



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

Case reference : **LON/00BG/HMF/2020/0138**

Property : **Apartment 2010, Altitude Point, 71
Alie Street London E1 8NG**

Applicant : **Diana Kimbayeva**

Representative : **Justice for Tenants**

Respondents : **Wai Fun Leong (1)
Judy Leong (2)**

Representative : **N/A**

Type of application : **Application for a rent repayment
order by tenant under Chapter 4,
Housing and Planning Act 2016**

Tribunal : **Judge Hansen
Steve Wheeler MCIEH CEnvH**

Date of Hearing : **10 December 2021**

DECISION

DECISION

- (1) The Tribunal makes a rent repayment order in favour of the Applicant in the sum of £22,102.55 pursuant to section 43(1) of the Housing and Planning Act 2016.
- (2) The Respondents are jointly and severally liable to repay the said sum of £22,102.55 to the Applicant.
- (3) The Tribunal further orders the Respondents to reimburse the Applicant in the sum of £300 pursuant to paragraph 13(2) of the 2013 Tribunal Procedure Rules.

REASONS

1. This is an application for a Rent Repayment Order (“RRO”) in the sum of £26,003 pursuant to Chapter 4 of the Housing and Planning Act 2016. The application is dated 16 July 2020 and is made in respect of the 12-month period from 26 August 2018 until 25 August 2019. The application names Judy Leong and Wai Fun Leong as the Respondents. Judy Leong is the landlord identified in the tenancy agreements. Wai Fun Leong is the registered proprietor of the leasehold title (AGL306973).
2. The Respondents have not engaged with the application at all or with any of the directions issued by the Tribunal and by Order of the Tribunal dated 16 November 2021 they were debarred from adducing evidence at the hearing. They were not debarred from participating in the hearing but did not do so. The hearing proceeded remotely. The Tribunal is satisfied that the Respondents have been served with the application, been given due notice of the hearing and sent the information required to join the hearing had they so wished. In those circumstances, the Tribunal considered it to be in the interests of justice and consistent with the overriding objective to proceed with the hearing in their absence and did so. The tenant was represented by Clara Sherratt of Tenants for Justice. The Tribunal heard submissions from Ms Sherratt and evidence from the tenant which it accepts as true.
3. The Applicant was the tenant of Apartment 2010, Altitude Point, 71 Alie Street, E1 8NG (“the Property”). The Property is a flat in a purpose-built block. There were two tenancy agreements as follows. The tenant entered into an assured shorthold tenancy agreement for a term from 26 May 2018 until 25 May 2019. The tenancy is signed by both parties. The landlord was identified as Mrs Judy Leong c/o PK Sales & Lettings. The rent was £2,167 per month payable quarterly in advance in the sum of £6,501 per

quarter. The tenant was responsible for the payment of council tax and utilities. She also paid a deposit of £3,000. The tenant then entered into a second tenancy agreement for a term from 26 May 2019 to 25 May 2020 on substantially similar terms including identical terms as to the payment of rent. Although the agreement in the bundle is unsigned, we are satisfied this second agreement governed the relationship between the parties from 26 May 2019. The tenant vacated the Property on 25 August 2019 having been served with a purported s.21 notice under the Housing Act 1988 on 20 June 2019. The second tenancy agreement made no provision for short notice by the landlord prior to the expiry of the fixed term, although we note that the first agreement did allow for the landlord to serve a 2-month notice expiring after 6 months.

4. Having heard evidence from the tenant, who verified her statement of case and her witness statement, and considered the submissions of Ms Sherratt made on her behalf and the documentary evidence in the bundle, we find the facts as follows. Firstly, we are satisfied so as to be sure that the Property is a house within the meaning of s.99 of the Housing Act 2004. Secondly, we are satisfied so as to be sure that the Property was at all material times situate within the London Borough of Tower Hamlets' Selective Licensing Scheme which came into force on 1 October 2016 and was therefore required to be licensed. Thirdly, we are satisfied so as to be sure that the Property has never been licensed and that there was no application pending for a license at any material time. Fourthly, we are satisfied so as to be sure that both Respondents are persons having control of and/or managing a house within the meaning of s.263(1) and/or (3) of the Housing Act 2004. Fifthly, we are satisfied so as to be sure that neither Respondent had a reasonable excuse for having control of and/or managing a house which was required to be licensed but was not so licensed. In those circumstances we are satisfied beyond reasonable doubt that both Respondents have committed an offence under s.95(1) of the Housing Act 2004.
5. Section 40(1) of the Housing and Planning Act 2016 states that the FTT has power to make an RRO when the landlord has committed an offence to which Chapter 4 relates, which offences are specified in a table in subsection (3). The offences include control or management of an unlicensed house under section 95(1) of the Housing Act 2004.
6. Section 43 of the 2016 Act provides:

“(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).

.....

(3) The amount of a rent repayment order under this section is to be determined in accordance with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).”

7. Section 44 of the 2016 Act provides:

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

(2) The amount must relate to rent paid during the period mentioned in the table

(3) The amount that the landlord may be required to repay in respect of a period must not exceed –

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount, the tribunal must, in particular, take into account –

(a) the conduct of the landlord and the tenant;

(b) the financial circumstances of the landlord; and

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.”

8. The table referred to in s.44(2) specifies that in the case of an offence of controlling or managing an unlicensed house, the amount “*must relate to rent paid by the tenant in respect of ... a period, not exceeding 12 months, during which the landlord was committing the offence*”.

9. Section 46 of the 2016 Act provides:

(1) *Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).*

(2) *Condition 1 is that the order –*

(a) *is made against a landlord who has been convicted of the offence, or*

(b) *is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.*

(3) *Condition 2 is that the order is made –*

(a) *in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or*

(b) *in favour of a local housing authority.*

(4) *.....*

(5) *Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers that it would be unreasonable to require the landlord to pay.”*

10. The Tribunal is satisfied, beyond reasonable doubt, that the Respondents have committed an offence to which Chapter 4 of the 2016 applies. For the avoidance of doubt, we are sure that the First and Second Respondents are either one and the same person or joint landlords being persons having control or persons managing the Property within the meaning of section 263 of the 2004 Act. In our judgment the application quite properly names both Respondents as parties to the application. Mindful of the apparent discrepancy between the tenancy agreements and the office copy entry, the tenant’s representative sought clarification of the position from the Respondents by letter dated 13 August 2021. However, there has been no response or engagement with the case at all by the Respondents, and we infer in those circumstances that they are either one and the same person, there being no evidence that they are different people or, if they are, that they are nonetheless joint landlords, by which we mean the tenant’s immediate landlord, there being no suggestion that one is a superior landlord: see *Rakusen v Jepsen* [2021] EWCA Civ 1150.

11. The Tribunal is therefore satisfied that it has jurisdiction to make a RRO against both Respondents and that the tenant has the right to apply for a RRO as the offence

referred to above relates to housing that was let to the tenant at the time of the offence and was committed in the period of 12 months ending with the day on which the application was made.

12. In considering the correct approach to quantifying the amount of an RRO, the Chamber President, Fancourt J, said this in *Williams v Parmar* [2021] UKUT 244 (LC):

23. *The offence of having control of or managing an unlicensed HMO is not an offence described in s. 46(3)(a) and accordingly there was no requirement in this case for the FTT to make a maximum repayment order. That section did not apply. The amount of the order to be made was governed solely by s.44 of the 2016 Act. Nevertheless, the terms of s.46 show that, in cases to which that section does not apply, there can be no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44 or s.45. The terms of s.44(3) and (4) similarly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must “relate to” the total rent paid in respect of that period.*

24. *It therefore cannot be the case that the words “relate to rent paid during the period ...” in s. 44(2) mean “equate to rent paid during the period...”. It is clear from s. 44 itself and from s. 46 that in some cases the amount of the RRO will be less than the total amount of rent paid during the relevant period. S. 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and s. 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.*

25. *However, the amount of the RRO must always “relate to” the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary “starting point” for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).*

26. *In this regard, I agree with the observations of the Deputy President of the Lands Tribunal, Judge Martin Rodger QC, in *Ficcara v James*. [2021] UKUT 0038 (LC), in which he explained the effect of the Tribunal's earlier decision in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC). *Vadamalayan* is authority for the proposition that an RRO is not to be limited to the amount of the landlord's profit obtained by the unlawful*

activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in s. 44(4).

...

40. It seems to me that the FTT took too narrow a view of its powers under s. 44 to fix the amount of the RROs. For reasons already given, there is no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s. 44(4), though the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

41. In my judgment, the FTT also interpreted s. 44(4)(a) too narrowly if it concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the “conduct of the landlord”, so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the FTT should take into account the purposes intended to be served by the jurisdiction to make an RRO: see [43] below.

42. The landlord in this appeal faces an initial difficulty that the argument that the FTT erred by misinterpreting the breadth of its discretion is not a ground of appeal for which permission has been sought or granted. Despite that, Mr Colbey advanced his case succinctly and clearly and the tenants, with some assistance from the Tribunal, were able to participate fully in arguing the point, to the extent that, as non-lawyers, they were able to do so. They were fully able to make observations about whether the FTT had gone wrong in awarding them too high a figure. Their skeleton argument also ranged more widely than the narrow question of the interest-only mortgage repayments. I do not consider that they were disadvantaged by the fact that a ground of appeal had not spelt out the argument that the landlord advanced at the hearing. In those circumstances, I consider that it is just to allow the landlord to raise the point without notice and I grant permission for an amended Ground B to include the argument that I have summarised.

43. Mr Colbey argued that the FTT was wrong to regard the amount of rent paid as any kind of starting point and that the orders should have been made on the basis of what amount was reasonable in each case. He relied on guidance to local authorities issued under Chapter 3 of Part 2 of the 2016 Act, entitled “Rent Repayment Orders under the Housing and Planning Act 2016: Guidance for Local Authorities”, which came into force on 6 April 2017. Notably, this is guidance as to whether a local housing authority should exercise its power to apply for an RRO, not guidance on the approach to the amount of RROs. Nevertheless, para 3.2 of that guidance identifies the factors that a local authority should take into account in deciding whether to seek an RRO as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. Although those are identified in connection with the question whether a local authority should take

proceedings, they are factors that clearly underlie Chapter 4 of Part 2 of the 2016 Act generally.

44. The FTT erred in construing its powers too narrowly, in the respects that I have identified.

13. The offence of having control of or managing an unlicensed house is not an offence which obliges the Tribunal to make a maximum repayment order. The amount of the order to be made is governed solely by s.44 of the 2016 Act and we remind ourselves that in cases to which the terms of s.46 do not apply, there is no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44. As Fancourt J observed in *Williams v. Parmar*, the terms of s.44(3) and (4) clearly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must “relate to” the total rent paid in respect of that period.
14. In the present case the amount of rent in respect of the 12-month period from 26 August 2018 to 25 August 2019 was £26,003. In determining the amount of the RRO we take into account, in particular, the conduct of the landlord and the tenant, the financial circumstances of the landlord and whether the landlord has at any time been convicted of an offence to which Chapter 4 applies.
15. The tenant has, we find, been a model tenant. She has paid the rent as and when it fell due and there is no suggestion that she has not complied with her other obligations under the tenancy. The landlords’ conduct has been less than satisfactory. Whilst we accept, in the landlords’ favour, that the Property was in a good condition and that there would have been no reason to withhold a license had one been applied for, we accept the tenant’s evidence that she had great difficulty recovering her deposit and it was not finally repaid or substantially repaid until December 2020, and then only after she repeatedly chased and eventually left bad reviews. We also have concerns about the circumstances in which the tenant came to leave the Property. A section 21 notice was served in June 2019 expiring on 25 August 2019, barely a month after the tenant had been granted a further 12-month term. On the face of the second tenancy agreement, there was no right to serve such a notice, although we note that the first tenancy agreement did make provision for the service of such a notice so we are prepared to accept that there may have been a misunderstanding on the part of the new agent that served the notice. However, even on that basis, it is still evidence of poor management of the landlord and tenant relationship. There is no

evidence of the financial circumstances of the landlord other than the fact the Property was purchased for £459,000 in 2014. This was some time ago and we also note the presence of a charge on the register so this information provides little clue as to the landlords' current financial circumstances. Nor do we have any way of knowing whether the landlords are professional landlords or whether this is a one-off foray into the business of residential letting. Finally, there is no evidence of any conviction of a relevant offence and in those circumstances we consider it only fair to proceed on the basis that there is no relevant conviction.

16. Clearly, the picture we have of the landlord and tenant relationship and the landlords' financial circumstances is less than complete because of the lack of engagement by the landlords with this application. There being no evidence as to the financial circumstances of the landlords, we make no adjustment in the landlords' favour in respect of this factor. However, given the absence of evidence to prove the contrary, it seems to us only fair to proceed on the basis that this is a first offence. The tenant paid the utilities and has not been in receipt of any relevant benefits. Accordingly, no further adjustment is necessary to reflect either of these factors. On the basis of the tenant's evidence, we proceed on the basis that the tenant has been a model tenant whereas the landlords' conduct, as manifested by the actions of their agents, has been less than satisfactory in the two respects identified above.
17. We also bear in mind the purpose of the legislative provisions: to punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. In our judgment, this was a serious and persistent offence, over an extended period, albeit less serious than many other offences of this type.
18. In all the circumstances, the Tribunal considers that an order for repayment of at least a substantial part of the rent is warranted and we make a rent repayment order in favour of the Applicant in the sum of £22,102.55, being 85% of the maximum payable in respect of the 12-month period from 26 August 2018 to 25 August 2019 (£26,003). The Respondents are jointly and severally liable for the payment of that sum.
19. The Applicant also applied for an order under paragraph 13(2) of the 2013 Tribunal Procedure Rules for the reimbursement of the application fee and the hearing fee

which together total £300. We have a discretion. Having regard to our conclusions above, we consider it appropriate to make the order sought.

Name: Judge W Hansen

Date: 13 December 2021