FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2020/0189**
Property	**:**	**Flat 7, 1 Richard Street, London E1 2JP**
Applicants	**:**	**Theo Moore** **Jack Rudman** **Elliot Schneiderman**
Representative	**:**	**Justice for Tenants**
Respondents	**:**	**Jagtar Singh Aytan** **Sajjan Singh Aytan** **Nirmala Devi Aytan**
Type of Application	**:**	**Application for a rent repayment order by tenants**
Tribunal	**:**	**Judge Nicol** **Mr A Parkinson MRICS**
Date and Venue of Hearing	**:**	**27th May 2021;** **By video conference**
Date of Decision	**:**	**17th June 2021**

DECISION

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1) **The Respondent shall pay to the Applicants a Rent Repayment Order in the sum of £31,200.**

2) **The Respondent shall further reimburse the Applicants their Tribunal fees totalling £300.**

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

Reasons

1. The Respondents are the joint freehold owners of subject property at Flat 7, 1 Richard Street, London E1 2JP, a 3-bedroom flat. They purchased the building in 1997. They later obtained planning permission and completed the re-development, including the residential upper floors, in January 2019. They accept that:

   (a) The Applicants were joint tenants of the property pursuant to a tenancy agreement made on 15th March 2019;
   (b) The rent due under the tenancy was £2,600 per month, payable on the 15th of each month, and it was paid for the full 12 months as claimed;
   (c) The property is within an area made subject to additional licensing by the London Borough of Tower Hamlets ("the Council") with effect from 1st April 2019;
   (d) At the date the additional licensing designation came into force, the property was occupied by the Applicants pursuant to the aforementioned tenancy and they continued to occupy the property as their only or main residence; and
   (e) The Applicants did not form a single household for the purposes of section 258 of the Housing Act 2004 ("the 2004 Act").

2. The Applicants seek a rent repayment order against the Respondents in accordance with the Housing and Planning Act 2016 ("the 2016 Act").

3. The matter was heard on 27th May 2021 by remote video conference. The attendees were:

   - The Applicants;
   - Mr Alasdair McClenahan from Justice for Tenants, representing the Applicants;
   - The First Respondent, Mr Jagtar Aytan; and
   - Mr Nigel Woodhouse, counsel for the Respondents.

4. Each of the Applicants and the First Respondent had given witness statements on which the First Applicant and the First Respondent were cross-examined.

5. The documents available to the Tribunal consisted of the following in electronic form:

   - A bundle compiled by Justice for Tenants;
   - A bundle compiled on behalf of the Respondent;
   - A smaller reply bundle, also compiled by Justice for Tenants; and
   - Mr Woodhouse's skeleton argument and authorities.

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 have alleged that the Respondents are

guilty of having control of or managing an HMO (House in Multiple Occupation) 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 Respondents assert they have a defence of reasonable excuse under section 72(5) in the light of the following matters:

(a) The Respondents appointed Net Lettings Ltd to act as their agent for the letting of the Property;
(b) Net Lettings was, so far as the Respondents were aware, a reputable lettings agent;
(c) Net Lettings acted for the Respondents on the grant of the Tenancy;
(d) The Tenancy was granted before the Additional Licensing Designation came into force;
(e) The Respondents were not aware of the Additional Licensing Designation at the time the Tenancy was granted and were not informed by Net Lettings of the Additional Licensing Designation or the requirement for a licence for the Property;
(f) The Tenancy specifically provides by clause 7.11.1 that the Tenant shall not "use the Premises for any other purpose than that of a strictly private residence in single occupation";
(g) The Respondents first became aware that the Property required a licence under the Additional Licensing Designation when they received a letter from the Applicants' representative, Justice For Tenants, dated 22nd September 2020;
(h) The Respondents applied for a licence for the Property on 14th October 2020.

8. If a defendant did not know that there was an HMO which was required to be licensed, that would be relevant to the defence of reasonable excuse: *R (Mohamed & Lahrie) v LB Waltham Forest* [2020] EWHC 1083 (Admin); [2020] 1 WLR 2929 at paragraph 44.

9. However, the only matter of which the Respondents claim to be ignorant is the Council's additional licensing scheme. According to the First Respondent's evidence, Net Lettings showed them the tenancy agreement so the Respondents knew that the property was to be used as a house in multiple occupation for 3 people, despite the aforementioned terms of clause 7.11.1.

10. The Respondents claim that neither they nor Net Lettings were consulted ahead of the adoption of the additional licensing scheme in accordance with the requirements on the Council under the 2004 Act and that this explains their ignorance. However, Mr Woodhouse conceded that there was no evidence that the Council had failed to comply with their obligations to publicise the scheme (see reg.9 of the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006) and should be assumed to have complied.

11. The additional licensing designation was made on 31st October 2018 (as noted in the Respondents' statement of case), 5 months before it came into force. A professional landlord and their agents would be expected to keep abreast of such matters through mailing lists, newspapers, specialist publications and other contacts (see *Chan v Bilkhu* [2020] UKUT 289 (LC) at paragraph 25). Therefore, the Respondents would be expected to have processes in place to keep themselves informed.

12. The Respondents rely on the fact that they carried out due diligence before using Net Lettings. However, they have not disclosed their agreement with Net Lettings and, therefore, there is no means for the Tribunal to judge the extent of their mutual obligations, let alone whether Net Lettings were required to address licensing matters or keep the Respondents informed of them. Even if there is such a contractual obligation, that is merely the basis for apportioning legal responsibility between them – it cannot relieve the Respondents of their own legal responsibility to ensure their properties comply with any relevant licensing requirements.

13. The Respondent's ignorance in this case does not amount to a reasonable excuse. Therefore, the Tribunal is satisfied that the Respondents have no defence to the charge that they committed the offence of failing to licence this HMO.

Rent Repayment Order

14. 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 RRO provisions were considered by the Upper Tribunal (Lands Chamber) in *Parker v Waller* [2012] UKUT 301 (LC). Amongst other matters, it was held that an RRO is a penal sum, not compensation.

15. The law has changed since *Parker v Waller* and was considered in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC) where Judge Cooke said:

> 9. In *Parker v Waller* … the President (George Bartlett QC) had to consider the provisions of sections 73 and 74 of the 2004 Act, which gave the FTT jurisdiction to make rent repayment orders; but they have been repealed so far as England is concerned and now apply only in Wales.
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> 10. Section 74(5) of the 2004 Act provided that a rent repayment order in favour of an occupier had to be "such amount as the tribunal considers reasonable in the circumstances". … With regard to orders made in favour of an occupier, therefore, he said at paragraph 26(iii):
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> > "There is no presumption that the RRO should be for the total amount received by the landlord during the relevant period unless there are good reasons why it should not be.

> The RPT must take an overall view of the circumstances in determining what amount would be reasonable."

11. But the statutory wording on which that paragraph is based is absent from the 2016 Act. There is no requirement that a payment in favour of the tenant should be reasonable. … Paragraph 26(iii) of *Parker v Waller* is not relevant to the provisions of the 2016 Act; nor is the decision in *Fallon v Wilson* [2014] UKUT 0300 (LC) insofar as it followed that paragraph.

12. That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent.

13. In *Parker v Waller* the President set aside the decision of the FTT and re-made it. In doing so he considered a number of sums that the landlord wanted to be deducted from the rent in calculating the payment. The President said at paragraph 42:

> I consider that it would not be appropriate to impose upon [the landlord] an RRO amount that exceeded his profit in the relevant period.

14. It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament's intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord's profits was – as the President acknowledged at his paragraph 26 – not the only purpose of a rent repayment order even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied.

15. That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord has spent on the property during the relevant period. That expenditure will have repaired or enhanced the landlord's own property, and will have enabled him to charge a rent for it. Much of the expenditure will have been incurred in meeting the landlord's obligations under the lease. The tenants will typically be entitled to have the structure of the property kept in repair and to have the property kept free of damp and pests. Often the tenancy will include a fridge, a cooker and so on. There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order.

19. The only basis for deduction is section 44 itself and there will certainly be cases where the landlord's good conduct, or

financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence.

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. …

16. On the basis of the decision in *Vadamalayan*, when the Tribunal has the power to make an RRO, it should be calculated by starting with the total rent paid by the tenant within time period allowed under section 44(2) of the 2016 Act, from which the only deductions should be those permitted under section 44(3) and (4).

17. In *Ficcara v James* [2021] UKUT 38 (LC) the Upper Tribunal judge, Martin Rodger QC, expressed concerns (at paragraphs 49-51) whether it is correct to use the full amount of rent paid as the "starting point". However, he said that this issue is a matter for a later appeal. In the meantime, the Tribunal must follow the guidance in *Vadamalayan*.

18. In *Awad v Hooley* [2021] UKUT 0055 (LC) Judge Cooke also expressed concerns (at paragraph 40) that using the total rent as the starting point means it cannot go up, however badly a landlord behaves, thereby limiting the effect of section 44(3). However, with all due respect, this stretches too far the analogy between RROs on the one hand and criminal penalties or fines on the other.

19. Levels of fines in each case 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. However, an RRO is penal but not a fine. The maximum RRO is set by the rent the tenant happened to pay, not by the gravity of the offence. 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.

20. 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, as happened in *Awad v Hooley* when the tenant withheld their rent, and that is how section 44(3) finds expression.

21. As to the Respondents' conduct, it is a not uncommon assertion that the conditions at the property were good so that the tenants did not suffer significantly by the lack of a licence. The Respondents relied in particular on the fact that the rooms appeared to exceed the Council's minimum room sizes for an HMO and that gas safety and the operation of the smoke alarms were successfully checked. However, compliance with the licensing regime is an important objective in itself, quite apart from the conditions or the standards of management. By not having the property licensed, the Respondents deprived their tenants of the protections of the HMO regime. Those protections are like insurance – the fact that they are never called upon does not mean they aren't essential.

22. The Respondents pointed out that they had recently completed their construction of the building and it complied with the latest building regulations. However, they wouldn't have received the necessary approval if that were not the case. The Respondents cannot expect much credit for something they are legally required to do anyway. Further, while there is some overlap, compliance with building regulations does not in any way imply compliance with HMO standards. It can't be assumed that, because the building is new, it is compliant or even substantially compliant.

23. The Applicants put forward two matters to support their case:

    (a) The Applicants' bundle contained reports on the private rented sector and the impact of housing on mental health. While these were interesting, they were not helpful in reaching a decision. The statutory regime for HMOs already incorporates any policy considerations as to improving the lot of tenants in the private sector. The Tribunal has no power to take such matters into account so as to make any penalties harsher than otherwise indicated.

    (b) The Applicants asserted that the building was not quite finished when their tenancy started. They claimed the lift was broken, the property needed cleaning, the staircase needed painting and there were various loose cables around the building. Some of these issues took some time to be resolved. There was also no communal refuse disposal area accessible to the Applicants for many months. However, these matters were not sufficiently significant to impact on the calculation of the RRO.

24. As to the Respondents' financial circumstances, they pointed to the fact that an RRO would deprive them of significant funds that they use towards payment of the substantial mortgage instalments on the building. In calculating the RRO, the Tribunal will have in mind a figure having gone through the other matters relevant to that determination. The role of the landlord's financial circumstances is to

persuade the Tribunal to reduce the amount of the RRO which would otherwise be awarded. This is a matter of whether the landlord is able to pay or whether the consequences of requiring payment of a certain amount are disproportionate. For example, if the amount of an RRO would be sufficiently large that the landlord would be unable to muster the resources to pay it without going out of business or, say, making staff redundant, these would be good grounds for reducing the amount which would otherwise be payable.

25. However, the Respondents make no such claims. The payment of an RRO may well be painful but, as a penal sum, it is supposed to be. The Applicants have pointed out that the Respondents hold a number of directorships of other companies so there is no reason to think that this particular building is either their sole or main source of income. There is no evidence that the Respondent cannot pay the sums under consideration and so there is no basis for reducing the amount of the RRO to take account of their current financial circumstances.

26. The Tribunal accepts the Applicant's claim that the RRO should be calculated by reference to the rent for a full 12 months which totals £31,200 (12 x £2,600). This is to be divided equally between the Applicants. For the above reasons, there is no basis on which to reduce these amounts.

27. The Applicants also sought reimbursement of their Tribunal fees, £100 for the application and £200 for the hearing, under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Given the fact that the application has been successful, and in the light of all the circumstances of this case, the Tribunal has concluded that it is appropriate to order reimbursement.

Name: Judge Nicol **Date:** 17th June 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).

263 Meaning of "person having control" and "person managing" etc.

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

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–

(a) receives (whether directly or through an agent or trustee) rents or other payments from–

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(3) A reference to *"an offence to which this Chapter applies"* is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

	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 46 Amount of order following conviction

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2) Condition 1 is that the order—

(a) is made against a landlord who has been convicted of the offence, or
(b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.

(3) Condition 2 is that the order is made—

(a) in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or
(b) in favour of a local housing authority.

(4) For the purposes of subsection (2)(b) there is "no prospect of appeal", in relation to a penalty, when the period for appealing the penalty has expired and any appeal has been finally determined or withdrawn.

(5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable to require the landlord to pay.