



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER (RESIDENTIAL  
PROPERTY)**

**Case Reference** : **LON/00BJ/HMF/2021/0055**

**HMCTS code  
(paper, video,  
audio)** : **V - Video**

**Property** : **Flat 2, 4 Marney Road, London SW11 5EP**

**Applicants** : **(1) Mr. George Wheeler  
(2) Miss Sophie Hurlstone**

**Representative** : **Not represented**

**Respondent** : **Mr. Kevin Bowen**

**Representative** : **Not represented**

**Type of Application** : **Application for a rent repayment order by  
tenants**

**Tribunal** : **Tribunal Judge S.J. Walker  
Tribunal Member T. Sennett.**

**Date and Venue of  
Hearing** : **21 October 2021 - video hearing**

**Date of Decision** : **21 October 2021**

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**DECISION**

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- (1) The Tribunal refuses the application for a Rent Repayment Order under section 43 of the Housing and Planning Act 2016.**
- (2) The Tribunal makes no order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imbusement of fees.**

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are set out below, the contents of which were noted. The Tribunal's determination is set out below.

## **Reasons**

### **The Application**

1. The Applicants seek two rent repayment orders pursuant to sections 43 and 44 of the Housing and Planning Act 2016 ("the Act") for different periods. The First Applicant seeks an order for the period from 1 July 2020 until 31 January 2021. The Second Applicant seeks an order for the period from 1 August 2020 until 31 January 2021.
2. The application was made on 18 February 2021, so is in time, and alleges that the Respondent has committed an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act") – having control or management of an unlicensed House in Multiple Occupation ("HMO").

### **The Hearing**

3. Both Applicants and the Respondent attended the hearing. None of them were represented.
4. The Tribunal had before it two bundles of documents prepared by the Applicants consisting of 84 and 15 pages respectively. There was a bundle of documents from the Respondent of 52 pages. Page references that follow are to these bundles, prefaced by A, A2 or R respectively.

### **The Law**

5. The relevant legal provisions are set out in the Appendix to this decision.
6. The Tribunal may make a rent repayment order when a landlord has committed one or more of a number of offences listed in section 40(3) of the Act. An offence is committed under section 72(1) of the 2004 Act if a person has control or management of an HMO which is required to be licensed but is not. By section 61(1) of the 2004 Act every HMO to which Part 2 of that Act applies must be licensed save in prescribed circumstances which do not apply in this case.
7. Section 55 of the 2004 Act explains which HMOs are subject to the terms of Part 2 of that Act. An HMO falls within the scope of Part 2 if it is of a prescribed description. Those prescribed descriptions are to be found in the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018. Under that Order an HMO falls

within the prescribed description if it is occupied by five or more people, and is occupied by people living in two or more single households, and, among other things, it meets the standard test under section 254(2) of the 2004 Act.

8. A building meets the standard test if it;
  - “(a) consists of one or more units of living accommodation not consisting of a self-contained flat or flats;*
  - (b) the living accommodation is occupied by persons who do not form a single household ...;*
  - (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it;*
  - (d) their occupation of the living accommodation constitutes the only use of that accommodation;*
  - (e) rents are payable or other consideration is to be provided in respect of at least one of the those persons’ occupation of the living accommodation; and*
  - (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.”*
9. By virtue of section 258 of the 2004 Act persons are to be regarded as not forming a single household unless they are all members of the same family. To be members of the same family they must be related, a couple, or related to the other member of a couple.
10. By section 72(4)(b) of the 2004 Act it is a defence to a charge of an offence under section 72(1) that an application for a licence has been duly made in respect of the house under section 63.
11. By section 63 an application must be made to the local housing authority and must be made in accordance with such requirements as the authority may specify. Those requirements may include the payment of a fee fixed by the local authority.
12. An order may only be made under section 43 of the Act if the Tribunal is satisfied beyond reasonable doubt that an offence has been committed. This is the criminal standard of proof and is a high hurdle to overcome, though it does not require proof beyond any doubt at all.
13. By section 44(2) of the Act the amount ordered to be paid under a rent repayment order must relate to rent paid in a period during which the landlord was committing the offence, subject to a maximum of 12 months. By section 44(3) the amount that a landlord may be required to repay must not exceed the total rent paid in respect of that period. By section 41(2)(a) of the Act a tenant may only apply for a rent repayment order if the offence relates to housing that, at the time of the offence, was let to that tenant.

14. Section 44(4) of the Act requires the Tribunal to have regard to the conduct of the landlord and tenant, the financial circumstances of the landlord and whether or not the landlord has been convicted of a relevant offence when determining the amount to be paid under a rent repayment order.

### **Findings**

15. In this case many of the fundamental elements of the case which are not normally in dispute were the subject of fierce contention.
16. The Tribunal was satisfied that the property is owned by the Respondent. Evidence of title is at pages A54 and A55. This was not disputed.
17. It was also not disputed that the property comprised 5 rooms together with 3 bathrooms and a kitchen arranged over the first, second and third floors of the building. There is a plan at page R21.
18. The Applicants' case as explained to the Tribunal was that the First Applicant became a tenant at the property on 1 July 2020 when he moved in. Although the Second Applicant's application seeks an order from 1 August 2020 onwards, her own evidence was that she in fact moved in on 4 August 2020, and this was stated to be the start date of her tenancy in the document upon which she relied.
19. The Respondent's case was that he had let the property on 4 September 2019 to four single tenants. His argument was that he did not know that the Applicants were living in the property until at least September 2020 when he was told by his tenant Armin Habibi that some new tenants had moved in – para 15 of his statement at page R3. He denied that they were ever tenants of his and his case was that he had never entered into any contractual relations with them. He contended that either his tenant had been subletting rooms without his knowledge or replacing existing tenants with new ones (para 16 of his statement).
20. The Tribunal began by considering whether or not an offence had been committed under section 72(1) of the 2004 Act. In his statement of case the Respondent relied on an assertion that he had made an application for an HMO licence in respect of the property on 1 August 2020 and that the fee for this application had been paid on 5 August 2020 – see paras 7 and 8 of his witness statement at page R3 and the documents at pages R7 to R20. If this were in fact the case, then he would have made out the statutory defence under section 72(4)(b).
21. The Tribunal asked the Applicants whether they accepted that such an application had been made. They did not. The Tribunal therefore decided to determine the question of whether or not the application had in fact been made as a preliminary issue. As the issue concerned a statutory defence to a criminal charge the burden was on the Respondent to show, on the balance of probabilities, that the application was indeed made.

### **The Section 72(4)(b) Defence**

22. The Respondent relied on the evidence in his witness statement and the documents referred to above. He also relied on proof of a payment to Wandsworth Council, the licensing authority, of £949 on 11 August 2020 (page R30). His oral evidence was that he had printed off a form from the council's website, filled it in and posted it, and that he had made payment to them separately. Initially he said that he had paid the fee by BACS though he later said that it had been paid by debit card – this is what is said in his witness statement. There were no documents from Wandsworth confirming receipt of his application. However, in the documents relied on by the Applicants there is an e-mail from a council officer which states that, certainly by 21 January 2021, an application for 4, Marney Road was being processed (see page A30). The Respondent could not explain why the bank statement stated that the transaction was on 11 August 2020 when his evidence was that he paid on 5 August.
23. The Respondent also relied on correspondence he had had with the local authority chasing his application. In particular, an e-mail dated 15 July 2021 to an officer at the London Borough of Merton (page R29). In this he stated that he had made his application on 5 August 2020 and paid the fee the same day, and he then asked if he could rent the property pending the granting of his licence. (It should be noted that nothing turns on the fact that she was an officer for a different local authority as it is clear from the document at page A30 that Merton, Wandsworth and Richmond-upon-Thames administer their licensing functions jointly). Although the reply to this enquiry says no more than that he may rent out the property as long as the application and fee have been received, it also does not state anything which is inconsistent with the Respondent's case and does not refute his assertion that he made an application on 5 August 2020.
24. The Respondent also explained that he had also made an application for an HMO licence in respect of his other property at 10, Marney Road. His evidence was that this application had taken about 9 months to process. At page A51 there is an extract from the local authority's licensing register which shows that flat 2, 10 Marney Road was granted a licence on 26 January 2021.
25. The Applicants invited the Tribunal to conclude that the Respondent had not made the application relied on. They had no documentary evidence from the local authority which directly refuted the Respondent's case. They relied on the e-mail at page A30 already referred to in which the officer stated "*I can see an HMO licensing fee and application form have been submitted towards the end of last year*" and invited the Tribunal to conclude that this could not refer to an application made in August 2020. They also relied on a telephone conversation which had taken place recently – of which no record was provided – which the First Applicant said he had had with the same officer, in which it was said that an entry was made on a database in

respect of the application on 10 December 2020. The nature of this entry was not explained.

26. The Applicants relied on the absence of documentary confirmation from the local authority as to when the application had been received. They also suggested that it was possible that the payment of £949 in August 2020 was in respect of the Respondent's other licensing application and they relied on the lack of any clear reference on the proof of payment identifying the property in question.
27. The Tribunal retired to consider its findings on this preliminary issue. It concluded that it was satisfied on the balance of probabilities that the application was made by the Respondent in the manner described by him and that payment for the application had been made by debit card on 5 August 2020. There was no doubt that an application had been made and paid for – as this is confirmed by the e-mail at page A30 – the application would not be being processed if the fee had not been paid. The only real question, therefore, was when was this application made. The Respondent had provided a witness statement supported by a statement of truth which averred that the application was made and paid for by 5 August 2020. In the view of the Tribunal the Applicants had provided insufficient evidence to cast doubt on that assertion. It had been open to them to obtain information from the local authority as to the date on which the application was received but they had not done so. Little weight could be attached to the hearsay conversation between the First Applicant and the council officer which, taken at its highest, stated nothing more than that an entry was made on a database in December.
28. The Tribunal considered that the application was not properly made until payment was made or the means to make payment were provided – eg the date on which the debit card details were given to the local authority. It accepted the Respondent's account that this payment was made on 5 August 2020. Though the bank statement showed the date of 11 August 2020 this could be due to many factors such as a delay in the bank's systems, or a delay in the local authority processing the payment. In any event, for reasons which will be set out below, whether the date of payment was 5 August 2020 or 11 August 2020 makes no material difference to the Tribunal's decision in respect of the application.
29. It follows from what is said above that the Tribunal was satisfied that the Respondent had made out the statutory defence in section 72(4)(b) for the period from 5 August 2020 onwards. Therefore, no offence was committed in that period.

**The period from 1 July 2020 to 4 August 2020 inclusive**

30. Having announced its decision on the preliminary point, the Tribunal went on to consider whether the Applicants had established that an offence had been committed under section 72(1) for the period from 1 July 2020 to 4 August 2020 inclusive.

31. The Respondent accepted that there was no HMO licence and no outstanding application in place prior to 5 August 2020. The key first question for the Tribunal was, therefore, whether or not the Applicants had established beyond reasonable doubt that there were 5 people living at the property throughout that period.
32. The Tribunal was satisfied that the First Applicant was living at the property from 1 July 2020 as claimed, as his presence there is confirmed by a bank statement in his name addressed to him at the property for the period ending 30 June 2020 (page A79). There were no documents showing that the Second Applicant was living there.
33. The Tribunal found the Applicants' evidence about who the other people living in the property were confused and surprisingly lacking in detail. In his oral evidence the First Applicant stated that when he moved into the property he joined four others, who he named as Armin Habibi, a man called Ryan who appears to be Ryan Moss, someone called Jessie, Jennifer Tran and someone called Yvonne. His evidence was that he became aware in April 2020 of a forthcoming vacancy, and that on 23 May 2020 he paid Armin Habibi a sum of £200 in order to secure that vacancy – this is shown in the bank statement at page A57. His evidence was that he in fact moved in on 1 July. He said that he replaced Jessie who had had to return to Australia. The Applicants' evidence was that the Second Applicant moved in on 4 August 2020. When asked who she had replaced both Applicants were initially confused and uncertain about their answer. They were unclear whether it was Ryan or Yvonne, though they then said that Yvonne had been replaced by someone called Chris Greenslade. The Tribunal found the oral evidence of the Applicants about who was living at the property and when they were living there unconvincing.
34. In addition to this oral evidence the Applicants relied on documentary evidence which, though it could easily have made the situation clear, was equally unconvincing. Reliance was placed on two witness statements, one from Jennifer Tran (page A2 12), and one from Ryan Moss (page A2 14). Both state that there were always 5 people living at the property. However, neither statement explains when the witnesses in question were in fact living at the property themselves – so, therefore, they do not explain when there were 5 people living there - nor do they set out who the other occupants were at the time they were living there. Also, neither statement says that they were living at the property at the same time as either of the Applicants, nor do they make any reference to who, if anybody, had a contractual tenancy with Mr. Bowen. Neither statement gives the witness' current address and neither is supported by a statement of truth.
35. The Applicants also rely on the first page of what appears to be a tenancy agreement between the Respondent on the one hand and the Applicants, Chris Greenslade, Amin Habibi and Jennifer Tran on the other. On the face of it, this document appears to show that a tenancy

was granted jointly to five tenants for a period of a year from 4 August 2020 onwards. The rest of the document has not been provided. Taken at face value it would suggest that the property was occupied by 5 people. However, the Respondent's evidence was that this agreement was not provided by him and that he was not aware of any of the people named on it apart from Armin Habibi (para 28 at page R4). There is no evidence from any of the other people named on this document as tenants in support of the Applicants' case other than from Miss Tran. However, she herself in her statement makes no reference to this agreement at all. She does not confirm its validity or state that she was in fact a party to it, and in the absence of evidence from her about when she was living at the property, it cannot be inferred with any certainty that she was even living at the property when this agreement was said to come into effect. In the view of the Tribunal, the Respondent has cast doubt on the veracity of this document. It is possible that this doubt could have been dispelled by evidence from, in particular, Miss Tran, but that has not happened.

36. The Applicants also rely on correspondence between them and the Respondent. This includes a statement in an e-mail dated 18 January 2021 as follows;

*“Also, the flat was rented out to 5 people and now there appears to be only 3”*

This clearly shows that at some point the property was indeed occupied by 5 people. Unfortunately, though, it does not show when that was, other than at some time prior to 18 January 2021. It certainly does not show that there were 5 people living in the property from 1 July 2020 to either 5 or 11 August 2020.

37. Taking the evidence as a whole and bearing in mind the relevant burden and standard of proof the Tribunal was not satisfied so that it was sure that there were 5 people living at the property at any time between 1 July 2020 and 11 August 2020. The evidence provided by the Applicants is simply lacking in the necessary detail to establish their case to the criminal standard.
38. It follows that the Tribunal was not satisfied that the Respondent had committed an offence under section 72(1) of the Housing Act 2004. That being the case, there was no basis for the making of an order under section 43 of the Act. The application is therefore refused.
39. There was no application by the Applicants under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imburement of the fees paid for bringing the Application. The Tribunal concluded that, in any event, given its decision, it was not just and equitable to make such an order.

**Name:** Tribunal Judge S.J.  
Walker

**Date:** 21 October 2021



## **ANNEX - RIGHTS OF APPEAL**

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.
- If a party wishes to appeal against this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
- The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

### **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.
- (1) 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.
- (2) 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.
- (3) 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).

### **263 Meaning of “person having control” and “person managing” etc.**

- (1) In this Act “person having control”, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

- (2) In subsection (1) “rack-rent” means a rent which is not less than two-thirds of the full net annual value of the premises.
- (3) In this Act “person managing” means, in relation to premises, the person who, being an owner or lessee of the premises—
- (a) receives (whether directly or through an agent or trustee) rents or other payments from—
- (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
- (ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or
- (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
- and includes, where those rents or other payments are received through another person as agent or trustee, that other person.
- (4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).
- (5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

## **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.

<b>Act</b>	<b>section</b>	<b>general description of offence</b>
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 —
- the offence relates to housing that, at the time of the offence, was let to the tenant, and
  - 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—
- the offence relates to housing in the authority's area, and
  - 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—
- section 44 (where the application is made by a tenant);
  - section 45 (where the application is made by a local housing authority);
  - 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.

## **Section 52 Interpretation of Chapter**

- (1) In this Chapter—

“offence to which this Chapter applies” has the meaning given by section 40;

“relevant award of universal credit” means an award of universal credit the calculation of which included an amount under section 11 of the Welfare Reform Act 2012;

“rent” includes any payment in respect of which an amount under section 11 of the Welfare Reform Act 2012 may be included in the calculation of an award of universal credit;

“rent repayment order” has the meaning given by section 40.

- (2) For the purposes of this Chapter an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent.