First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/43UM/HMF/2021/0021**
Property	**:**	**25 Bramwell Place, 99 Chertsey Road, Woking, Surrey GU21 5BL**
Applicants	**:**	**(1) Serpil Dayi (2) Stefano Gianoglio**
Respondent	**:**	**Greg McCrory**
Application	**:**	**Applications by tenants for Rent Repayment Orders following an alleged offence committed by the Respondent of having control or management of an unlicensed house – Section 43 of the Housing and Planning Act 2016 ("the 2016 Act")**
Date of application	**:**	**8th August 2021**
Tribunal	**:**	**Bruce Edgington (lawyer chair) Bruce Bourne MRICS Ed Shaylor MCIEH**
Date of decision	**:**	**2nd December 2021**

DECISION

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1. Tribunal makes a Rent Repayment Order against the Respondent in the sum of £9,000.00 which is payable on or before 4.00 pm on the 5th January 2022 to the Applicant Serpil Dayi who must then pay Stefano Gianoglio any contribution he made to the rent payments.

2. The Respondent shall also re-pay to the Applicants the fees totalling £300 paid to the Tribunal in respect of this application by the same date.

Reasons

Introduction

3. Rent Repayments Orders ("RROs") require landlords who have broken certain laws to repay rent paid by tenants which is intended to act as a deterrent to prevent offending landlords profiting from breaking such laws.

4. The orders were originally made pursuant to the **Housing Act 2004** ("the 2004 Act") but this application is made under the later provisions contained in the 2016 Act. Section 41(1) of the 2016 Act says that "*A tenant…..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*".

5. Section 40 of the 2016 Act sets out the offences and prefaces the definition by saying "*an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord*". One of those offences described is under section 95(1) of the 2004 Act i.e. "*control or management of unlicensed house*" and this is the offence relied upon by these Applicants.

6. These selective licences are for areas with low housing demand with the need to contribute to the improvement of the social and economic conditions in the area in question. Further, such areas are experiencing a significant and persistent problem caused by anti-social behaviour and private sector landlords are failing to take action to combat the problem. The matters to be considered by the relevant local authority are set out in section 80 of the 2004 Act.

7. Once an area has been designated, private landlords must apply for a licence and failure to do so amounts to a criminal offence (section 95 of the 2004 Act).

8. The Tribunal made a Directions Order on the 22nd September 2021 timetabling the case to a video hearing because of the Covid pandemic.

9. The Respondent has taken no part in these proceedings and, thus, has not complied with the Directions Order which directed him to file and serve a response to the application. The Tribunal sent a copy of the application and the Directions Order in September 2021 by pre-paid post to the landlord at the address in the tenancy agreement i.e. West Clayton Estate, Chorleywood, Hertfordshire WD3 5EX and to the Respondent's letting agent TRSL Ltd at Unit 2 Wintersells Road, Byfleet, KT14 7LF, which is the name and address in the tenancy agreement. That company is registered at Companies House as an existing company which is now called Stirling Ackroyd Group Ltd. with its registered office at Unit 2 Wintersells Road, Byfleet. That company's website confirms that its address is that address and it has 18 branches.

10. This hearing date was set out in the Directions Order and the Tribunal did sent the link details to the Respondent and the letting agent on the 30th November to enable them to log in to the hearing.

Jurisdiction

11. Section 41 of the 2016 Act says that the Tribunal has jurisdiction if "*the offence was committed in the period of 12 months ending with the day on which the application is*

made". The Tribunal has to be satisfied that an offence has been committed using the criminal standard of proof i.e. beyond a reasonable doubt.

12. Section 44 of the 2016 Act says that the RRO can "*relate to rent paid during….a period, not exceeding 12 months, during which the landlord was committing the offence*".

13. The property is situated in a block of flats. The definition of a 'house' in an area of designation is in section 99 of the 2004 Act which says "*'house' means a building or part of a building consisting of one or more dwellings; and references to a house include (where the context permits) any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it)*". The property is a fifth storey flat and so would come within that definition.

The Hearing

14. The Applicants' evidence by way of a letter from Woking Borough Council is that the Council "*implemented a Selective Licensing Scheme from 1st April 2018 for all residential landlords with properties in part of the Canalside Ward (parts of Maybury and Woking Town Centre)*". They go on to say that the property is within that scheme area.

15. The Applicants also filed a copy of their tenancy agreement dated 23rd June 2018 which is for an initial term of 12 months at a rent of £1,500.00 per calendar month. Ms. Dayi has produced a copy of her bank statement showing the payments of £1,500.00 per month from 23rd August 2018 until 23rd April 2021. A further sum of £542.46 was paid to Gary McCrory on the 4th June 2021.

16. The hearing was attended by both Applicants. The tribunal waited for 10 minutes after the time on the notice of hearing to give the Respondent an opportunity to attend but he did not. The Tribunal chair introduced himself and the other Tribunal members and various questions were asked of the Applicants.

17. As to the Respondent's address, they said that they had no direct contact with him. An agent named Les Owen described herself as the 'manager' of the property and that was the person with whom the Applicant's communicated. That person possibly said that she was employed by the Respondent as manager but the Applicants were not entirely sure. They gave her address (which was not the Respondent's address) and telephone numbers.

18. They had a letter from Woking Borough Council dated 7th February 2020 asking for their details and those of the landlord. Ms. Dayi said that she telephoned them and gave their details and the name and address of the landlord i.e. the Respondent. She then e-mailed this information to the Council on the 11th February. On the 10th August 2020 the Council wrote again stating that the Respondent had still not applied for a licence. As is now known, the application for a licence was made in September 2020.

19. The Applicants themselves wrote to the Respondent at the address in the tenancy agreement on the 12th October 2021 with various copy documents in connection with this application but the envelope was returned a week later with a message stamped on the envelope to the effect that the Respondent did not live at that address.

20. As far as any conduct is concerned, the Applicants said that they did have problems with mould from a water leak from the roof plus a defective boiler which also leaked water although this only affected their hot water. The heating was not affected. This was never sorted out and they moved out as soon as the Covid restrictions enabled them to. However, it is relevant to this application to record that the hot water problem did not occur whilst the offence was being committed prior to the 22nd September 2020.

Conclusion as to Primary Liability

21. The Tribunal is reminded of the words of Judge Cooke in the Upper Tribunal case of **Paulinus Chukwuemera Opara v Marcia Olasemo** [2020] UKUT 96 (LC) when she criticised a First-tier Tribunal of being over cautious in considering the words 'beyond reasonable doubt'. She said this:

> "*…For a matter to be proved to the criminal standard it must be proved 'beyond reasonable doubt'; it does not have to be proved 'beyond any doubt at all'. At the start of a criminal trial the judge warns the jury not to speculate about evidence that they have not heard, but also tells them that it is permissible for them to draw inferences from the evidence that they accept…*".

22. None of the pre-paid post sent to the Respondent and his letting agent by the Tribunal has been returned and the Tribunal concludes that the copy application and Directions Order must have been received by the Respondent and/or the letting agent. Further, the Respondent had applied for a licence before the application was made and therefore must have realised that a licence was required.

23. The Tribunal was concerned to note that the letter sent by the Applicants to the Respondent at the address in the tenancy agreement on the 12th October 2021 was returned. However, when looking at the address on Google Earth, it appeared that the address was in a rural location with a house and one or two buildings which looked like small warehouses. The Tribunal then reminded itself of section 48 of the **Landlord and Tenant Act 1987** which requires a landlord to notify any tenant of an address in England and Wales "*at which notices (including notices in proceedings) may be served on him by the tenant*".

24. Thus, even if the address in the tenancy agreement was not the dwelling of the Respondent, it remained the address for service until at least the end of the tenancy and everything relating to these proceedings has therefore been served at the only address given to the Applicants.

25. On the evidence produced and discussed above, the Tribunal is satisfied beyond a reasonable doubt that an offence was being committed by the Respondent as landlord between the 1st April 2018 and 22nd September 2020. Woking Borough Council has confirmed that the application for a licence was submitted on the 18th September 2020 and is presumed to have arrived by the 22nd September being the second working day after it was submitted. The submission of an application for a licence amounts to a defence to the offence.

26. The offence was being committed on a daily basis which means that the requirement for the offence to be committed within the 12 month period prior to the application to this Tribunal is satisfied.

Discussion as to Amount Payable

27. On the question of quantum, the 2016 Act changed the way in which Tribunals should consider the calculation of an RRO. Under the 2004 Act, the Tribunal's calculation had to be tempered by a requirement of reasonableness. For example, the landlord should only be ordered to repay any profit element from the rent. As was confirmed in the Upper Tribunal case of **Vadamalayan v Stewart** [2020] UKUT 183 (LC), section 44 of the 2016 Act says, in effect, that the Tribunal should no longer consider such matters as what profit would have been earned by the rent paid. In other words, expenses incurred by the landlord as a result of obligations to keep a property in repair, insured etc. under the terms of an occupancy agreement would have had to be incurred in any event and should not be deducted.

28. The starting point is therefore the actual rent paid during the relevant period. Such matters as the parties' conduct or the landlord's financial circumstances can be used to assess any claim. There is no actual evidence of financial hardship on the part of the Respondent.

29. As to the parties' conduct, the Applicants have referred to behaviour which is unreasonable but which was not serious during the time when the offence was being committed. The Tribunal did not consider that this should affect the amount it orders for repayment.

Conclusion as to the Amount of any Order

30. The Tribunal is aware of another First-tier Tribunal case relating to the top floor flat at 9 Dover Place, Bristol BS8 1AL. This is the case of **Ahmed and others v Rahimian** CHI/00HB/HSD/2020/0002 which was determined by Regional Judge Tildesley OBE. This was a case where the Respondent did not apply for a licence to control or manage a House in Multiple Occupation. This Tribunal considers that the same basic principles apply to this case.

31. Another First-tier Tribunal decision is not binding on this Tribunal. However, this Tribunal agrees with that decision and reasoning. It sets out at length the law and reasons for a determination of about half of the maximum amount which could have been awarded i.e. £10,000 ordered as opposed to the maximum of £19,803 which could have been awarded.

32. Judge Tildesley OBE in **Ahmed** said, in awarding £10,000 (paragraphs 102 & 103);

> "*This is not a case which justifies an award of the maximum amount of £19,803.00. The Tribunal normally considers such an award where the evidence shows that the landlord was a rogue or criminal landlord who knowingly lets out dangerous and sub-standard accommodation. The Respondent did not meet that description….The Tribunal here is dealing with two sets of decent honourable persons who are separated*

by the fact that the Respondent failed to licence the HMO and thereby committed an offence…"

33. In the subsequent Upper Tribunal case of **Kowalek v Hassanein Ltd.** [2021] UKUT 143 (LC), the Deputy Chamber President considered another First-tier Tribunal ("FtT") case where such Tribunal had awarded about 50% of the total rent paid. The points on which permission to appeal were granted did not include a consideration of the proportion of rent to be repaid but, nevertheless, the Upper Tribunal, in reciting the FtT's determination, made no comment to suggest that the proportion was incorrect in a case where the general conduct of the parties was not particularly bad on either side.

34. This Tribunal determines that a similar proportion of the rent paid should be ordered in this case. The sum of £18,000.00 was paid to the Respondent by Ms. Dayi over the period of one year when the offence was being committed. The RRO will therefore be for the sum of £9,000.00. As this is a Rent Repayment Order and only Ms. Dayi has paid any rent to the Respondent, the Order will have to be in her favour. She is then obliged to repay Mr. Gianoglio any money he contributed towards such rent.

Fees

35. Rule 13(2) of the **Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013** ("the 2013 rules") says that a Tribunal may make an order requiring a party to reimburse fees paid by the other party on its own initiative. In this case, it is clear that the Respondent was committing an offence and an RRO has been made. Thus the Tribunal considers that the Respondent should reimburse the fees paid to the Tribunal by the Applicants.

Should this Decision have been made?

36. As will be clear from the reasons, the Tribunal was concerned about whether the Respondent and the letting agent named in the tenancy agreement were aware of these proceedings and had the chance to make representations. The letting agent was not a Respondent but it must have been aware of this application, it clearly had a moral, if not a legal obligation to notify the Respondent.

37. On the evidence presented, it seemed to be clear to the Tribunal beyond a reasonable doubt that an offence had been committed and that the Respondent must have known this as he did in fact make an application for a licence.

38. If in fact there was no offence committed and/or there were matters of misconduct on the part of the Applicants, it is open to the Respondent to apply to the Tribunal to set aside this decision under rule 51 of the 2013 rules but such application will have to set out clearly the basis for any such allegation.

……
Judge Edgington
8th December 2021

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. 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.

iv. 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.