FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:BIR/00FY/HMJ/2021/0001 and 0002**
Property	**:23 Berridge Road, Nottingham, NG7 6LX**
Applicants	**: Georgina Farrand and Monique Henry**
Respondent	**: Rachel Gyekye**
Representative	**: Kaylie Thompson**
Type of Application	**:Application for Rent Repayment Order by tenant** Sections 40,41,43 and 44 Housing and Planning Act 2016
Tribunal Members	**: Judge T N Jackson** **Mr P Wilson LLB MRICS MCIEH CEnvh**
Date and venue of Hearing	**: 19th August 2021** **Midland Residential Property Tribunal via remote Hearing by VIDEO**
Date of Decision	**: 5 October 2021**

DECISION

Decision

The Tribunal makes Rent Repayment Orders against the Respondent in the sum of £6,480 to be paid to the Applicants within 28 days of the date of this Decision.

Reasons for decision

Introduction

1. On 9th March 2021, each Applicant applied for a Rent Repayment Order stating that the Respondent had the control or management of a house required to be licensed under section 85 (1) of the Housing Act 2004 ('the 2004 Act') but which was not so licensed. The Applicants sought Rent Repayment Orders in the amounts of £8,100. As both applications dealt with the same tenancy and issue, the cases were heard together.

Background

2. On 1st August 2018, Nottingham City Council introduced a Selective Licensing Scheme under the provisions of Part 3 of the 2004 Act.

3. Sometime in February 2019, the Respondent had attempted to apply online for a License for the Property. She was able to set up an account online but the system had prevented her from proceeding to the application itself. She did not contact the Council to explain the problem she was having.

4. On 29th March 2019, the Applicants entered an assured shorthold tenancy agreement with the Respondent for a period of 6 months from and including 29th March 2019 to 28th September 2019 at a rent of £675 per calendar month. Thereafter it became a statutory periodic tenancy. The Applicants gave one month's notice to the Respondent on 28th September 2020 and left the Property on 28th October 2020.

5. At the start of the tenancy, the Property was managed by Express Lettings (Nottingham) Limited. The Respondent asked them to apply for the Licence which they said they would do in their name.

6. On approximately 15th April 2019, the management of the Property was transferred to HM Lettings. During the transfer HM Lettings were made aware that there was no Licence in place and they agreed to apply for a Licence in their name.

7. On 29th April 2020, HM Lettings Ltd, applied for a Temporary Exemption Notice from the Selective Licensing Scheme. On 13th May 2020, the application was rejected by the Council.

8. On the date of the rejection, the Respondent wrote to HM Lettings stating "*Can you please sort applying for the selective Licence ASAP as previously agreed. I do not want to get a fine. You originally applied months ago for selective licensing. The insurance details were given to you then. Please confirm when this is done and let me know when payment is due".*

9. On 15th May 2020, the Respondent chased HM Lettings again stating "*I need you to set up the Licence asap……".* By 18th May 2020, HM Lettings completed the application online

and asked the Respondent to log onto the system to make the payment. The application was acknowledged by the Council on 21st May 2021.

10. A Licence was granted on 5th October 2020 to expire on 31st May 2025.

11. In August 2020 HM Lettings was sold to the Belvoir Nottingham Group.

12. From the start of and during the tenancy the Applicants complained to the first two managing agents, and to the Respondent directly regarding the condition of the Property. The disrepair included a hole in the bedroom window; windows that would not open or close; rotting wooden window frames; unsecured glass panels; lack of a gas certificate; out of date electricity certificate; no kitchen fire door; a faulty fire alarm system; rising and penetrative damp; black mould; patches of salting; faulty shower head and inability to use the shower as it leaked through the kitchen ceiling; a leaking pipe in the kitchen; new bathroom sealant required and exposed pipes and wiring.

13. HM Lettings engaged a contractor to carry out an inspection which took place on 21st September 2019. The Applicants were not provided with a copy of the contractor's inspection report despite numerous requests.

14. At the Respondent's request, HM Lettings arranged for a contractor to visit the Property on 31st October 2019 to assess the issues but the contractor did not attend. A further date of 15th November 2019 was arranged and a contractor attended with the Respondent. The contractor visited the Property on 27th November 2019 and 1st December 2019 during which visits he sealed one of the bedroom windows shut, put silicone around the window sill, filler on the outside window frames, covered the hole in the bedroom window with a plastic sheet and assembled a blind in the kitchen. No other repairs were carried out.

15. On 21st December 2019, the Applicants refused access to the Respondent and the contractor who had attended without notice. The Applicants asked the Respondent and contractor to schedule visits through HM Lettings.

16. The Applicants sent a formal complaint letter by Special Delivery and email to HM Lettings on 24th December 2019 outlining their complaint that repair works were still outstanding. The Applicants did not receive an acknowledgement. In what they considered appropriate action to get the attention of HM Lettings, the Applicants held back the rent for February 2020 due on 29th January 2020 until they received a response to their complaint. The Applicants received generic automatic messages regarding the rent but nothing regarding the repairs or the written complaint.

17. On 14th February 2020, the Respondent posted 'Abandonment Notices' on the Property alleging a lack of activity in and about the Property indicating that the Applicants had abandoned the Property. The Notice required the Applicants to contact HM Lettings within 7 days failing which the Property would be 'retaken', locks changed, an inventory taken and personal belongings placed in storage for 28 days following which they would be disposed of or sold.

18. The Applicants were still occupying the Property. After seeking advice from the CAB on 17th February 2020, the Applicants paid the outstanding rent on 18th February 2020.

19. On 19th February 2020, the Applicants received a hand delivered section 21 notice signed on behalf of HM Lettings requiring the Applicants to leave the Property after 21st April 2020 failing which the Landlord may apply to the court for possession of the Property.

20. On 21st February 2020, the CAB advised the Applicants that the section 21 Notice was invalid as the Property did not have a Selective Licence. The CAB spoke to HM Lettings to advise them of this and the latter said they would contact the Applicants but they did not.

21. On the same date, the Applicants contacted the Environmental Health Department who inspected the Property on 2nd March 2020. They identified fire hazards such as the lack of gas safety certificate, faulty fire alarm system, lack of a kitchen fire door and also concern regarding the leak from the kitchen water pipe. The Council Officer informed HM Lettings that work was required imminently and that a formal inspection would be carried out on 17th March 2020. Council officers advised the Applicants of their rights and about the issue of Rent Repayment Orders.

22. Prior to 17th March 2020, a contractor fixed the water leak, tested the fire alarms and measured for a fire door. On 17th March 2020, Environmental Health cancelled the appointment due to Covid-19. However, on the same date a contractor arranged by HM Lettings carried out a further inspection of the Property; a gas engineer attended to carry out a gas safety inspection and disconnected the fire which was stated to be unsafe; and a contractor repaired the faulty fire alarm.

23. The Applicants chased HM Lettings for a copy of the gas certificate, the findings of the inspection and details of when the remaining works were to be completed. After several chasing emails, the Applicants were provided with a copy of the gas certificate a month later. At HM Lettings request, the Applicants provided at different times two separate sets of dates for contractors to attend. They were advised contractors could not attend on the first set of dates but did not receive a response to the second set of dates.

24. The Applicants contacted Environmental Health regarding the failure of the managing agent to appoint contractors. Environmental Health contacted HM Lettings who advised that they would be in touch with the Applicants when they could find a contractor. On 17th July 2020, HM Lettings confirmed that they did not have any contractors to do the repairs. On 5th August 2020, HM Lettings advised the Applicants that HM Lettings was to be sold to the Belvoir Nottingham Group which sale was confirmed in an email to the Applicants on 26th August 2020.

25. The Applicants submitted one month's notice to end the tenancy on 28th October 2020.

Inspection

26. Because of current COVID-19 restrictions no inspection was carried out. However, from the documentation submitted and access to publicly available online street view information it may be said that the Property is a two storey, three -bedroom semi-detached house built probably just before or just after Second World War. It has brick elevations under a duo pitch roof with natural slate covering. The accommodation comprises two reception rooms to the ground floor and three bedrooms and bathroom to the first floor. The Property has a cellar.

Hearing

27. An oral hearing was held via Cloud Video Platform on 19th August 2021. The Applicants attended the hearing and were unrepresented. The Respondent attended the hearing and was represented by Ms Thompson in accordance with Rule 14 (5) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

The Law

28. Section 41 of the Housing and Planning Act 2016 ("the 2016 Act"), provides that a tenant may apply to the Tribunal for a Rent Repayment Order against a landlord who has committed an offence to which the 2016 Act applies. The offence must relate to housing, that at the time of the offence, was let to the tenant and the offence must have been committed in the period of 12 months ending with the day on which the application is made. The 2016 Act applies to an offence committed under 95 (1) of the Housing Act 2004 ('the 2004 Act'), namely the control or management of a house required to be licensed under section 85 (1) of the 2004 Act but which is not so licensed.

29. Section 263 of the 2004 Act defines 'a person having control' and 'a person managing'.

30. Section 43 provides that the Tribunal may make a Rent Repayment Order if satisfied, beyond a reasonable doubt, that the landlord has committed an offence to which the 2016 Act applies (whether or not the landlord has been convicted).

31. Section 44 of the 2016 Act provides for how the Rent Repayment Order is to be calculated. In relation to offences under section 95(1) of the 2004 Act, the period to which a Rent Repayment Order relates is a period, not exceeding 12 months, during which the landlord was committing the offence. The rent the landlord may be required to pay in respect of that period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid in respect of rent under the tenancy during that period.

32. Section 44(4) of the 2016 Act states that in determining the amount of a Rent Repayment Order, we should take account of 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 that Chapter of the Act applies.

Submissions

Applicants

33. The Applicants say that the Respondent knew before the tenancy commenced that the Property required a Selective Licence as she had been so advised by Express Lettings but did not obtain one until eighteen months after the Property was let. The Respondent is an experienced landlord.

34. The Applicants say that the responsibility of seeking a Selective Licence lay with the Respondent and that if she gave the task to managing agents, it was her responsibility to chase it up in a timely manner.

35. The Respondent makes unfounded and unsupported allegations that the Applicants were difficult to manage. The Applicants state that they were advised repeatedly by HM Lettings that they were awaiting authorisation from the Respondent and that progress on repairs was delayed due to the Respondent's absence and failure to respond. As neither the Respondent nor HM Lettings appeared to be progressing the repairs, the Applicants tried to progress matters with the Respondent's contractor directly as he had provided his card to them on the visit with the Respondent on 15th November 2019.

36. During the tenancy two independent inspection reports were conducted but despite repeated requests by the Applicants for copies, these were denied by the Respondent. The Applicants say that the Property and garden were well maintained by them and that any issues with the Property were solely down to the negligence of the Respondent and her failure to acknowledge and carry out her responsibilities as a landlord.

37. The tenancy and maintenance issues commenced in March 2019, 12 months before the impact of Covid-19.

38. The Applicants refer to a police raid at the Property at 5am on 1st October 2019 which related to someone connected to the address rather than the Applicants, as a result of which the Applicants no longer felt safe in the Property.

39. The Applicants noted that on several occasions whilst they were at work it appeared that someone had been in the Property as windows were left open which they had left closed, personal items and bedroom blinds moved. The Applicants called the police, who after visiting the Property said that the Property was insecure and that they should change the locks for their own safety.

40. The Applicants refer to unannounced visits by the Respondent and contractors. They refer to an incident in the early hours of 15th February 2020 where they allege that the Property was monitored by a car parked outside after which they felt that they were being watched and were fearful of leaving the house.

41. The stress and anxiety of not having a safe and secure home, the deterioration and neglect of the Property, the service of an unjustified Abandonment Notice and unlawful section 21 Notice and the lack of response and delay by the managing agencies and the Respondent have significantly affected both their mental and physical health and has required medication and occasions where, for the benefit of their well-being, they have had to leave the Property for periods.

Respondent

42. The Respondent says that she has let the Property for 15 years and has always used managing agencies. Prior to letting the Property in March 2019, she had attempted to apply online for the Licence herself but was unable to do so due to technical difficulties. Express Lettings said that they could apply for the Licence in their name and the Respondent agreed that they should do so. On the transfer of the management of the Property to HM Lettings, they said that they would ensure that an application was sent and that it would be in the name of HM Lettings. The Respondent states that she had continuously chased up the selective licensing application with a specific employee of HM Lettings and was repeatedly advised that it was being sorted and that the lettings manager was in continuous contact with the Council.

43. The lettings manager made an application for a Temporary Exemption Notice on 29th April 2020 as the Respondent wished to sell the Property The application was refused on 13th May 2020. The Respondent continued to chase up the lettings manager and the application was completed in the Respondent's name in May 2020 prior to the redundancy of the lettings manager.

44. The Respondent states that throughout the duration of letting the Property with HM Lettings she followed the advice of the lettings manager. She says that the managing agencies have a legal obligation not to let a property without a Licence.

45. The Respondent states that during the Covid-19 pandemic there were times when communication with HM Lettings was extremely difficult. The Respondent has provided a chronological account of correspondence regarding the selective licensing application process with the emails attached.

46. The Respondent states that she had the impression from the lettings manager of HM Lettings that the Applicants were, at times, difficult to manage in relation to the Property and that often communication and correspondence was difficult. The Respondent had little direct communication with the Applicants and therefore was unable to say if this was the case.

47. The Respondents says that with the exception of the broken bedroom window she was unaware of any work that needed doing until approximately November 2019 when she arranged for a contractor to visit the Property. She considered that the Applicants had caused some of the disrepair complained of, and with the exception of the bedroom window, the Property had been in good repair immediately before it was let as she had been living there. She arranged for works identified by Environmental Health to be carried out.

Deliberations

48. We considered the applications in the following stages –

a) Whether we were satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 95(1) of the 2004 Act;

b) Whether the Applicants were entitled to apply to the Tribunal for a Rent Repayment Order;

c) Whether we should exercise our discretion to make a Rent Repayment Order;

d) Determination of the amount of any Order

Offence

49. Section 95(1) of the 2004 Act provides that:

i. '*a person commits an offence if he is a person having control of or managing a house which is required to be licensed under [section 85(1) of the 2004 Act] but is not so licensed*.'

50. Section 95(2) provides that it is a defence if:

a. 'at the material time,
   i. .....
   ii. an application for a licence had been duly made in respect of the house under section 87

b. and that ..... application was still effective.'

51. Section 95(4) provides that is a defence if the person:

a. 'had a reasonable excuse-

i. *for having control or managing the house in the circumstances mentioned in subsection (1) or'*
ii. *.....'*

52. Section 263 of the 2004 Act provides:

> *(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).....*
> *(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 or parts of the premises, or of the whole of the premises;*
>
> *and includes, where those rents or other payments are received through another person as agent or trustee, that other person'.*

53. Through a sequence of three managing agents at different times, the Respondent was receiving rent from the Applicants who, by virtue of the tenancy agreement, were in occupation of the Property as tenants. The Respondent was therefore a 'person managing' the Property. The Respondent accepts that she is the owner or lessee of the Property.

54. There is no dispute that the Property was required to be licensed under the Selective Licensing Scheme and was not licensed until 5th October 2020.

55. We considered whether the defence under section 95(2)(b) applies. 'A duly made' application for a Licence is one which is complete and contains all relevant documentation upon which the Council can make a decision. In the absence of any evidence that further information was required by the Council, we find that the application was duly made on 21st May 2020. The offence was therefore committed until 20th May 2020 and the defence applies thereafter.

56. We considered whether the defence under section 95(4)(a) applies. We find that it does not. The Respondent has rented out the Property for over fifteen years and has always used managing agencies. The Respondent asserts that it was the managing agents' legal obligation not to let the Property without a Licence and to obtain the Licence once she had passed the Property to them to manage. We do not accept this. Passing a property to a managing agent is delegation rather than abdication of responsibility and the Respondent as owner remains responsible and accountable. It remains her legal obligation as the owner. The Respondent was clear that she knew that a Licence was required before the tenancy could commence and had attempted to apply herself but had failed. She told us that she had read the 'pack' and knew that there were consequences of failing to have a Licence such as a civil penalty or a Rent Repayment Order. Before the Property was, let Express Lettings advised the Respondent on 5th March 2019 that without a Licence or proof of application they were unable to let the Property. The evidence shows that the Respondent knew at several periods throughout the tenancy, including explicitly on the change of the managing agent in April 2019, and subsequently in June 2019, September 2019, October 2019, December 2019, and January 2020 that the managing agents had not yet submitted the application. If the Respondent considered that a managing agent was not pursuing the application with sufficient urgency, it was open to her to either demand

that it be done as a matter of urgency or alternatively change managing agent to ensure an application was made. It is not reasonable to do nothing.

57. We do not accept the Respondent's assertion that she was advised by the managing agencies that, due to a backlog at the Council as a result of the recent introduction of the Selective Licensing Scheme, it was acceptable to let out the Property without having made an application. The Respondent has not provided any documentary evidence to support this either from the managing agencies or the Council and the email of 5th March 2019 referred to above suggests the opposite. Such advice, if it was given, would be clearly wrong. We also find it unlikely that two separate managing agencies would give the same incorrect advice. As an experienced landlord, and having tried to apply for a Licence herself and knowing the consequences to herself as a landlord of not having a Licence whilst letting a property, we find it implausible that she would not have challenged or checked such a statement. The Respondent did not check that the alleged position was correct with the Council despite contacting them in February 2019 to clarify whether a managing agent could apply for a Licence in their name rather than hers.

58. Neither do we accept the premise that a 'backlog' of applications would prevent an application being made, although we accept that the Council's consideration of any application may be delayed due to a backlog of applications. The process followed was an online application which did not require any action on behalf of the Council other than the receipt of a payment, which we suggest would have been automated. Neither do we accept that an application submitted by an agent, either in the name of the Respondent or of the agency itself, could be submitted any quicker or easier than by an owner applying themselves.

59. On the basis of the facts set out in paragraphs 53 to 58 above, we are satisfied, beyond a reasonable doubt, that the Respondent had committed an offence under section 95 (1) of the 2004 Act, namely being a person managing a house which was required to be licensed under section 85(1) of the 2004 Act but was not so licensed.

Entitlement of the Applicants to apply for a Rent Repayment Order

60. We determine that the Applicant was entitled to apply for a Rent Repayment Order. At the time of the offence the Property was let to the Applicants by the tenancy agreement dated 29th March 2019 and the offence was committed between 29th March 2019 and 20th May 2020 inclusive which is in the period of 12 months ending with the day on which the application to the Tribunal was made (9th March 2021).

Discretion to make a Rent Repayment Order

61. Having considered the matter, including in particular the Respondent's oral evidence and written submission, we were satisfied that there were no ground on which it could be argued that it was not appropriate to make Rent Repayment Orders in the circumstances of this case.

Amount of Rent Repayment Order

62. In accordance with section 44 of the 2016 Act, the amount of an Order must relate to rent paid in a period, not exceeding 12 months, during which the landlord was committing the offence under section 95(1). The Respondent ceased to commit the offence on 21st May 2020 when the application for the Licence was duly made. The relevant period during

which the offence was committed was therefore between 29th March 2019 and 20th May 2020.

63. As is evidenced by the extract from the Applicants' bank statement, during the relevant period the Applicants paid £675 each calendar month. The maximum that we can order to be paid is limited to 12 months, namely £8100 (£675 x 12).

64. Section 44(4) stipulates that '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.

Conduct

65. We do not find anything in the conduct of the Applicants that justifies a deduction to be made from the £8100 paid. Throughout their tenancy, they have tried to have repairs remedied and resorted to withholding a month's rent following continued failures by the managing agent to respond to them and to a formal complaint submitted in December 2019. They also had to resort to contacting Environmental Health due to the failure by the Respondent and/or her managing agents to remedy disrepair. We disregard the Respondent's statement of the managing agent's view of the Applicants as that is unsubstantiated and the Respondent accepts that she has had little directly to do with the Applicants.

66. In relation to the Respondent's conduct, we find as follows. We do not find that the Respondent entered the Property without the consent of the Applicants. The Applicants concede that they have assumed that the person entering the Property was the Respondent but have not provided any evidence to that effect. The Respondent denies that she did so. Neither do we take into account the fact that there was a police raid and the assertion that the Property was 'known' to the police. Whilst experiencing a police raid would undoubtedly be a harrowing experience for the Applicants, there is no evidence that the raid was in any way connected to the Respondent. We also have had no regard to the allegation that people were watching the house on 15th February 2020 as no evidence was submitted that this was at the behest of the Respondent.

67. In relation to disrepair, there is a disagreement between the parties as to the extent of the disrepair. However, the Respondent accepts that the broken bedroom window existed at the start of the tenancy agreement. The Respondent has not provided the Tribunal with copies of the inspection reports of September 2019 or March 2020 to support her assertion that the Property was not in the state of disrepair as claimed by the Applicants. Further, despite stating at the hearing that she would provide the Tribunal with a copy of the correspondence from Environmental Health identifying the works that were required, the Respondent has subsequently stated that she does not have a copy and that it is with the managing agent but has not obtained a copy to provide to the Tribunal. The failure to provide such information suggests to us that the extent of disrepair is greater than suggested by the Respondent. Works were required following the inspection by Environmental Health which also suggests that the Property had health or safety hazards. The Respondent, and her managing agents, have failed to address the state of disrepair from the start of the tenancy until November 2019 at the earliest, when what we would

describe as temporary fixes were applied. Whilst we accept that post March 2020 there may have been an initial difficulty in engaging contractors due to Covid, there is no reasonable justification for the failure to engage contractors prior to March 2020. As this is not a disrepair claim, we do not have to make a finding on the exact nature or extent of any disrepair. However, the evidence available suggests that there was disrepair and health or safety hazards and that no action was taken on the former until November 2019 and such action that was taken was limited.

68. The Respondent's failure to respond to managing agents who were seeking authority for action has been remarked upon by two of the three managing agents.

69. The Applicants received an Abandonment Notice whilst still occupying the Property and which was therefore unjustified. The Applicants also received a section 21 Notice which was unlawful as no Licence was in place.

70. The Respondent says that she relied on the managing agents throughout as they were the professional firm charged with the responsibility of managing the Property. However, within the context of the Respondent having been a landlord for fifteen years, using several managing agencies, knowing that the Property required a Licence before being let and being specifically advised so before it was let, and being aware of the consequences of failing to have a Licence, in the absence of any written evidence that supports the Respondent's contention that she was advised by managing agents that there wasn't a problem in letting the Property without a Licence due to the backlog, we consider that such reliance was unreasonable. The Respondent's oral evidence was that she was touch with the managing agents by phone every 4-5 weeks. However, there is limited written evidence from the start of the tenancy of the Respondent chasing either managing agent to apply for the Licence as a matter of urgency. It is only following the refusal of the Temporary Exemption Notice, on 13th May 2020, that in emails to HM Lettings on 13th and 15th May 2020, the Respondent injected some urgency into the matter by asking for the Licence to be applied for 'as soon as possible'. This resulted in an application being made within 5 days, whereas prior to this there had been a failure to apply in the previous 15 months. For the reasons described in paragraphs 57 and 58 above, we do not accept the explanation that 'there was a backlog' at the Council as a reason for the failure by the Respondent or a managing agent to apply for a Licence either before or immediately at the commencement of the tenancy.

71. We have only been provided with part of the correspondence between the Respondent and the managing agents, with the majority comprising only the Respondent's side of the communication. We do not accept, as claimed by the Respondent, that she would have been unable to obtain the other side of the correspondence from the current managing agents who had bought the previous managing agents. We also have not been provided with a copy of either of the two inspection reports nor of the correspondence from Environmental Health. We find that the Respondent has been less than transparent in these proceedings which reduces her credibility.

72. If the Respondent considers that she has been incorrectly advised by any of the managing agencies involved, then it is open to her to take legal action against them.

Financial

73. Despite the Directions stating that she should provide details of her financial situation, the Respondent has not provided such information and at the hearing stated that she did not want her financial circumstances to be taken into account.

Conviction

74. We have no evidence that the Respondent has been convicted of any housing related offences or received any financial penalties.

Decision

75. Having regard to the all these factors, we considered whether we should make an award of the maximum amount repayable. There have been suggestions that, after the decision in *Vadamalayan v Stewart & Ors [2020] UKUT 0183 (LC)*, the starting point for any award must the maximum repayable and that a First Tier Tribunal has only very limited discretion to reduce this. In *Vadamayalan*, the Upper Tribunal also made clear that there is no express requirement for any award to be 'reasonable' as in the previous regime. However, the Upper Tribunal has indicated (for example in *Ficcara v James [2021] UKUT 0038 (LC),* at paragraph 51) that the main focus of the Upper Tribunal in *Vadamayalan* was sweeping away "… the redundant notion that the landlord's **profit (**our emphasis**)** represented a ceiling on the amount of the repayment."

76. In *Ficcara v James [2021] UKUT 0038 (LC)*, at paragraph 50 the Upper Tribunal states:

> "*The concept of a "starting point" is familiar in criminal sentencing practice, but since the rent paid is also the maximum which may be ordered the difficulty with treating it as a starting point is that it may leave little room for the matters which section 44(4) obliges the FTT to take into account, and which Parliament clearly intended should play an important role. A full assessment of the FTT's discretion as to the amount to be repaid ought also to take account of section 46(1). Where the landlord has been convicted, other than of a licensing offence, in the absence of exceptional circumstances the amount to be repaid is to be the maximum that the Tribunal has power to order, disregarding subsection (4) of section 44 or section 45.*"

77. The clear implication of this paragraph is that significant discretion is retained and has an important role, including, it would appear, as to the starting point. The paragraph notes the differential treatment of licensing offences by section 46(1); there is an obligation to award the full rent repayable with the offences of violence for securing entry, illegal eviction or harassment of occupiers, breach of a banning order and failure to comply with an improvement notice or prohibition order but not where the offence is control or management of an unlicensed house as here. Clearly offences such as violent entry, illegal eviction/harassment are egregious in nature and cause great misery and the implication is that the offence of managing an unlicensed house is viewed in a less serious light and accordingly does not warrant the automatic imposition of a requirement to repay a full year's rent.

78. We thought it helpful to bear in mind the purpose and context of the legislation, not least in the light of comments in the recent Court of Appeal decision in *Rakusen v Jepson & Ors [2021] EWCA Civ 1150*.

79. Part 2 of the 2016 Act is headed "Rogue landlords and property agents in England" and section 13(1) says "This Part is about rogue landlords and property agents". Part 2 contains provisions which relate to banning orders and a database of rogue landlords and property agents in addition to rent repayment orders. At paragraph 38 of *Rakusen,* the Court of Appeal states "*On its face, therefore, the legislation confers tough new powers to address these problems*" and at paragraph 39 *"It is common ground that Chapter 4 is*

intended to deter landlords from committing the specified offences". The theme of deterrence is evident in several Upper Tribunal (Lands Chamber) decisions, for example at paragraph 31 of Ficcara: "*… the purpose of rent repayment orders is primarily to deter landlords from committing housing offences rather than to compensate tenants who have experienced the consequences of those offences."*

80. No definition of 'rogue landlord' is given but the response of the Baroness Williams of Trafford, the Parliamentary Under-Secretary of State for Communities and Local Government, to a parliamentary question prior to the enactment of the 2016 Act is of value:

> *"The term 'rogue landlord' is widely understood in the lettings industry to describe a landlord who knowingly flouts their obligations by renting out unsafe and substandard accommodation to tenants, many of whom may be vulnerable. The Housing and Planning Bill contains a number of measures to help local authorities crack down on rogue landlords and force them to either improve or leave the sector."*

81. In *Rakusen,* the Upper Tribunal stated at paragraph 64:

> '*The policy 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, and the main object of the provision is deterrence rather than compensation'.*

82. In *Ficcara,* the Upper Tribunal stated at paragraph 31:

> '*…the purpose of rent repayment orders is primarily to deter landlords from committing housing offences rather than to compensate tenants who have experienced the consequences of those offences. An unlicensed HMO may be a perfectly satisfactory place to live and may give no rise to disadvantage to the tenant requiring compensation, yet such a tenant is just as able to apply for a rent repayment order as a tenant who has been unlawfully evicted. A tenant who has suffered loss or damage as a result of an unlawful eviction or a breach of a landlord's repairing obligation need not rely on a rent repayment order for compensation and has additional rights to claim damages (a rent repayment order is not an award of damages).'*

83. In *Kowalek v Hassanein Limited [2021] UKUT 143 (LC)*, the Upper Tribunal stated at paragraph 37:

> *'A tenant in whose favour a rent repayment order is made cannot be regarded as being punished by a reduction in the amount of the order below the maximum permissible. From the point of view of the tenant, any repayment is a windfall. It is of course the case that some tenants in whose favour orders are made have been the victims of serious housing offences (harassment or unlawful eviction) or will have lived in hazardous or unpleasant conditions because of breaches of their landlords' obligations. But that will often not be the case. As the Tribunal said in Rakusen v Jepsen [2020] UKUT 298 (LC) at [64], unlicensed accommodation may provide a perfectly satisfactory place to live, despite its irregular status, and the main object of rent repayment orders is deterrence rather than compensation.*

84. A prime purpose of a selective licensing scheme is to ensure that houses rented out through private landlords or agencies are properly managed, in good condition and fit to live in.

85. Could the Respondent be said to be a 'rogue landlord' and was the Property a '*perfectly satisfactory place to live* '? Whilst we do not consider that the Respondent could fairly be described as a 'rogue landlord', based on the evidence, we consider her to be a landlord with a cavalier attitude to the responsibilities inherent in renting out property, in particular an indifferent approach to organising repairs. Such conduct may lead to consequences for a tenant which the legislation is seeking to deter. The Respondent is not naïve or inexperienced; she has been a landlord for 15 years and has worked with several managing agents during this time. She told us that she is a civil servant and understands the need to comply with statutory requirements. She has allowed a tenancy to commence at her Property without a Licence in the full knowledge that a Licence was first required. She has not been proactive with the managing agents to ensure that an application was made as a matter of urgency until the Temporary Exemption Notice was refused, some 15 months after the tenancy commenced. She has not responded promptly or effectively to queries from managing agents regarding concerns raised by the Applicants regarding matters of disrepair. She has not been transparent with the Applicants regarding the extent of disrepair following the two inspections. Whilst, from the evidence presented, the Property could not be said to be in substantial disrepair, the Respondent did not arrange any remedial works until November 2019.Her 'indifference' as a landlord and her failure to act did result in the Applicants living in a house which was less than satisfactory and which ultimately led to the involvement of enforcement officers from the Local Housing Authority.

86. Accordingly, having regard to the evidence and to all factors identified above, and considering the matter in the round, we determine that the appropriate level for a Rent Repayment Order is 80% of the maximum rent repayable.

87. By Section 47 of the 2016 Act, a Rent Repayment Order is recoverable as a debt. If the Respondent does not make the payment to the Applicants in the above amounts within 28 days of the date of this decision, or fails to come to an arrangement for payment of the said amounts which is reasonable and agreeable to the Applicants, then they can recover the amounts in the County Court.

Appeal

88. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

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Judge T N Jackson