FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AP/HMF/2022/0183 (1)** **LON/00AP/HMF/2022/0168 (2)**
HMCTS	:	**V: CVPREMOTE**
Properties	:	**Flat 201, North Lodge, Lebus Street, London, N179FQ (1)** **Flat 601, North Lodge, Lebus Street, London N179FQ (2)**
Applicants	:	**Flat 201 - Jinran Wang, Shrodda Goswami (1)** **Flat 601 - Valentina Garro, Jack Bedford,Sophie Newman, Callum Hyne (2)**
Respondent	:	**LDC (Ferry Lane) GP3 Limited**
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** **Antony Parkinson MRICS**
Venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**11th May 2023**

DECISION (Amended under Rule 50 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013)

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing

1. This case concerns two flats in student accommodation in North London. These are Flat 201 and Flat 601, North Lodge, Lebus Street, London, N179FQ. The Respondents own the flats. They are a national provider of student accommodation. The Applicants were all occupiers of the one or the other of the flats.

2. The Applicants are seeking Rent Repayment Orders against the Respondents. These vary in amount depending on the duration of occupation:
    - Jinran Wang claims £6524.29 for his occupation of 201 North Lodge between 6/9/20- 29/8/21.
    - Shrodda Goswami claims £6673.29 for her occupation of 201 North Lodge between 10/9/20 – 29/8/21.
    - Callum Haynes claims £8087 for his occupation of 601 North Lodge between 6th September 2020 – 29th August 2021.
    - Jack Bedford claims £9180 for his occupation of 601 North Lodge between 6th September 2020 – 29th August 2021
    - Sophie Newman claims £9180 for her occupation of 601 North Lodge between 6th September 2020 – 29th August 2021.
    - Valentina Garro claims £9180 for her occupation of 601 North Lodge between 6th September 2020- 29th August 2021

3. Although there are two flats and there were two applications both concerned the question of whether the Respondents should have licensed the flats under the HMO legislation.

4. Both flats are 10 bedroom flats with shared kitchens and communal space, in a purpose build block of student accommodation. Flat 201 was occupied by 7

students at the relevant time. Flat 601 was occupied by 9 people at the relevant time (see above for the relevant times).

5. The Respondents are a subsidiary of Unite Group PLC (Unite) a specialist provider of student accommodation.

6. The area that the flats were located was subject to an Additional Licensing Scheme imposed by Haringey under which HMOs with 3 occupants who shared amenities needed to be licensed. The designation was made on 12th February 2019 and expires on 26th May 2025. It was common ground that the Additional Licensing scheme did not make any exemption for student accommodation.

7. Haringey have confirmed that the flats needed a license and at the hearing the application was still being administered – this is a lengthy process due to the total number of flats involved.

8. The Applicants argue that the Respondents should have been well aware of the need to license the flats. They are a large national organisation that lets properties to students, some of which are HMOs. The Applicants listed other properties owned by the Respondents that had already been licensed.

9. The Applicants also argued that the failure to license offence was aggravated by various factors relating to the Respondents' alleged conduct. These can be broadly summarised as follows:

   a) Inadequate support of the Applicants during the pandemic.
   b) Poor waste management.
   c) Lack of fire safety training.
   d) Unlawful entry by security staff.
   e) Poor response to maintenance requests.
   f) Flat 601 being excessively hot.
   g) An infestation of flies in Flat 601.

10. For the Respondents part they accepted that the flats were licensable under the Housing Act 2004 but argued that they had a reasonable excuse for not

licensing them because the local authority had carried out inadequate consultation and they had not been made aware of the need to license.

11. They said that Haringey should have been aware of their presence in the borough and should have targeted them to be consulted. In effect they blame the Local Authority for failing to notify them individually about the additional licensing scheme. The argument runs that "consultation" in the case of larger, prominent landlords means direct contact and notification which goes beyond ordinary consultation.

12. The Respondents argue that as soon as they were aware of the need to license they checked whether they were exempt and once they were realised they were not (they were notified of the need to license by Haringey on 24th October 2022) they began the process of application which has been delayed due to the number of flats involved.

13. In relation to quantum the Respondents argue that a reduction for utilities should be made to reflect the cost of utilities of £588.14 per annum per student which is included in the rent. They also say the offence if there is one is at the low end of seriousness.

14. In response to the allegations about their conduct the Respondents say they followed government guidance during the pandemic and provided support that was possible; they say that the tenancy agreement allows access without notice to the flats depending on the circumstances; they say the Applicants should have dealt with the fly infestation themselves; finally they deny that they did not respond to maintenance issues.

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 reedy 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. North Lodge would be exempt from the mandatory licensing scheme because it comprises purpose built self contained flats in a building containing more than three of them (Article 4(c)(ii) of the Licensing of Houses in Multiple Occupation (prescribed description)(England)Order 2018). In addition it would be exempt if it was managed by a prescribed educational establishment rather than a private landlord like the Respondents.

19. However, Haringey introduced an Additional Licencing Scheme which applies to properties with 3 or more occupiers. There was no exemption for student accommodation. The Respondents say this was unintended but there was no real evidential basis for this allegation save for correspondence from officers who are not necessarily in tune with the decision makers who decided to introduce the additional licensing scheme.

20. Section 263 provides:

"(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–

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

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

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

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

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

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

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."

The hearing

34. Mr Morris of Flat Justice appeared on behalf of the Applicants and Mr Whatley of Counsel appeared on behalf of the Respondents. The hearing took place over two dates, the first dealing with the evidence and the second dealing with closing submissions.

35. All of the Applicants gave evidence and were cross examined. The focus of their evidence was on the allegations about the Respondents' conduct during the pandemic, the alleged security guard intrusions and poor response to maintenance. It was put by Mr Whatley that the Respondents offered welfare assistance. The Applicants in turn said they were not given information about the welfare team. Mr Whatley also suggested that the flies could have originated from poor management of refuse by the tenants. In relation to the blocked sink in Flat 601 the Applicants said they had themselves unblocked the sinks. One of the Applicants said they had witnessed the security guard enter the flat. They had not been scared and he had not entered the individual rooms. It was suggested he was merely carrying out a security check.

36. Will White the Head of Operations for Unite Students gave evidence. He said local managers were responsible for licensing. He said they found out about licensing requirements by the local authority contacting them or by local officers reaching out to the local authority. He accepted that changes needed to be made to ensure that the Respondents complied with licensing requirements in the future. He maintained that the Respondents had provided welfare assistance during the pandemic. The Respondents had not been informed of the security guard incursions and had not therefore investigated them.

Reasonable excuse

37. 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.

38. The key provision here is subsection (3). The Respondents say that Haringey failed to comply with the requirements of the subsection. Notably they have not sought to challenge this failure via Judicial Review which would have been the appropriate route. Instead, they seek to rely on the alleged failure to support their reasonable excuse argument. They say that Haringey failed to comply with the subsection because they did not recognise that purpose - built student accommodation would likely be affected by the proposed designation. They advance no evidence to support this allegation other than letters from officers who were administering the Additional Licensing Scheme. They provide no connection between these officers and those who carried out the designation – i.e. the policy makers. If they had challenged the local authority properly via Judicial Review they could have sought such disclosure. Instead, they speculate as to the local authority's motives.

39. In any event the Tribunal rejects the central tenor of the Respondents' argument that as a student provider of housing which is exempt from the mandatory licensing requirements they are entitled to special consultation treatment which excuses them from making their own investigations into the existence and effect of the designation on their own properties. In fact, they are in no different position to a private landlord who was not caught by the mandatory scheme but is caught by the Additional Licensing Scheme. In this scenario the

private landlord is culpable because he failed to inform himself of the requirement. The fact that the Respondents are a large student provider who have apparently licensed before in other boroughs and have staff that should "reach out" to the local authority merely strengthens the argument that it was for them to find out what the local authority's requirements were. It is simply unacceptable to blame the authority for not making specific contact with them.

40. Haringey's actual consultation prior to designation remained unacknowledged by the Respondents because of their misguided expectation of special treatment. An email from Glayne Russell the Team Leader of the Private Sector Housing Team states that before the designation took place it was advertised in newspapers, at the landlord's forum, sent to all landlord governing bodies and to the landlord and agent mailing list. She also states "Unite never came to us to discuss the matter which I would have expected them to do". In other words the designation was widely advertised. Further there are publication requirements relating to the designation contained in the Licensing and Management of Houses in Multiple Occupation and other Houses (Misc Provisions) (Engl;and) Regulations 2006/373. No evidence was provided to suggest this publication was not carried out. The Respondents cannot excuse their failure to license on the basis that the local authority did not go one step further and contact them directly. The reasonable excuse defence is rejected.

Conduct

41. The Tribunal were largely unimpressed by the Applicants' arguments on conduct which appeared to have been formulated to try and boost the penalty rather than based on genuine complaint. To suggest that the Respondents had special duties during the pandemic is unrealistic. The argument about incursions by security guards was largely based on innuendo rather than direct knowledge. The arguments about alleged fly infestations and heat in the property were equally unimpressive.

Quantum

42. Applying the criteria in Acheampong above:

43. The total rent claimed by each Applicant was as follows:

- Jinran Wong - £6524.29
- Shrodda Goswami - £6673.29
- Callum Haynes - £8087
- Jack Bedford - £9180
- Sophie Newman - £9180

44. There is a deduction to be made for utilities. On a broad brush calculation using the information provided by the Respondents this is £40 per Applicant per month. The adjusted rent figures are therefore:

- Jinran Wong - £6084.29
- Shrodda Goswami - £6233.29
- Callum Haynes - £7647
- Jack Bedford - £8740
- Sophie Newman - £8740

45. The offence is not considered at the serious end of the scale either comparing the offence to other offences or other cases of the same offence. The Respondents should have been aware of the need to license but this was not a deliberate breach. Hopefully they will ensure that they don't fall foul of the law again. No addition is made for conduct for the reasons already given. We consider that a 50% penalty is appropriate.

46. Accordingly we determine that the Respondents should pay Rent Repayment Orders of the following amounts:

- Jinran Wong - £3042
- Shrodda Goswami - £3117
- Callum Haynes - £3823.50
- Jack Bedford - £4370
- Sophie Newman- £4370
- Valentina Garro - £4370

47. In addition the Tribunal orders the Respondents to pay the Applicants £300 - representing their application and hearing fees.

Judge Shepherd

11th May 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.