FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2021/0176**
Property	**:**	**Flat 47 Harriot House, Jamaica Street, London E1 3DT**
Applicants	**:**	**Camilla Randaccio Aldo de Luca Filippo Ceccanibbi**
Representative	**:**	**Represent Law Ltd**
Respondents	**:**	**Abdul Subhan Khan Bright Knights Ltd**
Type of Application	**:**	**Application for a rent repayment order by tenants**
Tribunal	**:**	**Judge Nicol Mrs L Crane MCIEH**
Date and Venue of Hearing	**:**	**26th January 2022; By remote video conference**
Date of Decision	**:**	**27th January 2022**

DECISION

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1) **The First Respondent shall pay Rent Repayment Orders in the following amounts:**
   - **First Applicant £7,970**
   - **Second Applicant £6,900**
   - **Third Applicant £3,736**
2) **The First Respondent shall further reimburse the Applicant his Tribunal fees totalling £300.**
3) **The application against the Second Respondent is dismissed.**

Directions for determination of costs under rule 13(1)(b)

4) The Applicants shall, by 11th February 2022, email to the Tribunal and to the First Respondent any submissions as to why the Tribunal should make an order for costs.

5) The First Respondent shall, by 25th February 2022, email to the Tribunal and to the Applicants any submissions in response to those of the Applicants on costs.

6) The Tribunal will as soon as possible thereafter determine the issue of costs on the documents provided.

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

Reasons

1. The Applicants were tenants at the subject property at Flat 47 Harriott House, Jamaica Street, London E1 3DT, a 4-bedroom flat with shared bathroom/toilet and kitchen facilities, for the following periods:

   - First Applicant 1st July 2019-9th October 2020
   - Second Applicant 1st September 2019-16th October 2020
   - Third Applicant 15th February-27th October 2020

2. There were other occupants of the fourth room but they took no part in this application.

3. The First Respondent is the leaseholder of the property. It used to be his family home. He suffers from ill-health (anxiety, depression, high blood pressure, sciatica, Type 2 diabetes and high cholesterol) and so entrusted the management of the property to his son-in-law who, in turn, appointed the Second Respondent as managing agents.

4. The Applicants seek rent repayment orders against the First Respondent or, alternatively, the Second Respondent in accordance with the Housing and Planning Act 2016 ("the 2016 Act").

5. There was a remote video hearing of the application at the Tribunal on 26th January 2022. The attendees were:

   - The Applicants, sharing a screen;
   - Ms Antonia Halker, counsel for the Applicants;
   - The First Respondent;
   - The First Respondent's brother, also Abdul Subhan Khan, who spoke on his behalf; and
   - The First Respondent's son, Abdul Hasath Khan.

6. The Second Respondent has taken no part in the proceedings and did not attend the hearing.

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

- A bundle of 169 pages compiled by Represent Law Ltd on behalf of the Applicants;
- A bundle of 62 pages compiled by and on behalf of the First Respondent;
- A Skeleton Argument and a bundle of authorities from Ms Halker.

8. All 3 Applicants and the First Respondent had provided witness statements and were subject to cross-examination. The First Respondent's English is limited but the Tribunal were satisfied that he was able to understand the questions put to him, sometimes with rephrasing, and to articulate his responses.

The offence

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

10. The Second Respondent's name is on each of the Applicant's tenancies as the landlord. However, the First Respondent is clear in his evidence that they were only ever employed as his agents. There is no written contract, let alone any grant to the Second Respondent of any interest in the property. In the circumstances, the Tribunal is satisfied that the Second Respondent signed each tenancy as mere agents of the actual landlord, the First Respondent.

11. While the offence under section 72(1) may be committed by agents, RROs may only be made against landlords. Even if the Second Respondent is guilty of the offence, the Tribunal cannot make an RRO against them and so there is no point in making a finding on their guilt in these proceedings. It would also be arguably unfair to do so in their absence.

12. It was the Applicants' primary case that the First Respondent was the correct Respondent. They only included the Second Respondent in the application in case, contrary to their primary case, they were found to be the landlord as the tenancy agreements purported to indicate. In the circumstances, the Tribunal decided it was appropriate to dismiss the application as against the Second Respondent.

13. While the First Respondent was aware that his property was being let, he was unaware at the time of who the tenants were or how many of them were in occupation. Having seen the Applicants' evidence, he now accepts the tenancies and the Applicants' occupation of the property during the periods claimed.

14. The First Respondent has pointed out, and the Applicants accepted, that an application for an HMO licence was made on his behalf on 9th November 2020, from which date he would have had a defence under section 72(4)(b). However, that is irrelevant in these proceedings as all the Applicants had left the property by that date. The First Respondent said that the property is currently let to a single family.

15. The evidence clearly shows that the local authority, the London Borough of Tower Hamlets, has an additional licensing scheme which applied in this area at all relevant times. The only question is whether there were 3 occupants in the property, as required for the scheme to apply, at all relevant times. The Applicants' evidence, which the Tribunal accepts, is that:

- The First Applicant moved in on 1st July 2019, at which time only one other room was occupied, by a friend.
- A few days later, a couple, known to the Applicants as Itaziar Blanco and Youseff, moved into one of the empty rooms. They were still there when the Applicants all left in October 2020.
- Shortly after, the First Applicant's friend was replaced by the Second Applicant.
- The last room was empty before the Third Applicant moved in other than a period of 2 months when someone else occupied that room.

16. This means that, apart from a few days in July 2019, the property had at least 3 occupants until all the Applicants had left. Therefore, it should have been licensed under Tower Hamlets's additional licensing scheme.

17. The Tribunal is satisfied so that it is sure that the required elements of the offence of having control of an HMO which is required to be licensed but is not so licensed have been made out.

18. The First Respondent made submissions in writing and through his brother at the hearing to the effect that there were mitigating circumstances to his offence such that the amount of any RRO should be reduced. He did not specifically raise the defence of reasonable excuse under section 72(5) of the Housing Act 2004 and the Tribunal is satisfied that the matters he raised do not amount to a reasonable excuse. The mitigating circumstances are addressed as such further below.

Rent Repayment Order

19. For the above reasons, the Tribunal is satisfied that it has the power under section 43(1) of the Housing and Planning Act 2016 to make Rent Repayment Orders on this application. The Tribunal has a discretion not to exercise that power. However, as confirmed in *LB Newham v Harris* [2017] UKUT 264 (LC), it will be a very rare case where the Tribunal does so. This is not one of those very rare cases. The Tribunal cannot see any grounds for exercising their discretion not to make a RRO.

20. 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.

21. 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."
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> 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 …
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> 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.
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> 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:
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> > I consider that it would not be appropriate to impose upon [the landlord] an RRO amount that exceeded his profit in the relevant period.
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> 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.

16. … the practice of deducting all the landlord's costs in calculating the amount of the rent repayment order should cease.

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. …

22. On the basis of the decision in *Vadamalayan*, when the Tribunal has the power to make a 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 deductions are permitted under section 44(3) and (4) – the Tribunal must take into account the conduct of the parties, the landlord's financial circumstances and whether the landlord has been convicted of a relevant offence (the First Respondent has not been convicted of any such offence).

23. In *Williams v Parmar* [2021] UKUT 0244 (LC) the Upper Tribunal held that there was no presumption in favour of awarding the maximum amount of an RRO. The tribunal could, in an appropriate case, order a lower than maximum amount of rent repayment, if the landlord's offence

was relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the tribunal should take into account the purposes intended to be served by the jurisdiction to make an RRO, namely to punish offending landlords; deter landlords from further offences; dissuade other landlords from breaching the law; and removing from landlords the financial benefit of offending.

24. In *Awad v Hooley* [2021] UKUT 0055 (LC) Judge Cooke 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.

25. 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.

26. 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) may find expression.

27. The maximum amounts of the RROs in this case are:

    a. First Applicant £7,970, being 12 months' rent
    b. Second Applicant £6,900, again being 12 months' rent
    c. Third Applicant £3,736, being the amount claimed for his 8½ months of occupation

28. During their occupation, the Applicants agreed with Mr Raihan (known to them as "Ray"), the principal of the Second Respondent, for there to be deductions from the rent due to their dissatisfaction at various times with the cleaning and internet services which were supposed to be included. The First Respondent argued that this reduced the amount of the rent actually paid and, therefore, the amount of any RRO. However, the deductions did not reduce the rent. They were in lieu of

compensation for a defective service. The rent itself did not change and there is no reason to regard the Applicants as having paid a lower rent.

29. In the event, the Third Applicant has only claimed the amounts he paid after the deductions and Ms Halker volunteered that it was not open to her at this late stage to try to bring the amounts of the deductions back into the calculation of the RRO for him.

30. The First Applicant submitted that the following were mitigating circumstances:

a. He is not a professional landlord. This one property, his former family home, was let out to provide him with a modest income sufficient to cover the cost of where he lives now.
b. He entrusted the management of the property to his son-in-law, Mr Shamim Uddin, and the Second Respondent. He is not familiar with the regulation or practice of residential lettings management whereas both Mr Uddin and the Second Respondent did so. He had no reason to think that they would fail to carry out a proper job. He now feels let down by them.
c. His reliance on Mr Uddin and the Second Respondent was in large part due to his ill-health which meant that he could not conduct day-to-day management himself.
d. He is unemployed and in receipt of Universal Credit. In his final submissions, the First Respondent's brother set out some figures for his income and expenditure on the subject property and his current home to show that his disposable income is minimal.
e. He had no intention for his tenants to be disadvantaged or to receive poor management and he apologised for the situation.
f. Having said that, there was nothing significantly wrong with the property so that the Applicants received the benefit of occupying a decent property in return for their rent.

31. There is, of course, nothing wrong with a landlord using agents to manage a property. In the First Respondent's circumstances, his use of agents is entirely understandable. If those agents meet acceptable standards, their involvement is likely to benefit all parties, including the tenants. However, not all agents do meet such standards. Only the landlord is in a position to ensure that the right agents are hired and do the job they are supposed to do. Therefore, a landlord would normally be expected to have a system in place to provide a degree of supervision, although what degree may depend on the circumstances of each case.

32. What a landlord cannot do is pass management to an agent, without any such system whatsoever, and then wash their hands of further responsibility. Unfortunately, that is effectively what the First Respondent did. He did not enter into any kind of written arrangement with either Mr Uddin or the Second Respondent wherein their duties would be laid out in a transparent manner, providing a framework for their accountability. Most agents provide a standard contract, the content of which can provide a measure of their professionalism.

Further, after delegating management to them, the First Respondent conducted no supervision of any kind, whether by regular reports or even occasional contact. Therefore, the First Respondent is in no position to complain that he was let down.

33. It is worth noting that the licence which the First Respondent subsequently obtained limits occupation to 4 people in 3 households, so as to leave one room as a communal living space. The occupation numbers exceeded this during the Applicants' time at the property so that the First Respondent received a higher income than he would have received if he had obtained such a licence first.

34. From the little evidence he put forward, the Tribunal accepts that the Respondent has limited financial means. However, there is no suggestion that the amounts claimed by the Applicants would be unaffordable or would have a significant adverse impact on the First Respondent. He had the opportunity to provide more evidence ahead of the hearing but claimed not to know that he should. It may well be difficult to pay any RRO but a penal sum is supposed to have an impact – it would not be much of a sanction if it were only ever set at a rate that could be paid easily.

35. Moreover, if the Respondent does find it difficult to pay the RRO, his full financial circumstances could be considered during any enforcement process, at which point his ability to pay should be taken into account. Fuller evidence may be provided at that point.

36. In the circumstances, the Tribunal is satisfied that RROs should be made in favour of the Applicants for the sums claimed, as set out in paragraph 27 above, without any deductions.

37. 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.

38. Ms Halker indicated that the Applicants wanted to seek an order for costs against the Respondent under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. She accepted that it would be better if written submissions could be made by both parties in the light of these reasons and, therefore, directions are set out above for the determination of this issue.

Name: Judge Nicol **Date:** 27th January 2022

Appendix of relevant legislation

Housing Act 2004

Section 72 Offences in relation to licensing of HMOs

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

(2) A person commits an offence if–

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

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

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

(3) A person commits an offence if–

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

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

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

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

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

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

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

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

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

(c) for failing to comply with the condition,

as the case may be.

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

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

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

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

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

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

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

(2) The conditions are–

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

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

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

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

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

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

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

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

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

	Act	section	general description of offence
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

Section 41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if —

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if—

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

Section 43 Making of rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with—

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

Section 44 Amount of order: tenants

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in the table.

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed—

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account—

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord, and

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