FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/43UD/HMF/2020/0033
Property:	1 The Ridges, Guildford, Surrey GU3 1LH
Applicants:	William Davis Adele Edwards Mark Wiselka Owen Stoneman Michael Arrow
Representative:	In Person
Respondent:	Ian Wilson
Representative:	In Person
Type of Application:	For Rent Repayment Orders Sections 40, 41, 42, 43 and 45 of the Housing Act 2004 ("the Act")
Tribunal Members:	Judge A Cresswell Mr B Bourne MRICS
Date and venue of Hearing:	9 February 2021 by Video
Date of Decision:	11 February 2021

DECISION

The Application

1. The Respondent is the owner of the Property, which was let to multiple tenants.

2. He was required to have an HMO licence for the Property but did not do so.

3. The Applicants have applied on 11 November 2020 for a rent repayment order ("RRO") under section 41 of the Housing and Planning Act 2016 ("the Act").

Summary Decision

4. The Respondent is ordered to repay to the Applicants the following amounts:

Tenant	**Rent**	**RRO amount**
Davies	£1,758.87	**Nil**
Edwards	£7,200	**£6,075.59**
Wiselka	£7,200	**£6,075.59**
Stoneman	£6,720	**£5,688.60**
Arrow	£1,750	**£1,489.87**

Directions

5. Directions were issued on 8 December 2020. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.

6. This determination is made in the light of the documentation submitted in response to those directions and the evidence and submissions made at the hearing. Evidence was given to the hearing by the Applicants and by the Respondent. At the end of the hearing, the parties told the Tribunal that they had nothing further to add.

The Law

7. Section 41 of the Housing and Planning Act 2016 provides that a tenant may apply to the First-tier Tribunal (FtT) for a RRO against a landlord who has committed an offence to which the 2016 Act applies. The 2016 Act applies to an offence committed under section 72(1) of the Housing Act 2004 (section 40(3) of the 2016 Act).

8. Section 43 provides that the FtT may make a RRO if satisfied, beyond reasonable doubt, that the landlord has committed an offence to which the 2016 Act applies.

9. Section 44 of the 2016 Act provides for how the RRO is to be calculated. In relation to an offence under section 72(1) the period to which a RRO relates is a period, not exceeding 12 months, during which the landlord was committing the offence. The amount that the landlord may be required to pay in respect of

a period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period (Section 44(3)).

10. By section 44(4) in determining the amount, the Tribunal had 'in particular' to take account of the following factors: (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.
The use of the words 'in particular' suggests that these are not the only considerations the tribunal is to take into account.

11. ***Mohamed and Lahrie v London Borough of Waltham Forest*** (2020) EWHC 1083 (Admin): 39. "In practical terms it was common ground that in order to prove the offence under section 72(1) of the 2004 Act the prosecution will need to make the relevant tribunal sure that: (1) the relevant defendant had control of or managed, as defined in section 263 of the 2004 Act; (2) a HMO which was required to be licensed, pursuant to sections 55 and 61 of the 2004 Act; and (3) it was not so licensed."
48. "For all these reasons we find that the prosecution is not required to prove that the relevant defendant knew that he had control of or managed a property which was a HMO, which therefore was required to be licensed. As noted above the absence of such knowledge may be relevant to the defence of reasonable excuse."

12. ***Thurrock Council v Daoudi*** [2020] UKUT 209 (LC), ***I R Management Services Limited v Salford Council*** *[2020] UKUT 81(LC)* and ***Nicholas Sutton (1) Faiths' Lane Apartments Limited (in administration) (2) v Norwich City Council*** *[2020] UKUT 90(LC)* which dealt with the question of reasonable excuse as a defence to the imposition of financial penalties under section 249A of the Housing Act 2004. The decisions have equal application to the corresponding situation under RROs when the defence of reasonable excuse is pleaded. The principles applied by the above authorities:

a) The proper construction of section 72(1) of the 2004 Act is clear. There is no justification for ignoring the separation of the elements of the Offence and the defence of reasonable excuse under section 95(4).

b) The offence of failing to comply with section 72(1) is one of strict liability subject only to the statutory defence of reasonable excuse.

c) The elements of the offence are set out comprehensively in section 72(1). Those elements do not refer to the absence of reasonable excuse which therefore does not form an ingredient of the offence, and is not one of the matters which must be established by the Tenant.

d) The burden of proving a reasonable excuse falls on the Landlord, and that it need only be established on the balance of probabilities.

e) The burden does not place excessive difficulties on the Landlord to establish a reasonable excuse. In this case the Landlord relied on the fact that he did not know the property required to be licensed. Only

the Landlord can give evidence of his state of knowledge at the time. The Tenant, on the other hand, has no means of knowing the state of knowledge of the Landlord. It is very difficult for the Tenant to disprove a negative.

f) Whether an excuse is reasonable or not is an objective question for the Tribunal to decide. Lack of knowledge or belief could be a relevant factor for a Tribunal to consider whether the Landlord had a reasonable excuse for the offence of no licence. If lack of knowledge is relied on it must be an honest belief (subjective test). Additionally, there have to be reasonable grounds for the holding of that belief (objective).

g) In order for lack of knowledge to constitute a reasonable excuse as a defence to the offence of having no licence, it must refer to the facts which caused the property to be licensed under section 72(1) of the Act. Ignorance of the law does not constitute a reasonable excuse.

h) Where the Landlord is unrepresented the Tribunal should consider the defence of reasonable excuse even if it is not specifically raised.

39. ***Babu Rathinapandi Vadamalayan v Elizabeth Stewart & Others*** [2020] UKUT 183 (LC): The Upper Tribunal clarified the correct approach to the calculation of a rent repayment order under the Housing and Planning Act 2016 s.44 where a landlord did not hold a licence to manage a house in multiple occupation. The obvious starting point was the rent for the relevant period of up to 12 months. The rent repayment order was no longer tempered by a requirement of reasonableness, as it had been under the Housing Act 2004. It was not possible to find any support in s.44 of the 2016 Act for limiting the rent repayment order to the landlord's profits; that principle should no longer be applied, *Parker v Waller [2012] UKUT 301 (LC), [2013] J.P.L. 568, [2012] 11 WLUK 747* and *Fallon v Wilson [2014] UKUT 300 (LC), [2014] 7 WLUK 37* not followed. That meant that it was not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord had spent on the property during the relevant period. That expenditure would have enhanced the landlord's own property and enabled him to charge rent for it. Much of the expenditure would have been incurred in meeting the landlord's obligations under the lease; there was no reason why the landlord's costs in meeting his obligations should be set off against the cost of complying with a rent repayment order. The only basis for deduction was s.44 itself. There might be cases where the landlord's good conduct or financial hardship justified an order of less than the maximum. In addition, there might be a case for deduction where the landlord paid for utilities, as those services were provided to the tenant by third parties and consumed at a rate chosen by the tenant. In paying for utilities the landlord was not maintaining or enhancing his own property. Fines or financial penalties should not be deducted, given Parliament's obvious intention that the landlord should be liable both (a) to pay a fine or civil penalty and (b) to make a repayment of rent (see paras 12-19 of judgment).

40. Following **Vadamalayan**, the proper approach is to start with the maximum amount, then decide what weight to be given to the findings in relation the factors identified in section 44 and what deductions if any should be made to

the maximum amount. The preferred approach is to express the final order in terms of a percentage of the maximum amount.

Agreed History

41. The Tribunal first records the relevant history specifically agreed by the parties or where there is no challenge made to the case stated by the Applicant.

42. The Respondent is the owner of the property. He managed the property throughout the relevant period.

43. The property was occupied under a tenancy by 5 adults for the period 1 October 2018 to 20 November 2019, the relevant period.

44. An HMO licence was required from 1 October 2018 by reason of The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018.

45. There was no licence for the property during the period 1 October 2018 to 20 November 2019, during which period 5 tenants were in occupation. The Respondent accepts that he had no HMO licence during the relevant period.

46. After making his application, the Respondent was told by the Council that a licence would be conditional upon safety works being completed, broadly being the fitting of fire doors and an integrated fire warning system.

47. The Respondent was granted an HMO licence on 3 September 2020; the face of the licence showed it to be backdated to 1 October 2018. The Council's online record of HMO licences shows the date of its grant as being 3 September 2020.

48. William Davis accepts that he did not pay rent during the relevant period and so cannot further pursue his application for a RRO. Michael Arrow accepts that he paid rent only for the period 10 August 2019 to 20 November 2019 inclusive and beyond.

49. The Respondent admits that £22,870 was paid in rent during the 12- month period preceding 20 November 2019 by all Applicants excepting William Davis, in the sums of £7,200 each for Ms Edwards and Mr Wiselka, £6,7230 for Mr Stoneman and £1,750 for Mr Arrow.

The Tribunal's Findings and Decision

50. The Tribunal is satisfied beyond a reasonable doubt that the Respondent was committing an offence under section 72(1) of the Act from 1 October 2018, up to 20 November 2019 when he applied for an HMO licence.

51. An offence under Section 72(1) is committed when the Respondent *is a person having control of or managing an HMO which is required to be licensed under RE: Unlicensed HMO Response Letter this Part (see section 61(1)) but is not so licensed.* It is a defence that, at the material time….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.

52. The Tribunal, accordingly, finds that the defence is available to the Respondent and was effective from his application for an HMO licence, made on 20 November 2019.

53. The Tribunal finds that the Respondent had no reasonable excuse for his failure to have an HMO licence from 1 October 2018. He argued that he did not know that he required a licence until he heard from the Council via its letter of 21 October 2019. He argued further that he should have been told earlier by the Council of the requirement because it was aware of the number of tenants from his responses to its requests for electoral roll information.

54. Mr Wiselka responded that not all of the tenants featured on the electoral roll and Ms Edwards queried whether it was the responsibility of the Council or the Respondent to licence the property. Of course, it is the Respondent who was responsible. Whatever the situation regarding the electoral roll, the responsibility lies squarely upon the Respondent. He told the Tribunal that he was a member of the Resident Landlord Association and that he only looks at their website if he needs to check whether there are updated tenancy agreements available to download. "*There were tenants there for a long time and there was no turnover. There was little point going to the website.*" Here then was a ready source of professional relevant advice available to the Respondent, to which he turned a blind eye. Accordingly, the Tribunal finds that he had no reasonable excuse for his failure to apply for an HMO licence.

55. The Respondent sought to argue that he could also take advantage of the backdating of the HMO licence as a further form of defence. Here, there was some confusion on the part of the Council in how it communicated the true position.

56. The Respondent told the Tribunal that a Mr Stuart Hamilton had told him that the licence was to be backdated to 1 October 2018. The Council's website shows the licence as being granted on 3 September 2020. Mr Sean Grady, the Council's Housing Standards Team Leader told Mr Davies in an email of 15 December 2020: *I can confirm that the property was unlicensed until the HMO application was received on 20.11.2019.*
The landlord avoided enforcement as application was received after our 2nd and final warning letter.
The date on the HMO licence (when issued) does not negate that the property was unlicensed until 20.11.2019. The landlord did respond to the letters and licensed the dwelling.
We will vary the current HMO licence to reflect the gap in licensing.

57. The Tribunal is aware that Councils do sometimes backdate HMO licences, but this is not to provide HMO operators with a defence to a RRO, but rather to penalise them by thereby reducing the length of the licence post application to take account of the obligation to have a licence from a date predating the application. It does not change the reality that the Respondent was required to have a licence from 1 October 2018, and committed the offence under Section 72(1) until he made his application on 20 November 2019.

58. The Respondent does not argue that the exemption in Sections 62 is applicable.

59. The Respondent argued that he was joint landlord of the property, but then agreed that he had been managing the property throughout the relevant period. At the outset of his evidence, he had told the Tribunal that he was the owner of the property, which had been his home before his marriage.

60. The Respondent has not sought to argue that he had financial hardship such that he could not meet the requirements of a RRO.

61. The Tribunal was not told of any circumstances of good conduct on the part of the Respondent. He did give evidence of various repairs and of having completed the fire safety works by November 2020, but the very requirement of those works reveal a less than safe environment for the 5 tenants.

62. The offence here was of a relatively short duration and caused by ignorance; the Respondent is, however, a professional landlord, albeit on a small scale.

63. The Tribunal was told by the Respondent that he had made various utility payments during the 12 month period preceding 20 November 2019, being £250.60 and £292.90 for water, £1254.95 for gas and electricity, £264 for broadband and £2,338.62 for Council Tax.

64. The Tribunal has weighed all of the relevant factors and concluded that the Respondent should make a full repayment of the monies paid in rent for the 12- month period minus the sums paid out by him for utilities, broadband and Council Tax.

65. Accordingly, and with a view to reaching as near a proper figure as possible and accepting a difference of some pence in a more finite calculation, the Tribunal approached the calculations in the following way. The total sum of rent paid by the remaining 4 Applicants during the 12- month period preceding 20 November 2019 is £22,870, contributed in the following very approximate proportions of 31.4% by Ms Edwards and Mr Wiselka, 29.4% by Mr Stoneman and 7.7% by Mr Arrow. From this sum, the Tribunal deducted 4/5ths of the monies paid by the Respondent for utilities and broadband and Council Tax (£3,520.86) leaving £19,349.14. The Tribunal then divided the remainder by the proportions in which the Applicants' rent payments represented the total of rent paid, leading to the approximate sums of £6,075.59, £6,075.59, £5,688.60 and £1,489.87.

66. The below table reveals the sums which the Tribunal orders the Respondent to repay to the Applicants by way of a RRO:

Tenant	**Rent**	**RRO amount**
Davies	£1,758.87	**Nil**
Edwards	£7,200	**£6,075.59**
Wiselka	£7,200	**£6,075.59**
Stoneman	£6,720	**£5,688.60**

Arrow	£1,750	**£1,489.87**

APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Schedule

Housing and Planning Act 2016

Section 40

(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).....

(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	Section1(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

The table described in s40(3) includes at row 5 an offence contrary to s72(1) of the Housing Act 2004 "control or management of unlicensed HMO" Section 72(1) provides: (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.

Section 41

(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

(1) The First-tier Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applied (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

Tenant

(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

The table provides that for an offence at row 5 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.

(3) The amount that the landlord may be required to pay 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.

72 Offences in relation to licensing of HMOs

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

(2) A person commits an offence if—

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

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

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

(3) A person commits an offence if—

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

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

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

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

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

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

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

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

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

(c) for failing to comply with the condition,

as the case may be.

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

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

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

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

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

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

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

(9) The conditions are—

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

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

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