FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BB/HMF/2019/0022**
Property	**:**	**12 Marmara Apartments, 13 Western Gateway, London E16 1AJ**
Applicants	**:**	**Samuel Brown** **Jessica Williams**
Representative	**:**	**Legal Road**
Respondents	**:**	**Mohamed Khalil** **Nataly Atalla**
Representative	**:**	**DMH Stallard**
Type of Application	**:**	**Rent Repayment Order**
Tribunal	**:**	**Judge Nicol** **Ms S Coughlin MCIEH**
Date and Venue of Hearing	**:**	**30th September 2019;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**05 November 2019**

DECISION

The Tribunal orders that

1) There shall be a **Rent Repayment Order** in the sum of **£3,459.04**; and

2) The Respondents shall reimburse the Applicants their application and hearing fees totalling £300.

The relevant provisions in the Housing Act 2004 and the Housing and Planning Act 2016 are set out in an Appendix to this decision.

Reasons

1. The Respondents have owned the subject property, a 3-bedroom flat on the 3rd floor of a block of flats, since 2005. It used to be their home until 2010, since which they have let it out through agents. From 2013, the agent they used was EAEO Ltd, referred to them by the concierge at the property. They say they had no problem with their agents until the events set out further below. The first Respondent gave evidence to the Tribunal that he visited the property every six months or so in order to inspect it and see what was happening.

2. On 23rd August 2018 the London Borough of Newham granted the first Respondent a selective licence for the property, for a maximum of 6 people living as one household, with effect from 1st March 2018 to 28th February 2023.

3. The Applicants took a tenancy of one of the bedrooms on 8th October 2018 at a rent of £1,200 per month. They say that another bedroom was already occupied by Mr Urgucan Ozkanim and, on 17th November 2018, Mr Matheo Okrasinski and Ms Melissa Ponge moved into the third bedroom.

4. The first Applicant gave evidence to the Tribunal that an officer of the London Borough of Newham visited the property in about late November and he told the officer who was living there. Probably as a result of this, on 29th November 2018, Newham sent the first Respondent a letter entitled "Notification of Incorrect Licence Type" which stated:

> The licence type held for this property is for a single household (Selective Licence) and was based on the information supplied on the application. It has come to light that the property may be occupied by more than one household and therefore may have an incorrect type of property licence.
>
> … Properties occupied by more than one household should have a HMO licence (Additional or Mandatory Licence)>
>
> You must now take one of the following actions within 28 days of this letter, by 27/12/2018. **Failure to respond will mean the Council will take steps to vary or revoke your licence**.
>
> 1. **SUBMIT A NEW APPLICATION**
> The property can continue to be occupied as a HMO (House in Multiple Occupation) but you will need to apply for a new HMO Additional Licence. …
>
> OR
>
> 2. **TAKE IMMEDIATE STEPS TO RETURN BACK TO A SINGLE FAMILY DWELLING**
> If you were unaware that this property is in use as a HMO, provide documentary evidence to this Department by 27/10/2018 that you have/are actively taking steps to

> return the property back into use as a single family dwelling i.e. by seeking possession of the property via the correct legal methods, dependant on the type of tenancy or licence that current occupants possess. …

5. The Respondents did not take the first option. The first Respondent telephoned his agents, EAEO, and arranged a meeting for 7th December 2018. At that meeting, EAEO told him that the property was not an HMO and they would sort out the situation. Other than granting EAOA authority to correspond with Newham as his agents, the Respondents took no other steps and did not question their agents further. Somewhat surprisingly, particularly given his regular visits to the property, it did not occur to the first Respondent to go and inspect the property to see the situation for himself.

6. On 10th January 2019 EAEO applied for another selective licence for the property. This was an unnecessary and useless step since the property was already covered by a selective licence. An HMO licence was what was required but, like the Respondents, EAEO never sought one.

7. Otherwise, EAEO appear to have taken no steps. When Newham again contacted the first Respondent on or about 6th February 2019 to point out that the property remained an HMO, he told EAEO that he wanted the property back. He says that EAEO told him that this would happen within a few days. Despite Newham's reference in their letter to "correct legal methods", the Respondents did not question how EAEO intended to achieve this and, despite having no idea as to what such methods were, other than that they may involve going to court, they made no efforts to apprise themselves as to what they were.

8. In the event, the member of the agents' staff with whom the Applicants had been dealing, Taher Uddin, texted them on 25th February 2019 to inform them that "the landlord … wants to take the property back." The Applicants queried the lack of any legal notice but, in fact, had been thinking to move and took the opportunity to do so. They left voluntarily on 18th March 2019.

9. In the meantime, the first Respondent finally decided to inspect the property on or about 26th February 2019. He attended with two people from EAEO who let him in and showed him around. His inspection was surprisingly cursory. He did not notice that locks had been installed on two of the bedroom doors. When a man came out of one of the bedrooms, he did not take the opportunity to talk to him, let alone introduce himself or ask any questions about what had been happening – he didn't even remember what the man looked like and could not say whether it had been the first Applicant. He did manage to notice that one of the three bedrooms was vacant and obviously unoccupied at that time.

10. The first Respondent had produced a witness statement for the Tribunal but it was dated 25th September 2019 and was substantially

out of time. The Tribunal allowed it in because the Applicants had no objection and conceded that the late service had not caused them any prejudice. This statement did not mention the February visit to the property. The Tribunal had been inclined to doubt the reliability of the first Respondent's evidence to the Tribunal but the Applicants again conceded that the first Respondent was right about the third bedroom being vacant – the occupiers had left on Saturday 16th February 2019.

11. The Applicants asserted that the subject property was an HMO in accordance with section 254 of the Housing Act 2004 and the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 from 17th November 2018 until 16th February 2019 because there were 5 persons living in at least two households. It was not licensed as an HMO at any time and so they further asserted that an offence had been committed under section 72 of the Housing Act 2004 of controlling or managing an unlicensed HMO.

12. Neither party considered the effect of Newham's Additional Licensing Scheme. It would appear from Newham's website that this Scheme covered HMOs with as few as three tenants living in two or more households. That would have extended the alleged period of breach to the entire period of the Applicants' occupation, from 8th October 2018 to 18th March 2019. However, that was not the basis on which the Applicants put their case and the Respondents were not on notice of this point. Therefore, it would not be fair on the Respondents for the Tribunal to consider this extended period.

13. The Respondents did not dispute the relevant law but asserted that the Applicants had not made out their case to the required standard of proof. The issue here is whether the Respondents have committed the aforementioned criminal offence under section 72, which means that the standard of proof is the criminal one, namely beyond a reasonable doubt or certain so that you are sure.

14. The Respondents' case was that, if the Applicants were right, there should be documentary evidence to support the first Applicant's oral evidence. The first Applicant produced a tenancy agreement for Mr Urgucan Ozkanim but the address was missing at the head of the document. Mr Brewin, counsel for the Respondents, pointed out that there was no page with both a signature and the address. Further, while the first Applicant claimed in his oral evidence to the Tribunal that he had seen a tenancy agreement for Mr Matheo Okrasinski and Ms Melissa Ponge and a utility bill addressed to Mr Ozkanim at the property, neither document was disclosed. Newham had also been unusually unco-operative in producing supporting documentation.

15. However, the Tribunal found Mr Brown to be an honest and credible witness, not least for the concessions he made which counted against his case. When he said that he saw the other rooms occupied by tenants, the Tribunal believed him. The lack of corroborative documentation in these circumstances is insufficient to produce any

reasonable doubt as to whether the property was used as an HMO. It is notable that the Respondents had never sought such documents themselves, including from EAEO, and did not seek disclosure at this late stage.

16. The first Respondent strongly asserted that he did not know that EAEO had brought the HMO into being – he said he was "scammed". He said they told him the property had been let to a couple with a son but, at least on this occasion, he did not seek references, trusting to EAEO's good faith. However, this is no excuse. When pressed by the Tribunal, he grudgingly accepted that it was his responsibility as landlord to ensure that his agents behaved properly. He had the power to supervise his agents more closely and chose not to exercise that power. It may be understandable that a landlord chooses to repose trust in their agents but this approach inevitably runs a risk that liability will arise if the agents do not do their job properly. In that case, a landlord may have a remedy against the agents but cannot use their deliberate ignorance as a shield against their own liability.

17. The Respondents pointed to the written tenancy agreement itself. Their name does not appear. Indeed, no landlord is mentioned at all, in possible breach of section 48 of the Landlord and Tenant Act 1987. Further, the tenancy purported to be granted by a company called KME Ltd as agent, without saying whose agent they were. The Tribunal believes the first Respondent when he says he had no dealings with KME Ltd and was unaware of them until the Applicants produced their copy of the tenancy agreement. Having said that, if he had taken the obvious step of asking EAEO to see the relevant tenancy agreements at their meeting (at EAEO's offices) on 7th December 2018 or, indeed, at any time, he would have found out then.

18. Mr Brewin submitted that there was no evidence of any connection between KME Ltd and either the Respondents or EAEO so that there was no evidence of any connection between the Applicants and the Respondents. On that basis, he submitted that the Respondents were not the Applicants' landlords.

19. Neither Mr Brewin nor the Respondents appeared to appreciate how deeply unpleasant and contrary to the purposes of the Housing Act 2004 this submission was. It is unfortunately not uncommon for landlords to be undisclosed principals in tenancies arranged by agents and for agents to run through different names and even to use related companies interchangeably. If landlords were able to use such arrangements and then deliberately avoid knowledge of what was actually happening at their properties, they could drive a coach and horses through the statute.

20. The arrangements in this case did not constitute weighty evidence of a lack of connection between the parties. Substantially more significant were:

(a) The Respondents granted EAEO extremely wide discretion in their management agreement dated 1st October 2018. Clause 2.1 obliged the Respondents to "ratify all acts deeds and things done by EAEO Ltd in connection with the management of the Property". As a matter of law, this would arguably cover using another company, such as KME Ltd, to grant a tenancy on behalf of EAEO as agents for the Respondents.

(b) The evidence showed that the Applicants paid their rent and that the Respondents received regular payments from EAEO. The amounts were not the same but that is explained by the fact that the management agreement required EAEO to pay the Respondents a sum of £2,500 per month, less a 7% management fee. There is simply no explanation as to why EAEO paid the sum for many months, without protest, unless they were in turn receiving income from the tenants of the subject property.

21. Mr Brewin asserted that the grant of the Applicants' tenancy was unlawful because it was in breach of the licensing provisions, including the selective licence which the Respondents had already shown to EAEO, and that EAEO's authority as agents did not extend to unlawful acts. However, the tenancies granted to the occupants of the property were entirely lawful between landlord and tenant and within the authority granted by the management agreement. For the principle espoused by Mr Brewin to extend to these circumstances would permit landlords to avoid liability under the Housing Act 2004 just by employing an agent. The non-enforceability of unlawful acts is a matter of public policy but it would be equally against public policy for landlords to be able to avoid their obligations in this way.

22. On the evidence, the Tribunal is satisfied so that it is sure that the Respondents were the Applicants' landlords, despite the lack of any specific knowledge of their existence.

23. It is a defence to an allegation of an offence under section 72 that the landlord had a reasonable excuse – subsection (5). The Respondents asserted that they were the innocent victims of EAEO's improper actions. Mr Brewin submitted that the Respondents had followed the second option provided by Newham in their letter of 29th November 2018 of taking reasonable steps to put the property back into single family use. Therefore, he further submitted, the Respondents had a reasonable excuse.

24. The Tribunal has no hesitation in rejecting this assertion. At every step, the Respondents chose to keep themselves ignorant of what was happening at their own property rather than to take simple, reasonable steps which would have allowed them to keep on top of the situation. They didn't even comply with Newham's second option – simply tasking the agents on 7th December 2018 to take unspecified or unknown steps, without any follow-up until prompted by Newham two months later, could not be regarded as reasonable by itself and the

Respondents never submitted any documents as required by Newham, by the deadline given or at all.

25. Mr Brewin submitted that taking more steps would have made no difference because the full legal procedure from service of a section 21 notice to enforcement of a possession order would normally take longer than the amount of time it took from the Respondents' first knowledge of the HMO to the Applicants' voluntary departure. However, this is to take advantage of a coincidence. The Respondents cannot rely on the Applicants' actions, done for their own reasons, as founding their own reasonable excuse.

26. For the reasons already set out, the Tribunal is satisfied beyond any reasonable doubt that the Respondents committed the offence under section 72 of the Housing Act 2004 of controlling or managing an unlicensed HMO for at least the period from 17th November 2018 until 16th February 2019.

27. On 12th June 2019 the Tribunal received the Applicants' application for a rent repayment order in accordance with section 41 of the Housing and Planning Act 2016. The earlier RRO provisions under the Housing Act 2004 were considered by the Upper Tribunal (Lands Chamber) in *Parker v Waller* [2012] UKUT 301. Amongst other matters, it was held that an RRO is a penal sum, not compensation, and that the Tribunal should take an overall view of the circumstances, including whether the landlord has already been fined for the offence and whether the rent includes items the tenant has had the benefit of.

28. The Tribunal has a discretion not to make a rent repayment order but sees no reason why it should exercise that discretion. The Respondents' ignorance is no defence. The tenants were denied the important and substantial protections of the licensing system. The Respondents have not been prosecuted and so will be subject to no further sanction for failing to license their property.

29. The rent was £1,200 per month. The Applicants would have made 3 payments of rent during the period from 17th November 2018 to 16th February 2019. That period is also 91 days and, on a daily rate, the rent liability was £3,590.14. The parties accepted that this was the maximum amount that the Tribunal could award. The application had asked for 12 months' rent but Ms Bullen-Manson, counsel for the Applicants, conceded that the Tribunal had no power to go further than the rent actually paid during the relevant period.

30. In determining the amount of the rent repayment order, the Tribunal must, under section 44(4) of the Housing and Planning Act 2016, take into account the conduct of both parties, the landlord's financial circumstances and whether the landlord has been convicted of any offence to which the rent repayment order provisions apply. The Respondents have no previous relevant convictions.

31. The Respondents repeated the points made in support of their reasonable excuse defence so that the way they behaved should be considered as substantial mitigating factors which should significantly reduce the RRO otherwise payable. The Tribunal rejects this submission for the same reasons. There is no suggestion that the Applicants' conduct included anything relevant for these purposes.

32. The Respondents provided a council tax bill which showed their annual liability for the year which included the relevant period was £1,818.22. Pro rata, that was £453.31 for the relevant period. One-third of this was relevant to the Applicants, namely £151.10. The Tribunal accepts that this was meant to be covered by the Applicants' rent.

33. No other deductions were claimed other than it was pointed out by Mr Brewin that the Respondents did not appear to have received all of the rent so that they did not fully profit from the HMO. However, that was their choice, decided by the form of the management agreement they freely entered into. It cannot diminish the measure of the amount of a rent repayment order.

34. Therefore, the rent repayment order is calculated as £3,590.14 - £151.10 = £3,459.04.

35. Although both parties had threatened to make an application at the hearing, they reserved their respective positions as to whether either would make an application for costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 until after they had seen this decision.

36. However, the Applicants did apply under rule 13(2) for reimbursement of their application fee of £100 and their hearing fee of £200. The Applicants have succeeded in this case – they did not get all they initially claimed in their application but they did obtain a RRO in an amount near the maximum possible. There were no mitigating factors. In the circumstances, the Tribunal is satisfied that it is appropriate to order reimbursement of the whole £300.

Name: NK Nicol **Date:** 05 November 2019

Appendix of relevant legislation

Housing Act 2004

Section 72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(2) A person commits an offence if–

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) A person commits an offence if–

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse–

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either–

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(3) A reference to *"an offence to which this Chapter applies"* is to 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.

	Act	section	general description of offence
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

Section 41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if —

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if—

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

Section 43 Making of rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

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

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

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

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

Section 44 Amount of order: tenants

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

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

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(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.

…