FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AN/HMG/2022/0018**
HMCTS	**:**	**Face-to-Face Hearing**
Property	**:**	**965 Fulham Road, London, SW6 5JJ**
Applicants	**:**	**Ever and Benjamin Laven**
Representative	**:**	**Chris Daniel (Justice for Tenants - REF 12830)**
Respondent	**:**	**1. Graham Chappell** **2. Linda Susan O'Leary**
Representative	**:**	**1. Graham Chappell – in person** **2. Linda Susan O'Leary – no appearance**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant**
Tribunal Member	**:**	**Judge Robert Latham** **Appollo Fonka MCIEH CEnvH MSc**
Date and Venue of Hearing	**:**	**24 January 2023 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**20 February 2023**

DECISION

Decision of the Tribunal

1. The Tribunal makes a rent repayment order against the First Respondent in the sum of £8,626.50.

2. The Tribunal makes no order against the Second Respondent.

3. The Tribunal determines that the First Respondent shall also pay the Applicants £300 in respect of the reimbursement of the tribunal fees which they have paid.

4. The Respondent is to pay the said sums by 13 March 2023.

The Application

1. By an application, dated 6 February 2022, the Applicants seek a Rent Repayment Order ("RRO") against the Respondents pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The application relates to a one-bedroom flat known as 965 Fulham Road, London, SW6 5JJ (the "Flat"). The Applicants seek a RRO in the sum of £9,585 which is 100% of the rent which they paid over the period that they occupied the flat, namely 9 January to 31 August 2021. The Applicants have been assisted by Justice for Tenants, a Community Interest Company which seeks to ensure that tenants have access to justice. The Applicants have provided a Bundle of Documents to which reference is made in this decision.

2. When the application was issued, the following facts were known to the Applicants:

(i) The flat is on the ground floor of a three storey terraced property in a parade of shops. The flat had previously been used as retail premises.

(ii) On 9 January 2021, Graham Chappell granted the Applicants an assured shorthold tenancy ("AST") of the flat for a of 12 months commencing on 9 January 2021 at a rent of £1,250 pm (at p.59-71). They paid a deposit of £1,250. The rent was inclusive of water, gas, electricity and internet.

(iii) The freehold of the property is registered in the name of Linda Susan O'Leary whose titles was registered on 3 November 2011 (at p.41-42).

(iv) The shop front had been recently decorated and bore the name "Nuspace London".

(v) There is a registered company "NU Space Holdings Limited". On 25 July 2019, Graham Chappell had been appointed as its director (at p.43-

48). His occupation is described as "Md". The nature of the business is described as “other letting and operating of own or leased real estate”.

(vi) On 5 June 2017, the London Borough of Hammersmith and Fulham ("LBHF") introduced a Selective Licencing Scheme which applies to this property (p.158).

(vii) There was no licence in respect of the flat (p.121).

(viii) On the first and second floors there is a separate flat known as 965a Fulham Palace Road. In August 2019, LBHF issued a licence in respect of this flat to Ms O'Leary (p.120)

3. The Applicants issued their application against both the First Respondent, as their named landlord, and the Second Respondent. They did not know what legal interest, if any, that the First Respondent had in the flat, or whether he had granted the tenancy as agent for the Second Respondent.

4. In Order to ensure that the application was issued against "the most appropriate respondent", the Applicants sought an order under rule 20 of the Tribunal (Procedure) (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules") that

> "The Respondents shall, within a period of time the Tribunal deems appropriate, answer the following questions and provide the following disclosure:
>
> a. What is the Respondent’s interest in the subject property (e.g. freehold, leasehold)?
>
> b. What is the Respondents’ relationship with other Respondents?
>
> c. In particular, was Graham Chappell the Land Registry owners agent, tenant or licensee in relation to the said property during April 2020 to October 2021?
>
> d. The Respondents shall email to the Applicant and the Tribunal a copy of any agency, tenancy or licence agreement relating to the said property which includes any part of the period from April 2020 to October 2021 inclusive."

5. On 20 September 2022, the Tribunal gave Directions. This case highlights the need for parties to comply with these, if a Tribunal is to deal with cases fairly and justly in accordance with the Overring Objective in Rule 3 of the Tribunal Rules. None of the parties in this application are legally represented. Any party is entitled to know the case that they will have to meet in advance of any hearing.

6. By 3 October, the Respondents were directed to answer the questions and provide the documents sought by the Applicants. Neither Respondent complied with this Direction.

7. By 7 November 2022, the Applicants were directed to serve their Bundle of Documents. The Applicants filed a Bundle extending to 210 pages. This includes witness statements from both Mr and Mrs Laven.

8. By 28 November 2022, the Respondents were directed to file their Bundle of Documents. Neither Respondent complied with this Direction. On 20 December a Procedural Judge made an order debarring the Respondents from adducing any evidence in the proceedings.

The Hearing

9. The Applicants were represented by Mr Chris Daniel from Justice for Tenants. Mr Chappell appeared in person. There was no appearance by Ms O'Leary.

10. The Tribunal asked Mr Chappell to answer the Rule 20 questions which had been specified in the Directions. He produced an undated and unsigned tenancy agreement. He stated that Ms O'Leary had granted him a six year tenancy of the ground floor shop premises commencing on 30 April 2017 at a rent of £12k per annum.

11. The Tribunal confirmed Mr Chappell's status in the proceedings given his failure to comply with the Directions and the Debarring Order that had been made. The Tribunal was not willing to permit him to give evidence or to adduce any documentary evidence. However, Mr Chappell was permitted to cross-examine Mr and Mrs Levan, both of whom gave evidence. He was also permitted to make closing submissions.

12. Mr Chappell sought to adduce a number of documents relating to the expenses which he had incurred in respect of the flat, including business rates, electricity, water charges and the internet. Mr Daniel objected to these documents being adduced and we upheld this objection. Mr Daniel also objected to the Tribunal being provided with a copy of the undated tenancy agreement. We upheld this objection. When Mr Daniel later sought to rely on this document, we held him to the election that he had earlier made.

13. Mr Chappell sought to raise a number of factual issues both in his closing submissions and in the questions that he put to the Applicants. He claimed that he had suffered from stress. He had no medical evidence to support this. He stated that he was in financial difficulties. He asserted that before letting the shop for residential use, he had refurbished it at a cost of some £30k. Had he sought to adduce evidence on any of these points, he should have complied with the Directions. It would have been unfair to the

Applicants had we permitted Mr Chappell to admit this evidence at this late stage. We informed Mr Chappell that he had to recognise the consequences of his having failed to comply with the Directions. We could not have regard to the bare assertions which he made in his submissions. Indeed, Mr Daniel pointed out that were the finances to be as suggested by Mr Chappell, he would have been managing the Flat at a substantial loss. We do not believe that this was the position.

14. Both Mr and Mrs Laven gave evidence. Given that Mr Chappell was acting in person, the Tribunal required Mr Laven to give evidence in chief. The Tribunal asked them a number of questions. Both Mr and Mrs Laven were cross-examined by Mr Chappell. We have no hesitation in accepting their evidence. Mr Chappell had no criticism of their conduct as tenants.

15. Justice for Tenants had submitted a detailed Statement of Case in support of the application which addressed the approach that the Tribunal should adopt in making a RRO. Unfortunately, this did not address the most recent decision of the Court of Appeal decision in *Kowalek v Hassanein* [2022] EWCA Civ 1041; [2022] 1 WLR 4558 ("*Kowalek*" – 25 July 2022) or the further guidance given by Judge Cooke in the Upper Tribunal ("UT") in her recent decisions of *Acheampong v Roman and Choudhury v Razak* [2022] UKUT 239 (LC); [2022] HLR 44 ("Acheampong" – 5 September 2022) and *Hancher v David* [2022] UKUT 277 (LC) ("*Hancher*" – 21 October 2022). The Tribunal noted that Judge Cooke had not had regard to the Court of Appeal decision in *Kowalek*. Before we adjourned for lunch, we provided the parties with copies of these decisions and heard their submissions in the afternoon. We asked the parties to consider the extent to which Judge Cooke's guidance is consistent with the Court of Appeal decision in *Kowalek*.

Issues in Dispute

16. There are three issues which the Tribunal is asked to determine:

(i) Who is the relevant landlord against whom a RRO can be sought? The Tribunal is satisfied that Mr Chappell is the relevant landlord. There is no evidence that Ms O'Leary was a joint landlord. Mr Daniel did not seek to argue that Ms O'Leary is liable as a superior landlord. This is an issue that is currently being considered by the Supreme Court in *Jepson v Rakusen* (see below).

(ii) Whether we are satisfied beyond reasonable doubt that Mr Chappell has committed an offence under section 95(1) of the Housing Act 2004 of having control or management of an unlicenced house. We are so satisfied. We are further satisfied that this is an appropriate case for a RRO to be made.

(iii) The amount of any RRO, assessed under section 44 of the Housing and Planning Act 2016. This is the more difficult issue which requires careful consideration of the legislation and the relevant authorities. An important role of the Upper Tribunal ("UT") is to provide guidance so that First-tier Tribunals ("FTTs") can adopt a consistent approach in assessing RROs. The Tribunal reluctantly concludes that Judge Cooke's most recent guidance merely adds yet further confusion to an uncertain area of the law. It is unlikely to be the last word on the matter. The Tribunal makes a RRO in the sum of £8,625.50, namely 90% of the rent paid over the relevant period of eight months.

The Housing Act 2004 ("the 2004 Act")

17. 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 licenced 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.

18. By section 80, a local housing authority ("LHA") may designate a selective licencing area. Section 95 specifies a number of offences in relation to the licencing of houses. The material part provides (emphasis added):

> "(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85 (1)) but is not so licensed.

19. 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."

20. It is to be noted that there may be more than one person who may commit an offence under section 95 as having "control of" or "managing" a house. In such circumstances, it will be for the LHA to determine who is the appropriate person to hold a licence. However, when it comes to the making of a RRO, this can only be made against the "landlord".

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 *Jepsen v Rakusen* [2021] EWCA Civ 1150; [2022] 1 WLR 324, the Court of Appeal first considered the 2016 Act. The issue in the appeal was whether a RRO could be made against a superior landlord. The Upper

Tribunal held that it could; the Court of Appeal reversed this decision. The tenant has appealed to the Supreme Court. Argument has been heard and the judgment of the Supreme Court is awaited.

24. 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."

25. In the Court of Appeal, Arnold LJ endorsed these observations. At [36], he noted that Part 2 of the Act was the product of a series of reviews into the problems caused by rogue landlords in the private rented sector and methods of forcing landlords to either comply with their obligations or leave the sector. Part 2 is headed "Rogue landlords and property agents in England". At [38], he noted that the Act conferred tough new powers to address these problems. At [40], he added that the Act is aimed at "combatting a significant social evil and that the courts should interpret the statute with that in mind". The policy is to require landlords to comply with their obligations or leave the sector.

26. In the subsequent decision of *Kowelek*, Newey LJ summarised the legislative intent in these terms (at [23]):

> "It appears to me, moreover, that the Deputy President's interpretation of section 44 is in keeping with the policy underlying the legislation. Consistently with the heading to part 2, chapter 4 of part 2 of the 2016 Act, in which section 44 is found, has in mind "rogue landlords" and, as was recognised in *Jepsen v Rakusen* [2021] EWCA Civ 1150, [2022] 1 WLR 324, "is intended to deter landlords from committing the specified offences" and reflects a "policy of requiring landlords to comply with their obligations or leave the sector": see paragraphs 36, 39 and 40. "[T]he main object of the provisions", as the Deputy President had observed in the UT (*Rakusen v Jepsen* [2020] UKUT 298 (LC), [2021] HLR 18, at paragraph 64; reversed on other grounds), "is deterrence rather than compensation". In fact, the offence for which a rent repayment order is made need not have occasioned the tenant any loss or even inconvenience (as the Deputy President said in *Rakusen v Jepsen*, at paragraph 64, "an unlicensed HMO may be a perfectly satisfactory place to live") and, supposing damage to have been caused in some way (for example, as a result of a failure to repair), the tenant may be able to recover compensation for it in other proceedings. Parliament's principal concern was thus not to ensure that a tenant could recoup any particular amount of rent by way of recompense, but to incentivise landlords. The 2016 Act serves that objective as construed by the Deputy President. It conveys the message, "a landlord who commits one of the offences listed in section 40(3) is liable to forfeit

every penny he receives for a 12-month period". Further, a landlord is encouraged to put matters right since he will know that, once he does so, there will be no danger of his being ordered to repay future rental payments."

27. 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."

28. 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.

29. In a number of cases, Judge Cooke has suggested that FTTs should adopt a "starting point", before considering any mitigating or aggravating features. This suggests that a FTT should adopt the role of a criminal sentencer. It is difficult to reconcile this with the restitutionary remedy contemplated by the Court of Appeal in *Kowalek*.

30. Judge Cooke now suggests that a FTT is now obliged to assess the relative seriousness of seven categories of offence which "can be seen from the relevant maximum sentences on conviction" in assessing any RRO (see [39] below). She suggests that that the failure to licence an HMO should now be treated as less serious than an offence of harassment as no prison sentence can be imposed. There is nothing in the statute that indicates that a FTT should adopt such a course. Indeed, it is surprising that legislation intended to strengthen the regime of RROs should have had the opposite

effect in respect of the two licencing offences under sections 72(1) and 95(1) on the 2004 Act which were the only offences in respect of which a RRO could be made.

31. 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.

32. 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)."

33. 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.

34. "Rent" is not defined in the Act. However, for the past 100 years, "rent" has had a clearly defined meaning, namely "the entire sum payable to the landlord in money" (see Megarry on the Rent Acts, 11th Ed at p.519 and the reference to *Hornsby v Maynard* [1925] 1 KB 514 and subsequent cases). The meaning is the same at common law as under the Rent Acts (see the current edition of Woodfall "Landlord and Tenant" at 7.015 and 23.150). Parliament would have had this in mind in enacting the Act.

35. 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."

36. 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.

37. 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]).

38. 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%).

39. In *Acheampong*, 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."

40. The Tribunal makes the following observations on these guidelines:

(i) Judge Cooke did not have regard to the recent decisions of the Court of Appeal in *Kowalek*, a judgment given six weeks before Judge Cooke issued her guidelines. This contemplates a restitutionary remedy, rather than a criminal sentencing exercise. Indeed, there are a number of circumstances when a FTT is required, subject to exceptional circumstances, to make a RRO at the maximum level (see section 46). Parliament has set the maximum penalties that a criminal court can impose for these offences. A RRO is rather a summary remedy that Parliament has afforded whereby a tenant is entitled to recover up to 12 months' rent.

(ii) Steps (a) and (d) are uncontroversial. They do no more than restate the factors specified in the s.44(3) and (4). Steps (b) and (c) are more

surprising as they seem to add a judicial gloss, namely additional steps that a FTT must follow, the effect which will be to ratchet down the RRO that a FTT would otherwise be minded to take were it merely to have regard to the statute.

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

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

(vii) Judge Cooke suggests that where precise figures are not available of the utility bills paid by a landlord, a FTT should make "an informed estimate". This is highly relevant in the current case where there is no evidence of the size of the deductions that should be made for gas, electricity and the internet. Mr Chappell has been debarred from adducing evidence on the sums that he has expended. We must ask ourselves whether we, as an Expert Tribunal, are competent to make such an estimate.

(vii) FTTs are now required to assess the seriousness of the seven offences specified in section 40(3) having regard to the maximum sentences which are available on conviction. It would seem that a RRO should reflect the following:

> (a) The most serious offences are those contrary to section 6(1) of the Criminal Law Act; and sections 1(2), (3) or (3A) of the Protection from Eviction Act 1977 which are punishable by up to 6 months imprisonment and/or a fine. On indictment, the maximum sentence for an offence under the Protection from Eviction Act is two years.
>
> (b) The next level of RRO is for an offence of breaching a banning order contrary to section 21 of the 2004 Act which carries a prison sentence of up to 51 weeks.
>
> (c) The other offences under the 2004 Act should be at the lowest level of scale as they are only punishable by a fine, albeit that a Level 5 fine is now unlimited.

(d) Thus, the two licencing offences, which were the only two offences in respect of which RROs could be made under the 2004 Act, should now attract a lower RRO.

(viii) FTTs should then consider the seriousness of the particular offence compared with other examples of the same offence. Section 44(4)(a) requires a tribunal to take into account the conduct of the landlord and the tenant. It is unclear what this additional statutory gloss adds.

(ix) An FTT is then to adopt a figure as a "starting point" and carry out a quasi-sentencing exercising. It is only at this stage that a FTT should apply the statutory criteria specified in section 44(4) and consider any aggravating or mitigating circumstances. This would seem to involve an element of double counting requiring an FTT to consider the seriousness of the offence and then make a separate adjustment having regard to the conduct of the landlord and the tenant.

41. In *Hancher*, Judge Cooke added two further judicial glosses:

(i) The FTT (in LON/00AP/HMG/2021/0013) had declined to make any reduction to the rent in respect of the utility bills and council tax which had been paid by the landlady as there was insufficient evidence as to what deductions should be made. Judge Cooke granted permission to appeal on the ground that it was arguable that the FTT had failed to take into account the evidence that the landlady had paid the utility bills. However, in her decision on the substantive appeal, Judge Cooke (at [18]) declined to make any adjustment as the landlady had not adduced any evidence about the payments that she had made. Judge Cooke did not explain why she had not made the "informed estimate" that she had directed that FTTs should make.

(ii) At [19] of her decision, Judge Cooke suggested that the FTT should have considered whether a licence would have been granted had an HMO licence been sought. The facts are not dissimilar to the current case. In *Hancher*, a warehouse had been let as living accommodation; in the current case it is shop premises. The FTT had made a finding that the staircase was not suitable and that a tenant had had a fall. An architect had identified a range of works that were required to improve the means of escape. In reducing the RRO from 100% to 65%, Judge Cooke held (at [19]) that there was no suggestion that the property would not have qualified for an HMO licence had one been sought.

42. Judge Cooke's guidance that FTTs should adopt a "starting point" has caused particular problems for both FTTs and those who appear before us. It has had two iterations. She initially suggested that the starting point should be the rent paid over the relevant period of 12 months (see *Vadamalayan v Stewart* [2020] UKUT 183 (LC); [2020] HLR 38 at [12] and *Chan v Bilkhu* [2020] UKUT 289 (LC) at [11]). In the subsequent decisions of *Ficcara v James* [2021] UKUT 38 (LC); [2021] HLR 30 (the

Deputy Chamber President) and *Williams v Parmar* (the Chamber President) reminded FTTs that the rent could not be the starting point as this was the maximum award that could be made. The concept of a starting point has now appeared in a different guise. This Tribunal finds this recent iteration equally difficult to reconcile with the wording of the 2016 Act and the recent decisions of the Court of Appeal. To suggest that the seriousness of the offence is the starting point before applying the statutory criteria in section 44(4), seems to put the cart before the horse. A FTT rather needs to assess the seriousness of the offence having applied the statutory criteria. It is only at this final stage that it can determine at what percentage any RRO should be set.

The Background

43. Mr and Mrs Laven are a young couple from Sweden. Mr Laven is a sound designer, whilst his wife is a fashion designer. They have both worked part-time in a warehouse. They have not been in receipt of any State benefits. At the material time, Mrs Laven was studying for a MA in fashion design, a course which she has now successfully completed. Mrs Laven suffers from asthma and atopic eczema. Their evidence was supported by a number of photographs and WhatsApp messages.

44. In January 2021, the Applicants saw the flat advertised on SpareRoom. They were interested in it because it seemed to offer a good amount of space for their relatively limited budget. However, they were concerned that the flat looked like a shop front in a busy street. The parties communicated by text message. Mr Chappell indicated that he had a flat share in Fulham if they did not like the flat. However, he assured them that the flat was "fantastic", as it was large, cheap and in a good location. He offered to install sound proof curtains. These were never installed.

45. The accommodation was being offered during a period of Covid lockdown. When the Applicants went to view the flat, they communicated with Mr Chappell by FaceTime. A set of keys had been left for them in a key safe. Mr Chappell agreed that they could move in next day. He agreed to provide a washing machine.

46. The tenancy agreement is dated 10 January 2020 (at p.59-71). The AST was for a term of 12 months from 9 January 2021. The rent was £1,250 per month and they paid a deposit of £1,250. The rent included water, heating, electricity, gas, an alarm system, internet access.

47. On 5 June 2017, LBHF had introduced a selective licencing scheme that applied to this flat. Mr Chappell had not applied for a licence. Neither had he sought planning permission for use of the shop for residential accommodation. The living space was at the front of the building. The bedroom and bathroom were at a lower level to the rear of the property.

48. Mr Chappell did not comply with his obligations as a landlord. He did not provide an EPC, a gas safety certificate, a record of the electrical inspections or the "How to Rent" checklist.

49. When they moved in, the Flat had not been cleaned. There were big bags of dirty laundry, used plastic bottles, letters, boxes of debris, and other miscellaneous items spread across the flat. They were quite forgiving as they had been allowed to move in at short notice. They were told that these items would be removed. This never happened. They also complained about the water damage to the rear of the kitchen sink (see photo at p.189).

50. On 12 January, a washing machine was delivered. This was not installed until 19 February. Mr Chappell cancelled a planned installation, apparently because he thought that Marion, his builder, was proposing to charge too much. Marion told them that Mr Chappell was "a very difficult man and that they would have to chase him every day if they wanted anything done". During this period, the Applicants had to use the laundrette, which was not desirable during the Covid lockdown.

51. At the end of January, the Applicants had no internet for three weeks. This was a particular problem for Mrs Laven who required internet access for her studies. The problem seems to have been that the account was registered with one of Mr Chappell's associates and the Applicant were therefore unable to reach the service provider.

52. At this time, they also noticed water damage and staining on the bathroom ceiling and on the lower floor. The floor tiles did not seem to be properly sealed. On 8 February, the Applicants reported this to Mr Chappell and provided a number of photographs (at p.190). On 8 March, the Applicants made further complaints. Mushrooms were growing up through the floor tiles in the bathroom and there was mould growth (see photo at p.193). Mr Chappell suggested that they should vacate the flat for a few days so that he could retile the floor. This was not a practical proposal during the Covid lockdown. They expressed concern about the impact of the mould on their health (at p.194). Mr Chappell did not respond.

53. Throughout the tenancy, there were problems with the electricity supply. Fuses regularly blew. On Saturday, 10 April, they had no hot water. The fuse had blown and turning it on blew one of the main fuses for the flat. The problem was not resolved until the Wednesday. The electrician stated that the problem had probably been caused by a rodent. At 19.00, on the Monday, an electrician attended. They later heard rodents moving in the walls.

54. On 9 May (at p.197), the Applicants implored Mr Chappell to do something about the black mould and fungus. They repeated their concern about the potential impact on their health. On 19 May, they complained about an infection of flies. These seem to have been drain moths. They had to spray

the flat and clear away the dead flies every day. They reminded Mr Chappell of the mushrooms that were growing through the floor tiles (see photos at p.198-9). On 1 June (at p.199), they made further complaints. They offered to move into temporary accommodation so the works could be executed, if Mr Chappell was willing to agree to a reduction in rent.

55. On 18 June, the Applicants decided to take a short break and stay with their parents in Sweden. This would enable Mr Chappell to carry out any necessary works and seemed the most affordable option to them. They went to Sweden on 20 June and returned on 6 August.

56. During their absence, they communicated with Mr Chappell by WhatsApp. On 24 June (at p.200) they complained that they had become exhausted from having to clean away the flies, fungus and mould. In its current state, the flat was not "liveable". They were concerned for their health. The noise reducing curtains had not been provided, and the traffic noise was unbearable. They were also very concerned about the rodents. They discussed terminating their tenancy. Mr Chappell stated that he would require two months' notice so that he could find new tenants. They stated that they would need to contact the council, if Mr Chappell did not address the problems.

57. On 6 August, the Applicants returned from Sweden. Mr Chappell had cleaned the living room but not the bathroom or bedroom at the rear of the shop on the lower floor. The bathroom was infested with flies, moths and spiders. There was a leak through the ceiling. The pillows and duvet that they had purchased when they moved into the flat were damp and mouldy. There was also mould on a number of their belongings including shoes, trousers and an iPad case. There was mould in the kitchen, for example on their packets of floor and other items of food. There are photographs at p.205-208. The Applicants had to wash or dry clean everything that they had left at the flat. Mr Chappell agreed to pay the cost of dry cleaning their bedding.

58. The Applicants vacated the flat on 31 August 2021. Mr Chappell returned their deposit. The state of the flat at the end of the tenancy is illustrated in the photos at p.209. There was extensive mould growth.

59. Mr Chappell informed the Applicants that he had found another tenant who was willing to take a contract for a term of two years. However, Mr Chappell informed the Tribunal that the flat was still empty at the date of the hearing and had not been relet. Mr Chappell had not applied for planning permission for change of use of for a licence. He suggested that he would have no difficulty in obtaining planning permission for change of use. He stated that he owned an architectural practice and had obtained planning permission in respect of another retail unit.

60. Mr Chappell put a number of questions to the Applicants. He suggested that he had spent £30k in refurbishing the flat before he had granted the

tenancy. There was no evidence to support this statement. He suggested that he had responded promptly to address the complaints raised by the Applicants. The Applicants rejected this suggestion. Had they been concerned about the state of the flat, he suggested that he was surprised that they had not left earlier.

61. The Tribunal has no hesitation in accepting the evidence of the Applicants. The Tribunal is satisfied that the flat was not fit for human habitation when let to the Applicants. There were particular problems at the rear of the flat where the bedroom and bathroom were situated. There were major defects to the floor which were never addressed.

Issue 1: Who is the Relevant Landlord?

62. The Tribunal is satisfied that Mr Chappell is the sole landlord and the only person against whom a RRO can be made. Mr Daniel asked the Tribunal to infer from the following facts that Ms O'Leary was a joint tenant: (i) she is the freehold owner of the property; and (ii) she is the licence holder in respect of the upper flat. We find it impossible to accept this. Mr Chappell is the sole landlord named on the tenancy agreement. There is no such evidence to contradict the express terms of the tenancy agreement.

63. Mr Chappel did not seek to argue that Ms O'Learly could be made jointly and severally liable as a superior landlord. On the current state of the law (albeit that it is subject to an appeal in the Supreme Court), such a submission could not be maintained (see *Rakusen v Jepson*).

Issue 2: Has an Offence been Committed?

64. The Tribunal is satisfied beyond reasonable doubt that Mr Chappell has committed an offence under section 95(1) of the 2004 Act:

(i) On 5 June 2017, LBHF introduced a Selective Licencing Scheme that applied to this flat.

(ii) It was common ground that Mr Chappell had not applied for a licence.

(iii) Mr Chappell was the person who had both "control of" and had been "managing" the unlicenced house. He was entitled to receipt of the rents under the tenancy and was in receipt of the rents. It was common ground that the Applicants had promptly paid their rent throughout the tenancy (see p.77-115).

(iv) The Offence was committed from 9 January to 31 August 2021, namely the whole period of the tenancy.

Issue 3: The Assessment of the RRO

3.1 Introduction

65. The 2016 Act gives the Tribunal a discretion as to whether to make an RRO, and if so, the amount of the order. We are satisfied that this is an appropriate case for a RRO to be made.

66. Section 44 provides that the period of the RRO may not exceed a period of 12 months during which the landlord was committing the offence. The amount must not exceed the rent paid by the tenant during this period, less any award of universal credit. Both Applicants were working and were not in receipt of any benefits. It is common ground that they paid rent of £9,585 during the tenancy. This is the maximum RRO that the tribunal could award.

3.2 The Submissions of the Parties

67. Had the Tribunal been able to merely focus on the statutory criteria specified in section 44 of the 2016 Act, the assessment of the RRO would have been straight forward:

(i) The parties agreed that the Applicants had paid rent of £9,585.

(ii) There was no criticism of the conduct of the tenants.

(iii) The only issue in dispute was the conduct of Mr Chappell. The Applicants were extremely critical of his conduct and suggested that this put the case into the worst category. Mr Chappell responded that these complaints were exaggerated.

(iv) There was no evidence of Mr Chappell's financial circumstances.

(v) Mr Chappell had not been convicted of any relevant offence.

68. Regretfully, it is now necessary for the Tribunal to address the judicial minefield which has been created by the UT.

69. Mr Daniel sought a RRO in the sum of £9,585. He recognised that this was the maximum award that the Tribunal could make and that the Tribunal might consider it appropriate to make sum reduction. He raised the following points:

(i) The maximum rent that the Tribunal can make under section 44(3) is the "rent" paid by the tenants and not the "net rent" with deduction made for the utility bills paid by the landlord.

(ii) If the maximum rent under section 44(3) is now to be defined as the "net rent", it would be inappropriate for any deduction to be made. The

landlord had not adduced any evidence of the sums that he has expended. He is now debarred from adducing such evidence. It would be inappropriate for the Tribunal to make an "informed estimate".

(iii) Having determined the maximum RRO that could be made, the Tribunal should make an award at the highest level having regard to the statutory criteria in section 44(4). Particular regard should be had to the conduct of the landlord.

70. Mr Daniel argued that the Tribunal should have regard to the following factors:

(i) Mr Chappell let accommodation that was not fit for habitation. Numerous complaints were raised which the landlord failed to remedy.

(ii) Mr Chappell had not obtained planning permission for change of use. The shop was manifestly unsuitable for human habitation and he had acted in cynical disregard of his obligations as landlord.

(iii) The premises were damp. There was mould growth, fungus and mushrooms. The Flat was infested by flies. Mrs Laven suffered from asthma and atopic eczema.

(iv) The tenants were compelled to surrender their tenancy more than four months before the fixed term expired because the landlord had failed to remedy these defects. In June, they vacated the Flat for seven weeks in the hope that the flat would be rendered habitable on their return. They were required to pay rent during this period.

(v) Mr Chappell failed to comply with a number of his statutory obligations. He did not provide the tenants with an EPC, a gas safety certificate, a record of the electrical inspections or the "How to Rent" checklist. The deposit was not paid into a rent deposit scheme, albeit that it was returned when the Applicants surrendered the Flat.

71. Mr Daniel rejected the suggestion that the Tribunal was required to identify a "starting point" and conduct a quasi-criminal sentencing process. The Applicant's Statement of Case discusses the role of licencing in improving the quality of the housing stock. This refers to a 2019 CIEH Report that the role of selective licencing schemes in improving housing conditions. The CIEH has found that 69-84% of properties in licenced areas require work to bring them up to a decent standard. This also refers to a Select Committee Report that expressed the low level of enforcement action taken by LHAs. The Committee concluded that vulnerable tenants are being left without the protection to which they are legally entitled. RROs are an alternative to enforcement by a LHA. A LHA could bring a criminal prosecution which is now punishable by an unlimited fine or impose a Financial Penalty of up to £30,000. The 2016 Act imposes a

maximum limit for a RRO of 12 month's rent. A RRO should be made at the highest level to punish the offender, deter the offender from repeating the offence and dissuading others from committing similar offences. This reflects the statutory guidance issued by the Secretary of State to LHAs.

72. Mr Daniel rejected the suggestion that RROs for licencing offences should be treated as less serious than the other offences listed in section 40 for which a sentence of imprisonment may be imposed. The 2016 Act was intended to increase the protection for vulnerable tenants, rather than reduce the level at which RROs should be set.

73. Mr Chappell argued that the Tribunal should apply the guidance given by Judge Cooke. The maximum RRO that the Tribunal has jurisdiction to award is the "net rent" and not the "rent". The Tribunal is therefore obliged to compute the net rent. If it was unwilling to make an estimate of the utility bills, he was in a position to provide invoices for the sums that he had paid. The Tribunal should also have regard to the rent that he paid to his landlord as this reduced the profit that he made from the letting.

74. Having determined the “net rent”, Mr Chappell argued that we then needed to consider the seriousness of the offence. Following the lead from Judge Cooke, he argued that an offence of failing a licence a property was now at the lower end of the scale as it was not punishable by imprisonment. Failing to licence a house under a Selective Scheme was less serious than failing to register an HMO under a mandatory scheme, because the hazards in an unlicenced houses were likely to be less severe than in an HMO. He suggested that in the current case, his breaches were relatively minor. Planning permission would have been granted for a change of use and a licence would have been granted. A licence had been granted in respect of the upstairs flat. He had taken reasonable steps to address the Applicants' concerns.

75. Having computed the relevant “starting point”, which Mr Chappell suggested was a substantial reduction in the rent, the Tribunal should make further reductions having regard to the matters specified in section 44(4). He had not been convicted of any previous offence. He suggested that the tenants had exaggerated their complaints. He had sought to respond promptly to the issues that they had raised. In *Hancher*, Judge Cooke had reduced the award from 100% to 65% on facts which were not dissimilar from the current case.

3.4 The Tribunal’s Assessment of the RRO

76. Section 44(4) of the 2016 Act provides that the maximum RRO that it is open to this Tribunal to make is the rent of £9,585 which the Applicants paid between 9 January and 31 August 2021. The fact that they were driven out of occupation more than four months before the expiry of their twelve month fixed term tenancy is not a matter that we can take into account in determining the maximum award.

77. Having determined the maximum award, section 44(4) of the 2016 Act required us to take into account the following factors:

(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.

78. There is no criticism of the conduct of the tenants. We find that the following matters are relevant to the conduct of the landlord:

(i) We are satisfied that Mr Chappell let the Flat in a condition that was not fit for human habitation having regard to the hazards identified under the Housing Health and Safety Rating System introduced by the 2004 Act. Numerous complaints were raised which the landlord failed to remedy.

(ii) Mr Chappell had not obtained planning permission for change of use. The shop was manifestly unsuitable for human habitation and he had acted in cynical disregard of his obligations as landlord.

(iii) The premises were damp. There was mould growth, fungus and mushrooms. The Flat was infested by flies. Mrs Laven suffered from asthma and atopic eczema. We are satisfied that the condition of the Flat was prejudicial to their health as defined by the Environmental Protection Act 1990.

(iv) The tenants were compelled to surrender their tenancy more than four months before the fixed term expired because the landlord had failed to remedy these defects. In June, they temporarily vacated the Flat for seven weeks in the hope that the flat would be rendered habitable on their return. They were required to pay rent during this period.

(v) Mr Chappell failed to comply with any of his statutory obligations. He did not provide an EPC, a gas safety certificate, a record of the electrical inspections or the "How to Rent" checklist.

(vi) The Flat was let during the period the Covid-19 lockdown. It was therefore particularly important that the landlord should have complied with his statutory obligations and have ensure that the Flat was fit for habitation.

79. Mr Chappell has adduced no evidence that any RRO should be reduced on grounds of his financial circumstances. The is no evidence that Mr Chappell has been convicted of an offence to which the Chapter applies. However, we give limited weight to this. LHAs are under considerable financial pressures and are only able to take action in limited cases. A

conviction would have been an aggravating factor. However, given the circumstances of this case, we make no reduction for the absence of any conviction.

80. We are considering a restitutionary remedy. Our first reaction was to make RRO of £9,585, namely 100% of the rent paid by these Applicant before they were forced out of occupation of their home. We believe that this is the award that Parliament would have expected us to make given the social evil at which this legislation is directed.

81. However, the Deputy President has indicated in his most recent decisions that a maximum award should be reserved for the worst case (see [38] above). Whilst the current case is extremely bad, we are reluctant to put it in the worst category. We therefore make an award of 90% of the maximum award, namely £8,626.50.

82. We must then turn to the guidance given by Judge Cooke in *Acheampong* and *Hancher*. First, we must consider whether the maximum award should be the "net rent" (making deductions for utilities and/or any rent paid by Mr Chappell to his superior landlord). We decline to do so as we are satisfied that "rent" should be construed as it has been understood for the last 100 years, namely "the entire sum payable to the landlord in money" (see [34] above). We do not consider that Judge Cooke's suggestion (at [9] of *Acheampong*) that "a sum the tenant pays the landlord for utilities is not really rent" is a sufficient justification to depart from this established jurisprudence.

83. If we are wrong on this, there is no sufficient evidence before us to make any assessment of the "net rent":

(i) Mr Chappell has not adduced any evidence of the sums that he has paid for utilities or of any rent paid to his superior landlord. He has been debarred from adducing any evidence.

(ii) We reject the suggestion that a FTT should make "an informed estimate". We do so for two reasons. First, any litigant should plead in their Statement of Case any factors that they require the tribunal to take into account in assessing a RRO. It is not for a FTT to step into the arena and take a point which has not been raised by a party. Secondly, whilst FTTs are Expert Tribunals, an assessment of utility bills is outside our expert knowledge, particularly at a time of rampant inflation in fuel charges. We note that in *Hancher*, Judge Cooke decided not to make "an informed estimate". We are satisfied that she was correct to take this course.

84. Judge Cooke suggests that, before applying the statutory criteria in section 44(4), we should adopt a "starting point". We should make a significant reduction as an offence of failing to licence a house under section 95(1) is

less serious than the other offences specified in section 40 as no term of imprisonment can be imposed. We find it impossible to accept that in passing the 2016 Act, parliament intended to ratchet down the level of RROs that FTTs should make in respect of licencing offences. Further, as an Expert Tribunal, we have considerable knowledge of housing conditions in London. Unlicenced properties with inadequate means of escape carry a serious risk of death or serious injury. Equally, properties let in in unfit condition with dampness and mould growth also carry a risk of death or serious injury to health. These are serious hazards when assessed under the Housing Health and Safety Rating System introduced by the 2004 Act. We are not willing to minimise the social evil at which the 2016 Act is addressed.

85. Judge Cooke then requires us to consider the seriousness of this offence compared with other licencing offences. This would have been an additional and separate exercise from considering the conduct of the landlord. This requires an element of double counting and the somewhat semantic exercise of seeking to distinguish which factors in [78] above relate to the “seriousness of the offence” and which to “conduct of the landlord”. We do not consider that this "judicial gloss" impacts upon the RRO that we are minded to make.

86. Finally, Judge Cooke now requires us to consider whether a licence would be granted were an application to be made. We decline to make such a finding as we are satisfied that we would be usurping the statutory function that the 2004 Act has bestowed on LHAs. However, having regard to the housing conditions that the Applicants were required to endure, we consider it most unlikely that LBHF would grant a licence. We note that the Flat is still empty.

Conclusions

87. Having regard to findings above, we are satisfied that it is appropriate to make a RRO against the First Respondent in the sum of £8,626.50, namely 90% of the rent paid over the period 9 January to 31 January 2021.

88. We are also satisfied that the First Respondent should refund to the Applicants the tribunal fees of £300 which they have paid in connection with this application.

89. We do not make any order against the Second Respondent.

Judge Robert Latham
20 February 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.