FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/HMF/2021/0183 & 0173**
HMCTS	**:**	**V: CVPREMOTE**
Property	**:**	**6 Canalside Studios, 2-4 Orsman Road, London N1 5FB.**
Applicants	**:**	**Louise McLoughlin (1)** **David Scott (2)**
Representative	**:**	**In person**
Respondent	**:**	**Orsman Properties LLP**
Representative	**:**	**Mr. Michael Gerrard**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant**
Tribunal Member	**:**	**Anthony Harris LLM FRICS FCIArb** **Ms R Kershaw**
Date and Venue of Hearing	**:**	**24 November 2021 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**25 November 2021**

DECISION

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: CVPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Applicant and Respondent each filed a Bundle of Documents and to which references are made in this decision.

Decision of the Tribunal

1. The Tribunal makes a rent repayment order against the Respondent in the sum of £8986.12 in favour of the 1st Applicant and £8585.92 in favour of the 2nd Applicant. This is to be paid by 10 January 2022.

2. The Tribunal determines that the Respondent shall also pay the Applicants £300 by 10 January 2022 in respect of the reimbursement of the tribunal fees paid by the Applicants.

The Application

3. By an application, dated 30 July 2021, the 1st Applicant, Ms McLoughlin seeks a Rent Repayment Order ("RRO") in the sum of £8986.12 against the Respondents pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The Respondent is the Manager of the Flat 6, Canalside Studios, 2-4 Orsman Road, London N1 5FB (the Flat).

4. By an application, dated 23 July 2021, the 2nd Applicant, Mr Scott seeks a Rent Repayment Order ("RRO") in the sum of £8585.92 against the Respondents pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The Respondent is the Manager of the Flat.

5. On 13 August 2021, the Tribunal gave Directions. Pursuant to the Directions, each party has filed a Bundle of Documents.

The Hearing

6. All parties appeared via video link.

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

7. Section 40 provides :

> "(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."

8. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". These include the offence under section 72(1)) of the Housing Act 2004 ("the 2004 Act") of control or management of an unlicenced HMO.

9. 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.

10. 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)."

11. 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.

12. Section 44(4) provides (emphasis added):

> "(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."

13. Section 56 is the definition section. This provides that "tenancy" includes a licence.

The Housing Act 2004 ("the 2004 Act")

14. Part 2 of the 2004 Act relates to the designation of areas subject to additional licensing of houses in multiple occupation (HMO). By section 56, a local housing authority ("LHA") may designate the area of their district or an area of the district is subject to Additional Licensing in relation to the designated HMOs specified.

15. Section 72 specifies a number of offences in relation to the licencing of houses. The material parts provide (emphasis added):

> "(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61 (1)) but is not so licensed.
>
> (4) 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
> (b) an application for a licence had been duly made in respect of the house under section 63

16. It is to be noted that this section does not use the word "landlord". Section 263 defines the concepts of a person having "control" and/or "managing" premises. These definitions are wide enough to include a number of different people in respect of a property. Where there is a chain of landlords, more than one may be liable. It may also extend to a managing agent.

17. Section 263 provides (emphasis added):

> "(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

(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."

18. In *Rakusen v Jepson and Others [2021] EWCA Civ 1150,* the Court of Appeal, in a judgement handed down on 22 July 2021, reversed the decision of the Upper Tribunal which upheld the decision of the First-tier Tribunal in concluding that an RRO could be made against a superior landlord. In its judgement, the Court of Appeal concluded that section 40(2)(a) only enables an RRO to be made against an immediate landlord and not a superior landlord.

19. The decision of the Court of Appeal is binding on this tribunal.

The Evidence

20. On 10 May 2018, the London Borough of Hackney introduced an Additional Licencing Scheme designating the whole Borough as an area for Additional Licensing of all Houses in Multiple Occupation. The scheme came into force on 1 October 2018 and runs until 30 September 2023.

21. The 1st Applicant stated in evidence that she had occupied the Flat between March 2016 and January 2021 under several tenancy agreements. The most recent agreement was for term from 22 May 2020 to 21 May 2021 at a rent of 2296.67 per calendar month. The tenants are named as Louise McLoughlin, David Scott and Dana Debora Feigenblat who is not part of the application. In response to a question from the tribunal it was confirmed that the Flat had been continuously occupied by three persons in the 12 months prior to the first Applicant vacating the property. This was not disputed by the Respondent.

22. The 2nd Applicant stated he had lived at the property from July 2019 until May 2021.

23. The written documents show that the rent is shared between the three tenants with Miss McLauchlan paying a rent of £765.81 per calendar month and Mr Scott a rent of £732.16 per month. No services or utilities are included in the rent.

24. The evidence shows that the Flat is a three-bedroom flat in a converted warehouse containing multiple units and it was occupied by three persons during the 12 month period to January 2021 forming at least two households thus satisfying the licensing condition.

Licensing Scheme

25. The Additional Licensing Scheme applies to all properties which are occupied by three or more persons, comprising two or more households. The tribunal is satisfied beyond reasonable doubt that the Flat comes within the scheme and was required to be licensed.

26. It was common ground between the parties that the property was not licensed and no licence had been applied for prior to 21 April 2021.

27. The tribunal is satisfied, beyond reasonable doubt, that the Flat was an HMO, it was required to be licensed and was not licensed prior to the application.

The period of the offence

28. Under section 41(2)(a) of the Housing and Planning Act 2016 a tenant may apply for a rent repayment order if 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 was made.

29. The tribunal is satisfied that the offence was committed during a period of both Applicants occupation ending in January 2021 which was within the period of 12 months ending on the day the application was made to the tribunal.

The relevant landlord

30. The Respondent gave evidence that the application named the wrong person and that Michael Gerrard was not the landlord but a member of the Orsman Properties LLP although the Applicants had corresponded with him. The tenancy agreement names Orsman Properties LLP as the landlord. The tribunal accepts the evidence that Orsman Properties LLP is the relevant landlord for the purposes of the application and this was accepted by the Applicants. It was stated in evidence that an agent was involved at some point and appears to have prepared the tenancy agreement but rent payments were made to the Respondent and there is a sufficient

body of correspondence between the Applicants and Respondent regarding the state of repair of the property for the tribunal to be satisfied beyond reasonable doubt that the Respondent was a person in control or managing the property.

31. The definition of a landlord is discussed above under section 263 of the Housing Act and amplified by the decision of the Court of Appeal in *Rakusen v Jepson and Others*. The tribunal is satisfied beyond reasonable doubt that the Respondent is the landlord for the purposes of section 263.

32. We are therefore satisfied beyond reasonable doubt that the Respondent also falls within the definition of a landlord.

Repayment Order

33. The tribunal is satisfied that the conditions for the making of a Rent Repayment Order have been made out. Under section 44 of the 2016 Act the amount the landlord may be required to repay must not exceed the rent paid in that period. The tribunal must also take into account the conduct of the landlord and tenant and the financial circumstances of the landlord and whether the landlord has been convicted of an offence.

34. The tribunal has no evidence of a conviction.

35. The tribunal has no evidence of the Respondents financial circumstances.

36. Much of the evidence at the hearing and in the written evidence concerned the state of repair of the Flat. In particular evidence was given of a long-running problem of roof leaks particularly affecting the bedroom of the first Applicant. Repairs were effected in early 2019 and for a short period of time the Applicants were rehoused by the landlord. The quality of the rehousing was disputed. £500 compensation was paid by the Respondent. The roof was repaired by placing corrugated plastic over the defective area. An additional skylight was said to have been installed.

37. Also in dispute was the background to the application for, and granting of, a licence to operate a bar or cafe immediately adjoining the Flat and the hours of operation. The first Applicant gave evidence that the application was for a 4 AM licence. The Respondent stated that the licence was granted until 10 PM was on occasions a 21 day notice was given for an extension. The tribunal finds that the first Applicant was a careful and credible witness and prefers her evidence on this point.

38. The Respondent disputed that it was a poor landlord and failed to carry out repairs promptly. In its view it always reacted to emails reporting disrepair. The Respondent stated it had not been aware of the requirement to licence the property and as soon as it was drawn to its attention it immediately applied for a licence. The Respondent disputed that repairs to the roof and

gutter had been carried out using tape. A fire alarm system was installed in 2019 of the break glass type and it was fully compliant.

39. The amount of rent paid in the relevant period is by the 1st Applicant was £8986.12 and the amount paid by the 2nd Applicant was £8585.92

40. The tribunal has considered the evidence prefers the evidence of the Applicant in relation to the long-running problem with roof repairs which is supported by documentary evidence photographs and videos. The landlord is a professional landlord with multiple properties and should have known the licensing requirements. While in some circumstances a prompt application could be mitigation the tribunal does not find it in this case.

41. The tribunal finds no evidence of any conduct on behalf of the tenant which is relevant to this assessment.

42. The tribunal has considered the guidance given by the Upper Tribunal in Williams v Parmar and finds that the appropriate starting point for assessment of an RRO is 100% of the rent paid. It does not find anything in the conduct of either party to justify variation from this figure and therefore makes a rent repayment order in favour of the Applicants.

Our Determination

43. The Tribunal is satisfied beyond reasonable doubt that the Respondents have committed an offence under section 72(1) of the 2004 Act of control of an unlicenced HMO. The House was a property that required a licence under Hackney's Additional Licencing Scheme. At no time during the 1st and 2nd Applicants period of occupation, was it so licenced.

44. We are further satisfied that the Respondents were "persons having control" of the House as they received the rack-rent of the premises from the Applicants.

45. The tribunal makes a rent repayment order in favour of the 1st Applicant in the sum of £8986.12 and in favour of the 2nd Applicant in the sum of £8585.92.

46. We are also satisfied that the Respondents should refund to the Applicant's the tribunal fees of £300 which have been paid in connection with this application.

A Harris LLM FRICS FCIArb
Valuer Chair

25 November 2021

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.