UPPER TRIBUNAL (LANDS CHAMBER)

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Royal Courts of Justice,

Strand, London WC2A

23 June 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – conduct issues relied on by tenants not dealt with by FTT – appeal allowed - approach to be taken to FTT's assessment in redetermining tenants' original application – ss. 40, 44, Housing and Planning Act 2016 – s.12, Tribunals, Courts and Enforcement Act 2007

AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL

(PROPERTY CHAMBER)

BETWEEN:

SIMPSON HOUSE 3 LIMITED

Appellant

-and-

DR JORDAN OSSERMAN

MR DANIEL MAPP

DR FOIVOS DOUSOS

Respondents

Re: 8 Simpson House,

2 Somerford Grove,

London N16

Martin Rodger QC, Deputy Chamber President

Heard on 28 April 2022

The appellant did not attend

Michael Sprack, instructed directly, for the respondents

The following cases are referred to in this decision:

Aytan v Moore [2022] UKUT 027 (LC)

Ekwezoh v LB Redbridge [2021] UKUT 180 (LC)

Vadamalayan v Stewart [2020] UKUT 0183 (LC)

Williams v Parmar [2021] UKUT 0244 (LC)

Introduction

1.
In this decision I will refer to the appellant as “the Landlord” and the respondents as “the Tenants”. The decision is made on the Tenants’ cross-appeal against a decision of the First-tier Tribunal, Property Chamber (the FTT) ordering the Landlord to repay 65% of the rent it had received from the Tenants in the year to 31 August 2021.

2.
The FTT’s decision was made under section 40 of the Housing and Planning Act 2016 which allows a rent repayment order to be made if it is established, beyond reasonable doubt, that a landlord has committed an offence to which Chapter 4 of Part 2 of the 2016 Act applies. The relevant offence in this case was that the Landlord had had control or management of an unlicensed HMO, contrary to section 72(1) of the Housing Act 2004. The Landlord’s defence was that it had a reasonable excuse for that state of affairs, because the managing agents it had instructed to manage the building on its behalf had failed to inform it (as they were contractually bound to do) that the property was subject to an additional licensing scheme introduced by the local housing authority shortly after the original letting to the Tenants commenced.

3.
The FTT rejected the Landlord’s defence but granted it permission to appeal on the issue of reasonable excuse, and on the quantum of the rent repayment order.

4.
The Tenants did not initially seek to challenge the FTT’s decision, but once permission was given to the Landlord to appeal, they sought and obtained permission to cross-appeal on the grounds that the FTT’s decision to award repayment of only 65% of the rent they had paid during the relevant period failed to take into account five of the six conduct issues which they had relied on as justifying a much higher award.

5.
A few weeks before the hearing and without any explanation being given the Landlord withdrew its appeal. It subsequently chose not to be represented at the hearing of the Tenants’ cross-appeal.

6.
At the hearing of the cross-appeal the Tenants were represented by Mr Michael Sprack, as they had been before the FTT. I am grateful to him for his helpful submissions.

The facts

7.
The Tenants were formerly all tenants of the Landlord at Flat 8, Simpson’s House. Simpson’s House is part of a former industrial building in Dalston which comprises 2-4 Somerford Grove, and 6 Somerford Grove. It immediately adjoins and is attached to Olympic House, a building at 8 Somerford Grove which also belongs to the Landlord. Both Simpson’s House and Olympic House have been converted to provide self-contained flats. Flat 8 is a three-bedroomed flat with a kitchen, living room and two bathrooms.

8.
On 18 September 2018 the Landlord granted a single tenancy of Flat 8 to the Tenants at a rent of £2,361 a month. Two weeks later, on 1 October 2018, the local housing authority introduced an

additional licensing scheme which required that all HMOs in the area to which the scheme applied should be licensed under Part 2 of the Housing Act 2004.

9.
Although the three Tenants took a single tenancy of the whole flat and shared their housing and utilities costs, it has never been disputed that the six conditions comprising the self-contained flat test in section 254(3), 2004 Act were satisfied while they were in occupation and the flat was therefore an HMO. Nor has it been disputed that the additional licensing scheme applied to it.

10.
The Landlord is a large property investment company and it appointed Tower Quay Ltd as its letting and managing agent for Simpson's House. The contract between the Landlord and the agent required the agent to ensure that the Landlord complied with all relevant statutory provisions relating to the management and occupation of the property. The FTT had before it a written statement by a director of the agent accepting that it should have advised the Landlord that a licence was required but that it had not done so.

11.
At the start of the tenancy the Tenants complained to the agent about various matters concerning the flat and the building, including the installation of extractor fans in the bathrooms and the provision of keys for a mailbox. Later they raised further concerns, including about the presence of mice in the building and damage caused to the front door by vandals which in turn led to a problem of the theft of post from the common parts. They also joined with other tenants of the building in forming a tenant's association, Somerford Grove Renters.

12.
On 8 September 2019 the tenancy was renewed for a further year.

13.
In March 2020, following the nationwide lockdown imposed in response to the Coronavirus pandemic, Dr Osserman joined as a co-signatory to a letter to the Landlord asking for financial help for tenants and a guarantee of security of occupation. The Landlord's response was unsympathetic and attracted publicity in The Guardian on 21 April 2020 under the headline "Tenants told to use lunch and holiday savings to pay full rent". One of those quoted in the newspaper article was Dr Osserman's husband, Marc Sutton, who also resides in the flat, although he is not one of the tenants. At about the same time Dr Osserman gave interviews to journalists about what he described in his evidence as "cruel treatment during a pandemic from a wealthy commercial landlord". After that, Dr Osserman believed that he was being subject to surveillance. He later gave evidence to the FTT that security guards had followed him and filmed him in the building, and that when he questioned one of them he was told that the guard had been instructed to do so by Tower Quay, the Landlord's agents.

14.
Three months after the newspaper article appeared the Tenants were given notice under section 21 of the Housing Act 1985. The notice was dated 20 July 2020 and required the Tenants to leave the flat after 21 September 2020. It was invalid because emergency legislation introduced in March 2020 had extended the minimum period of notice to three months.

15.
The notice was followed by an email from the Landlord's agent on 21 July which stated that the reason the tenancy would not be renewed was a "business decision". The email also included a statement

that “Failure to surrender the premises on the date required by law will result in forfeiture of your deposits, proceedings for immediate possession and could harm your credit rating.” In response to this threatening communication the Tenants sought the advice of the local housing authority, three of whose officers visited the flat on 10 August.

16.
A second section 21 notice was served by the Landlord on 10 September 2020, but this too was invalid and was withdrawn on 18 November when a gas safety certificate and an energy performance certificate were served on the Tenants for the first time.

17.
At about this time the Tenants were advised by the local housing authority that the flat was an unlicensed HMO, and on 28 October 2020 they made their application to the FTT for a rent repayment order.

18.
A third section 21 notice, this time of the required six months duration, was served on 23 November. In compliance with that notice the Tenants left the flat on 26 April 2021.

The Tenants’ case before the FTT

19.
The Tenants filed evidence in support of their application which included a witness statement prepared by a Housing Officer employed by Hackney Council, Mr MFum. He gave evidence that the flat was an unlicensed HMO and described what he had found when he inspected it on 10 September 2020, including that the staircase and corridors were fitted with a linked smoke alarm. Mr MFum said that he was experienced in the assessment of housing standards, but the only defect which he pointed out in the flat itself was that the smoke detector fitted in the kitchen “was loose and hanging off the ceiling”; He added that this defect needed to be remedied at the earliest opportunity “in order to provide an effective early warning in the event of fire” and that “failure to remedy the defective fire detector element within the shared kitchen constitute an offence” namely a breach of the requirement of regulation 4(2) of the HMO Management Regulations that the manager of an HMO must “ensure that any fire fighting equipment and fire alarms are maintained in good working order”. Mr MFum did not say that he had tested the smoke detector, nor did he say that it was not working but his description of it as “defective” suggests that he considered that the detector was not in good working order.

20.
The only other matter of concern to Mr MFum was a “defective and misleading Fire Notice” displayed in the common parts of the building which advised residents, if they discovered a fire, to call the fire brigade and “state 6 Somerford Grove”. He did not suggest in terms that this was a breach of the HMO Management Regulations, but he was concerned that in the event of a fire it might cause the fire brigade to be misdirected. As Mr MFum pointed out, 6 Somerford Grove has a separate entrance, and the correct address of the building in which the flat is located is 2-4 Somerford Grove.

21.
Mr MFum’s evidence was not challenged by the Landlord.

22.

Evidence was also given by Dr Osserman with supporting witness statements from the other Tenants. In his statement Dr Osserman identified a number of issues of concern to them. He described the history of complaints about work required to the flat and to the common parts of the building and referred to a more recent delay in repairing the boiler in February and March 2021 which had meant that his bedroom was inaccessible for a week while works were undertaken. He also described the establishment of the tenants' association, his correspondence with the Landlord at the start of the pandemic, and the publicity given to the landlord's unsympathetic response. He explained that he had been told by one of the security guards that Tower Quay had given him and his colleagues instructions to film him. Finally, he referred to the first two section 21 notices and concluded his evidence by stating: "Given the poor conduct I have described, I believe our landlord should be subject to the maximum penalty permitted under law".

23.
The Tenants were represented by Mr Sprack at the hearing before the FTT. In a skeleton argument he argued that the appropriate rent repayment order should be "at the top of the range". He relied on six examples of poor conduct by the Landlord taken from the evidence of Dr Osserman and Mr MFum.

The landlord's case before the FTT

24.
The Landlord was also represented by counsel before the FTT and did not dispute that the flat had been an unlicensed HMO between at 1 September 2019 and 31 August 2020. One of its directors, Mr Hadjiioannou, provided a witness statement on which he was cross examined. The Landlord also relied on a witness statement of a director of Tower Quay, Mr Datta, who explained that he was too unwell to attend the hearing and that no other director was sufficiently familiar with the circumstances of the case to give evidence in his place.

25.
Mr Hadjiioannou's main point was that the landlord had relied on and been let down by its agent, which had been responsible for ensuring regulatory requirements were met but had been unaware of the need for an HMO licence and had not given appropriate advice. He also dealt with other complaints raised in the Tenants' evidence including the following points:

a.
the tenancy agreement required the tenants to carry out regular checks on the smoke detectors and to inform the landlord if any was not working, but no notice of any defect had been received;

b.
the fire notices in the building correctly referred to Olympic House, because that was where the site security guards, who were "fire trained", were based and was where the Fire Brigade would attend first on arrival; no issue concerning the form of the notices had been raised by the Fire Brigade on their regular inspections, although the notices had now been changed;

c.
the provision of gas and energy certificates was the responsibility of an independent contractor;

d.
compensation had been agreed with the Tenants for delays and problems relating to the replacement of the broken boiler;

e.

the Landlord had given no instructions to Tower Quay to film or harass any of the Tenants, and he could think of no reason why the agents would do so on their own initiative; security staff were required to monitor “issues with tenants accessing the roof which was dangerous” so “if Mr Osserman was filmed by a security officer it seems likely that this was a misunderstanding connected to concerns about tenants accessing the roof”.

26.
Mr Hadjiioannou also explained the Landlord’s reasons for serving the section 21 notices. He rejected as “speculation” the suggestion that this was revenge for the Tenants’ involvement in setting up the tenants’ association. He explained instead that: “It was clear that the applicants were not happy with the position at Simpson House, so it was not in anybody’s interest to continue the relationship.”

The FTT’s decision

27.
The FTT found that an offence had been committed and dismissed the Landlord’s reasonable excuse defence. In view of the withdrawal of the Landlord’s appeal I need say no more about that aspect of the case, other than to emphasise that the Tribunal should not be taken to have formed any view on the strength or weakness of that appeal. The circumstances in which reliance on an agent may provide a reasonable excuse for a landlord neglecting to licence an HMO were considered by the Tribunal in its recent decision in Aytan v Moore [2022] UKUT 027 (LC), at [40].

28.
The FTT also recorded the Tenants’ case that the Landlord’s conduct had been poor due to the neglect of fire safety, the breakdown of the boiler and consequent lack of heating and hot water, the poor maintenance of the building and the lack of pest control. It noted that they sought repayment of the full amount of the rent they had paid for the maximum permitted period of 12 months. It did not refer to the allegations concerning surveillance or the service of section 21 notices after the formation of the tenants’ association, nor to Mr Hadjiioannou’s denial that these were related to complaints and agitation by the Tenants.

29.
When it considered the quantum of the rent repayment order the FTT began by directing itself that the “starting point” in determining the amount of the order should be the whole amount of the rent paid for the period of 12 months claimed. It referred to section 74(5) and (6) of the Housing Act 2004 which it said “sets out the matters that must be considered by the tribunal”. It quoted those sub-sections including section 74(5) which provided that the amount required to be paid is to be “such amount as the tribunal considers reasonable in the circumstances”. As I will explain, each of those preliminary directions which the FTT gave itself was out of date and inaccurate.

30.
The FTT then found that the Tenants’ complaints of disrepair were dealt with appropriately and in a timely manner and they had been compensated for the inconvenience they had experienced. The instances of vandalism and pest problems had not been ignored by the Landlord’s agent, and the Tenants appeared to the FTT to have had unrealistic expectations about how quickly the necessary works could be completed. It nevertheless found that there were no matters concerning the conduct of the Tenants which needed to be reflected in the appropriate order.

31.
The FTT dealt with the issue of the Landlord’s conduct as follows:

“31. The tribunal also considered the conduct of the respondent in determining the appropriate amount of any RRO. The tribunal considers it is entitled to consider both any ‘good’ and ‘bad’ conduct by the landlord. As stated above the tribunal considers that overall, the respondent was reactive to complaints made by the applicants through its managing agents and its repairing contractors. Further, the tribunal finds that the respondent acted responsibly by engaging an experienced managing/letting agent and the ill-health of Mr Datta and its disabling impact upon him and his ability to manage the subject property could not have been foreseen by the respondent.

32. The tribunal considers that a deduction limited to 35% should be applied to the amount of RRO order sought by the applicants, in order to reflect the respondent’s ‘good conduct’, thereby amounting to £18,420.96 (rounded) to be equally divided among the three applicants.”

The Tenants’ cross-appeal

32.
The sole ground of the Tenants’ cross-appeal and the focus of Mr Sprack’s submissions was that the FTT had failed to take relevant matters into consideration when determining the amount of the rent repayment order. Specifically, it had failed to have regard to the uncontested evidence of Mr MFum concerning non-compliance with relevant fire safety regulations; nor had it dealt with the Tenants’ allegation that the Landlord had mounted a campaign of harassment against them including instructing security guards to conduct surveillance and serving notices terminating their tenancy accompanied by statements misrepresenting what would happen if they did not vacate the flat on the required date. It was apparent from paragraph 31 of the decision that the FTT had only taken account of ‘good conduct’ issues, which it considered justified a deduction of 35% from the total amount of rent claimed. No account had been taken of ‘bad conduct’ in the weighing of factors relevant to the amount of the order.

33.
I accept Mr Sprack’s submission. The absence of any reference in the decision to the alleged acts of harassment suggests either that the FTT did not consider that these were relevant to the amount of the rent repayment order, or (in relation to the suggested surveillance) it did not accept that it had occurred. But Mr Hadjiioannou’s evidence did not dispute that security guards might well have been observing and filming tenants at the property, including Dr Osserman, because of some suggested concern about access to the roof of the building. The FTT did not say whether it accepted Dr Osserman’s evidence about what had happened to him or what he had been told by security guard who had been filming him, nor did it say what it made of Mr Hadjiioannou’s explanation or whether what there might have been some innocent explanation for the suggested surveillance.

34.
The FTT did not mention the section 21 notices or the Landlord’s motive for serving them. There was no doubt that the notices had been served in response to the Tenants’ complaints. Although Mr Hadjiioannou said the suggestion that there was an element of “revenge” was “speculation”, his own explanation explicitly linked the decision to terminate the tenancy with the Tenants’ dissatisfaction with the condition of the building: “It was clear that the applicants were not happy with the position at Simpson House, so it was not in anybody’s interest to continue the relationship.”

35.
Nor did the FTT refer to the Landlord’s failure to provide gas safety or energy performance certificates until they became necessary to terminate the tenancy.

36.
It is of course true that a tribunal is not required to deal with every point raised by a party in evidence or submissions, but it must deal with the points of substance which are capable of affecting the outcome. If it considers that it is unnecessary to resolve a factual dispute because it will make no substantial difference to the decision, a tribunal should explain why that is so (unless the reason is so obvious that an explanation is unnecessary). If it does not do so the parties will be left feeling that part of the case has not been considered without knowing why and without knowing whether the point left unresolved might have made a difference.

37.
Whether the omissions in the FTT's decision are treated as evidence of a failure to take relevant considerations into account when assessing the appropriate penalty, or as a failure to provide adequate reasons for the decision does not matter. The FTT was required to have regard to the conduct of the Landlord in reaching its decision, and the Tenants' case highlighted specific examples of poor conduct on which they relied. It was essential that the FTT deal with those examples when it explained its decision.

38.
Although Mr Sprack did not base his appeal on this point, it is also the case that the FTT misdirected itself on the relevant law. As section 74(1) explains, section 74, 2004 Act, to which the FTT referred as the source of its discretion, applies to rent repayment orders made under section 73(5). Since 2016, that sub-section has applied only in Wales, and the power to make a rent repayment order in respect of an HMO in England has been found in Chapter 4 of Part 2 to the Housing and Planning Act 2016. The amount of a rent repayment order is now to be determined by the FTT applying section 44, 2016 Act, which, unlike section 74(5), 2004 Act, makes no reference to what is "reasonable in the circumstances". Instead, section 44(2) provides that the amount of the order "must relate to rent paid" during the relevant period. Section 44(3)-(4) then provide that:

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

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

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

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

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

(b) the financial circumstances of the landlord; and

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

39.
Nor was the FTT right when it directed itself that that the "starting point" in determining the amount of the order should be the whole amount of the rent paid for the relevant period. It issued its decision on 21 July 2021, before the publication of this Tribunal's decision in Williams v Parmar [2021] UKUT 0244 (LC) explaining that the concept of a 100% "starting point" was based on a misreading of the Tribunal's earlier decision in Vadamalayan v Stewart [2020] UKUT 0183 (LC) and was wrong. It is clear from the FTT's direction and to the reference in paragraph 32 of the FTT's decision to "a

deduction limited to 35%" that the FTT applied a mistaken approach to the determination of the amount of the order.

40.
Those misdirections and the omission to take account of the evidence on conduct issues provide more than enough justification for setting aside the FTT's decision. But unusually in this case the question whether, having identified significant errors of law in the FTT's decision, I should proceed to set it aside, is not straightforward.

41.
The right of appeal against a decision of the FTT made under Part 2, 2016 Act (including against a rent repayment order) is conferred by section 53 of the 2016 Act. A person "aggrieved by a decision" may appeal to the Tribunal under section 53(1); if the appeal is on a point of law, it must be brought instead under section 11 of the Tribunals, Courts and Enforcement Act 2007. In either case this Tribunal's consideration of the appeal is regulated by section 12 of the 2007 Act (see section 53(5), 2016 Act).

42.
Section 12, 2007 Act provides, so far as relevant:

"12 Proceedings on appeal to Upper Tribunal

(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal–

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either–

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

(3) [remission ...]

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal–

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate.

43.
Thus, if the Tribunal is satisfied that the decision of the FTT contains an error of law it "may (but need not) set aside the decision"; where the appeal succeeds on a ground other than error of law (i.e. under section 53, 2016 Act) the Tribunal has the same power, but not an obligation, to set the decision aside. If it exercises that power and sets the decision aside it must either remit the case to the FTT for reconsideration or re-make the decision.

44.
The Tenants were clear in their instructions to Mr Sprack that they did not want the case to be remitted to the FTT for it to provide additional reasons or make further findings dealing with the

issues it had previously overlooked. They have been kept out of the repayment due to them because of the Landlord's appeal, which was eventually abandoned, and they do not want the resolution of their claim to be further delayed. Mr Sprack therefor invited me to re-make the decision.

45.
But nor were the Tenants keen to lose the benefit of the decision in their favour that the landlord should repay at least 65% of the rent. What they wanted to do, in effect, was to "bank" the 65% assessment based on the matters which the FTT took into account, and then to have this Tribunal supplement that award by grafting on an additional sum reflecting the other matters which the FTT had not dealt with.

46.
One difficulty with the course which Mr Sprack invited me to adopt is that it is neither one thing nor the other; it neither involve setting aside the FTT's decision, nor remitting it for reconsideration, so it is not within the power conferred by section 12(2)(b). A second difficulty is that the FTT arrived at its figure of 65% by a flawed process which started with the assumption that repayment of 100% of the rent paid should be ordered unless there was a reason to reduce that figure. That error makes the FTT's award an unsafe starting point from which to embark on remaking the decision.

47.
I cannot take the course suggested by Mr Sprack. If I am to remake the decision I must remake it from scratch, as it were, having regard to the unchallenged findings of fact made by the FTT and to such further findings as can be made from the material which was before it. What I cannot do is make new findings of fact on contested evidence which is available to me only in written form.

48.
I nevertheless recognise that the Landlord had permission to appeal on the quantum of the rent repayment order as well as on the defence of reasonable excuse and it chose to abandon that appeal. It would be unfair in those circumstances for the Tenants to see an FTT decision in their favour set aside and replaced by one by this Tribunal which awarded them a lesser sum. Before considering whether to set aside the FTT's decision, or to leave it undisturbed despite its flaws, I will therefore consider what rent repayment order I would make on the unchallenged material before me.

49.
The matters to which I have regard are first, the importance of HMO licensing as a tool for improving housing standards and the need to ensure compliance with additional licensing schemes made by local housing authority; additional licensing schemes may only be made where an authority considers that a significant proportion of HMOs in the area are being managed ineffectively (section 56(2), 2004 Act). Rent repayment orders are one means by which the objectives of such schemes can be promoted, and non-compliance curbed.

50.
Secondly, I take into account that the Landlord is a substantial property investment company with resources sufficient to ensure that is complies fully with its responsibilities. The Landlord is not in the same position as a private landlord with a small number of properties who does not have the skills, experience, time or inclination to manage them personally to a high standard and who instead employs an agent to do so. Smaller landlords should be encouraged to seek the assistance of professional managing agents, because in general their tenants are likely to benefit; that encouragement should be reflected in appropriate cases in the rent repayment order regime (as the Tribunal has recently recognised in Ayan and before that in the financial penalty case Ekwezoh v LB

Redbridge [2021] UKUT 180 (LC), at [50], where the landlord's decision to employ an agent was an important factor in justifying the imposition of no penalty). There is less reason to extend the same encouragement to a more substantial commercial enterprise like the Landlord in this case. It could no doubt manage its property portfolio to a high standard in-house but chooses instead to delegate management to agents, for perfectly good commercial reasons; it does not thereby divest itself of its responsibilities or the risks of non-compliance which they carry. The failure to licence was not an isolated omission as the Landlord did not provide gas safety or energy efficiency certificates, for which it also blamed its agents. Those additional failures suggest more than just an isolated lapse by a manager in poor health failing to keep up with a recently introduced licensing requirement, but indicate instead that the Landlord's business practices involved a systematic or institutional neglect of regulatory requirements. On the other hand, the fact that the Landlord was let down by its agent is not irrelevant, and I take it into account.

51.
Thirdly, I take into account the condition of the property. The policy underlying the rent repayment regime is directed towards the maintenance of good housing standards. It is consistent with that policy that a landlord who lets a property in good condition and who complies with its repairing obligations should be treated differently from one who lets property in a hazardous or insanitary condition. There have clearly been some issues in this case with repairs, but I am not prepared to go behind the FTT's finding that complaints of disrepair were dealt with appropriately and in a timely manner and the Tenants had been compensated for the inconvenience they had experienced in relation to the broken boiler. I bear in mind also that, with one exception, Mr MFum found no defects worthy of comment when he inspected the flat. Subject to that exception I approach my assessment on the basis that the Tenants were not exposed to greater risks or deprived of practical protections which they would have obtained if the Landlord had applied for a licence.

52.
I then come to more contentious matters and those which were not take into account by the FTT.

53.
Proper compliance with a landlord's duties in relation to fire precautions is of the utmost importance but in some respects the evidence concerning the Landlord's suggested failure to take safety measures in breach of regulation 4 of the 2006 Regulations is incomplete. I am satisfied on the unchallenged evidence of Mr MFum, an experienced environmental health officer, that the kitchen smoke detector which was "loose and hanging off the ceiling" when he carried out his inspection, was evidence of a breach of the Landlord's duty to keep fire alarms "maintained in good working order". Whether the condition of the detector amounted to a criminal offence would depend on whether the Landlord had a reasonable excuse for it being in that condition (see section 234(3), 2004 Act). The evidence of Mr Hadjiioannu was that the Tenants had not reported the defect to the Landlord's agent. Where a defect is within premises demised to tenants, I would accept that an absence of notice would amount to a reasonable excuse for the existence of an isolated defect. I note also that Mr MFum took no action in relation to the defect other than to warn that a failure to remedy it would amount to an offence.

54.
In the absence of evidence of notice being given of the defect, and in the face of the FTT's positive assessment of the Landlord's general responsiveness to requests for repair, I am not prepared to attribute weight to the condition of the fire detector.

55.
Nor is it possible to for me to give weight to the suggested inadequacy of the warning notice displayed in the common parts of the building. The Tenants, supported by Mr MFum, suggest the notice gave incorrect information but Mr Hadjiioannu insisted it correctly recorded what the fire service needed to know. Which of them was correct could no doubt be resolved by further evidence if the matter was remitted to the FTT, but in the absence of evidence I cannot make a positive finding that the notice was defective. I note additionally that there is no specific duty under the 2006 Regulations to display warning notices in the common parts of blocks of flats (regulation 4(3) deals only with notices displayed in the HMO itself. Regulation 7(1)(b) imposes a duty to ensure that all common parts of the HMO are maintained in a safe condition, but that again would not appear to apply to the common parts of a building containing self-contained flats.

56.
With some hesitation I am also unable to reach a conclusion on the allegation that the Tenants were subjected to surveillance by the Landlord's agent. For an agent to take photographs or videos of Tenants who had complained with a view to intimidating or unsettling them, would undoubtedly be conduct capable of being taken into account in determining the amount of a rent repayment order. But the FTT made no findings in relation to those allegations, despite having heard the evidence of both sides. The incidents were disputed in the evidence of Mr Hadjiioannou and I cannot rule out the possibility of an innocent explanation.

57.
On the other hand, I give considerable weight to the Landlord's decision to serve notices to terminate the tenancy in response to complaints by the Tenants about the need for repairs and their other expressions of dissatisfaction. Mr Hadjiioannou said the tenancy was terminated because it was not in either party's interests for the landlord and tenant relationship to continue. He cannot speak for the Tenants, who did not want to leave. I infer that the Landlord regarded termination of the tenancy as being in its interests because the Tenants were, at best, an inconvenience. Accepting Mr Hadjiioannou's denial that the "commercial decision" had nothing to do with the formation of a tenants' association, it can only have been because of the Tenants' requests for work to be done.

58.
The Landlord had the right to terminate the tenancy under the general law and cannot be criticised simply for having done so; nor can the Tenants be criticised for insisting on repairs being carried out. Nevertheless, the purpose of the rent repayment order regime is to secure compliance with the law on housing standards, one object of which is to ensure that HMOs are safe and free from serious defects. For a landlord to respond to legitimate requests by its tenants concerning repairs and the condition of the building by vindictively terminating the tenants' right of occupation can only deter the making of such requests thereby putting the achievement of satisfactory housing standards at risk. If such behaviour goes unmarked it may discourage these or other tenants from requesting that repairs be carried out and encourage this or other landlords to avoid their obligations. For that reason I take it into account.

59.
The Landlord can also be criticised for misrepresenting the consequences for the Tenants of non-compliance with the original section 21 notice; both the Landlord and its agent would have known that a tenant who has not vacated by the date stated in a section 21 notice does not risk forfeiting their deposit or adverse credit scores (provided they continue to pay what is due from them).

60.
Having regard to these factors the order I will make is that the Landlord repay to each of the three Tenants the sum of £7,500, that being a little under 80% of the total rent of £28,339.92 which they paid during the period from 1 September 2019 to 31 August 2020 to which their application relates.

Costs

61.
Mr Sprack invited me to direct that the hearing fee for the appeal should be paid by the Landlord. As the appeal has been withdrawn and the cross-appeal has succeeded, I am happy to make that order.

62.
Mr Sprack also indicated that the Tenants wished to apply for their costs of the cross-appeal and of defending the appeal up to the point it was withdrawn under rule 10(3)(b) of the Tribunal's Rules. It is not necessarily unreasonable for a party to withdraw or abandon an appeal, but a party who does so at a late stage without any explanation is at risk of being taken never to have been serious about pursuing the appeal and to have done so simply to delay the enforcement of the FTT's order for repayment. If the Tenants wish to pursue their application they should give notice to the Landlord concisely identifying the conduct they consider unreasonable. The Landlord may then have 21 days to respond to the application.

Martin Rodger QC,

Deputy Chamber President

23 June 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.