FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AL/HMF/2022/0039**
Property	**:**	**82 Whitworth Road, London SE18 3QF**
Applicants	**:**	**Joseph Damonte** **Vanessa-Maria Garzon Galindo** **Celine Sprenger** **Harry Blackman**
Representative	**:**	**Legal Road Ltd**
Respondents	**:**	**Helen Henderson** **Andrew Henderson**
Type of Application	**:**	**Application for a rent repayment order by tenants**
Tribunal	**:**	**Judge Nicol** **Mrs A Flynn MA MRICS**
Date and Venue of Hearing	**:**	**15th September 2022;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**25th November 2022**

DECISION

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(1) The Respondents shall pay to the Applicants a Rent Repayment Order in the sum of £6,200.
(2) The Respondents shall also reimburse the Applicants their Tribunal fees of £300.

The relevant legislative provisions are set out in an Appendix to this decision.

Reasons

1. The Applicants were tenants at the subject property at 82 Whitworth Road, London SE18 3QF, a 3-bedroom house, for 6 months from 28th

August 2020 to 28th February 2021 at a monthly rent of £1,550. They paid 6-months' rent in advance in the total sum of £9,300.

2. The Respondents are the freeholders of the property which used to be their family home. Felicity J Lord acted as their agents for the letting.

3. The Applicants applied on 11th February 2022 for a rent repayment order ("RRO") against the Respondents in accordance with the Housing and Planning Act 2016 ("the 2016 Act").

4. The hearing of this matter was in person and took place on 15th September 2022. The attendees were:

- The 4 Applicants – Mr Blackman and Mr Damonte spoke to their witness statements;
- Ms Sally Aitchinson, the Applicants' representative from Legal Road; and
- Both Respondents – both gave evidence and made submissions.

5. Both parties had provided a bundle, 405 pages from the Applicants and 39 pages from the Respondents. It is unfortunate that both parties thought it necessary to repeat documents several times, unnecessarily increasing the time it takes to navigate their bundles. The Applicant also provided a brief reply to the Respondents' statement of case, as permitted by the Tribunal's directions dated 21st April 2022 and amended on 12th July 2022.

The offence

6. The Tribunal may make a rent repayment order when the landlord has committed one or more of a number of offences listed in section 40(3) of the 2016 Act. The Applicants alleged that the Respondents were guilty of having control of a house in multiple occupation ("HMO") which is required to be licensed but is not so licensed, contrary to section 72(1) of the Housing Act 2004 ("the 2004 Act").

7. The local authority, the Royal Borough of Greenwich, designated its entire district as an area for additional licensing of HMOs with 3 or more persons living in 2 or more households for the period between 1st October 2017 and 30th September 2022. Greenwich confirmed by email dated 21st October 2021 that the property was not licensed during the period of the Applicants' occupation.

8. The Respondents' case was summarised during the hearing as follows:

(a) The Respondents accepted that the elements of the offence under section 72(1) have been made out, namely that they had control of a HMO which should have been licensed but was not.
(b) However, they have two defences:
    (i) They claimed to have applied for a licence, which would be a defence from the date of such application under section 72(4)(b).

(ii) They also claimed to have a reasonable excuse under section 72(5).

(c) If neither defence is made out, the Tribunal should exercise its discretion not to make a RRO.

(d) If the Tribunal decided to make a RRO, the amount should be as low as possible to reflect the Respondents' lack of personal responsibility for the situation.

9. Although it would have been for the Applicants to establish that the offence has been committed to the criminal standard, namely beyond a reasonable doubt, it is for the Respondents to establish their defences to the civil standard, namely on a balance of probabilities.

Licence application

10. The Respondents explained that the subject property is a 3-bedroom semi-detached house which used to be their family home. They believe it to be in good condition. They rent out two properties, including this one, and assert that they are not rogue landlords.

11. The Respondents' son, Mr Harry Henderson, works in London and helped them with the property since they moved to Scotland in 2018. In Spring 2020, he started an application with Greenwich for an HMO licence. Some work was undertaken to ensure that the property would conform to the requirements of such a licence, including the installation of fire doors, a new consumer unit, an electrical safety check and a gas safety certificate.

12. However, the licence application was never completed. Mr Henderson moved to Scotland after the COVID pandemic began in order to be nearer his family. The Respondents employed agents, Felicity J Lord, to find suitable tenants. They say they relied on the agents' experience, knowledge and professionalism to manage the property fully.

13. However, in two phone calls, two employees of Felicity J Lord said they had two couples who wanted to rent the property together and that an HMO licence would not be needed. The Respondents obtained recordings of these phone calls which confirmed what they were told. Felicity J Lord accepted that this is what they had been told.

14. Unfortunately, the advice was clearly wrong. Two couples constitute two households and four people, putting any letting to them squarely within Greenwich's additional licensing scheme. The Respondents could have checked this for themselves on Greenwich's website, with which they were already familiar. However, the Respondents trusted their agents and authorised the letting without completing the HMO application.

15. The defence under section 72(4)(b) arises if and when an application for a licence has been duly made. A partially completed application which has not been submitted or paid for does not come within this provision. Therefore, this defence is not available to the Respondents.

Reasonable excuse

16. Under section 72(5) of the 2004 Act, it is a defence that the Respondents had a reasonable excuse for having control of or managing the property which should have been licensed but was not. The Respondents claim that they have a reasonable excuse because their agents gave them incorrect advice.

17. There is no express definition of "reasonable excuse" in the Act but it should be considered in the light of the statutory purpose. According to Newey LJ in *Kowalek v Hassanein Ltd* [2022] at paragraph 23, the RRO provisions are:

> Intended to deter landlords from committing the specified offences and reflects a policy of requiring landlords to comply with their obligations or leave the sector … the main object of the provisions is deterrence rather than compensation.

18. It might be argued that landlords should be encouraged to seek expert advice on how to comply with their obligations and they would be discouraged if they tried to do that but received poor advice and were then sanctioned by having to pay a RRO. However, this overlooks the fact that it is the landlord's choice not only whether to seek advice but who from and on what terms.

19. The Respondents asserted that Felicity J Lord were a well-known and reputable agency but presented no evidence as to the terms of their engagement, including as to the extent of the advice they were to provide or the possibility of sanction or compensation for incorrect advice.

20. There are legal remedies in contract and tort for poor service or advice which is how the legal system encourages advisers to do what they can to ensure their advice is sound and, where applicable, that there is insurance against any deficiencies in that advice. In the pursuit of such remedies, unlike before the Tribunal, the adviser would have an opportunity to put forward their defence, supported by relevant evidence. The Respondents seek findings about the advice they received on the basis of only their case, without any defence from Felicity J Lord.

21. In the circumstances, the Tribunal is not satisfied that the deficiencies in the advice they received from their agents provides the Respondents with a reasonable excuse. Therefore, the Tribunal is satisfied so that it is sure that the First Respondent has committed the offence of having control of the property which was required to be licensed but was not.

Rent Repayment Order

22. For the above reasons, the Tribunal is satisfied that it has the power under section 43(1) of the Housing and Planning Act 2016 to make Rent Repayment Orders on this application. The Tribunal has a

discretion not to exercise that power but, as confirmed in *LB Newham v Harris* [2017] UKUT 264 (LC), it will be a very rare case where the Tribunal does so. This is not one of those very rare cases. The Tribunal cannot see any grounds for exercising their discretion not to make a RRO.

23. The RRO provisions have been considered by the Upper Tribunal (Lands Chamber) in a number of cases and it is necessary to look at the guidance they gave there. In *Parker v Waller* [2012] UKUT 301 (LC), amongst other matters, it was held that an RRO is a penal sum, not compensation. The law has changed since *Parker v Waller* and was considered in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC) where Judge Cooke said:

> 53. The provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in *Parker v Waller*. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances. …

24. In *Williams v Parmar* [2021] UKUT 0244 (LC) the Upper Tribunal held that there was no presumption in favour of awarding the maximum amount of an RRO. The tribunal could, in an appropriate case, order a lower than maximum amount of rent repayment, if the landlord's offence was relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the tribunal should take into account the purposes intended to be served by the jurisdiction to make an RRO, namely to punish offending landlords; deter landlords from further offences; dissuade other landlords from breaching the law; and removing from landlords the financial benefit of offending.

25. In *Acheampong v Roman* [2022] UKUT 239 (LC) the Upper Tribunal sought to build on what was said in *Williams v Parmar*. At paragraph 15, Judge Cooke stated,

> it is an obvious inference both from the President's general observations and from the outcome of the appeal that an order in the maximum possible amount would be made only in the most serious cases or where some other compelling and unusual factor justified it.

26. The current Tribunal finds it difficult to follow this reasoning. Although RROs are penal, rather than compensatory, they are not fines. Levels of fines for criminal offences are set relative to statutory maxima which define the limit of the due sanction and the fine for each offender is modulated on a spectrum of which that limit defines one end – effectively the maximum fine is reserved for the most serious cases. In this way, the courts ensure that there is consistency in the amount of any fine – each person convicted will receive a fine at around the same

level as someone who committed a similar offence in similar circumstances.

27. However, an RRO is not a fixed amount. The maximum RRO is set by the rent the tenant happened to pay. It is possible for a landlord who has conducted themselves appallingly to pay less than a landlord who has conducted themselves perfectly (other than failing to obtain a licence) due to the levels of rent each happened to charge for their respective properties.

28. In the Tribunal's opinion, there is nothing wrong with or inconsistent in the statutory regime for RROs if a particular RRO can't be increased due to a landlord's bad conduct. It is the result which inevitably follows from using the repayment of rent as the penalty rather than a fine. The maximum RRO, set by the amount of the rent, is a cap, not the maximum or other measure of the gravity of the parties' conduct. A landlord's good conduct or a tenant's bad conduct may lower the amount of the RRO and section 44(3) finds expression in that way.

29. Judge Cooke went on in *Acheampong* to provide guidance on how to calculate the RRO:

> 20. The following approach will ensure consistency with the authorities:
>
> a. Ascertain the whole of the rent for the relevant period;
>
> b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.
>
> c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:
>
> d. Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

30. The whole of the rent paid by the Applicants for their occupation of the property for 6 months was £9,300.

31. In relation to utilities, the Tribunal again finds it difficult to understand Judge Cooke. It is common for a landlord to include some of the utility charges within the rent. However, this does not only benefit the tenant.

Landlords do not include such services in the rent out of charitable goodwill but for sound commercial reasons such as increasing the chances of achieving a letting, attracting and retaining desirable tenants, and maintaining control of the identity of suppliers to the property. The same reasoning applies to the provision of furnishings, including white goods, but Judge Cooke does not extend her reasoning to such matters. Obviously, tenants control the rate of consumption of such services but this is necessarily built in to the landlord's calculations when offering them within the rent.

32. Further, the Tribunal cannot identify any support within the statute for this approach to utility charges. Nor does Judge Cooke. On the contrary, the legislation refers to "the rent" and not "the net rent". "Rent" has a clearly defined meaning in the law of landlord and tenant, namely "the entire sum payable to the landlord in money" (see *Megarry on the Rent Acts*, 11th Ed at p.519 and *Hornsby v Maynard* [1925] 1 KB 514). It is also stated in *Woodfall: Landlord and Tenant* at paragraph 7.015 that, "At common law, the whole amount reserved as rent issues out of the realty and is distrainable as rent although the amount agreed to be paid may be an increased rent on account of the provision of furniture or services or the payment of rates by the landlord." Parliament would have had this in mind in enacting the legislation.

33. In any event, the obligation to pay for the utilities in this case was on the Applicants under clause 8.1 of their tenancy. Therefore, there are no deductions to be made on this count.

34. The next step is to consider the seriousness of the offence. While the Respondents' reliance on their agents' advice does not constitute a reasonable excuse for committing the offence, it is relevant to their degree of culpability. It is accepted that the Respondents were well-intentioned and would likely have followed through on their original intention to obtain a licence but for their son having moved on and their agents having misled them.

35. The Respondents asserted that the property was advertised in good condition so the tenants did not and could not have suffered any harm caused by them, either physically or financially. There is a number of problems with this assertion:

(a) Actual harm to the tenants is irrelevant for two reasons. Firstly, as has been said, RROs are penal, not compensatory. The purpose is to promote compliance, not to compensate tenants. Secondly, licensing is a preventative measure. If it works as it should, the likelihood of harm is significantly reduced.

(b) The Respondents presented no evidence beyond their own assertions. The Tribunal has no reason to disbelieve them when they say they began works to ensure compliance with likely licence conditions but there is no evidence, for example from an environmental health expert, as to what was needed or whether what had been done was sufficient. It

is a frequent and regular occurrence in cases before the Tribunal that landlords are surprised by the additional requirements imposed by local authorities to bring HMOs up to the required standards and so it cannot be assumed that their genuine belief as to the quality of their property is an accurate reflection of reality. The Respondents pointed out that the London Borough of Greenwich inspected and found nothing wrong with the property but that was after the Applicants had left and it was no longer an HMO.

36. The Respondents also pointed to the fact that the provisions in the 2016 Act relating to RROs are in Part 2 which is headed "Rogue Landlords" and asserted that they are no rogue landlords. This misunderstands the statute. In the context of the 2016 Act, a rogue landlord is not some Rachmanite caricature but simply a landlord who has not complied with the requirements referred to in Part 2.

37. In *Hancher v David* [2022] UKUT 277 (LC) Judge Cooke sought to build further on her guidance in *Acheampong* about measuring the seriousness of an offence. At paragraph 19, she stated, "The offence under section 72(1) of the Housing Act 2004 is not one of the more serious of the offences for which a rent repayment order can be made." Yet again, the Tribunal struggled to understand Judge Cooke. She provided no reasoning in support of this statement.

38. In the Tribunal's opinion, offences in relation to HMOs are at least as serious as the others listed in section 40(3) of the 2016 Act. In *Rogers v Islington LBC* (2000) 32 HLR 138, Nourse LJ stated at pages 139-140:

> A brief account of statutory control in relation to houses in multiple occupation ("HMOs") is to be found in the commentary to Part II of the Housing Act 1996 in the *Encyclopaedia of Housing Law and Practice*:
>
> > "Controls over [HMOs] were first introduced in 1958, and the powers were extended on no fewer than three occasions during the 1960s. Further amendments were made in the 1980s. Since the first controls were introduced it has been recognised that HMOs represent a particular housing problem, and the further powers included in this part of the Act are a recognition that the problem still continues. It is currently estimated that there are about 638,000 HMOs in England and Wales. According to the English House Condition Survey in 1993, four out of ten HMOs were unfit for human habitation. A study for the Campaign for Bedsit Rights by G Randall estimated that the chances of being killed or injured by fire in an HMO are 28 times higher than for residents of other dwellings."

39. The situation in relation to HMOs has not materially changed in the 23 years since Nourse LJ's judgment. Parliament has continued to legislate for HMOs in the 2004 Act and the 2016 Act on the basis that further

measures were required. There were an estimated 497,000 HMOs in England and Wales at the end of March 2018 (*Houses in Multiple Occupation (HMOs) England and Wales*, House of Commons Library Briefing Paper no.0708, 30th September 2019).

40. When an application is made for an HMO licence, the local authority requires the property to meet standards as to fire safety and the prevention of other hazards identified under the Housing Health and Safety Rating System. If those standards are not met, the lives of the occupants can literally be in danger. Not all the offences listed in section 40(3) of the 2016 Act are equally likely to be life or death matters.

41. The last stage is to consider the factors under section 44(4) of the 2016 Act. The Respondents have no relevant convictions. Their conduct has already been considered above. No accusations were made against the Applicants. (The Respondents did allege failures to comply promptly with the Tribunal's directions but they are not relevant to the calculation of the RRO.) The Respondents made no submissions and presented no evidence about their financial circumstances.

42. Taking into account the above considerations, particularly those at paragraph 35 above, the Tribunal considers a RRO order of two-thirds the maximum amount, £6,200, is appropriate.

43. The Applicants sought reimbursement of their Tribunal fees of £300. Given that their application has been successful, the Tribunal orders reimbursement.

44. The Applicants also sought other legal costs of £900. The Tribunal has no general costs jurisdiction. The Applicants did not specify any provision under which such costs could be claimed or put forward any relevant grounds for such an order. Therefore, the Tribunal refuses to make such an order.

Name: Judge Nicol **Date:** 25th November 2021

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).

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.

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.