FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/32UF/HMF/2020/0003**
Property	**:**	**1 Calderdale Drive, Spalding Lincs, PE11 1EQ**
Applicant	**:**	**Mr John Valmoria**
Representative	**:**	
Respondent	**:**	**Dr Ikenna Obi**
Representative	**:**	**Mr Rudall Counsel** **Mr Sexton Solicitor**
Type of application	**:**	**Section 41 (1) Housing and Planning Act: Rent Repayment Order**
Tribunal member(s)	**:**	**Judge J White** **Valuer H Thomas**
Venue	**:**	**Video (V)** **Northern residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2Piccadilly Plaza, Manchester, M1 4AH**
Date of decision	**:**	**9 November 2021**

DECISION

The Decision

(1) The Tribunal makes a rent repayment order ('RRO') in the sum of £3,327.5. in favour of the Applicant. The said sum is to be paid in 28 days.
(2) The Respondent shall pay the Applicant £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

(3) The Respondents may make any application for costs within 14 days.

The Application

1. The Tribunal is required to determine an application made on 7 January 2020, under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a RRO in respect of 1 Calderdale Drive, Spalding Lincs, PE11 1EQ ("the Property").

2. The Tribunal gave Directions. The purpose of such Directions is to identify the relevant issues that the Tribunal will need to consider determining the application fairly and in a proportionate manner. Pursuant to these Directions both parties filed a bundle of documents. Neither party requested an oral hearing.

3. On 5 May 2021 the Tribunal convened to determine the matter on the papers. We identified a number of factual issues where we required further clarity in order to make a decision beyond reasonable doubt. We adjourned setting out the issues and provided further opportunity for clarity. Unfortunately, despite a skeleton argument on behalf of the Respondent, we received no further evidence before the reconvened hearing on 9 November 2021. At the video hearing Mr Valmoria represented himself. Dr Obi was in attendance and was represented by Mr Rudall. Mr Bartlomiej Kowalski attended as a witness for the Respondent.

The Issues

4. The Application and Response raises the following issues:

   (i) Whether the Property as a whole is a House in Multiple Occupation (HMO) within the meaning of the standard test. In particular does it consist of more than one self-contained unit, occupied by different households sharing basic amenities;

   (ii) If so, does the Respondent have a reasonable excuse, and therefore a defence, to not obtaining a licence to operate an HMO;

   (iii) If not should we make Rent Repayment Order ("RRO") and if so at what level. The level of rent arrears at the date of the Application was agreed. This affects the maximum RRO. Both the Applicant and the Respondents raise some conduct issues.

5. The law in this area is complex. We annex the relevant statutory provisions to this decision.

The Findings

Undisputed facts

6. The Property is a three-story detached house comprising of:-

   (i) Ground floor: Entrance door opening onto shared hallway with three doors leading to a small kitchen, a WC/shower room, a lockable bedroom, stairs leading to ;

   (ii) First floor: Living room, large kitchen/diner with balcony to access the shared garden, stairs leading to;

   (iii) Second floor: Three lockable bedrooms, one of which is ensuite, family bathroom.

   (iv) Externally: Shared parking to the front and side access to the shared garden.

7. The Property was the home of the Respondent and his family until 2017 when he left to do his medical residency. From 2015, Joanna Drobenko, had rented the ground floor bedroom and had use of the whole of the ground floor. She shared with another occupier. Sometime in 2018 her boyfriend Peter moved into Joanna Drobenko's room.

8. The Respondent advertised to rent two bedrooms in a shared house on SpareRoom.com. On the 15 January 2018 John and Chikky Valmoria, entered into a verbal tenancy with the Respondent. They had paid a deposit of £500. The deposit was not protected. Rent payable was £275 per week for the first four weeks and thereafter reduced to £255. Rent included all bills.

9. John and Chikky Valmoria occupied one bedroom on the top floor. Their two children aged 11 and 9 at the time occupied the other. They had exclusive possession of the bedrooms including the ensuite. When they moved in another tenant occupied the third bedroom on the second floor. That tenant left sometime in 2018. No tenant had occupied the third bedroom for at least 12 months before the application.

10. The Property was not licenced as an HMO during the period of the tenancy.

11. Mr Valmoria was in financial difficulties. He had owned a house that had been repossessed. There were various charges on that property. As a result, he had been unable to obtain social housing. He quickly fell into rent arrears, due to continued financial difficulties. He made another application for social housing and was told this would only be accepted if he could produce a tenancy agreement. No written tenancy agreement was ever provided. Mr Valmoria did not apply for Housing Benefit or Universal Credit. He relied on family members. He made a few lump sum payments as detailed below. The amount of rent paid is not disputed.

12. A Notice of Seeking Possession served on 13 November 2019 confirmed the landlords position they were assured shorthold tenants. Though the notice was served on grounds of more than 2 months' rent arrears (Ground 8), the Possession Order made does not cite rent arrears or make a money judgement. The Applicant lodged an unsuccessful appeal against the Possession Order. He left the Property on 20 January 2020. On 28 February 2020, he handed in the keys to the maintenance man, Barlomiej Kowalski. The following day he sent a text to Dr Obi confirming he had done so. During that period, he was cleaning and moving out his possessions. There was no joint end of tenancy inspection.

Applicant's case

13. Mr Valmoria had sought the help of the local authority to try and obtain social housing. He was advised by South Holland District Council that they required a Tenancy Agreement before they accepted a duty to rehouse his family. They inspected the Property in February 2019 and again on 3 January 2020 and advised Mr Valmoria that the Property was an HMO.

14. The Applicant requested a copy of their tenancy agreement and copies of electrical and gas safety certificates. When these documents were not supplied they withheld rent. By not providing a tenancy agreement or other proof of tenancy, Dr Obi was preventing the Local Authority allocating social housing. They missed out on two properties.

15. They alleged that the tenants of the top floor third bedroom did not move out until September 2018. They allowed other people to occupy the Property and ruined the carpet in the living room. When they moved out another tenant moved in for a short period.

16. The kitchen drains kept on getting blocked and the Applicant paid £470 in total to repair the damage. He alleged that on one occasion Bartlomiej Kowalski told him that he had been unable to fix the blocked sink as had had not been given funds to do so and Dr Obi was

a late payer. Mr Valmoria bought supplies himself to enable repairs. He could call Bartlomiej Kowalski to come and do repairs and he had a set of keys to let himself in. He regularly couldn't get hold of him. On one occasion he was unwell for two months.

17. The Applicant supplied a letter from the Local Authority that stated when they inspected the Property on 3 January 2020 another resident was said to have been in occupation and had been for about two years. The Local Authority confirmed that no application for a HMO licence had ever been applied for. They had advised Mr Valmoria the Property was subject to a licence and what action he could take.

18. Mr Valmoria said in oral evidence that Joanna Drobenko and her boyfriend used the living room. It was the only living space. Her boyfriend also used the kitchen to cook, as the kitchen on the ground floor was so small. He also used it for access to the communal garden. He used the bath in the family bathroom as it was the only one in the Property.

19. They are seeking the return of the deposit of £500, twelve months rent of £13260 and £470 for the cost of repairs. In total they have paid £19,160 rent. They provide a copy of bank statements showing payments to the Respondent.

The Respondents case

20. The Property did not fall within the definition of an HMO during the relevant period. It did not fall within the definition in the standard test. Protection of the deposit, issue of a tenancy agreement and safety certificates are irrelevant to this issue.

21. It is admitted that for a short period at the start of the tenancy the previous tenant did not move out and occupied one of the three bedrooms on the third floor. This was in early 2018 and before the relevant period. Otherwise, the Applicant and his family occupied a self-contained unit. The only other household residing in the Property rented a self-contained flat on the ground floor. They did not share amenities as they had their own bedroom, kitchen and WC/shower room. The Local Authority has not served a declaration that it is an HMO.

22. The tenant who occupied the ground floor, Joanna Drobenko, has supplied a witness statement to the effect that she lived on the ground floor since 2015. Her boyfriend Peter moved in in December 2018. She has her own kitchen and bathroom. She asserts they did not share basic amenities with the other occupiers. They did not attend the hearing as they had other commitments. This is supported by a

witness statement of Bartlomiej Kowalski who works for the Respondent carrying out maintenance work. He attended the hearing and gave oral evidence as detailed below.

23. The Respondent has made three applications for an HMO Licence that have not been successful. He subsequently made an application for an HMO Licence on 28 November 2020. This was granted in September 2021. The applications were made in anticipation of the Property becoming an HMO, as opposed to accepting that it was currently an HMO. It would enable renting out the third bedroom.

24. If it is found that the property is an HMO, the applicant had a reasonable excuse not to have a licence. The RRO should be nil.

25. In the written submissions they assert the Applicant occupied the Property for 106 weeks at a rent of £255. The total rent payable was £27,030. They made payments of £8,995 for the first year and £11,000 in the following year. Rent arrears stood at £7,035 at the end of the Tenancy. They have not paid the County Court Possession Order costs in the sum of £481.75. They owe a total of £7,516.75 and apply for a set off if a Rent Repayment Order is made.

26. In oral submissions they assert that the Applicant did not move out until 28 February 2020 and made no additional rent payments. This amounts to 110 weeks and 4 days. £19,095 has been paid. £28,275.28 is owed leaving a debt of £8,283.28.

27. In oral evidence Dr Obi says that Joanna Drobenko only used the ground floor when he lived at the Property. There was no reason to use the rest of the Property as she had a kitchen and shower room. Mr Valmoria is making this up for us own ends and is unreliable. He did not tell the truth about his employment. He had said he only wanted to live at the property for a few weeks. He made repeated promises to move out and then failed to do so. He did not protect the deposit as he thought Mr Valmoria would move out in 30 days. He did not know the Property was a HMO until the Local Authority wrote to him on 7 March 2019. He started making the application. On the first attempt he was told the application was incomplete and the second attempt Mr Valmoria prevented him from entering the Property to complete the fire safety works required. In fact, he called the police to remove Dr Obi from the Property, though he had invited him in. It was Mr Valmoria who repeatedly blocked the sink due to allowing food to go down the drain.

28. Bartlomiej Kowalski lived around the corner and responded quickly to all reports of disrepair. He said in oral evidence that he attended the Property a few times a month to carry out maintenance work on the house and garden. There was only a period of two weeks when he

was on holiday that he was unable to attend. The other tenants did not use the amenities on the first and second floor as they had their own kitchen and bathroom, though they accessed the balcony and garden from the kitchen on the first floor. It took him and his wife a long time to clean and redecorate after Mr Valmoria had left.

Our Determination

The Offence

29. The Tribunal is satisfied beyond reasonable doubt that the Respondent has committed an offence under section 72(1) of the Housing Act 2004 (the 2004 Act). We are satisfied that:

(i) Between 15 January 2018 and 7 January 2020, the property was an HMO falling within the definition falling of the "standard test" as defined by section 254(2) of the 2004 Act. In particular:

(a) it consists of one or more units of living accommodation not consisting of self-contained flats;

(b) the living accommodation is occupied by persons who do not form a single household;

(c) the living accommodation is occupied by the tenants as their only or main residence;

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable in respect of the living accommodation; and

(f) two or more households who occupy the living accommodation share one or more of the basic amenities" (kitchen, bathroom or toilet).

(ii) The Respondent failed to licence the HMO as required by section 61(2) of the 2004 Act. This is an offence under section 72(1). They had no reasonable excuse.

(iii) The offence was committed in the period of 12 months ending on 7 January 2020, namely the date on which the application was made.

Reasons

30. It is not disputed by the Respondent that s254 (2) (a)-(e) above applies to the Premises. He contends that the only other tenant and her boyfriend occupied the ground floor. At the relevant time s254 (2) (a) and (f) did not apply. The ground floor tenant "had her own kitchen, bathroom and bedroom and shared no basic amenities". This is a self-contained flat. This is supported by a witness statement of the ground floor tenant. However, in oral evidence Dr Obi agreed that the layout of the Property was as described by the Applicant as set out above. We accept the layout of the building is as agreed by both parties.

31. The Tribunal has to decide beyond reasonable doubt that an offence has been committed. They do not, however have to decide beyond all doubt and may make inferences (Opara v Olasemo [2020] UKUT 0096 (LC)).

32. We find beyond reasonable doubt that the Property consists of one or more units of living accommodation not consisting of self-contained flats as required by s 254(2)(a) of the 2004 Act for the following reasons;

(i) The layout of the Property is not disputed, and the Respondent does not contend that there are lockable doors demarcating separate living accommodation.

(ii) The fact that there is a separate shower room and small kitchen on the ground floor does not in itself make it a self-contained flat. Neither does the fact that the third bedroom on the second floor was unoccupied for the period or that Joanna Drobenko may have chosen not to use any of the first or second floors.

(iii) The Respondent advertised on SpareRoom.Com and did not dispute he rented two out of the three bedrooms on the 2nd floor. He did not advertise a self-contained flat.

(iv) There is nothing to prevent any of the tenants moving between the living spaces, even if they choose not to.

(v) Mr Valmoria has to pass through the hallway on the ground floor to reach the upstairs accommodation. There are no separate entrances to individual flats.

(vi) There is no written tenancy agreement setting out the separate rented parts of the accommodation to particular tenants.

33. It is not disputed that s 254(2) (b) to (d) of the 2004 Act are satisfied. In particular there is more than one household.

34. We find beyond reasonable doubt that "two or more households who occupy the living accommodation share one or more of the basic amenities" (kitchen, bathroom or toilet) as required by s 254(2) of the 2004 Act for the following reasons;

(i) We accept Mr Valmoria's evidence that Peter uses the bath on the top floor and the kitchen on the first floor. He provided cogent reasons and was the only person in attendance able to give direct evidence.

(ii) This was supported by the view of the Local Authority who had attended the Property and had spoken to another member of the second household. We are told this was Peter. We have written evidence from the Local Authority as set out below.

(iii) The Witness Statement of the tenant who occupies the ground floor states, "I have my own kitchen, bathroom and bedroom on the ground floor, and share no basic amenities with any other household in the Property" and neither does her boyfriend[25 Respondent's bundle]. It does not say that anything prohibits them from doing so. Neither attended to be questioned on their evidence and this makes it less persuasive. She did not set out the layout of the Property.

(iv) Bartlomiej Kowalski, who is regularly employed by the Respondent, does not set out the basis for the assertion that basic amenities are not shared. Though he was a witness and gave oral evidence, when first asked the question by Mr Rudall he failed to answer. On the second occasion he was asked, later in the hearing, he said they do not, though failed so say how he knew that fact. He went on to say that they use the kitchen to access the balcony and garden. These statements are contradictory.

(v) Dr Obi gave oral evidence that Joanna Drobenko did not use the upstairs amenities when he lived at the Property. The period when he was Resident landlord ended in 2017. He could not provide direct evidence or any other reasons why that had not changed, beyond his witnesses.

(vi) The fact that another couple was still in occupation when the Applicant moved in, supports the view that basic amenities were shared. The tenants were not given exclusive possession of any amenities or living spaces. There was no tenancy agreement to define their separate living space.

35. The Tribunal has concluded that as the ground floor is not a separate flat and the tenants only have exclusive possession of their bedrooms. The fact that they may not choose to share the other bathroom or kitchen on the first floor is not a material factor. There are no tenancy agreements or locked access doors to prevent sharing of basic amenities. In any event, we accept the evidence that the amenities were in fact shared. This is supported by the Respondent's own evidence disclosed from the local authority.

36. The Respondent discloses a screenshot of a payment they made on 26 November 2018 of £545 for "HMO Licences" [17 Respondent's bundle]. On 7 March 2019 the Local Authority wrote to the Respondent stating they believe that the Respondent owns or manages a HMO and requesting that they make an application. On 7 March 2019 they wrote to the Respondent stating that following an inspection on 26 February 2019 works were required to bring the property up to a compliant HMO standard. On 10 January 2020 they again wrote to the Respondent returning an incomplete application form for a HMO licence. They acknowledged receipt of the safety certificates. A recent inspection showed that works required had not been completed and the tenants advised that there were currently five residents in two or more households and has been for a considerable amount of time and "this means that you are committing an offence under the above act by not being in possession of a licence" The Respondent made another application for an HMO in November 2020.

37. The property is therefore not configured or split into separate self-contained flats and the Local Authority concluded from their inspections that the property required a licence and the Respondents seemingly made two unsuccessful applications for an HMO licence. They were only successful in September 2021, on the third attempt. The fact that there is no declaration is not enough to cast doubt on our findings.

38. There are not any factors that establish that the Respondent had a reasonable excuse.

(i) The Respondent was aware of the requirements as he made a failed application on 26 November 2018.

(ii) The Respondent was informed by the Local Authority on 7 March 2019 that they should make an application and the Respondent delayed doing so for a considerable period. When they did it was on the wrong application form and there were further delays before a third application was made. He failed to undertake the fire safety works required.

(iii) Dr Obi sort to blame Mr Valmoria for not allowing access; preventing works to bring it up to standard. He cited one occasion where he attempted to gain access. It is disputed whether he let himself in unannounced or not, though it is agreed that Mr Valmoria called the police. In any event he had no documentary evidence to support the 48 hours written notice required, did not ask the Local Authority to attend with him, asserted that Bartlomiej Kowalski was in the Property regularly to carry out repairs and maintenance, made no further attempt to access the Property, and did not ask his other tenant to provide access.

(iv) They continued to assert that a licence was not required at this hearing. The submissions made were pure denials rather than clarifying the layout.

RRO

39. If there is no conviction for a relevant offence the Housing and Planning Act 2016 (2016 Act) gives the Tribunal, a discretion as to whether to make a RRO, and if so, the amount of the order. Section 44 (2) provides that "the amount must relate to rent paid during the period… not exceeding 12 months during which the landlord was committing the offence". The amount must not exceed the rent paid by the tenants during this period, less any award of universal credit paid to any of the tenants. We accept Mr Valmoria's oral evidence that he was not in receipt of any state benefits and that he paid the rent from his own resources.

Maximum Payable

40. Though there was a dispute between the parties of the date when the Applicant vacated, no rent was paid during that period. The RRO only relates to the rent paid during the period that the offence was committed. S41 (2)(b) says the offence was committed in the period of 12 months ending with the day on which the application is made. We are therefore looking at the 12 months up to the date of the application. The weekly rent during this period is £255. Twelve month rent totals £13,260. This is the maximum amount payable.

41. However, the Applicant was in significant rent arrears as set out above. This reduces the maximum amount payable. As was said by the Upper Tribunal in Kathryn Awad v Barbara Hooley [2021] UKUT 005 (LC) at paragraphs 17-18:-

…."the FTT subtracted from the £7,334.04 paid by the appellant the arrears at the start of the relevant period on the basis that the landlord would have attributed the first receipts from the tenant during the relevant period to the arrears. As it explained at its paragraph 37: "Section 44(3) confirms that the maximum the Tribunal can order a landlord to repay is "the rent paid in respect of that period" (emphasis added). As rent arrears had accrued prior to the Relevant Period, the Tribunal is satisfied that it would be standard accounting practice for any landlady/landlord or council/housing association to apply any payments made during the Relevant period firstly to any arrears that had accrued prior to the date of payment. Therefore because of the accrued rent arrears, the Tribunal found that any payments actually made by Ms Awad in the relevant Period should be treated as being made "in respect of" earlier periods when rent had not been paid, before being applied to the rent due during the Relevant period."

18. The first ground of appeal is that the FTT should not have subtracted the arrears. Mr Denman rightly did not pursue that ground. Whether or not an individual landlord regarded or accounted for the first payments made during the relevant period as going to the arrears, the reasoning set out by the FTT seems to me to be an entirely fair way to calculate the rent paid "in respect of" the relevant period for the purposes of section 44(3)(a)."

42. The Tribunal agrees that the landlord would have applied payments to the arrears. The Bank Statement together with the Rent Statement provided for the purposes of the possession case, shows that as at 7 January 2019 the Applicant was in arrears of £4,345. His next payment was £3,000 on 5 August 2019. That lump sum payment was not a weekly rent payment and would have been allocated to clear some of those arrears. He made a final lumpsum payment of £8,000 on 2 December 2019. By 23 December 2019 he was £6095 in arrears. The application was made on 7 January 2020 and he owed a further 2 weeks rent amounting to £510. By the date of the Application, he was £6,665 in arrears.

43. Mr Valmoria says that he moved out on 20 January 2020, at least 2 weeks after that date, owing at least another £510. However, Mr Valmoria agreed that he did not hand his keys in until 28 February 2020 and would have been liable to make further payments until that date.

44. The £500 deposit was retained by the Respondent at the end of the tenancy towards the arrears. Though Dr Obi asserts he left the Property in a mess, requiring cleaning and redecorating he has provided no evidence of the cost. The Tribunal accepts the £500 was retained to set off further arrears that accrued until Mr Valmoria handed in his keys on 28 February 2020.

45. The sum of £470 claimed to have been spent by the Applicant to effect repairs as a result of damage by other tenants is not particularised or supported by any other evidence, despite providing him with another opportunity to do so. As such he has not established a valid set off towards the arrears.

46. The court costs against the Applicant are not rent payments due and so cannot be added to the rent arrears.

47. In conclusion, for the 12-month period before the application, £13,260 rent was payable. The Applicant paid £6,655 rent in respect of that period. Consequently £6,655 is the maximum amount payable.

Amount Payable

48. In determining the amount payable under Section 44 of the 2016 Act, the Tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence.

49. We first consider whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies, namely the offences specified in section 40. There is no relevant conviction in this case. As there has been no conviction the Tribunal has discretion as to the amount taking into consideration the Section 44 factors.

50. In determining the amount of any RRO, we also have had regard to the policy consideration behind the 2016 Act that provides a different approach to that under the 2004 Housing Act. In Rakusen v Jepsen & Others[2020] UKUT 0298 (LC) at paragraph 64. Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber), has described the policy of the whole of Part 2 of the 2016 Act as clearly being to deter the commission of housing offences and to discourage the activities of 'rogue landlords' in the residential sector by the imposition of stringent penalties. Noting that "*an unlicensed HMO may be a perfectly satisfactory place to live despite its irregular status, the Deputy President has also described the main object of the provisions as being "deterrence rather than compensation*".

51. Section 44 of the 2016 Act does not state that the amount repayable to an occupier should be such amount as the tribunal considers reasonable in the circumstances, but neither does it contain a presumption that the full amount will be repayable. However, in Vadamalayan v Stewart [2020] UKUT] 183 (LC) UT Judge Cooke concluded at paragraph 12

52. *"… 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."*

53. Though identifying a profit element can no longer be used as a starting point Vadamalayan v Stewart decided that other factors such as payment for utilities could be taken into account. S44 should be a starting point and the seriousness of the offence or number of offences can be taken into account (Ficcara & Others v James [2021] UKUT 0038 (LC)).

Conduct of the Landlord

54. The Respondent did not provide evidence or arguments in relation to the status or financial circumstances of Respondent. In answer to questions by the Tribunal, Dr Obi said that he is not a professional Landlord. He lived in the property until he had to move for surgical rotation. He now owns another property where he lives, though he was renting during the period and had intended to return to the Property. He provided no evidence relating to costs and profits and was not able to answer questions relating to invoices paid.

55. There are a number of significant factors that goes towards his conduct.

    (i) He failed to obtain a licence for around three years, despite being advised that it was required. It is clear that he first made an unsuccessful application for a HMO in November 2018 as set out above. By 20 January 2020, he had still not made a correct application, after a failed attempt in 2019 (having completed the wrong form) as set out above.

    (ii) He failed to comply with the list of works required to bring the Property up to a complaint HMO standard as set out on 7 March 2019 and were still outstanding on 7 January 2020. This work contained important fire safety standards such as

fire doors, linked heat detectors, CO2 extinguishers and fire blankets, self-closer mechanisms.

(iii) The Gas and electrical certificates had not been supplied to the tenant or the local authority by the time of the letter of 7 March 2019, though had by 10 January 2020. Dr Obi has never supplied copies of the earlier certificates, though he maintains he had them.

(iv) There is a requirement for the tenancy deposit to be protected as it was a periodic assured shorthold tenancy as established in the Repossession case. The Respondent has admitted that it was not protected, though states it is not a relevant factor. It is unclear why a counterclaim to the possession claim was not made by the Applicant in that case or used as a defence to a mandatory Ground for Possession. Up to three times the deposit may be payable in compensation if a deposit is not protected. Section 213 of the 2004 Act requires that the landlord protect the deposit with a government-backed scheme within 30 days of the payment of the deposit. Section 214 provides that where the court is satisfied that a landlord failed to comply with its obligations under the law relating to tenancy deposit protection it must order that they pay the tenant between 1 and 3 times the amount of the deposit paid. The Applicant may take a claim in the county court. This is a relevant factor in relation to the Landlords conduct and level of the RRO. We are not impressed with the Dr Obi's reasoning that as it was intended to be a short stay let, he did not need to comply, particularly as Mr. Valmoria was a tenant for around two years.

(v) He did not provide a tenancy agreement and appeared not to realise the importance of regularising tenancies or complying with legal obligations or the advice of the Local Authority, continuing to lay blame on the Applicant. He did not appear to have supplied his address. He did not provide evidence of proper record keeping.

The conduct of the tenant

56. At paragraph 37 of Kathryn Awad v Barbara Hooley [2021] UKUT 005 (LC) the UT said:-

"The circumstances of the present case are a good example of why conduct within the landlord and tenant relationship is relevant; it would offend any sense of justice for a tenant to be in persistent arrears of rent over an extended period and then to choose the one

period where she did make some regular payments – albeit never actually clearing the arrears – and be awarded a repayment of all or most of what she paid in that period. That default, together with the respondent's kindness and the respondent's financial circumstances, led the FTT to make a 75% reduction in the maximum amount payable, and I see no reason to characterise any of those considerations as irrelevant or the decision as falling outside the range of reasonable orders that the FTT could have made."

57. We consider that there are the following conduct issues:-

(i) Clearly there were significant rent arrears. Mr Valmoria failed to make regular payments. He gave oral evidence that he only paid the lump sums near the end of the tenancy "as a good will gesture" as he thought he would be supplied with a tenancy agreement. Payment of rent is a contractual obligation, and he provided no reasons why he did not apply for benefits to cover his housing costs if he could not afford to do so.

(ii) Dr Obi was clearly frustrated as Mr Valmoria had made repeated promises to leave and then did not do so. This made it more difficult for Dr Obi to manage the tenancy.

(iii) In oral evidence, Dr Obi made numerous allegations relating to Mr Valmoria's use of the Property, including damage to the lock of a third bedroom, blocking up the sink drain, leaving the Property in a bad state, lack of access. The Tribunal found these were not sufficiently made out as he had not raised these factors in his written Response and had provided absolutely no documentary evidence to establish bad conduct, such as photographs, letters or texts, invoices. They were denied by Mr Valmoria.

Other factors including the financial circumstances of the landlord

58. Kathryn Awad v Barbara Hooley reviewed recent cases saying at paragraph 38-39_:

"38. In Vadamalayan v Stewart [2020] UKUT] 183 (LC) the Tribunal said that it was no longer appropriate for rent repayment orders to be limited to the repayment of the profit element of the rent. Nor is it correct for the FTT to deduct from the maximum amount the amount of any fine or civil penalty imposed on the landlord: " 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."

39. More recently in Ficcara v James[2021] UKUT38 (LC) the Deputy President said this: "49… the Tribunal's decision in Vadamalayan … rejected what, under the 2004 Act, had become the convention of limiting the amount payable under a rent repayment order to the amount of the landlord's profit from letting the property during the relevant period. The Tribunal made clear at [14] that that principle should no longer be applied. In doing so it described the rent paid by the tenant as "the obvious starting point" for the repayment order and indeed as the only available starting point."

59. There are no other known factors to take into account in this case. Though we may consider the services element of the rent. We can not make a pure mathematical calculation. In any event, Dr Obi did not provide any evidence of the services element or assert that it should be deducted.

Conclusion

60. We do not accept the Respondents argument that the amount should be nil. Despite engaging a solicitor and barrister he failed to properly particularise or provide evidence to support his case. The Applicant similarly failed to do so. It cast doubt on the credibility of both parties. Despite this we were able to make the finding above.

61. On one side there are a number of significant conduct issues by the Landlord. The offence was serious and continued for some considerable time. Dr Obi clearly did not accept that he was required to obtain a licence or was in breach of his duty to protect a deposit which is there to protect disputes between landlords and tenants; as is issuing tenancy agreement. There were failures in relation to requests by the local authority, including not carrying out fire safety work.

62. We accept Dr Obi is not a professional landlord and only let his Property for reasons of expediency. However, as time went on, lack of knowledge or expertise became less convincing. Conduct issues on behalf of the tenant is not a licence to ignore legal obligations. Dr Obi did not appear to wholly accept this and a RRO is made for the purpose of a deterrent.

63. On the other hand, the Applicant has been a persistent late payer in terms of his rent. In the relevant period he has not paid rent regularly instead has made two large lump sum payments. He has had use of the Property and services that he has not paid for. He has not paid the county court costs. Mr Valmoria did not appear to accept his contractual obligations and also sort to shift the blame onto Dr Obi. Despite other allegations made he again failed to particularise or provide documentary evidence.

64. There are assertions on both sides about damage and disrepair, and neither party provided convincing evidence in this regard. We do accept that, as Dr Obi's home it was modernised and generally in good condition. There were intermittent maintenance issues that were generally resolved in a reasonable amount of time by Barlomiej Kowalski. On occasions they were not.

65. Dr Obi did request that we consider his financial circumstance and did not provide information about this. We know there is an outstanding debt of unpaid rent of at least £500. He has retained the £500 deposit towards these arrears. We have therefore not included this in the rent paid, though note this sum was not protected as set out above.

66. Taking all relevant matters into account, we are satisfied that the RRO should be made in respect of 50% of the maximum rent paid during the period. We have computed this to be the rental of £6,655 received during the relevant period from the Applicant.

67. 50% of this figure is £3,327.50.

68. The Tribunal is not able to make any further decision/order to set off any debts or add any liabilities to this amount as they fall outside the relevant period and outside our jurisdiction.

Cost applications

69. As the Applicant has won his case we are satisfied that the Respondent should refund the Applicant the tribunal fees of £300 which he has paid pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"). This sum is made up of the application fee of £100 and the hearing fee of £200.

70. The Respondent has submitted a schedule of costs. This is a no costs jurisdiction subject to an application on the basis of unreasonable conduct. Any application for costs shall be made by the Respondent within 14 days.

71. The Applicant then has 14 days to respond.

72. The Tribunal will then convene and decide any costs application on the papers.

Judge J White
24 November 2021

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

Appendix of Relevant Legislation

Housing Act 2004 (the Act)

55 Licensing of HMOs to which this Part applies

(1) This Part provides for HMOs to be licensed by local housing authorities where–

(a) they are HMOs to which this Part applies (see subsection (2)), and

(b) they are required to be licensed under this Part (see section 61(1)).

(2) This Part applies to the following HMOs in the case of each local housing authority–

(a) any HMO in the authority's district which falls within any prescribed description of HMO, and
(b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation.

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.

Meaning of "house in multiple occupation"

(1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if–

(a) it meets the conditions in subsection (2) ("the standard test");

(b) it meets the conditions in subsection (3) ("the self-contained flat test");

(c) it meets the conditions in subsection (4) ("the converted building test");

(d) an HMO declaration is in force in respect of it under section 255; or

(e) it is a converted block of flats to which section 257 applies.

(2) A building or a part of a building meets the standard test if–

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

(c) the living accommodation is occupied by those persons as their only or main residence, or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018

This Order comes into force on 1st October 2018.

4. An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act if it—

(a)is occupied by five or more persons;

(b)is occupied by persons living in two or more separate households; and

(c)meets—

(i)the standard test under section 254(2) of the Act;

(ii)the self-contained flat test under section 254(3) of the Act but is not a purpose-built flat situated in a block comprising three or more self-contained flats; or

(iii)the converted building test under section 254(4) of the Act.

Housing and Planning Act 2016 (the 2016 Act)

40 Introduction and key definitions

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

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

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

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

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

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

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement

notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

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

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

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

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

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

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

(b) the authority has complied with section 42.

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

43 Making of a rent repayment order

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

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

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

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

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

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

44 Amount of order: tenants

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

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

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

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

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

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

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

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

(b) the financial circumstances of the landlord,

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