FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAN/HMF/2021/0273**
HMCTS code	**:**	**Video**
Property	**:**	**49 West Kensington Mansions, Beaumont Crescent, London W14 9PF**
Applicant	**:**	**(1) Francesca Troiani** **(2) Tamara Raidt** **(3) Maria del Carmen Egea Garcia**
Representative	**:**	**Ms Sherratt, Justice for Tenants**
Respondent	**:**	**(1) Kuldeep Singh Cheent** **(2) Love (UK) Limited**
Representative	**:**	**(1) Mr Shepheard** **(2) No appearance**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms R Kershaw BSc**
Date and venue of Hearing	**:**	**14 July 2022** **Remote**
Date of Decision	**:**	**15 July 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video using #. A face-to-face hearing was not practicable and all issues could be determined in a remote hearing.

Orders

(1) The Tribunal makes rent repayment orders against the First Respondent to each of the Applicants in the following sums, to be paid within 28 days:

Ms Troiani: £4,935
Ms Raidt: £3,929
Ms del Carmen Egea Garcia: £6,905

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants together the application and hearing fees in respect of this application in the sum of £300.

The application

1. On 20 November 2021, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for Rent Repayment Orders ("RROs") under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 24 November 2021 and varied on 13 January 2022.

2. In accordance with the directions, we were provided with an Applicant's bundle of 193 pages, and a witness statement from the first Respondent exhibiting a number of documents. Nothing was received from the second Respondent

The hearing

Introductory

3. Ms Sherratt of Justice for Tenants represented the Applicants. Mr Shepheard of counsel represented the first Respondent. The second Respondent did not appear.

4. The property is a three bedroom self-contained flat in a mansion block.

Preliminary issues

5. The Tribunal asked Ms Sherratt if she wished to make an application to stay the proceedings, given that permission to appeal to the Supreme Court had been given in respect of the Court of Appeal decision in *Jepsen and Others v Rakusen* [2021] EWCA Civ 1150, [2022] 1 W.L.R. 324. She said she did not seek a stay.

6. The Tribunal further considered, as a preliminary issue, whether the first Respondent was a proper respondent, given the decision of the Court of Appeal in *Jepsen and Others v Rakusen*.

7. Ms Sherratt said that, having considered the documents disclosed by Dr Cheent, she agreed that he was not a proper Respondent. The documents included sub-leases granted by Dr Cheent to the second Respondent.

8. The tribunal ordered that the first Respondent be removed from the application.

The alleged criminal offence

9. The Tribunal considered whether to proceed in the absence of the second Respondent (hereafter, the Respondent). We were satisfied that the Tribunal office had notified the Respondent of the proceedings, and that it was in the interests of justice to proceed, and accordingly the criteria in Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 34 were satisfied.

10. The Applicants allege that the Respondent was guilty of the having control of, or managing, an unlicensed house in multiple occupation contrary to Housing Act 2004 ("the 2004 Act"), section 72(1). The offence is set out in Housing and Planning Act 2016, section 40(3), as one of the offences which, if committed, allows the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

11. The Applicants case is that the property was situated within an additional licensing area as designated by the London Borough of Hammersmith and Fulham ("the Borough"). The relevant scheme was in force from 5 June 2017 to 4 June 2022, and applied to the whole of the area of the Borough. The notification included within the scheme all HMOs occupied by three or more persons comprising two or more households, with irrelevant exceptions. The property was located within the Borough. The Applicant provided a copy of the notification of the designation, and a map indicating the location of the property.

12. Correspondence from the Borough showed that at no time had the property been licenced as an HMO.

13. There was no material before the Tribunal that might found a defence of reasonable excuse (section 72(5) of the 2004 Act).

14. *Decision*: We are satisfied beyond a reasonable doubt that the offence in section 72(1) of the 2004 Act had been committed by the Respondent during the relevant periods (see below).

The maximum RRO

15. By sections 44(2) and (3) of the 2016 Act, the maximum possible RRO is the rent paid during a period of 12 months, minus any universal credit (or Housing Benefit – section 51) paid during that period.

16. The Applicant provided details of the rent paid by each Applicant, with proof of payment in the bundle. Each of the applicants provided a witness statement setting out their occupation and rent. In each case, the periods were discontinuous, in that at times, not all of the Applicants (or, in some cases, other occupants) were in occupation all of the time, such that there were periods when the criterion of three occupants was not satisfied.

17. None of the Applicants were in receipt of Universal Credit or Housing Benefit.

18. The relevant periods were:

Ms Troiani	26/02/2020 to 06/06/2020; 26/08/2020 to 06/12/2020
Ms Raidt	26/08/2020 to 06/12/2020; 24/04/2021 to 01/07/2021
Ms del Carmen Egea Garcia	01/08/2019 to 31/01/2020; 01/03/2020 to 31/05/2020; 01/09/2020 to 31/11/2020

19. As will be seen, for Ms Trioiani and Ms Raidt, the periods under consideration were within a span of 12 months from the first date to the last. However, in the case of Ms del Carmen Egea Garcia, the total span is 16 months.

20. Section 44 of the 2016 Act s ets out in a table at sub-s (2) the maximum amount of an RRO for this offence as "a period, not exceeding 12 months, during which the landlord was committing the offence". We put it to Ms Sherratt that the natural reading, that passage suggested that only the rent paid during a single period of 12 months, from the start of the period to the end, could count towards the calculation of the maximum RRO.

21. Ms Sherratt referred us to *Irvine v Metcalfe and Others* [2021] UKUT 0060 (LC). In that case, Judge Cooke reviewed her decision to refuse leave on a ground of appeal relating to the issue of whether the FTT had properly taken account of periods when fewer occupants than the number necessary to render the property an HMO had been present. In concluding that there was no purpose in granting permission to appeal, she relied on the fact that there had been a discontinuous period adding up to twelve months when there were the relevant number of occupants during a span of 16 months.

22. It does not appear that the issue that troubled us was the issue that Judge Cooke was considering, but nonetheless her decision was based on an assumption (at least) that a discontinuous period of 12 months accumulated over a longer period from beginning to end was within the definition of the period in section 44(2). Even if we are not strictly bound by that (and we do not decide that we are not), that is clearly highly persuasive, and we follow it.

23. The rents payable by the Applicants varied between £899 and £980 a month. We do not consider it necessary to exactly reproduce the calculations produced by the Applicants, which are somewhat complicated as a result of the need to discount periods of under-occupation on a day-rate basis, plus the different rents payable by different Applicants at different times. We have considered the calculations and accept them, noting a correction helpfully made orally by Ms Sherratt in relation to Ms del Carmen Egea Garcia. Below, we indicate the maxima we find.

24. *Decision*: The maximum RROs are as follows:

    Ms Troiani: £6,580
    Ms Raidt: £5,239
    Ms del Carmen Egea Garcia: £9,207

The amount of the RRO

25. Section 44(4) provides that in determining the amount of an RRO, within the maximum, the Tribunal should have particular regard to the conduct of both parties, and to the financial circumstances of the landlord.

26. In terms of adhering to the lease and matters such as repairs by the landlord or damage by the tenants, there were no adverse conclusions to be drawn from the conduct of either Respondent or Applicants. The Applicants' witness statements agreed that the property was generally well looked after and repairs were made when necessary. We have no information as to the means of the Respondent. Had it wished to have put such information before us, it could have appeared.

27. Ms Sherratt, however, relied on the fact that the evidence suggested that the Respondent was, or appeared to be, a professional rent-to-rent landlord, and so was in a similar position as the landlord in *Aytan v Moore* [2022] UKUT 27 (LC) and in another case that she helpfully cited to us, *Simpson House 3 Ltd v Osserman and Others* [2022] UKUT 164 (LC). In the former case, the Upper Tribunal arrived at a figure of 85% of the maximum RRO, relying on the fact that the landlords were professional property investors. In the latter, the matters that lead the Upper Tribunal to determine a figure of about 80% were, in addition to the professional nature of the landlord, a vindictive attempt at retaliatory eviction and misrepresenting non-compliance with a notice under Housing Act 1985, section 21.

28. Ms Sherratt also relied on the apparent failure of the Respondent to serve gas safety, EICR and EPCS on the Applicants, even though it appeared from Dr Cheetn's evidence that he had obtained them.

29. The Tribunal put to Ms Sherratt that the purported licences issued by the Respondent were transparent shams, and not only did not automatically protect the tenants deposits, but sought to charge the tenants should they choose for them to be placed in a deposit protection scheme. She submitted that we should take that into account.

30. We take into account all three. The most important is the professional nature of the Respondent as a rent-to-rent provider. The least is the failure to serve the (existing) certificates. More generally, we take account of the guidance in *Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8 and, and the cases referred to therein.

31. Weighing up these factors, we conclude that the RROs should be set at 75% of the maximum allowable. In each of the cases referred to above (*Aytan* and *Simpson House*) there were other substantive issues which would should increase the proportion, compared to this one. This is particularly so of *Simpson House*, so a figure of 80%, which we had tentatively in mind before considering that case in detail, would be too high.

Reimbursement of Tribunal fees

32. The Applicant applied for the reimbursement of the application and hearing fees paid by the Applicants under Rule 13(2) of the Rules. In the light of our findings, we allow that application.

Rights of appeal

33. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

34. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

35. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

36. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 15 July 2022

Appendix of Relevant Legislation

Housing Act 2004

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.

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and 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 to 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

	Act	*section*	*general description of offence*
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).

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.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a 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 had 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 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).

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 this 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 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,

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