The Upper Tribunal (Lands Chamber)

Case no. LC-2023-418

Respondent's notice

To an appeal against a decision of the First-tier Tribunal (Property Chamber), or a Leasehold Valuation or Residential Property Tribunal

Please read the attached guidance notes before completing this form

Respondent's details

Title

Messrs

Full name

Jinran Wong, Shrodda Goswani, Callum Haynes, Jack Bedford, Sophie Newman and Valentina Garro

Address

c/o
Flat Justice CIC, 1st Floor, 85 Great Portland Street, London

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Phone no.

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Email

Do you wish to receive correspondence about your case from the tribunal by email?

☐ Yes

☑ No

Respondent's solicitor or other representative

Full name

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My grounds for opposing the appeal (and, where permission to cross-appeal has been given, for cross-appealing) are set out in my attached statement of case

☑ Yes

☐ No

Type of procedure

I would like the appeal to be heard as:

☑ a review

☐ a rehearing

And by the

☑ Standard procedure

☐ Written representations procedure

I consider this procedure more suitable because:

It has already been chosen by UT

I intend to call an expert witness at the hearing of the appeal

- ☐ Yes
- ☑ No
- ☐ Possibly

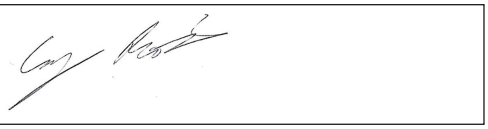
I may wish to call more than one expert witness

- ☐ Yes
- ☑ No
- ☐ Possibly

Declarations, signature and date

I accept responsibility for the conduct of the case and the payment of fees that fall due.

Signed



Print name

NG Morris

Date

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LC-2023-418
Application to cross appeal and grounds

Applicants: **LDC (Ferry Lane) GP3 Limited**
Property: Flat 201 and 601 **North Lodge**, Lebus Street, London, N17 9FQ
Decision of the First Tier Tribunal (Property Chamber) dated 11 May 2023

As foreshadowed in the tenants' response to the application for permission to appeal, the Respondents (Rs) to the appeal apply for permission to cross-appeal on the following grounds under s53(1) The Housing and Planning Act 2016 (HaPA) and under s11 of the Tribunals, Courts and Enforcement Act 2007.

Grounds for cross-appeal

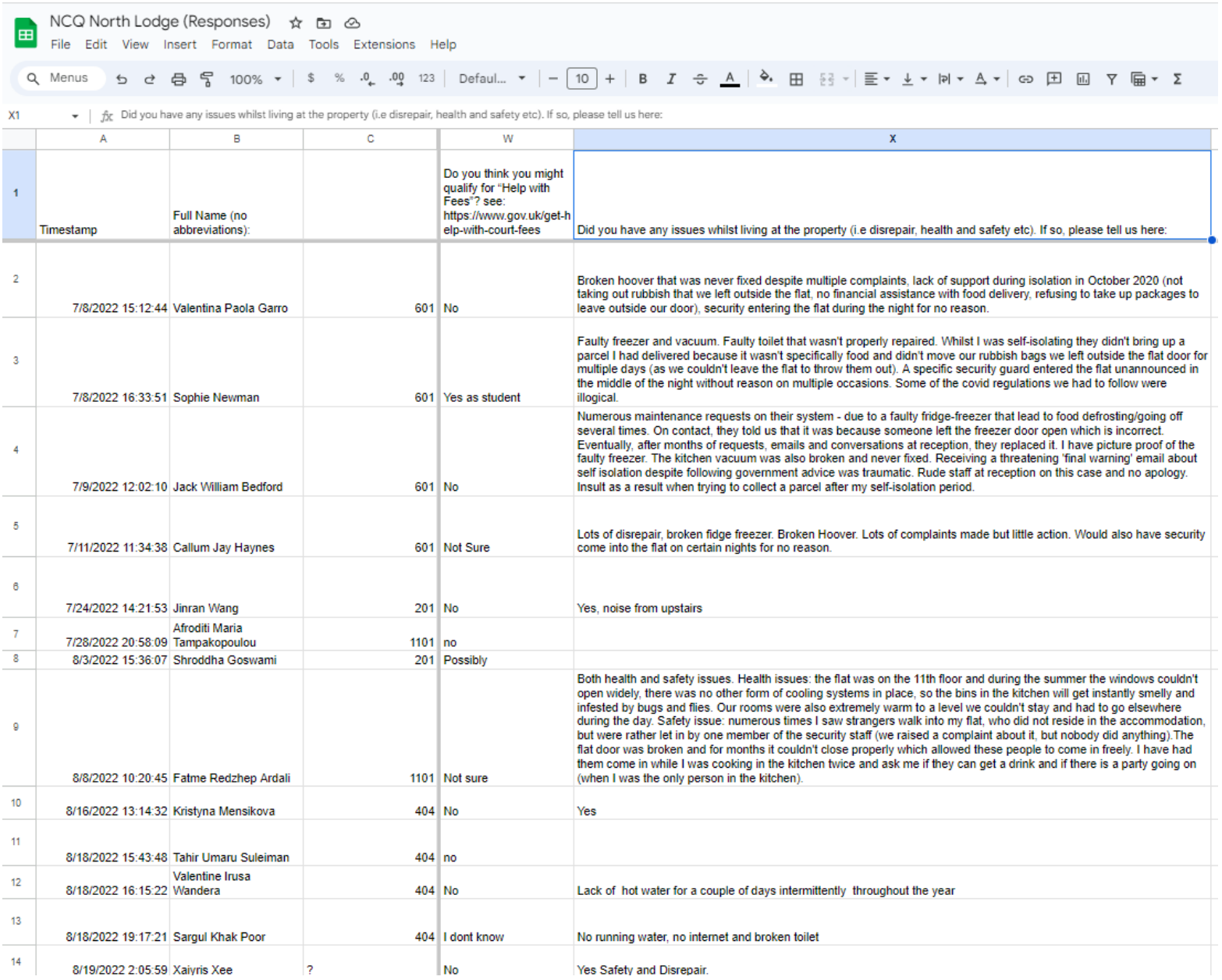
1. **First-tier Tribunal Property Chamber (Residential Property) (FtT) failed to give proper consideration to the tenants' complaints of the conditions at the property**

Rs argue that the FtT failed to give due consideration to the condition of the property in their assessment of the quantum. The Tribunal simply states, at §41 of the decision, that they were "unimpressed" by the arguments on conduct and condition.

The Rs presented extensive evidence on the conditions at the property. All Applicants attended the hearing and gave oral testimony. The tribunal stated (§41) that the statements "appeared to have been formulated to try to boost the penalty rather than based on any genuine complaint". This is not the position of the Respondents who maintain they suffered difficult conditions at the property. The use of the term "formulated" seems to imply that the Rs exaggerated their claims. This is refuted by Rs who from the outset all had genuine grievances against UNITE.

Indeed, Flat Justice has found that unless Applicants have had a difficult time at a property they are very unlikely to want to go through the enormous effort needed to bring a Rent Repayment Order (RRO) application, especially students who are nervous of legal proceedings and who, in most cases, move on to another property anyway the following year.

That these were genuine complaints is supported by the initial enquiries at Flat Justice by the Rs. Below is an excerpt from the responses to our "New Client Questionnaire", one of the first exercises in gathering information from new RRO Applicants:



NCQ North Lodge (Responses)

File Edit View Insert Format Data Tools Extensions Help

X1 | Did you have any issues whilst living at the property (i.e disrepair, health and safety etc). If so, please tell us here:

	A	B	C	W	X
1	Timestamp	Full Name (no abbreviations):		Do you think you might qualify for "Help with Fees"? see: https://www.gov.uk/get-help-with-court-fees	Did you have any issues whilst living at the property (i.e disrepair, health and safety etc). If so, please tell us here:
2	7/8/2022 15:12:44	Valentina Paola Garro	601	No	Broken hoover that was never fixed despite multiple complaints, lack of support during isolation in October 2020 (not taking out rubbish that we left outside the flat, no financial assistance with food delivery, refusing to take up packages to leave outside our door), security entering the flat during the night for no reason.
3	7/8/2022 16:33:51	Sophie Newman	601	Yes as student	Faulty freezer and vacuum. Faulty toilet that wasn't properly repaired. Whilst I was self-isolating they didn't bring up a parcel I had delivered because it wasn't specifically food and didn't move our rubbish bags we left outside the flat door for multiple days (as we couldn't leave the flat to throw them out). A specific security guard entered the flat unannounced in the middle of the night without reason on multiple occasions. Some of the covid regulations we had to follow were illogical.
4	7/9/2022 12:02:10	Jack William Bedford	601	No	Numerous maintenance requests on their system - due to a faulty fridge-freezer that lead to food defrosting/going off several times. On contact, they told us that it was because someone left the freezer door open which is incorrect. Eventually, after months of requests, emails and conversations at reception, they replaced it. I have picture proof of the faulty freezer. The kitchen vacuum was also broken and never fixed. Receiving a threatening 'final warning' email about self isolation despite following government advice was traumatic. Rude staff at reception on this case and no apology. Insult as a result when trying to collect a parcel after my self-isolation period.
5	7/11/2022 11:34:38	Callum Jay Haynes	601	Not Sure	Lots of disrepair, broken fidge freezer. Broken Hoover. Lots of complaints made but little action. Would also have security come into the flat on certain nights for no reason.
6	7/24/2022 14:21:53	Jinran Wang	201	No	Yes, noise from upstairs
7	7/28/2022 20:58:09	Afroditi Maria Tampakopoulou	1101	no	
8	8/3/2022 15:36:07	Shroddha Goswami	201	Possibly	
9	8/8/2022 10:20:45	Fatme Redzhep Ardali	1101	Not sure	Both health and safety issues. Health issues: the flat was on the 11th floor and during the summer the windows couldn't open widely, there was no other form of cooling systems in place, so the bins in the kitchen will get instantly smelly and infested by bugs and flies. Our rooms were also extremely warm to a level we couldn't stay and had to go elsewhere during the day. Safety issue: numerous times I saw strangers walk into my flat, who did not reside in the accommodation, but were rather let in by one member of the security staff (we raised a complaint about it, but nobody did anything).The flat door was broken and for months it couldn't close properly which allowed these people to come in freely. I have had them come in while I was cooking in the kitchen twice and ask me if they can get a drink and if there is a party going on (when I was the only person in the kitchen).
10	8/16/2022 13:14:32	Kristyna Mensikova	404	No	Yes
11	8/18/2022 15:43:48	Tahir Umaru Suleiman	404	no	
12	8/18/2022 16:15:22	Valentine Irusa Wandera	404	No	Lack of hot water for a couple of days intermittently throughout the year
13	8/18/2022 19:17:21	Sargul Khak Poor	404	I dont know	No running water, no internet and broken toilet
14	8/19/2022 2:05:59	Xaiyris Xee	?	No	Yes Safety and Disrepair.

One can see that nearly all the points of conduct complained of in the application witness statements are covered by these early responses. There was no "formulation" to "boost the penalty": they were genuine grievances and should properly have been considered by the tribunal in the setting of the award.

We ask that the UT remakes the award so that these issues are reflected in the quantum.

2. Deduction of utilities costs from the award

The appellant (A) provided no evidence for any of the utilities' costs they claimed in their statements. It has long been established that Rs under a RRO claim must provide evidence for any deduction claimed from an award. This principle was established under *Parker v Waller* [2012] UKUT 301 (LC)

(*Parker*) where Judge George Bartlett QC (President) stated at §40, in regard to a claimed deduction due to financial circumstances:

"*Were I to reduce the amount of the RRO because of these, the tenants would be entitled to know the facts that had led me to do so, not simply so that they understood the reasons for my decision but so that they could consider whether to seek permission to appeal against it.*"

The same principle applies, Rs argue, to the deduction of the utilities costs here. The Upper Tribunal has since confirmed this approach in a number of subsequent cases, e.g. *Hancher v David & ORS* [2022] UKUT 277 (LC).

Rs argue that without documentary evidence for the utilities costs there should not have been any deduction for the same.

Notwithstanding the above arguments, Rs further argue that, as a general principle, it is wrong for utilities to be deducted, from rents that include these, in the making of a RRO.

Historically, even after the Housing and Planning Act 2016 (HaPA) came into force, awards were normally calculated on the principles mainly established in the aforementioned *Parker*: i.e. that a landlord should not be allowed to profit from letting an unlicensed property. The *Parker* case was of course brought under The Housing Act 2004, which had been recognised by Parliament as inadequate in tackling the dangerous and substandard housing it was meant to combat.

Judge Cooke, in her landmark decision in *Vadamalayan* v *Stewart & ORS* [2020] UKUT 0183 (LC), reflected this sea-change, stating that (§19):
"*the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law*." (Our emphasis).
She further confirmed the move away from *Parker* at §31.

Nevertheless, the Vadamalayan decision compromised this position by allowing the deduction of utilities for those rents that included these (§16). We see this hybrid position as being at odds with the legislation. As Judge Cooke herself stated in the preceding paragraph:
"*There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order.*" (Our emphasis).

By the same logic, if a lease specifies that it is the landlord's obligation to pay for the utilities then these should not be deducted any more than any other such costs.

Judge Cooke argued that utilities are consumed "*at a rate the tenant chooses*". However, there is no consideration given in the ruling for the amount of the utility costs that represent standing charges from suppliers which would be borne by the landlord anyway as an ongoing cost were the property empty. Nor is there consideration for heating that would need to be maintained by the landlord for an empty property through the cold periods of the year. These are all necessary ongoing property maintenance costs.

Furthermore, in offering an inclusive rent, one must assume that a landlord has calculated what the average of such costs may be and decided to offer an inclusive rent to make a property more attractive

to prospective tenants. This is a marketing decision taken by the landlord at their own risk in a similar way to a landlord that offers, for example, a higher specification finish or one who offers a furnished flat as opposed to an unfurnished flat: yet the costs involved with those decisions are not deductible from a RRO.

We believe the logic of allowing deductions for utilities from inclusive rents is untenable.

Notwithstanding these rational considerations, we believe that such deductions are not legally justifiable either. As Judge Cooke succinctly stated in *Vadamalayan* (§12):

> "*this is a rent repayment order so we start with the rent*"

We would add: not the net rent.

Rent is defined in HaPA at s52(1) to include

"*any payment in respect of which an amount under section 11 of the Welfare Reform Act 2012 may be included in the calculation of an award of universal credit.*"

Many claimants of Universal Credit (UC) receive payments for their rent that includes utilities for properties in the Private Rented Sector (PRS). Indeed Government guidance has since clarified this point in "Universal Credit and rented housing: guide for landlords Updated 13 May 2020" at §7.2 (https://www.gov.uk/government/publications/universal-credit-and-rented-housing--2/universal-credit-and-rented-housing-guide-for-landlords#service-charges; accessed 24/08/2023):

"*In the private rented sector, a tenant's total rent is usually made up of both rent and service charges, which are not separately identifiable.*

DWP will not need to collect separate service charge information for the private rented sector group as DWP will pay the lesser of the total rent or the appropriate Local Housing Allowance."

As the Government does not separate out inclusive utilities in rent that is eligible for UC then nor should the judiciary in complying with this definition of rent with respect to a RRO.

We are not alone in our rejection of the UT guidance on deducting utilities from rent.

A number of FtT judges have made strong objections in their judgments to the guidance given under Vadamalayan in this respect.

Judge Nicol in LON/00AY/HMF/2020/0114 wrote in May 2021:

> *17. However, as well as not being a fine calculated by reference to the rent, an RRO is not a penalty to deprive landlords of their profits nor a repayment of that bit of the rent which exclusively relates to use of the property rather than for services or utilities.*
>
> *18. Rent is defined in section 52 of the 2016 Act as including any payment in respect of which an amount under section 11 of the Welfare Reform Act 2012 may be included in the calculation of an award of universal credit. That section provides that the*

calculation of an award of universal credit is to include an amount in respect of any liability of a claimant to make payments in respect of the accommodation they occupy as their home. There is provision for regulations to be made as to what is meant by payments in respect of accommodation and the circumstances in which a claimant is to be treated as liable, but there are no regulations excluding the costs of services or utilities for tenants in the private sector.

19. *The actual rent is specified in the tenancy or licence agreement. As an expert tribunal, the Tribunal can state that the rent is the price the landlord is prepared to offer, and the tenant is prepared to accept, not just for the property itself but for whatever services or inclusive bills it comes with. Landlords and letting companies offer services and inclusive bills not out of some altruistic motives but to ensure that the property is attractive in the market, so that they can find tenants prepared to pay the amount asked in rent. Therefore, there is no basis, either in law or in practice, for disregarding part of the rent to reflect the costs of such services or inclusive bills.*

20. *In paragraph 16 of her judgment in Vadamalayan, Judge Cooke said,*

> *"In cases where the landlord pays for utilities, there is a case for deduction, because electricity for example is provided to the tenant by third parties and consumed at a rate the tenant chooses; in paying for utilities the landlord is not maintaining or enhancing his own property. So it would be unfair for a tenant paying a rent that included utilities to get more by way of rent repayment than a tenant whose rent did not include utilities."*

This statement rests on the premise that the landlord gets nothing out of the deal and that the inclusion of such costs is not reflected to any extent in the rent, for neither of which is there any evidence.

21. *Furthermore, this is a policy argument, putting forward a rational basis for why the statute should provide for the exclusion of such costs. However, such arguments are for the legislature, not this Tribunal.* ***There is nothing in the statute which provides for such deductions.*** *As Judge Cooke said, the only deductions permitted are those listed in section 44 and the costs of services and utilities are not included in that list.* (Our emphasis).

22. *The Upper Tribunal is a superior court of record and, therefore, its decisions are binding on this Tribunal. However, utility costs were not part of the deductions sought or granted in Vadamalayan. Judge Cooke's comments on utility costs in paragraph 16 of her judgment were not part of the rationale for the decision and were therefore obiter.*
Therefore, they are not binding.

Similar arguments were made again by Judge Nicol in LON/00BG/HMF/2021/0195 in March 2022.

Judge Nicol further developed these arguments in LON/00AL/HMF/2022/0039 in November 2022:

31. *In relation to utilities, the Tribunal again finds it difficult to understand Judge Cooke.*

It is common for a landlord to include some of the utility charges within the rent. However, this does not only benefit the tenant.
Landlords do not include such services in the rent out of charitable goodwill but for sound commercial reasons such as increasing the chances of achieving a letting, attracting and retaining desirable tenants, and maintaining control of the identity of suppliers to the property. The same reasoning applies to the provision of furnishings, including white goods, but Judge Cooke does not extend her reasoning to such matters. Obviously, tenants control the rate of consumption of such services but this is necessarily built in to the landlord's calculations when offering them within the rent.

32. Further, the Tribunal cannot identify any support within the statute for this approach to utility charges. Nor does Judge Cooke. On the contrary, the legislation refers to "the rent" and not "the net rent". "Rent" has a clearly defined meaning in the law of landlord and tenant, namely "the entire sum payable to the landlord in money" (see Megarry on the Rent Acts, 11th Ed at p.519 and Hornsby v Maynard [1925] 1 KB 514). It is also stated in Woodfall: Landlord and Tenant at paragraph 7.015 that, "At common law, the whole amount reserved as rent issues out of the realty and is distrainable as rent although the amount agreed to be paid may be an increased rent on account of the provision of furniture or services or the payment of rates by the landlord." Parliament would have had this in mind in enacting the legislation.

The arguments were repeated in LON/00BJ/HMF/2022/0153 in January 2023 and Judge Nicol's dissenting opinion was repeated again last month in LON/00BH/HMG/2023/0003.

Judge Latham has also joined in the criticism of the UT's guidance on this subject in a judgment of 20th February this year, *Laven & Laven v Chappell & O'Leary* LON/00AN/HMG/2022/0018.
In his discussion of the UT's ruling in *Acheampong v Roman and Choudhury v Razak* [2022] UKUT 239 (LC) (*Acheampong*), Judge Latham makes the following observations at §40:

(iii) Judge Cooke suggests that the maximum award is the "net rent" rather than the "rent". She has not had regard to the established jurisprudence, but rather states (at [9]) that "a sum the tenant pays the landlord for utilities is not really rent".

(vi) [sic] *Judge Cooke does not explain how she has reached her conclusion that "rent" is to be equated with "net rent". Is she redefining the maximum award that a FTT has power to make under section 44(3) or is this a deduction that a FTT should make when it has regard to the financial circumstances of the landlord (section 44(4)(b))? There are circumstances where the legislation requires an FTT to make a RRO at the maximum level (section 46). The Tribunal would question whether it is appropriate for a judicial gloss to be applied reducing the maximum award from the "rent" to the "net rent".*

At §82 Judge Latham declined to follow Judge Cooke's guidance on deduction of utilities:

82. We must then turn to the guidance given by Judge Cooke in Acheampong and Hancher [Hancher v David [2022] UKUT 277 (LC)]. First, we must consider whether the maximum award should be the "net rent" (making deductions for utilities and/or any rent paid by Mr Chappell to his superior landlord). We decline to do so as we are satisfied that "rent" should be construed as it has been understood for the last 100 years, namely "the entire sum payable

to the landlord in money" (see [34] above). We do not consider that Judge Cooke's suggestion (at [9] of Acheampong) that "a sum the tenant pays the landlord for utilities is not really rent" is a sufficient justification to depart from this established jurisprudence.

Rs in the instant case add and adopt all of the arguments brought forward by Judges Nicol & Latham above and ask that the deductions made in this case be disallowed and that no such deductions should be made. We further request that the UT reviews its guidance with regard to allowing the deduction of utilities from rents that include these in the making of a RRO.

3. **Licensing offences should be considered as amongst the most serious offences under HaPA**

At §45 of the FtT decision in the instant case the Tribunal followed guidance from the UT that licensing offences should not be considered "*at the most serious end of the scale*". We believe that the UT guidance in this respect is incorrect and that the FtT should have considered the licensing offence as amongst the most serious of offences under The Housing and Planning Act 2016 (HaPA).

Under the The Housing Act 2004 (HA) failing to license a licensable property was **the only offence** for which a RRO could be made. Historically, the move to legislate to improve the safety of privately rented property was the continuation of the work of the "Campaign for Bedist Rights" group (CBR, later absorbed into Shelter), established after the horrific fire in a bedsit property in Notting Hill in 1982 where 8 people died and over 100 were left homeless. It has long been recognised that such properties present greater hazards than other types of accommodation: CBR found that the chances of being killed or injured by fire in an HMO were 28 times higher than for residents of other dwellings.

Licensing such properties to ensure that they comply with fire and safety regulations was seen as the main solution to this pervasive problem: the 2004 Act established the framework for this and gave authorities the means to enforce it.

Parliament recognised, however, that HA did not go far enough: landlords had realised quickly, under the HA, that they were very unlikely to be prosecuted for failing to license: on average one landlord was prosecuted per year per council. And without a prosecution from a council, tenants were powerless to make their own RRO application.

The Housing and Planning Act 2016 (HaPA) was intended to correct this. That further offences were added to the RRO scheme under HaPA should not detract from the fact that licensing is at the heart of the intention of RROs: to prevent criminal landlords from operating dangerous properties where tenants' lives are put at risk. That the UT should guide FtTs to consider that licensing offences are less important than the newly introduced offences indicates, we argue, that sight has been lost of the intention of this legislation: to ensure that tenants' homes are safe places to live. Diluting awards for licensing offences undermines Parliaments' intentions in both HA and HaPA, we believe, and this approach must be changed.

Our position on this has also been supported by Judge Latham in the above mentioned decision. At §84 he wrote, in considering the UT guidance in this respect:

"*We find it impossible to accept that in passing the 2016 Act, parliament intended to ratchet*

down the level of RROs that FTTs should make in respect of licencing offences. Further, as an Expert Tribunal, we have considerable knowledge of housing conditions in London. Unlicenced properties with inadequate means of escape carry a serious risk of death or serious injury. Equally, properties let in in unfit condition with dampness and mould growth also carry a risk of death or serious injury to health. These are serious hazards when assessed under the Housing Health and Safety Rating System introduced by the 2004 Act. We are not willing to minimise the social evil at which the 2016 Act is addressed."

In this regard, with respect to R's reliance on their membership of the ANUK/UNIPOL code as some sort of guarantor of quality, we refer the Tribunal to the example we related to the FtT in this case of another code member whose property was closed down by the West Yorkshire Fire Service earlier this year who found "*200 faults in* [the] *premises, and that should a fire have occurred, the building would offer little or no protection for its inhabitants*" (https://www.wyfs.co.uk/news/students-evacuated-flats-deemed-unsafe; accessed 17:08 22/08/2023). The code, which is largely self-policed, is clearly no guarantor of safety at student properties. The code member for the above property was expelled by the code's "Tribunal" in June this year but continues to operate the building as student accommodation. Most notably, the code's "Tribunal" made no findings about why the dangers at the property were not detected under the ANUK/UNIPOL code scheme nor any recommendations on how to avoid such a situation in the future.

Only the rigours of licensing and inspection by officers of the local authority offer this security. Indeed, we would argue that the ANUK/UNIPOL code is not fit for purpose and shelters providers from the rigorous tests of licensing in those boroughs that exempt members.

The award in this case should send a clear signal to the code members that they need to license their properties to ensure they are fully compliant. The safety of students in these properties should not be left to a self-administered, and self-serving, box-ticking exercise.

We ask that the Upper Tribunal re-assesses the award made in the instant case in line with the intention of Parliament to severely punish those landlords that fail to license their properties.

4. FtT's award did not reflect the UT's guidance that professional landlords should be punished more severely

In this case we have a professional landlord, perhaps the largest HMO operator in the country, that is well aware of the need to license its properties in areas where discretionary licensing schemes apply, having licensed such properties before. Indeed, it helped to draw up the UNIPOL/ANUK code of which it boasts membership: the same code specifies that its members must license their properties in such areas.

FtT should have had more regard to the fact that UNITE, knowing its obligations with regard to licensing, had either

1. failed to set up any proper mechanism to check whether a property needed licensing; or

2. deliberately ‘turned a blind eye’ to licensing requirements, hoping to escape the costs and additional checks involved

The appellant could produce no proper explanation for its failure to check the licensing requirements for the subject property, despite having licensed other such properties in other boroughs, e.g. Camden. Nor did the FtT increase the award to account for the delay of nearly three years involved in eventually making the licence application for the subject property.

On the other hand, Rs pointed the FtT to evidence that some of A’s properties had remained unlicensed throughout a whole five year licensing period, e.g. Moonraker Point in Southwark, so fully avoiding any licensing costs and the costs associated with making the building compliant, had these been necessary. Had a further two years lapsed before detection of the unlicensed subject property then A would have avoided licensing costs for not only North Lodge but likely also Emily Bowes Court and Station Court: all within Haringey.

Furthermore, a professional landlord of this scale should be punished with a commensurate award that has a chance of having some effect on their future conduct. R is a publicly listed company with a value in excess of £4 billion. As we pointed out to the FtT, A received substantial income from the wholly unlicensed North Lodge property which had a total of 528 beds. Taking the average of the Rs’ annual rents of £8,137 this makes a total income of ~£4,297,000. With a 97% occupancy level (last reported in UNITE’s Annual Report of 2012 for the subject property), this equates to an annual income from the unlicensed building of ~£4,168,000. The award of just over £23,000 made by the FtT therefore represents just over **half of one percent of the unlicensed property’s total incom**e for that year. In contrast, most smaller HMO landlords that have a RRO made against them can expect to lose the majority of the rent they received in a year from an unlicensed property.

As Newey LJ confirmed in *Kowalek v Hassanein Ltd* [2022] EWCA Civ 1041, regarding the purpose of RROs, at §23:

“*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*”. Continuing:

“*The 2016 Act serves that objective as construed by the Deputy President* [of UT in (Rakusen v Jepsen [2020] UKUT 298 (LC), [2021] HLR 18]. *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*.” (Our emphasis).

We cannot see that the award made in the instant case complies with this objective, bearing in mind the resources and size of this R. Nothing less than 100% should have been awarded in the RRO and we ask that UT re-makes the award accordingly.

Benjamin Herm-Morris
for
Flat Justice
On behalf of the Respondents to the appeal
24/08/2023