing agents. In fact both sides had been let down by the managing agent. He suggested that the RRO should be a maximum of 50% of the rent paid.

22. Miss Sharratt said that there was no evidence in the bundle as to the managing agent's responsibilities under the management agreement. The Respondent did not have a reasonable excuse because on his own admission he was not happy with the managing agents. He had not taken any reasonable steps to check on his legal obligations. The flat was unlicensed for two years. The respondent may not be a professional landlord but he is experienced. There had been a lack of involvement in the management of the flat; repairs were not dealt with promptly which interfered with the comfort of the flat. He had not provided any financial evidence to be taken into account when reaching a decision.

23. She referred to a number of Upper Tribunal decisions, the most recent being Amanda Williams and Kishan Parmar and Others [2021] UKUT 244LC.

The tribunal's decision

24. The tribunal determines that the amount of the RRO is £10,335 based on 65% of the rent paid.

Reasons for the tribunal's decision

25. The Tribunal was satisfied beyond reasonable doubt that the respondent has committed an offence pursuant to s41 of the Housing Act 2004, namely that he is a person having control of a house which is required to be licensed under s95(1) of the 2004 Act but was not so licensed.

26. In determining the amount of the RRO the Tribunal was mindful of the guidance provided by the Upper Tribunal in Amanda Williams v Kishan Parmar and Others [2021] UKUT 244 9LC where it was held that *"there is no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s. 44(4), though the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases……*

27. The circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord", so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the FTT should take into account the purposes intended to be served by the jurisdiction to make an RRO:"

28. The President further stated that "*It is notable that for an offence of this type the maximum amount stipulation in s. 46 of the 2016 Act does not apply where an RRO is applied for by a tenant, even if the landlord has been convicted of the offence. That is an indication that Parliament regarded offences of control or management of an unlicensed HMO and control or management of an unlicensed house, contrary to sections 72(1) and 95(1) of the 2004 Act, as being capable of being less serious than other offences to which Chapter 4 of Part 2 of the 2016 Act relates. In any such cases, however, the tribunal retains a discretion to order repayment in the maximum amount, if justified*."

29. The matters to be taken into account when assessing the amount of the RRO in this case are the conduct of the landlord and tenant as no financial information was provided by the landlord and the landlord has not been convicted of an offence.

30. The Tribunal considered whether the respondent's explanation for not having a valid licence due to him having relied on the managing agent to obtain the licence as the agent had apparently done in the past was a reasonable excuse which would provide a complete defence under s95(4) of the Act, We were not satisfied that the landlord was able to avail himself of this defence for the reasons set out in paragraph 32 below.

31. There is no evidence of misconduct by the tenant. Indeed the landlord stated in an email to her dated 18 November 'Thank you for being a good tenant. It's a shame you're leaving' The landlord admitted the offence. The flat is in a modern purpose built block and its condition did not require any work before a new licence was granted. The landlord said that he applied for a licence as soon as he became aware that the old licence had expired and did not relet the flat until he received the new licence. The offence is less serious than one where the accommodation required improvement or the premises were overcrowded.

32. Nevertheless, the landlord was remiss in not checking the validity of the licence particularly as he had already decided that the managing agent was no longer providing what had previously been a good service dating back some ten years. He ought to have proper procedures in place and accepts that he did not but relied on the managing agent. He was also aware, because the flat had been previously licensed of the possible need to obtain a licence to let out the flat. The tribunal noted however that he did not relet the flat during the period after the new licence application had been submitted to the council and the grant was some time later: the delay was due to Covid restrictions. The respondent's behaviour was taken into account when mitigating the amount of the RRO.

Name: Evelyn Flint **Date:** 9 December 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Housing Act 2004

95Offences in relation to licensing of houses under this Part

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

(2) ....

(3) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a)a notification had been duly given in respect of the house under section 62(1) or 86(1), or

(b)an application for a licence had been duly made in respect of the house under section 87,

and that notification or application was still effective (see subsection (7)).

(4)In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—

(a)for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b)for failing to comply with the condition,

as the case may be.

(5)A person who commits an offence under subsection (1) is liable on summary conviction to a fine.

96Other consequences of operating unlicensed houses: rent repayment orders

(1) For the purposes of this section a house is an "unlicensed house" if—

(a)it is required to be licensed under this Part but is not so licensed, and

(b)neither of the conditions in subsection (2) is satisfied.

(2) The conditions are—

(a)that a notification has been duly given in respect of the house under section 62(1) or 86(1) and that notification is still effective (as defined by section 95(7));

(b)that an application for a licence has been duly made in respect of the house under section 87 and that application is still effective (as so defined).

(3) No rule of law relating to the validity or enforceability of contracts in circumstances involving illegality is to affect the validity or enforceability of—

(a)any provision requiring the payment of rent or the making of any other periodical payment in connection with any tenancy or licence of the whole or a part of an unlicensed house, or

(b)any other provision of such a tenancy or licence.

(4) But amounts paid in respect of rent or other periodical payments payable in connection with such a tenancy or licence may be recovered in accordance with subsection (5) and section 97 or in accordance with Chapter 4 of Part 2 of the Housing and Planning Act 2016 (in the case of a house in England) .

(5) If—

(a)an application in respect of a house is made to the appropriate tribunal by the local housing authority or an occupier of the whole or part of the house, and

(b)the tribunal is satisfied as to the matters mentioned in subsection (8),

the tribunal may make an order (a "rent repayment order") requiring the appropriate person to pay to the applicant such amount in respect of the relevant award or awards of universal credit or the housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 97(2) to (8)).

(8)If the application is made by an occupier of the whole or part of the house, the tribunal must be satisfied as to the following matters—

(a)that the appropriate person has been convicted of an offence under section 95(1) in relation to the house, or has been required by a rent repayment order to make a payment in respect of

(i) ...., or

(ii) ....,

(b)that the occupier paid, to a person having control of or managing the house, periodical payments in respect of occupation of the whole or part of the house during any period during which it appears to the tribunal that such an offence was being committed in relation to the house, and

(c)that the application is made within the period of 12 months beginning with—

(i)the date of the conviction or order, or

(ii)if such a conviction was followed by such an order (or vice versa), the date of the later of them.

(10) In this section—

- " the appropriate person ", in relation to any payment of universal credit or housing benefit or periodical payment payable in connection with occupation of the whole or a part of a house, means the person who at the time of the payment was entitled to receive on his own account periodical payments payable in connection with such occupation;
- " occupier ", in relation to any periodical payment, means a person who was an occupier at the time of the payment, whether under a tenancy or licence (and " occupation " has a corresponding meaning); "periodical payments" means—

Housing and Planning Act 2016

41Application for rent repayment order

(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.

44Amount of order: tenants

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) ….

(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.

(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.

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