FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/HMA/2017/0003**
Property	**:**	**8 Molyneux Street, London W1H 5HP**
Applicant	**:**	**1. Mike Han** **2. William C Black** **3. Nabeel Rauf** **4. Eleonora Alberta Creti Zaberman** **5. Alisa Varusenjeva**
Representative	**:**	**In person**
Respondent	**:**	**PML Services Ltd**
Representative	**:**	**Timothy Deal, barrister**
Type of application	**:**	**Application for a Rent Repayment Order – sections 73(5) and 74 of the Housing Act 2004**
Tribunal member(s)	**:**	**Ruth Wayte (Tribunal Judge)** **Hugh Geddes RIBA**
Date and venue of hearing	**:**	**8 September 2017 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**12 October 2017**

DECISION

Decisions of the tribunal

(1) The tribunal makes a rent repayment order of £5,800. This sum is to be paid to the Applicants in the following amounts: Mr Han, £1,566; Mr Black, £1,044; Mr Rauf £1,450; Ms Zabermann £406 and Ms Varunsenjeva £1,334.

(2) The tribunal also orders the Respondent to reimburse Ms Varunsenjeva £700 in respect of the application and hearing fees.

The application

1. The Applicants seek a rent repayment order (RRO) under sections 73(5) and 74 of the Housing Act 2004 ("the Act"). They were all occupiers of the property and rely on the conviction of the Respondent for an offence under section 72 (1) of the Act, namely having control of a house in multiple occupation (HMO) without the necessary licence.

2. Directions were issued on 24 May 2017, amended on 24 July 2017 to allow additional time to the Respondent and the hearing took place on 8 September 2017. At the hearing Mr Han acted as spokesperson for all the Applicants and the Respondent was represented by counsel, Timothy Deal. Both parties sought to introduce new documents at the hearing, namely submissions for the Respondent and a number of documents on behalf of the Applicants, mainly printouts of "Whatsapp" conversations between the occupiers. No objection was made to the submissions but the Respondent did object to the additional evidence. The tribunal decided to allow reference to Westminster's HMO standards as a third party document but refused to allow the other evidence due to its late submission. Mr Han had already submitted ample documentation evidencing the occupiers' concerns about the property and additional evidence was unnecessary.

The law

3. Sections 73 and 74 of the Act are annexed to this decision. In summary, section 73 provides that the tribunal may make an RRO in favour of an occupier where the appropriate person has been convicted of an offence under section 72(1), the occupier has made periodical payments while an offence was being committed and the application is made within 12 months after the conviction. There was no dispute between the parties that these criteria were met, although the Applicants sought to extend the period of the RRO as described later on.

4. Section 74 provides that the RRO is to be such amount as the tribunal considers reasonable in the circumstances. The tribunal must take into account in particular:

- the total amount paid for occupation of the HMO while the offence was being committed;
- the extent to which that amount was actually received by the respondent;
- whether the Respondent has been convicted under section 72(1);
- the conduct and financial circumstances of the respondent and
- the conduct of the occupier.

In addition to the above, an RRO may not require the payment of any amount in respect of time falling outside the period of 12 months ending with the date of the occupier's application to the tribunal.

5. During the hearing, the Respondent also relied on the cases of *Parker v Waller* [2012] UKUT 301 (LC) and *Fallon v Wilson* [2014] UKUT 0300. Copies were made available to the Applicants.

Background

6. The Respondent's evidence included witness statements by Annika Ledskog and Lorenzo Fontanelli, both directors of PML. They stated that the company started their business – granting "licences to occupy" to professionals that wish to stay in central London – in the second half of 2014. Their business model was that the company would rent the properties and then sublet them, with the property at Molyneux Street one of the first properties used for the business. A copy of the tenancy agreement between the Respondent and the owner of the property was included in the Respondent's bundle. It was dated 7 July 2015 and stated to expire on 6 July 2016, although the statements confirm that the Respondent continued to rent the property until 30 May 2017, when the letting was brought to an end by the landlord. The tribunal pointed out that the tenancy agreement included an obligation on the part of the tenant "*not to run a business, register a company or use the Property for anything other than for the purpose of a private residence in occupation by the Tenant and any visitors*" (clause 8). The Respondent had no answer to this apparent conflict with their business model.

7. There is no dispute that the Respondent subsequently let the property to the applicants. Mike Han occupied the property from 9 July 2015 to 12 May 2017; William Black from 26 April 2016 to 25 February 2017; Nabeel Rauf from 14 May 2016 to 30 May 2017; Eleonora Zauberman from 1 September 2016 to 30 November 2016 and Alisa Varunsenjeva from 9 July 2015 to 5 December 2016. The agreements used were

variously described as assured shorthold tenancy agreements and licences. The status of the occupiers is not relevant to their application as it is the fact of their occupation which gives rise to their claim. The tribunal queried the description of the agreements as "licences" and again received no response from Mr Deal, although the tribunal notes that he makes a concession in his written submissions that the property was occupied under a tenancy "solely for the purpose of this application".

8. No application was made for an HMO licence by the Respondent, despite the fact that their business model relied upon letting the property as 7 separate tenancies. The Respondent's initial statement of case, signed by Mr Fontanelli, was that as they were a tenant of the property, they believed the obligation to obtain the licence should be placed on the owner or owner's managing agent. The Respondent claimed they had always been open and cooperative with Westminster Council and provided copies of their correspondence in evidence. The tribunal notes that in the information provided to Westminster the Respondent has claimed that Sow & Reap, the owner's agents, receive rents from tenants and other occupiers, described as the individual occupiers of the seven bedrooms. This was of course inaccurate as those persons paid rent to the Respondent, who in turn paid rent on their own behalf to the owner. The tribunal further notes that on 11 May 2016 Annika at PML Services wrote to Westminster Council in the following terms:

"*Our company, PML Services Ltd is the Tenant of the house that pay the rent. We are not the management, have no management agreement have do not have any responsibility of the house. Sow and Reap is the company that receive the rent and the company that manage the house. I also want to specify that there is no other Tenancy under our company's Tenancy*."

Again, given the Respondents' business model and the concession made by Mr Deal in paragraph 7, this was clearly inaccurate. In any event, Westminster Council subsequently issued proceedings against the Respondent for their failure to obtain a licence to which a guilty plea was entered on 26 October 2016. The Respondent received a fine of £10,000 (maximum £20,000) and paid an additional £1,418.42 in costs and victim's surcharge.

9. The Respondent finally applied for an HMO Licence on 27 October 2016 which was granted on 27 January 2017 (but with effect from 28 October). A copy was enclosed in the bundle which states that there are 4 shared baths and wcs. The Respondent admitted in the hearing that this is also inaccurate. They accepted that the property in fact had two shared bathrooms and two ensuite bathrooms for the exclusive use of two of the bedrooms. Mr Han stated that in reality the shared bathroom on the second floor was used by the occupiers of five rooms

as the bathroom on the lower ground floor was used almost exclusively by the occupiers of the "studio flat" on that floor. Mr Han also pointed to Westminster's HMO standards which require separate wcs for 5 or more occupiers sharing bathroom facilities, which were not met in this case.

10. The applications for an RRO were received by the tribunal on 24 April 2017.

Period of the RRO

11. As set out above, section 74(8)(b) of the Act limits the RRO to a maximum of 12 months prior to the applications being made. That period is further limited by section 73(5) to rent paid during the period when the property was unlicensed (i.e. the offence was being committed). Bearing in mind that occupier RROs follow local authority enforcement, during which the landlord will almost certainly have applied for a licence, these provisions can mean that occupier RROs are limited to a short period of time within the 12-month longstop.

12. In this case, Mr Deal submitted that the relevant period was from 25 April 2016 to 27 October 2016. The start date was based on the occupiers' application being received by the tribunal on 24 April 2017, meaning that the 12-month period would commence on 25 April 2016. The Respondent applied for a licence on 28 October 2016, which meant that the end date would be 27 October 2016, being the last day the offence was being committed.

13. Mr Han sought to argue on behalf of the Applicants that the tribunal should consider a longer rental period. In particular, he argued for a full 12-month period, either prior to the date on the applications for an RRO (7 April 2017) or the Respondent's application for a licence (28 October 2016). His argument was that the Respondent failed to observe the terms of the licence due to the number of shared bathrooms and the failure to provide the applicants with a copy of the licence, depriving them of the opportunity to complain to the council. The Applicants could not point to any part of the Act supporting their claim but submitted that would be fair in all the circumstances.

14. The Tribunal's jurisdiction is limited by the Act and in the circumstances, the Tribunal determines that the relevant period is 25 April 2016 to 27 October 2016. In terms of the start date for the 12-month period, the Tribunal considers that the applications are "made" when they are received by the tribunal, which was 24 April 2017. This means that the 12-month period starts from 25 April 2016. For the avoidance of doubt, there is no statutory authority to support a 12-month period starting with the application for the licence, although the Tribunal considers that would have been more logical, not least because of the difficulty raised in paragraph 11 above.

15. As to the end date, paragraph 11 sets out the statutory authority for a further limit of rent paid while the Property remains unlicensed. The last day in this case was 27 October 2016. The Applicant did not seek to argue that the licence was of no effect due to the alleged breaches and the Respondent has produced the licence as evidence that the offence was no longer being committed from 28 October 2016, which the tribunal accepts.

16. This conclusion is also supported by paragraph 27 of *Parker v Waller* [2012] UKUT 301 (LC) which states:

"*Under section 63(8)(b) the RPT must be satisfied that the occupier paid rent during a period during which an offence under section 72(1) was being committed. An RRO may only be made in respect of rent paid during that period (see section 73(5)) and it is limited to the 12 months ending with the occupier's application to the RPT (see section 74(8)). It may not be made for any period after an application for an HMO licence under section 63 has been made (see section 73(1) and (2)).*

17. The evidence from the Respondent was that the Applicants paid a total of £29,396.18 rent during this period.

Amount of any RRO

18. As stated above, section 74(5) of the Act provides that the amount of the RRO is such amount as the tribunal considers reasonable in the circumstances. Section 74(6) sets out a number of matters which the tribunal must take into account, three can be dealt with shortly: there being no dispute as to the amount of rent received or the fact of the conviction and no evidence that the conduct of the Applicants was an issue, in a negative sense. That leaves three further matters (dealing with the Respondent's finances and conduct separately) which required consideration by the Tribunal.

19. Firstly, the total amount of relevant payments paid during *any period* during which an offence was being committed. It is common ground that the offence was committed from the start of the letting of the Property without the requisite licence, with 9 July 2015 being the earliest date two of the Applicants started to pay rent. Mr Dean stated that the income from the property during the relevant period was £257.46 per day. Assuming that this figure holds good for the entire period, that would mean an income for the Property of £122,808.42 from 9 July 2015 to 27 October 2016. For the avoidance of doubt, this is for the whole Property as opposed to the sums paid by the Applicants and is therefore probably more than simply the "relevant" payments. A reduction to reflect that 5 of the 7 Applicants issued the application would reduce this figure to £87,720.

20. Secondly, the conduct of the Respondent. The Applicants' evidence was that the Respondent was an unsatisfactory Landlord, mainly in respect

of its failure to ensure a sufficient supply of hot water but also due to the practice of visiting the Property unannounced to show rooms to prospective tenants and confusion in respect of which bathrooms were shared, which led to too many people using the bathroom on the second floor. The Respondent maintained that the Applicants appeared very happy with their accommodation, pointing out the renewal of their "licences to occupy" on several occasions. The Respondent also maintained that its failure to obtain a licence was due to a "misunderstanding", as opposed to a deliberate attempt to flout the law.

21. The Tribunal does consider the Respondent's conduct to be unsatisfactory. As *Parker v Waller* states at paragraph 26: "*A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.*" The evidence indicates that the Respondent made no real attempt to understand the relevant law, in respect of tenancy agreements or HMO licensing. As indicated in the background section above, the correspondence with Westminster contains several serious inaccuracies about the nature of the Applicant's role. Although its communications with the occupiers were professional in tone, the failure to clarify what bathroom facilities were available for shared use adversely affected the occupiers' enjoyment of the Property. The rent was substantial and the occupiers were entitled to receive accommodation commensurate with that sum. As a landlord the Respondent was liable to ensure that the system for heating and hot water was maintained in good repair and condition.

22. That leaves the financial circumstances of the Respondent as the final consideration under section 74. It was not actually clear what these are, although Mr Han gave evidence that the Respondent now had 20 employees, which Mr Deal did not dispute. It was also clear that the Respondent let a number of properties, this one being the first. The Respondent focused on showing that it had in fact made a loss from this particular letting, although a witness statement from Annika Ledskog, director, stated that numerous requests were made for a new tenancy agreement from their landlord, to no avail.

23. Mr Deal stated that the expectation in respect of the Property had been a profit in the region of £5,000 per month but in fact only some £800-850 was realised on the whole rent, a figure which should be reduced to take into account the fact that only 5 out of 7 occupiers sought an RRO. This figure also ignores the cost of the licence and the fine which would put the account in debit. Following *Parker v Waller* and *Fallon v Wilson* no RRO should be ordered.

24. Given the amount of the fine and the other findings in this case, the Tribunal considers that it would be inequitable to determine that as there was in effect no profit there should be no RRO. The facts of this case are very different to those in *Parker v Waller* and *Fallon v Wilson*. The Respondent had no reasonable excuse for failing to apply for a licence, a fact recognised by the substantial fine of £10,000. It cannot

be reasonable that in cases where the conduct of the landlord is so serious as to merit a substantial fine, the occupiers are less likely to obtain an RRO. In any event, simple application of a "profit" calculation ignores the matters the tribunal "must" take into account under section 74(6).

25. In all the circumstances of this particular case the Tribunal therefore determines that a reasonable amount is £5,800. This is based on one month's rent paid by the Applicants during the relevant period as stated by the Respondent and in the view of the Tribunal produces a reasonable compromise between the actual profit and the factors set out in section 74, together with the substantial fine. Dividing this amount by the percentage paid during the relevant period produces the following amounts payable to each applicant:

Mr Han	27%	£1,566
Mr Black	18%	£1,044
Mr Rauf	25%	£1,450
Ms Alberta and Mr Zaberman	7%	£ 406
Ms Varunsenjeva	23%	£1,334

26. Finally, the Tribunal also orders the Respondent to reimburse the application and hearing fees paid by the Applicant (Ms Varusenjeva) of £700.

Name: Ruth Wayte **Date:** 12 October 2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Annex: Housing Act 2004

S.73 Other consequences of operating unlicensed HMOs: rent repayment orders

(1) For the purposes of this section an HMO is an 'unlicensed HMO' if –

(a) it is required to be licensed under this Part but is not so licensed, and

(b) neither of the conditions in subsection (2) is satisfied.

(2) The conditions are–

(a) that a notification has been duly given in respect of the HMO under section 62(1) and that notification is still effective (as so defined by section 72(8));

(b) that an application for a licence has been duly made in respect of the HMO under section 63 and that application is still effective (as so defined).

(3) No rule of law relating to the validity or enforceability of contracts in circumstances involving illegality is to affect the validity or enforceability of–

(a) any provision requiring the payment of rent or the making of any other periodical payment in connection with any tenancy or licence of a part of an unlicensed HMO, or

(b) any other provision of such a tenancy or licence.

(4) But amounts paid in respect of rent or other periodical payments payable in connection with such a tenancy or licence may be recovered in accordance with subsection (5) and section 74.

(5) If–

(a) an application in respect of an HMO is made to a residential property tribunal by the local housing authority or an occupier of a part of the HMO, and

(b) the tribunal is satisfied as to the matters mentioned in subsection (6) or (8),

The tribunal may make an order (a 'rent repayment order') requiring the appropriate person to pay to the applicant such amount in respect of the housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 74(2) to (8)).

(6) If the application is made by the local housing authority, the tribunal must be satisfied as to the following matters–

(a) that, at any time within the period of 12 months ending with the date of the notice of intended proceedings required by subsection (7), the appropriate person has committed an offence under section 72(1) in relation to the HMO (whether or not he has been charged or convicted),

(b) that housing benefit has been paid (to any person) in respect of periodical payments payable in connection with the occupation of a part or parts of the HMO during any period during which it appears to the tribunal that such offence was being committed, and

(c) that the requirements of subsection (7) have been complied with in relation to the application.

(7) Those requirements are as follows–

(a) the authority must have served on the appropriate person a notice (a 'notice of intended proceedings')–

(i) informing him that the authority are proposing to make an application under subsection (5),

(ii) setting out the reasons why they propose to do so,

(iii) stating the amount that they will seek to recover under that subsection and how that amount is calculated, and

(iv) inviting him to make representations to them within a period specified in the notice of not less than 28 days;

(b) that period must have expired; and

(c) the authority must have considered any representations made to them within that period by the appropriate person.

(8) If the application is made by an occupier of a part of the HMO, the tribunal must be satisfied as to the following matters –

(a) that the appropriate person has been convicted of an offence under section 72(1) in relation to the HMO, or has been required by a rent repayment order to make a payment in respect of housing benefit paid in connection with occupation of a part or parts of the HMO.

(b) that the occupier paid, to a person having control of or managing the HMO, periodical payments in respect of occupation of part of the HMO during any period during which it appears to the tribunal

that such an offence was being committed in relation to the HMO, and

(c) that the application is made within the period of 12 months beginning with –

(i) the date of the conviction or order, or

(ii) if such a conviction was followed by such an order (or vice versa), the date of the later of them.

(9) Where a local housing authority serve a notice of intended proceedings on any person under this section, they must ensure–

(a) that a copy of the notice is received by the department of the authority responsible for administering the housing benefit to which the proceedings would relate; and

(b) that the department is subsequently kept informed of any matters relating to the proceedings that are likely to be of interest to it in connection with the administration of housing benefit.

(10) In this section–

'the appropriate person', in relation to any payment of housing benefit or periodical payment payable in connection with occupation of a part of an HMO, means the person who at the time of the payment was entitled to receive on his own account periodical payments payable in connection with such occupations;

'housing benefit' means housing benefit provided by virtue of a scheme under section 123 of the Social Security Contributions and Benefits Act 1992 (c4);

'occupier', in relation to any periodical payment, means a person who was an occupier at the time of the payment, whether under a tenancy or licence or otherwise (and 'occupation' has a corresponding meaning);

'periodical payments' means periodical payments in respect of which housing benefit may be paid by virtue of regulation 10 of the Housing Benefit (General) Regulations 1987 (SI 1987/1971) or any corresponding provision replacing that regulation.

(11) For the purposes of this section an amount which–

(a) is not actually paid by an occupier but is used by him to discharge the whole or part of his liability in respect of a periodical payment (for example, by offsetting the amount against any such liability), and

(b) is not an amount of housing benefit,

is to be regarded as an amount paid by the occupier in respect of that periodical payment.

S.74 Further provision about rent repayment orders

(1) This section applies in relation to rent repayment orders made by residential property tribunals under section 73(5).

(2) Where, on an application by the local housing authority, the tribunal is satisfied–

(a) that a person has been convicted of an offence under section 72(1) in relation to the HMO, and

(b) that housing benefit was paid (whether or not to the appropriate person) in respect of periodical payments payable in connection with occupation of a part or parts of the HMO during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO,

the tribunal must make a rent repayment order requiring the appropriate person to pay to the authority an amount equal to the total amount of housing benefit paid as mentioned in paragraph (b).

This is subject to subsections (3), (4) and (8).

(3) If the total of the amounts received by the appropriate person in respect of periodical payments payable as mentioned in paragraph (b) of subsection (2) ('the rent total') is less than the total amount of housing benefit paid as mentioned in that paragraph, the amount required to be paid by virtue of a rent repayment order made in accordance with that subsection is limited to the rent total.

(4) A rent repayment order made in accordance with subsection (2) may not require the payment of any amount which the tribunal is satisfied that, by reason of any exceptional circumstances, it would be unreasonable for that person to be required to pay.

(5) In a case where subsection (2) does not apply, the amount required to be paid by virtue of a rent repayment order under section 73(5) is to be such amount as the tribunal considers reasonable in the circumstances.

This is subject to subsections (6) to (8)

(6) In such a case the tribunal must, in particular, take into account the following matters –

(a) the total amount of relevant payments paid in connection with occupation of the HMO during any period during which it appears to the tribunal that an offence was being committed by the appropriate person in relation to the HMO under section 72(1);

(b) the extent to which that total amount –

(i) consisted of, or derived from, payments of housing benefit, and

(ii) was actually received by the appropriate person;

(c) whether the appropriate person has at any time been convicted of an offence under section 72(1) in relation to the HMO;

(d) the conduct and financial circumstances of the appropriate person; and

(e) where the application is made by an occupier, the conduct of the occupier.

(7) In subsection (6) 'relevant payments' means –

(a) in relation to an application by a local housing authority, payments of housing benefit or periodical payments payable by occupiers;

(b) in relation to an application by an occupier, periodical payments payable by the occupier, less any amount of housing benefit payable in respect of occupation of the part of the HMO occupied by him during the period in question.

(8) A rent repayment order may not require the payment of any amount which–

(a) (where the application is made by a local housing authority) is in respect of any time falling outside the period of 12 months mentioned in section 73(6)(a); or

(b) (where the application is made by an occupier) is in respect of any time falling outside the period of 12 months ending with the date of the occupier's application under section 73(5);

and the period to be taken into account under subsection (6)(a) above is restricted accordingly.

(9) Any amount payable to a local housing authority under a rent repayment order–

(a) does not, when recovered by the authority, constitute an amount of housing benefit recovered by them, and

(b) until recovered by them, is a legal charge on the HMO which is a local land charge.

(10) For the purpose of enforcing that charge the authority have the same powers and remedies under the Law of Property Act 1925 (c 20) and otherwise as if they were mortgagees by deed having powers of sale and lease, and of accepting surrenders of leases and of appointing a receiver.

(11) The power of appointing a receiver is exercisable at any time after the end of the period of one month beginning with the date on which the charge takes effect.

(12) If the authority subsequently grant a licence under this Part or Part 3 in respect of the HMO to the appropriate person or any person acting on his behalf, the conditions contained in the licence may include a condition requiring the licence holder –

(a) to pay to the authority any amount payable to them under the rent repayment order and not so far recovered by them; and

(b) to do so in such instalments as are specified in the licence.

(13) If the authority subsequently make a management order under Chapter 1 of Part 4 in respect of the HMO, the order may contain such provisions as the authority consider appropriate for the recovery of any amount payable to them under the rent repayment order and not so far recovered by them.

(14) Any amount payable to an occupier by virtue of a rent repayment order is recoverable by the occupier as a debt due to him from the appropriate person.

(15) The appropriate national authority may by regulations make such provision as it considers appropriate for supplementing the provisions of this section and section 73, and in particular –

(a) for securing that persons are not unfairly prejudiced by rent repayment orders (whether in cases where there have been over-payments of housing benefit or otherwise);

(b) for requiring or authorising amounts received by local housing authorities by virtue of rent repayment orders to be dealt with in such manner as is specified in the regulations.

(16) Section 73(10) and (11) apply for the purposes of this section as they apply for the purposes of section 73."