**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case reference** | **:** | **LON/00BC/HMF/2020/0035** |
| **HMCTS Code** | **:** | **V: CVPREMOTE** |
| **Property** | **:** | **119A Maybank Road, London E18 1EJ** |
| **Applicant** | **:** | **(1) MR S AGYEI**<br>**(2) MS G OKINE** |
| **Applicant's Representative** | **:** | **Mr McLenahan of Justice for Tenants** |
| **Respondent** | **:** | **MR R ATKINS** |
| **Type of application** | **:** | **Application for a rent repayment order by tenant**<br>Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016 |
| **Tribunal members** | **:** | **Judge T Cowen**<br>**Mr S Wheeler MCIEH CEnvH** |
| **Date of hearing** | **:** | **14 July 2021** |
| **Date of decision** | **:** | **19 July 2021** |

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**DECISION**

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**The Tribunal orders that:**

(1) The Respondent is required to make a rent repayment to the Applicants in the sum of £12,204.84.

(2) The Respondent is required to reimburse the Applicants the application and hearings fees in the total sum of £300.

## Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected 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 before the tribunal at the hearing were in an electronic applicant's bundle of 148 pages. At the hearing, Mr Alasdair McLenahan of Justice for Tenants very ably and helpfully represented the Applicants.

The Respondent did not appear and was not represented. The Respondent did not comply with any orders of the Tribunal, did not respond to the application in any way and did not submit any documents, evidence or submissions.

The Tribunal heard evidence at the hearing from the Second Applicant, Ms Okine. The First Applicant could not attend because at the time of the hearing, he was hospitalised with COVID-19. The First and Second Applicants had both signed a statement of truth at the bottom of their joint statement of case.

The Tribunal took account of all of the documents submitted and all of the evidence and submissions made at the hearing in reaching its decision.

## REASONS FOR ORDER

## Absence of the Respondent

1. The Respondent did not attend the hearing and had not played any part in the proceedings at all. In the circumstances, the Tribunal needed to decide whether to proceed with the hearing in the absence of the Respondent.

2. We considered the criteria in rule 34 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules") and after reviewing the Tribunal's file and listening to the submissions of the Applicant's representative, we came to the following conclusion:

    2.1. We are satisfied that the Respondent had been notified of the hearing and that reasonable steps had been taken to notify him of the hearing. On 20 June 2018, the Respondent's then solicitors wrote to the Applicants to inform them of the Respondent's address for service for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987. Section 48 of that Act requires a landlord to "give an address in England and Wales

at which notices (including notices in proceedings) may be served on him by the tenant" (our emphasis). The Applicants are entitled to assume that the address given in that letter - an address in Waltham Abbey - is the Respondent's address for service, unless informed otherwise by the Respondent. There has been no notification by the Respondent of any change of address. Notices in these proceedings, including notification of the date of this hearing, were all sent to that address. The improvement notice (referred to below) was sent to the Respondent by the London Borough of Redbridge ("the Council") in April 2019 at the same address. We noted that the Prohibition Order was sent by the Council to a different address in Woodford Green, but Mr McLenahan was unable to explain why that was the case. In addition, the Applicants have been communicating with the Respondent through an email address. We are satisfied that the Applicants' representative had sent notification of the date of this hearing and the hearing bundle to that email address on 13 May 2021. We are therefore satisfied that the Respondent has been made aware of the date of the hearing or that at least reasonable steps have been taken to inform him.

2.2. It is in the interests of justice to proceed with the hearing in the Respondent's absence for the following reasons. No explanation has been given for his absence. He has not played any part in the proceedings so far. He has not complied with any of the Tribunal's directions. He has shown every sign of deliberately choosing to ignore these proceedings. In those circumstances, it would not be just to deny or delay the Applicants their opportunity to prove their case and seek the remedy which they claim.

## The Property

3. The Property is a 2 storey purpose-built maisonette above a shop, constructed in about 1970. It comprises three bedrooms, bathroom, living room, kitchen and WC.

## The tenancy

4. The Property was let to the Applicants in February 2008 under an assured shorthold tenancy granted by the Respondent's immediate predecessor in title for a fixed term of 12 months. At the end of the term in February 2009, the tenancy became a statutory tenancy under the Housing Act 1988. The Applicants have continued to occupy the Property with 2 children, on that basis. At the time of the alleged offence, the children were aged 11 and 9.

5. The Respondent purchased a 144 year headlease of the Property which had been granted on 30 May 2018 to his predecessor in title by the Council. It appears that the headlease must have been a renewal of an earlier lease because the same predecessor in title had granted the tenancy to the Applicants in 2008. The Office Copy Entries of leasehold title number BGL143154 at HM Land Registry show that the Respondent purchased the leasehold on 30 May 2007, which was before the grant of the tenancy to the Applicants and before the headlease itself was granted, which makes no sense. The Respondent was not registered as its proprietor until 2 August 2018. On 20 June 2018, the Respondents' then solicitors had written to the Applicants informing them that the Respondent had completed his purchase of the property on 30 May 2018, giving them the new landlord's address for service and bank details for payment of the rent. It is likely that the date "30 May **2007**" is a typographical error in the register at HM Land Registry and that in reality the Respondent purchased the leasehold title immediately after it was granted to his predecessor in title on 30 May **2018**. In any event, nothing turns on this, as it is clear that the Respondent was the owner of the landlord's interest and had assumed the position of landlord by the time of the alleged offences and was in receipt of the rent throughout the relevant period.

## The application

6. The Applicants made this application for a rent repayment order under section 41 of the Housing Act 2016 on 10 March 2020. It was based on an allegation that the Respondent has committed the following three offences:

    6.1. Having control of or managing an unlicensed house under section 95(1) of the Housing Act 2004

    6.2. Failing to comply with an improvement notice under section 30(1) of the 2004 Act

    6.3. Failing to comply with a prohibition order under section 32(1) of the 2004 Act.[1]

7. All of those are offences under section 40(3) of the Housing and Planning Act 2016.

8. The period during which the offences are alleged are as follows:

    8.1. It is alleged that the Property was unlawfully unlicensed from 1 October 2018 (when a relevant selective licensing scheme came

[1] this ground was not pursued at the hearing.

into force) until 24 March 2019 (the day before the Respondent made an application for a licence).

8.2. It is alleged that the Respondent failed to comply with an improvement notice from 14 May 2019 (the date after the notice required him to start work) until at the earliest 30 September 2019 (because there is evidence that some work was done in October 2019).

9. The alleged breach in relation to the improvement notice was originally claimed from 13 May 2019, the day on which the Respondent was required to commence work. In exchanges with the Tribunal during the hearing, the Applicant's representative conceded that the offence could not have commenced until the following day, by which time it would have been clear that the Respondent had not complied with the requirement to start work on 13 May 2019.

10. The periods for which rent repayment is claimed are therefore:

10.1. 1 October 2018 to 24 March 2019

10.2. 14 May 2019 to 30 September 2019

11. Even though, it may be that the Respondent continued to be in breach of the improvement notice and/or the prohibition order after 30 September 2019, the Applicants claim is limited to that date because:

11.1. The Applicants' representative took the view that he was not able to prove the offences to the required standard of proof beyond that date; and

11.2. Because that way the period for which rent repayment is claimed is restricted to a single 12 month period (albeit with a period between 25 March and 13 May during which no offence is alleged).

12. The monthly rent payable during the relevant periods is £1,175.00. We were taken to the Applicants' bank statements which showed the monthly payment of that sum to the Respondent, paid on time every month throughout the relevant periods.

13. The amounts claimed by way of rent repayment in respect of these periods (after the adjustment of one day resulting from the Applicants' concession mentioned above) is **£12,204.84**.

14. The Applicants were not in receipt of a housing element of universal credit or housing benefit during the relevant period. The Respondent did not pay for any utilities or council tax at the Property.

15. The figure of **£12,204.84** is therefore the maximum which the Applicants could be awarded under section 44 of the 2016 Act.

## Findings of fact

16. The Applicants' evidence was contained in their statement of case supported by a statement of truth. The Second Applicant gave oral evidence in which she confirmed the truth of her statement of case and answered questions from the Tribunal.

17. We found the Second Applicant to be an honest and reliable witness with a clear memory of all the matters about which she gave evidence.

18. As a result of hearing the evidence and reviewing the documents relied upon in support, we have made the following findings of fact. Because of the clear documentary evidence and the credible oral evidence of the Second Applicant, we are sure of the truth of these findings beyond reasonable doubt. The findings of fact we make are as follows.

*Tenancy*

19. The Applicants moved into the Property in 2008 and have continued to occupy under an assured shorthold tenancy agreement dated 1 February 2008 (and a subsequent statutory tenancy following its expiry at the end of January 2009).

20. The Respondent became the owner of the interest immediately expectant on the reversion of the tenancy by purchasing leasehold title number BGL143154 and being registered as its proprietor on 2 August 2018.

21. The Applicants started to pay rent to the Respondent following the letter dated 20 June 2018 from the Respondent's then solicitors.

22. During the period to which this claim relates, the Respondent was the person who received the rack-rent of the premises. He was therefore the person having control of or managing the Property within the meaning of section 95(1) of the 2004 Act as defined by section 263 of the 2004 Act.

*Selective Licensing*

23. On 31 December 2016, the Council exercised its powers under section 80 of the 2004 Act and designated an area labelled "Scheme 2" as being subject to selective licensing. The designation applied to any privately rented property within the Scheme 2 area occupied under a tenancy or licence, which was not a licensable house in multiple occupation ("HMO").

24. The scheme 2 designation came into force on 1 October 2018 and will cease to have effect on 20 September 2023.

25. The Property is within the Scheme 2 area.

26. The Property is a "house" within the meaning of section 79(2) of the 2004 Act because:

    26.1. It is part of a building consisting of one or more dwellings within the meaning of section 99 of the 2004 Act.

    26.2. The whole of it is occupied under a single tenancy, namely the assured shorthold tenancy agreement referred to above.

    26.3. The tenancy is not exempt under section 79(3) of the 2004 Act.

    26.4. The Property is not an HMO.

27. The Respondent did not hold the necessary licence at any time during the period from 1 October 2018 to 24 March 2019.

28. On 25 March 2019, the Respondent applied for a licence. The Applicants cannot prove beyond reasonable doubt that the Respondent did not have a licence from that date and the Respondent may be able to rely on the defence in section 95(3)(b) in relation to the period from 25 March 2019.

29. For the avoidance of doubt, we are not making a finding that the Respondent did hold a licence any time from 25 March 2019. We have the evidence of the Second Applicant that she had been told the Respondent had been refused a licence, but the evidence for that did not satisfy the requisite burden of proof and the Applicants' representative properly did not seek to rely on any breach after that date.

30. It follows that from 1 October 2018 until 24 March 2019, the Respondent was a person having control of or managing a house which is required to be licensed, but was not so licensed.

31. The Respondent was therefore guilty of an offence to which Chapter 4 of the 2016 Act applies, for the purposes of section 40(3) of that Act.

*Improvement Notice*

32. On 11 April 2019, the Council served on the Respondent an improvement notice under sections 11 and 12 of the 2004 Act, because they were satisfied that Category 1 and 2 hazards existed on the premises. The hazards were specified in Schedule 1 to the notice and the works required were specified in Schedule 2.

33. The hazards included rotten floorboards in the bathroom, a hole in the same floor as a result of a significant leak in February 2019, a detached wash hand basin in the WC, water leaks in the kitchen, excess cold throughout the property as a result of various gaps in windows and doors, condensation mould growth on walls surrounding the windows, damp and mould in the bathroom.

34. The improvement notice required the Respondent to begin the works specified in schedule 2 to the notice not later than 13 May 2019 and to complete them within 30 days of that date.

35. It is necessary to decide whether the improvement notice was operative on 13 May 2019, within the meaning of section 15 and section 30 of the 2004 Act. Under section 15, an improvement notice becomes operative 21 days after it is served. We do not have evidence of when the improvement notice was received by the Respondent. We do know that it was sent to the Respondent on 11 April 2019. We are satisfied that it would have been received by 22 April 2019 (which is 21 days before 13 May 2019). The improvement notice was therefore operative by 13 May 2019.

36. The Respondent did not commence any relevant works at the property until October 2019. The works which he commenced in October 2019 were inadequate and incomplete, but the Applicants could not prove beyond reasonable doubt that the Respondent failed to comply with the improvement notice after 30 September 2019. In the absence of evidence to the requisite standard of proof, the Applicants' properly did not claim after that date.

37. For the avoidance of doubt, we are not finding that the Respondent did comply with the improvement notice after 30 September 2019 or at all.

38. The Respondent is a person on whom an improvement notice was served and on 13 May 2019 the notice was operative. The Respondent failed to comply with the improvement notice on 13 May 2019 and on every day thereafter at least until 30 September 2019. The Respondent therefore committed an offence under section 10(1) of the 2004 Act between those dates.

39. In respect of the improvement notice therefore, the Respondent was therefore guilty of an offence to which Chapter 4 of the 2016 Act applies, for the purposes of section 40(3) of that Act.

*Prohibition Order*

40. An emergency prohibition order under section 43 of the 2004 Act was served on the Respondent by the Council on 9 September 2019 on the

grounds that serious hazards existed at the Property which posed an imminent risk to the health and safety of the occupiers and visitors.

41. The Applicants included in their application form an allegation that the Respondent had committed the offence of failing to comply with the prohibition order. At the hearing, however, the Applicants' representative stated that they were no longer pursuing that claim. The claim related only to the period from 9 September 2019 to 30 September 2019, which is already part of the period for which a claim is made in respect of the improvement order. This means that the Applicants no longer pursuing that alleged offence makes no difference to the maximum amount of the overall claim.

42. For the avoidance of doubt, we are not making a finding, and the Applicants did not concede, that the Respondent did comply with the prohibition order.

**Reasonable excuse**

43. Pursuant to section 95(4) (in respect of selective licensing) and section 30(4) of the 2004 Act (in relation to the improvement notice), it is a defence to those offences if the Respondent had a reasonable excuse for the acts or omissions which would amount to the commission of the offence.

44. The Upper Tribunal stated in relation to an HMO case in *IR Management Services Limited v Salford City Council* [2020] UKUT 81 at paragraph 40 that "the issue of reasonable excuse is one which may arise on the facts of a particular case without [a respondent] articulating it as a defence (especially where [a respondent] is unrepresented). Tribunals should consider whether any explanation given … amounts to a reasonable excuse whether or not [the respondent] refers to the statutory defence". Although the *IR Management* case, concerned an HMO defence, the principle has been applied by the Upper Tribunal to licensing cases, such as this one and there is no logical reason why it should not. See *D'Costa v D'Andrea* [2021] UKUT 144.

45. It is also seems that where a respondent is absent (rather than unrepresented), it is just as important to consider whether the facts may disclose a reasonable excuse.

46. In our judgment, in this case, there are no facts which could amount to a reasonable excuse on the evidence available to us.

**The making of a rent repayment order**

47. It follows from the above and from section 40(1) of the 2016 Act, that we have power to make a rent repayment order in this case in respect of the offences and the period set out above.

48. This is an application by tenants under section 41(2) of the 2016 Act. We have found that the offences relate to housing that, at the time of the offences, was let to the Applicants as tenants. The application was made on 10 March 2020. We have also found that the selective licensing offence was committed at least up to 24 March 2019 and the improvement notice offence was committed between 14 May 2019 and 30 September 2019. Therefore the offences were committed during the period of 12 months ending with the day on which the application was made. This satisfies the requirements of section 41(2) of the 2016 Act.

49. We are satisfied beyond reasonable doubt, for the reasons stated above, that the Respondent has committed offences to which Chapter 4 of the 2016 Act applies. We therefore may make a rent repayment order under section 43(1) of the 2016 Act.

## The amount of the rent repayment order

50. The maximum amount claimed by the Applicants is set out and calculated above. It relates to the period set out in section 44(2) of the 2016 Act and it does not exceed the amount specified in section 44(3).

51. There is no evidence of the financial circumstances of the Respondent. We therefore have nothing to take into account under section 44(4)(b) of the 2016 Act. We have no evidence that the landlord has been convicted of any offence to which Chapter 4 of the 2016 Act applies, for the purposes of section 44(4)(c) of the 2016 Act.

52. We are, finally, required by section 44(4)(a) of the 2016 to take account of the conduct of the landlord and the tenants.

### *Conduct of the tenants*

53. We have no indication that the conduct of the tenants has been anything other than exemplary. Despite the terrible circumstances in which they have had to live in this Property, they have always paid the rent on time and we have no record of any complaints against them nor any reason to believe that they are in breach of the covenants of their tenancy agreement in any way.

### *Conduct of the landlord*

54. We find on the evidence and documents available to us that:

54.1. The Respondent was letting to the Applicants, a family with young children, a property which was dangerously unsafe, as evidenced by the content of the notices served by the Council.

54.2. The Respondent did nothing about the serious defects which were making the Property dangerously unsafe for the entire period of the claim and probably for some time thereafter. The Applicants' evidence was that necessary repair works to the property have still not been completed. It is also likely, given the nature of the defects, that they were the result of neglect by the Respondent for some time before the improvement notice was served.

54.3. As a result of the landlord failing to comply with the improvement notice, the Second Applicant suffered a serious accident on 30 August 2019 when the first floor bathroom floor collapsed and she fell through the ceiling of the floor below and required the assistance of the emergency services to rescue her. The collapse of the floor was the result of the rotten floorboards noted as a hazard in the improvement notice.

54.4. The Respondent attended the Property unannounced in October 2019 and forced entry into the Property. When challenged by the Second Applicant and asked to leave, the Respondent said "this is my property so I can do whatever I like" and threatened to hit the Second Applicant with a tool. The Second Applicant called her neighbours to come to her assistance as she feared for her personal safety.

54.5. On a previous occasion, the Respondent said to the Applicants "black people do not deserve any good thing".

54.6. The landlord did not attend the hearing or submit any documents to demonstrate any good conduct on his part. We considered whether we could take account of the fact that he did eventually apply for a selective licence as evidence of some good conduct. However, the Second Applicant's evidence was that the only reason he applied was because he otherwise could not get an order for possession in order to evict the Applicants. In any event, we have no evidence that he actually obtained the necessary licence and we have some evidence that he was refused.

54.7. We also considered whether we could take account of the fact that he did start works of repair eventually in response to the improvement notice. However, the Second Applicants' evidence was that the Respondent initially attended by himself without any professional qualification or ability to carry out important safety work and was rude, violent and abusive when challenged.

He sent a contractor several months later who did some work one day a week for about four weeks and then did not return.

**Reasoning and decision**

55. For the reasons stated above, we have found that the offences were committed beyond reasonable doubt and we have decided that this is a case in which we may make a rent repayment order. We have decided to make such an order and must now consider the amount of the rent repayment order.

56. In doing so, we take account of the factors stated above and also the following principles which can be derived from recent authorities:

    56.1. The amount payable does not need to be limited to the amount of the landlord's profit from letting the property during the relevant period. See *Vadamalayan v Stewart* [2020] UKUT 183.

    56.2. The total amount of rent paid by the tenant during the relevant period is the maximum penalty available, but it should not be treated in the same way as a "starting point" in criminal sentencing, because it can only go down, however badly a landlord has behaved. See *Awad v Hooley* [2021] UKUT 55 at paragraph 40.

    56.3. "It will be unusual for there to be absolutely nothing for the FtT to take into account under section 44(4)". See *Awad v Hooley* [2021] UKUT 55 at paragraph 40.

57. We have reached the view that this is one of those unusual cases in which there is nothing which the Tribunal can take into account to reduce the amount payable to below the maximum possible penalty. The fact that the landlord is absent in these proceedings is a reason to be cautious in coming to conclusions against him, but on the other hand the reason why he is absent is because he has chosen to ignore these proceedings. This follows the pattern of his conduct throughout the period since he purchased the property in 2018.

58. It seems to us that this is one of those cases which Parliament had in mind when providing this remedy as a penalty for irresponsible, negligent and abusive landlords. Mr Atkins falls into all of those categories. His conduct in failing to comply with the minimum requirements of the law (namely to obtain a licence and to comply with the improvement notice), without any excuse or explanation, is aggravated and compounded by:

    58.1. the terrible consequences of his failure (namely the accident suffered by the Second Applicant); and

58.2. the violence threatened against her and the racist abuse the Respondent inflicted on the Applicants.

59. In our judgment, this case is at the highest end of culpability for the offences committed. We therefore make a rent repayment order in the full amount claimed by the Applicants, namely the sum of £12,204.84.

60. The Applicants have also applied for an order requiring the Respondent to reimburse the fees paid to the Tribunal in the sum of £300. We have no hesitation in making that order under rule 13(2) of the Rules in the circumstances. There is no reason why the Applicants should be out of pocket in any way as a result of having to bring these proceedings to enforce their rights.

**Dated this 19th day of July 2021**

**JUDGE TIMOTHY COWEN**

## 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).