FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2021/0255**
HMCTS code	**:**	**Video**
Property	**:**	**Flat 6 Albany Works Gunmakers Lane, London E3 5SB**
Applicant	**:**	**(1) Rory Parker (2) Olivia Lynch (3) Henry Weaver**
Representative	**:**	**Mr Parker, representing himself and the other Applicants.**
Respondent	**:**	**Noura Al-Kaalik**
Representative	**:**	**In person**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival Mr S Wheeler MCIEH, CEnvH**
Date and venue of Hearing	**:**	**4 April 2022 Remote**
Date of Decision	**:**	**6 April 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video using CVP. A face-to-face hearing was not practicable and all issues could be determined in a remote hearing.

Orders

(1) The Tribunal makes rent repayment orders against the First Respondent to each of the Applicants in the following sums, to be paid within 28 days:

Mr Parker: £3,133.84

Ms Lynch: £2,713.84

Mr Weaver: £3,133.84

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants together the application and hearing fees in respect of this application in the sum of £300.

The application

1. On 1 November 2021, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for Rent Repayment Orders ("RROs") under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 24 November 2021. The application alleged the criminal offence in section 72(1) of the Housing Act 2004 ("the 2004 Act").

2. In accordance with the directions, we were provided with an Applicant's bundle of 245 pages, and a Respondent's statement of case and witness statement of 10 pages.

The hearing

Introductory

3. Mr Parker represented himself and the other two Applicants. Ms Al-Kaalik represented herself.

4. The property is a two storey flat or maisonette within a converted industrial building. There are some 15-20 other flats in the building. The flat consists of two bedrooms and a bathroom, kitchen and living area.

Preliminary issues

5. The Tribunal dealt with two matters as preliminary issues. We adjourned and made decisions on both issues, reserving our reasons for this Decision.

6. The first issue was whether Ms Al-Kaalik was the correct respondent. She argued that it was a company she controlled, Blueberry Portfolio Management Ltd ("Blueberry"), which should have been the Respondent. She personally held a long leasehold interest in the flat, but the company, she argued, had been the other party to the tenancy agreement with the Applicants. In her submissions, Ms Al-Kaalik accepted that she received the rent from the flat via Blueberry.

7. Mr Parker argued that, in fact, the counter party was described in the agreement as "Noura Al-Kaalik of Blueberry Portfolio Management Ltd"; that the term "Landlord" was defined as "a person or persons who at any relevant time own, or have formal interest in the premises that gives the right to possession of the premises"; and that the guarantor agreements for each of the Applicants was with Ms Al-Kaalik personally.

8. We note the general confusion as to whether it was Ms Al-Kaalik who appeared on the agreement or the company, or both. We are quite satisfied that it was Ms Al-Kaalik who owned the relevant interest in the property, and who granted the tenancy. There was no suggestion that a lease had been granted to the company by Ms Al-Kaalik, and it had no interest that would enable it to let a tenancy. Further, she expressly accepted receiving the rent.

9. The second preliminary issue related to the proper period in respect of which an RRO was applied for. The tenancy was for one year between 17 June 2020 and 16 June 2021. However, the Applicants had identified the period from 2 November 2020 to 1 November 2021, during which rent had been paid up to 16 June 2020. The directions identified the relevant period as 17 June 2020 to 16 June 2021.

10. It transpired that Mr Parker had mistakenly conflated the period specified in section 41(2)(b) of the 2016 Act (the limitation period of 12 months from the last occasion on which the offence had been committed) and that in section 44(2)(the period for which the RRO could be claimed), and so had thought he could only claim for a period falling within the 12 months before the application was made. He said he would have claimed the full period (ie that set out in the directions) had he understood the legislation properly, and accordingly applied for the application to be amended to specify that period.

11. Ms Al-Kaalik accepted that she found the application difficult to deal with, as a litigant in person surprised by the issue. She would have

preferred to have had time to consider, and possibly to have taken advice. Unrepresented as she was, she was not sure what she would be agreeing to if she agreed that the application should be made.

12. We refused the application. We recognise the difficulty presented to both parties as litigants in person, and particularly, in respect of this application, to Ms Al-Kaalik.

13. First, we do not think the fact that the more advantageous period from the Applicants' point of view appeared in the directions was sufficient to put Ms Al-Kaalik on notice of it, if it did not put the Mr Parker on such notice. He thought it a mistake, and his detailed calculations in his bundle, subsequent to the directions, were based on his original application period. The directions only set out that period, without drawing attention to the fact that it was different to that in the application.

14. Secondly, we do not think it fair to Ms Al-Kaalik to allow the amendment at this late stage. Had the period been made clear earlier, and had the relevant, higher, calculation of maximum RRO been made, she might have taken advice and have acted in some other way, by, for instance, seeking a settlement.

15. Finally, we were concerned that allowing the application at this late stage, and in the context of it being the Tribunal which had explored and uncovered Mr Parker's mistake, might give rise to a perception of unfairness. It is the Tribunal's overriding objective to "deal with cases fairly and justly" (Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"), Rule 3). Fairness includes being seen to be fair.

The alleged criminal offence: was a licence required?

16. The papers revealed considerable confusion on behalf of both parties as to the question of whether there was a requirement for the property to be licensed. In particular, both parties seemed to consider that it was important whether Mr Weaver and Ms Lynch, who were described as being a couple and shared one of the two bedrooms in the flat, constituted one household. In order to simplify and focus the parties' submissions, therefore, Mr Wheeler, on the invitation of Judge Percival, set out the Tribunal's understanding of the possible application of the law to this property.

17. Mr Wheeler explained the difference between mandatory and additional licensing, and observed that mandatory licensing was not relevant, as it required that there be five occupiers of the property. Mr Wheeler said that he was aware that the London Borough of Tower Hamlets operated a borough-wide additional licencing scheme (save for those wards in which a selective scheme, of broader application,

applied), and had done so since 2019. The Borough's additional scheme applied to all HMOs, and thus was capable of including a flat occupied by at least three people, constituting at least two households (the 2004 Act, section 254(1) and (3), and schedule 14, paragraph 7).

18. The Tribunal pointed out that the Applicants had provided no evidence of the Tower Hamlets additional scheme, as the Tribunal would normally expect. Mr Wheeler, however, knew that the Borough did operate such as scheme as outlined above, having sat in a number of RRO applications relating to additional licensing in Tower Hamlets, and having seen the instruments setting out the scheme in those cases. The Tribunal invited submissions as to whether we should act on Mr Wheeler's certain knowledge of the scheme, in the absence of evidence from the Applicants.

19. Although Ms Al-Kaalik had, in her witness statements, at times suggested that the three Applicants constituted a single household (and at others, two), she did not advance that case before the Tribunal. Rather, we understood it to be her case that Ms Lynch and Mr Weaver constituted one household (as people living together as husband and wife, we assume: see the 2004 Act, section 258(2)(a) and (3)(a)), and Mr Parker a second. We make no finding as to whether Ms Lynch and Mr Weaver are, or were, living together as husband and wife, as it is not relevant in any event, for the reasons set out above.

20. In respect of the reception of Mr Wheeler's expertise as to the Tower Hamlets additional licensing scheme, Mr Parker submitted that he did not include evidence of the scheme, as he assumed that the Tribunal would be as aware of it as a legal instrument as we would be aware of the relevant primary legislation and statutory instruments. Ms Al-Kaalik did not submit that we should not entertain the information.

21. We concluded that we should take cognisance of and act upon Mr Wheeler's knowledge. We do not think that Mr Parker is strictly right that a designation of an area as subject to additional licensing under section 56 of the 2004 Act is a matter of law on a footing with primary or secondary legislation; or even, indeed, as a by-law, which in any event in strict proceedings requires proof, as set out in the empowering Act (see *Phipson on Evidence*, 19 ed, para 41-70). Nonetheless, designation is under an Act, requires the approval of the Secretary of State (section 58), and is subject to statutory publication requirements (section 59(1), and Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006, Regulation 9). Mr Parker's submission might, therefore, be said to have some power in an analogous sense.

22. In general, additional licensing requirements should be properly proved by evidence put before a Tribunal, as is usually the case when an application is presented by lawyers or by one of the non-profit

organisations active in this area. We would not act on the Tribunal's knowledge in this way if there were any lack of certainty at all about the existence and terms of the designation. That is not the case here. We consider that we would not be acting proportionately (see Rule 3(2)(a) of the Rules) if we were to adjourn so that formal evidence of that of which we are, as a matter of fact, sure could be procured; still less to decline to notice that of which we are certainly aware, and come to a decision on a basis we know to be erroneous.

23. We conclude that the flat was liable to be licensed under Tower Hamlets' additional licensing scheme.

The alleged criminal offence: was there a reasonable excuse?

24. Ms Al-Kaalik argued that in the circumstances, there was a reasonable excuse for not licensing the property. She relied broadly on two arguments.

25. The first argument is set out in her witness statement. She says that she telephoned Tower Hamlets prior to the letting to see if an HMO licence was required. She did so, as the freeholder of Albany Works did not permit the letting of flats as HMOs. She "was told quite categorically that as it was a couple plus a friend that was 2 households and, under Tower Hamlets rules we would not need an HMO Licence." She exhibited a single page printed from Tower Hamlets' website which contains the statement "A HMO is a house or a flat which is occupied by three or more unrelated persons, who do not form a single household …".

26. The page, however, is headed "Mandatory House In Multiple Occupation (HMO) Licensing", and the sub heading under which the passage quoted appears is the same. At the end of the same paragraph, the following sentence appears "There are two current HMO licensing schemes in the borough, which are: Mandatory and Additional Licensing."

27. Secondly, in a more general submission, Ms Al-Kaalik said that, while she was the director of Blueberry, she relied on a particular employee to manage the property, and would have expected her to have picked up the necessity for an HMO licence. She also relied on an employee of a company which placed tenants called Kate, who – acting to find a letting for the Applicants – told her that an HMO licence was not required. She accepted that she was in overall oversight of Blueberry and its employees.

28. In respect of the telephone call to Tower Hamlets, we accept that Ms Al-Kaalik is an honest witness, and no doubt the telephone call took place. However, we find it incredible that an officer of the Borough with any real knowledge of the Borough's licensing regime would have wholly

overlooked the additional licensing scheme. One explanation is that the telephone conversation was confusing – we note Ms Al-Kaalik's confusion as to, for instance, her case in relation to the number of households in her witness statement – and that she either misunderstood what she was told, or the person she was speaking to misunderstood what he or she was being asked. Another possible explanation is that Ms Al-Kaalik was speaking to an officer in a general public information role, who may have gone beyond his or her expertise in the information given to Mr Al-Kaalik (we note the confusing passage in the website quoted above). In either case, we do not think that Ms Al-Kaalik can properly rely on a flawed conversation of this nature (see also below).

29. Ms Al-Kaalik owns, and through Blueberry is concerned in the management of, between 20 and 25 rental properties. By any measure, she is a professional landlord. As a professional landlord, she should have in place proper systems to establish what her legal responsibilities are and to meet them. Relying on a single employee who was also responsible – it appears – for all of the ordinary management tasks associated with such portfolio is not sensible or adequate provision. Nor is relying on a single telephone call with an un-named interlocutor at the local authority, even if the points made about the unsatisfactory nature of the call in paragraph 28# above are discounted.

30. Even if Blueberry was an independent agent, reliance on an agent could only rarely be relied on to make out a reasonable excuse defence. At the very least, a landlord would have to be able to show that there was a contractual obligation on the agent to provide up-dating information to the landlord, and in this case Ms Al-Kaalik said that she did not even have a written agreement with Blueberry (see *Aytan v Moore* [2022] UKUT 27 (LC), paragraph [40]).

31. We conclude that Ms Al-Kaalik cannot make out a reasonable excuse.

32. We are satisfied beyond a reasonable doubt that Ms Al-Kaalik committed the offence contrary to section 72(1) of the 2004 Act. We consider that we should make an RRO.

Quantum of RRO

33. The total rent paid, and thus the maximum RRO, was not contested in principle. Mr Parker, for the Applicants, had, however, calculated a single sum, the aggregation of the rent paid during the relevant period by all the Applicants. We used the same methodology as he adopted to attribute the correct sum for rent paid by each Applicant individually. During the claim period, Ms Lynch was in receipt of Universal Credit for one month, and that sum has been deducted.

Mr Parker: £4,476.92

Ms Lynch: £3,876.92

Mr Weaver: £4,476.92

34. We heard evidence from both parties on conduct. There was no claim to take account of the Respondent's financial circumstances.

35. We can deal with the conduct issues briefly.

36. Mr Parker relied on three elements which he said went to the conduct of the Respondent.

37. The first relates to problems with the electrical system in the flat. Initially, in October 2020, the Applicants complained about the boiler malfunctioning, and then subsequently to the effect that certain works should have been undertaken by a "Part P electrician" (we assume a reference to the Building Regulations 2010, Part P on electrical safety in dwellings), in reliance on the advice of a friend, who was an electrician. The Respondent's initial response was to send a plumber, an inappropriate professional, and the matter was not dealt with properly until mid-January 2021.

38. The second related to a dispute over the deposit. Blueberry initially demanded not only the whole of the deposit be surrendered, but also threatened legal action over a larger bill still for alleged damage to the property. It is clear that the restrictions imposed as a result of the Covid-19 pandemic made the preparation of proper inventories at both ends of the tenancy impossible, which was partly substituted by the Applicants video filming the condition of the flat. In the result, the relevant deposit scheme came to an adjudication, as a result of which all but £200 (agreed by the Applicants) was returned to the Applicants.

39. The third matter relied on by Mr Parker was the failure of the Respondent to licence the property (or to conduct what he called due diligence in assessing whether a license was necessary).

40. The Respondent made no specific complaints about the conduct of the tenants.

41. We do not consider that the conduct of the Respondent should have more than a marginal effect on the quantum of the RRO.

42. The issues with the electrical system were clearly real, and there might have been some dilatoriness in rectifying it. But, in the context of the Covid-19 lockdown, we do not think that the Respondent can be said to have been seriously at fault.

43. As to the deposit dispute, landlords and tenants have disputes over deposits, and a system for adjudicating such disputes has been

established. Clearly, in this case, that system worked, from the Applicants point of view. We accept that it may be that the Respondent's agent pursued the dispute with excessive vigour at one point – as we understood Ms Al-Kaalik to conceded, at least to a degree. But, in comparison with the sort of malpractice that is familiar to the Tribunal in HMO cases, and which can be seen in the reported cases, this was no more than moderately questionable conduct.

44. Mr Parker's also relies on the Respondent's conduct in committing the offence. The seriousness, or otherwise, of the offence is something we should take into account. However, this is not one of the more serious cases of a breach of section 72(1). In particular, there was no evidence that the Respondent deliberately flouted the licensing regime for pecuniary gain, or to allow her to continue to let accommodation that was in a seriously sub-standard state, rather than spend money on it. As we have said above, she was clearly at fault in not having an adequate system in place to ensure she met her legal responsibilities, but that is as far as this element goes.

45. In assessing the quantum of the RROs, we have taken account of the guidance in *Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8 and *Aytan v Moore* [2022] UKUT 27 (LC), and the cases referred to therein.

46. Weighing up these factors, we conclude that the RROs should be set at 70% of the maximum allowable.

Reimbursement of Tribunal fees

47. Mr Parker applied for the reimbursement of the application and hearing fees paid by the Applicants under Rule 13(2) of the Rules. In the light of our findings, we allow that application.

Rights of appeal

48. 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 London regional office.

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

50. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

51. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 6 April 2022

Appendix of Relevant Legislation

Housing Act 2004

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.

Housing and Planning Act 2016

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

	Act	*section*	*general description of offence*
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.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

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.