FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AQ/HMF/2022/0238**
Property	**:**	**261A Station Road, Harrow, HA1 2TB**
Applicant	**:**	**Ms Anzhela Valerievna Crossen**
Representative	**:**	**Mr C Neilson, of Justice for Tenants**
Respondents	**:**	**Mr K Bruno**
Representative	**:**	**In person**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms S Coughlin MCIEH**
Date and venue of Hearing	**:**	**1 March 2023** **10 Alfred Place**
Date of Decision	**:**	**8 March 2023**

DECISION

Orders

(1) The Tribunal makes a rent repayment order against the Respondent in favour of the Applicant, to be paid within 28 days of the date of this decision, in the sum of 3,158.

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

The application

1. On 3 October 2022, the Tribunal received an application (dated 3 April 2022) under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a Rent Repayment Order ("RRO") under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 17 November 2022.

2. In accordance with the directions, we were provided with an Applicant's bundle of 135 pages. The Respondent has not provided a bundle, or any other substantive representations in advance of the hearing.

The hearing

Introductory

3. The hearing took place remotely, using CVP.

4. Mr Neilson of Justice for Tenants represented the Applicant. The Applicant's bundle included a witness statement from Ms Crossen. There was also a copy of a questionnaire, which Mr Neilson told us was in a standard form used by Justice for Tenants when gathering evidence. These questionnaires were not usually included in a bundle prepared by Justice for Tenants. It appears this one was included, as it gave more precise details of the Applicant's case in respect of the occupation of the property. Ms Crossen gave oral evidence and was cross-examined by the Respondent. The bundle also contained a witness statement from Mr Manu Puthusseri Unni, another tenant at the property. Mr Unni did not attend the hearing.

5. The Respondent failed to comply with the directions. He did, however, appear at the hearing. An application by the Applicant to disbar him from taking further part in the proceedings had been refused by a

procedural judge in advance of the hearing. Mr Neilson did not oppose the proposition that the Applicant should be permitted to cross examine the Applicant when she gave evidence, and to make submissions, but not to introduce any new evidence, and we so ordered.

6. There was some confusion as to the identity of the Respondent or Respondents. Initially there had been three Respondents. The third was, it was agreed, removed after the directions hearing. There was no record available to the Tribunal suggesting that the second, Ms Rutha Bruno, had been removed, but we did have a letter from the Tribunal stating that Mr Kelven Bruno was the only Respondent. Both parties considered that Ms Bruno should not be a party. If it were necessary to do so, we remove Ms Bruno as a party under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 10.

7. The property was a flat on two stories over a shop. There were two bedrooms on each floor, a small kitchen and a bathroom/WC on the first floor, and a WC on the second floor.

The alleged criminal offence

8. The Applicants allege that the Respondent was guilty of the having control of, or managing, an unlicensed house in multiple occupation contrary to Housing Act 2004 ("the 2004 Act"), section 72(1). The offence is set out in Housing and Planning Act 2016, section 40(3), as one of the offences which, if committed, allows the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

9. The Applicant's case is that the property was situated within the additional licensing area which had or has been designated by London Borough of Harrow ("the council") under two schemes. The first came into force in 2016, and ceased to have effect on 28 February 2021. This scheme applied to a specified number of wards, within one of which the property was situated. The second came into force on 6 August 2021, and will cease on 5 August 2026. It applied to the whole area of the borough.

10. The relevant periods during which the Applicant alleges that the offence under section 72(1) was committed are from 13 November 2020 to 28 February 2021, in respect of the first scheme, and 6 August 2021 to 12 November 2021, in respect of the second. She lived at the property from 5 September 2020 to 12 November 2021, in room 1.

11. The Applicant provided evidence of both schemes, in the form of documents setting out the schemes and their extent from the Council's website. Both schemes applied to all HMOs. Proof that no licence was in place was provided in the form of email correspondence with an officer of the Council.

12. There was no evidence to contradict this evidence, and Mr Bruno did not challenge it in cross examination or in his submissions.

13. The two live issues were whether the two periods constituted one offence or two offences, and whether the occupancy criterion for the property to be an HMO was satisfied for all of both periods. The first is a question of law that the Tribunal put to the Applicant. Understandably, the Respondent was not able to make submissions. The second is a question of fact, in respect of which the Respondent made submissions, and asked questions in cross-examination of the Applicant.

14. The first issue was important, in that if there were two offences, not one, the first period would have been out of time, in the light of the 12 month limit after which a tenant cannot initiate proceedings under section 41(2) of the 2016 Act.

15. Mr Neilson argued, first, that it was uncontroversial that dis-continuous periods could constitute the same offence. He cited *Irvine v Metcalf and Others* [2021] UKUT 60 (LC) for that proposition. In that decision, Judge Cooke reviewed her decision to refuse leave on a ground of appeal relating to the issue of whether the First-tier Tribunal had properly taken account of periods when fewer occupants than the number necessary to render the property an HMO had been present. In concluding that there was no purpose in granting permission to appeal, she relied on the fact that there had been a discontinuous period adding up to twelve months when there were the relevant number of occupants during a span of 16 months. This decision was clearly at least based on the assumption that discontinuous periods could count in respect of the period in section 44(2) of the 2016 Act (the time limit for initiating proceedings by a tenant). The particular issue before the Tribunal in this case was not the one that Judge Cooke was dealing with in *Irvine*. However, even if we are not strictly bound by it (which we do not decide), it is highly persuasive (we note that in another case, in which the Judge presiding over this case also presided, the First-tier Tribunal came to this conclusion in respect of the effect of *Irvine*, and was not appealed. The case was 49 West Kensington Mansions LON/ OOAN/HMF/2021/0273).

16. In any event, if the matter were wholly devoid of authority, that is the conclusion to which we would have come. There is nothing to suggest that the 12 month period must be a continuous one in the statute. It is a feature of the system that a property may fall into and out of HMO status depending on the number of occupants, and it is in the nature of things that occupation may well dip above and below the threshold during any relevant period. In such circumstances, if only continuous periods of HMO status were to count for the purposes of section 41(2), Parliament would have said so. Further, if it were to be the case that a discontinuous period did not count, that would undermine the policy of

the regime for no apparent reason, a factor we should take into account in interpreting the statute.

17. The difference between the discontinuous period in this case and that in *Irvine* is that in this case, the two parts of the discontinuous periods were characterised by breach of different additional licensing schemes.

18. Mr Neilson submitted that the fact that two schemes were involved was irrelevant to the identification of the period of offending. That made sense, he argued, with the use of the definite article "the" in "the application" and "the offence" in section 41(2)(b). He drew our attention to the characterisation of the offence in *R (Mohamed) v London Borough of Waltham Forest Others* [2020] EWHC 1083 (Admin), [2020] 1 WLR 2929 at paragraph [51].

19. We agree with Mr Neilson's submissions. We note that, in *Mohamed*, there is also an extended discussion at paragraphs [17] to [28] of the information adequate for the issuing of a summons in general, referring to the relevant statutory provisions and a number of authorities. The Court specifically found that the information upon which the summons in that case was issue was adequate. That comprised a schedule, with a date, and allegation of control of a specified property "which was required to be licenced under Part 2 of the Housing Act 2004 but which was not so licenced contrary to section 72(1) of the Housing Act 2004." ([25], finding that this was adequate, [27]). The fact that the nature of the licensing obligation was not required is at least indicative that the fact that, in our case, the two parts of the period were under separate schemes is not essential to the nature and identity of the offence.

20. We find that the offence was a continuing one for 12 months, in two discontinuous parts of a single period for the purposes of section 41(1)(b) of the 2016 Act.

21. Both additional licensing schemes included all HMOs. The relevant occupation criterion was that there should be three or more occupants, comprising two or more households (section 254 of the Housing Act 2004 ("the 2004 Act")).

22. The Applicant's evidence was that she had been in occupation from December 2019 to 12 November 2021. Included in the bundle was a tenancy agreement which, the Applicant said, covered part of her occupation. She did not provide an agreement for the earlier period. The agreement has a date of 6 April 2021 in the particulars, but the term is defined as 4 December 2020 to 3 December 2021. The Respondent is named as the landlord, Ms Crossen as the tenant and Ms Lara De Zoysa as the landlord's agent.

23. The evidence as to the occupation of others is best set out in relation to the two parts of the overall period separately.

24. As far as the first part of the occupation period is concerned, it was the Applicant's evidence that, in addition to herself, the occupants were Mr Unni, and a Natasha Kazane, who was in occupation from January 2020. Her partner, whose name was Casa, was also in occupation, until the first lockdown, when he moved out. We take that to mean 23 March 2020.

25. Mr Unni's witness statement stated that he was in occupation from 5 September 2020 to 4 May 2021 (the witness statement has "2020" for the second date, but that is an obvious minor error). In the bundle was a photograph of the first page of a tenancy agreement for Mr Unni, on the same form as the Applicant's, dated 5 September 2020, with a term stated as 12 months from that date.

26. There is no evidence to contradict this. Further, the Respondent would have been entitled to have put that the occupation was otherwise than as stated in the Applicant's evidence in cross-examination, and (apart from some apparent questioning of the identity of Casa), he did not do so.

27. We are satisfied to the requisite standard that there were (at least) three occupants during the first period – the Applicant, Mr Unni and Ms Kazane.

28. The evidence for occupation during the second part of the period is more complicated.

29. It was Ms Crossen's primary evidence that the other occupants during the second part were Ms Kazane and Casa. She thought that they moved out between three weeks and a month before she did.

30. Her evidence was that Casa had returned to share with Ms Kazane after the end of the first lockdown. She could not give a more precise date. Unlike the introduction of the lockdown, its reversal took place through a sequence of announcements and events from 10 May to 23 June 2020 (in respect of these dates, the Tribunal has relied on the *Timeline of UK coronavirus lockdowns, March 2020 to March 2021*, published by the Institute of Government, a reputable non-government organisation, which is available at https://www.instituteforgovernment.org.uk /sites/default/files/timeline-lockdown-web.pdf).

31. In evidence, however, the Applicant added that, during the second part of the period, a man from South Africa and an Italian woman moved in, and were still in occupation when she left (prematurely, in circumstances we describe below). She could not be precise as to the

dates their occupation started. Initially, she could not remember their names. She was then referred by the Tribunal to a screenshot of an email dated 15 August 2021, and addressed to the Applicant, Manuela and Hugo. She then recalled that these were the names of the Italian and the South African.

32. The email is signed "Lara De Zoysa Bruno". It starts with "Good evening as you all know there is now 3 tenants in the Flat." It goes on to list a number of rules. It closes by asserting that tenants have been complaining to her about various matters, and should not do so. A final sentence asks the tenants to keep the flat clean and neat, as there will be viewings starting shortly.

33. It is not clear whether "there is now 3 tenants" means that the number has gone up to three, or (which we consider more likely) that the number has gone down to three. Whichever is the case, however, there is no reference to Ms Kazane (and hence Casa) as being in occupation at – and therefore, presumably from – 15 August 2021.

34. There is no evidence to contradict the Applicant. However, her evidence is not entirely consistent with the email. We are inclined to give the email, as independent contemporaneous evidence, significant weight. We should add that there was nothing in the way that Ms Crossen gave her evidence that leads us to question her honesty. On the contrary, she came over as someone doing her best to honestly recall the relevant events.

35. We have come to the conclusion that it is Ms Crossen's memory that was mistaken when she gave her initial account, and that Ms Kazane must have moved out earlier than she thought, and the two new tenants must have moved in earlier. As it happens, this account of the occupation gives greater certainty that the occupation criterion is fulfilled than the initial approach adopted by the Applicant, a further indication the confusion is a matter of mistake, not dishonesty.

36. We are therefore satisfied beyond a reasonable doubt that the occupation criterion was satisfied from the date of the email to the date on which the Applicant moved out. However, the second part of the relevant period starts on the 6 August 2021, when the new scheme came into force. As we indicate above, we think it more likely than not that there were other tenants in occupation in the period immediately before the email, but we do not think we can say that few are satisfied of that to the high criminal standard required.

37. We are accordingly satisfied to the requisite standard of occupation by three people or more in two or more households from 15 August until the Applicant moved out on 12 November 2021.

38. We have considered whether there might possibly be a reasonable excuse such as to satisfy the defence in section 72(5) of the 2004 Act, even in the absence of any evidence from the Respondent. We do not think there is any such possibility. There is no suggestion whatsoever, for instance, of reliance on the agent or any third party in respect to the obligation to licence the property.

39. Mr Bruno's relevant submissions in respect of the criminal offence were, first, that the tenancy agreement was dated 6 April 2021, and therefore there was no evidence of a relationship between him and the Applicant before that date. We reject this submission. Quite apart from the fact that the tenancy agreement appears to have been post-dated, there is ample evidence of occupation by the Applicant. First, her own evidence is to that effect. Secondly, she produced evidence of payment of rent consistent with her evidence. Finally, the Respondent chose to ignore the Tribunal's directions and not provide any evidence of his own. He has nothing with which to contradict the Applicant's evidence. Had he been able to do so, he had every opportunity to provide evidence that the Applicant was not in occupation until April 2021. As we note above, he did not put an alternative to her in cross-examination.

40. Secondly, he submitted that the identity of the occupiers and the dates from and to which they occupied were unclear. We have explained above our approach to the evidence of occupation, and why we are satisfied with our conclusions.

41. Accordingly, our overall conclusion as to the alleged criminal offence is that we are satisfied beyond a reasonable doubt that the offence was committed by the Respondent for the whole of the first part of the relevant period, and from 15 August 2021 to 12 November 2021.

The amount of the RRO

42. In considering the amount of an RRO, the Tribunal will take the approach set out in *Acheampong v Roman and Others* [2022] UKUT 239 (LC) at paragraph 20:

> "The following approach will ensure consistency with the authorities:
> (a) Ascertain the whole of the rent for the relevant period;
> (b) Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. …
> (c) Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made … and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the

> default penalty in the absence of any other factors but it may be higher or lower in light of the final step:
> (d) Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4)."

43. We add that at stage (d), it is also appropriate to consider any other of the circumstances of the case that the Tribunal considers relevant.

44. In respect of the relationship between stages (c) and (d), in *Acheampong* Judge Cooke went on to say at paragraph [21]

> "I would add that step (c) above is part of what is required under section 44(4)(a) [conduct of the parties]. It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked."

45. As to stage (a), by sections 44(2) and (3) of the 2016 Act, the maximum possible RRO is the rent paid during a period of 12 months, minus any universal credit (or Housing Benefit – section 51) paid during that period.

46. The Applicant's statement of case proceeded on the basis of a single sum representing the rent paid during both periods. The total was £4,160. She had not claimed benefit at any time during the period.

47. As the sum claimed by the Applicant was calculated on the basis that the second part of the period started on 6 August, we must deduct 9 days. The rent was £725 a month. Multiplying that sum by 12 and dividing by 365, then multiplying by nine gives a total reduction of £214. The total possible RRO is £3,946.

48. At stage (b), utilities were, Ms Crossen said, included in the rent. In those circumstances, Judge Cooke said in *Acheampong* that "[i]t is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate." Mr Neilson referred us to *Hancher v David* [2022] UKUT 277 (LC), in which Judge Cooke, retaking an overturned First-tier Tribunal decision, found herself unable to make any reduction where the landlord had provided no information as to what was spent on utilities.

49. We do not agree with Mr Neilson that *Hancher v David* overturns the Upper Tribunal's stated approach to utilities in *Acheampong*. It does, however, indicate that the Tribunal has a broad discretion when it is provided with no assistance at all by the landlord. In this case, not only

is there no information about utilities, there is no evidence whatsoever from the Respondent, who chose to ignore the Tribunal's directions. This is a particular kind of HMO, far from those which approximate to a family-occupied flat or house, and we do not consider we are in a position to do other than make a guess, of no guaranteed accuracy as to the expenditure on utilities. In these circumstances, we consider ourselves to be in (at least) a similar position to that Judge Cooke faced in *Hancher and David*, and, like her, decline to make any adjustment in relation to utilities.

50. In assessing the seriousness starting point under stage (c), there are two axes of seriousness. The first is the seriousness of the offence, compared to the other offences specified in section 41 of the 2004 Act. The offence under section 72(1) is significantly less serious than those in rows 1, 2 and 7 in the table in section 40 of the 2016 Act, and we take that into account. On the other hand, it is by far the most prevalent offence that comes before the Tribunal in relation to HMO licensing.

51. We turn to the seriousness of the offence committed by the Respondents compared to other offences against section 72(1).

52. As to fire precautions, the evidence was that there was only one battery-only smoke alarm (located in the upper corridor). There was no heat detector or fire blanket in the kitchen, and no fire escape signage. We had no evidence as to fire doors. License conditions would have required mains-wired smoke alarms on both floors, a heat detector and fire blanket in the kitchen, and thirty minute fire doors to the kitchen and each bedroom.

53. There was significant evidence of disrepair and poor equipment.

54. There were leaks into the upstairs bathroom and the kitchen when it rained. In both cases, the water ingress was through the light fittings, and on one occasion this caused an electrical fault. Complaints had been made, but no action was taken by the landlord, save that on one occasion, the Respondent personally had changed the shower head. The evidence was that this made no difference to the leaks.

55. There were visible sparks when appliances where plugged into the socket in the Applicant's bedroom. No electrical safety certificate was provided. In these circumstances, we are prepared to infer that this latter failing reflects a failure to secure an electrical safety certificate, not merely that a certificate which had been provided was not given to the tenant or displayed.

56. The entrance to the flat was via an external steel staircase, rising from an alley at the back of the property. The alley also served commercial premises, including restaurants. The stair itself was unlit. It was

described as having sharp elements, that could cause cutting. The tenants had asked that the light fitting be repaired, but nothing had been done. There were also complaints about the state of the alley, and smells, both of old food and what was described as a sewer smell. A similar smell was reported within the flat. Complaints were made, but not apparently investigated. We do not think we should take account of the state of the alley in assessing the seriousness of the offence, as it is outside the property and something over which the Respondent has no control. The same is not true of the lack of lighting on the stair, nor its condition. Nor is it true of the sewerage smell within the flat, which at least merited investigation.

57. The Applicant, in her evidence, reported leaking when the tumble dryer was used. When questioned by the Tribunal, it became apparent that she was not aware of the different kinds of tumble dryer. It became evident, however, that that installed in the property was a vented model which required external venting to discharge water and hot air, but the venting hose was simply left lose in the area in which the dryer was located, a confined space under the stairs on the first floor.

58. In assessing the quantum of the RROs at stage (c) (and at stage (d) below), we have taken account of the guidance in the following cases, including particularly where the Upper Tribunal has substituted percentage reductions from the maxima, or approved First-tier Tribunal findings: *Acheampong* (that is, the conjoined case of *Choudhury v Razak)*; *Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8; *Aytan v Moore* [2022] UKUT 27 (LC); *Hallett v Parker* [2022] UKUT 239 (LC); *Simpson House 3 Ltd v Osserman* [2022] UKUT 164 (LC); [2022] HLR 37; *Hancher v David and Others* [2022] UKUT 277 (LC); and *Dowd v Martins and Others* [2022] UKUT 249 (LC). These cases show a range of percentages of the maximum RRO ranging from 25% to 90%. We take account of the fact that a number pre-date *Acheampong*, and accordingly do not follow the four stage process set out in that case.

59. At this stage, having considered the above matters under stage (c), we would ordinarily specify a starting point percentage of the total RRO. For the reason we give at paragraph 74 below, we do not do so here. We add that this is not a case where we can draw close parallels with any of the guideline cases at this stage. We are, however, clear that the Respondent can properly be put into the category of rogue landlord, and so is nearer to the landlord in *Simpson House 3 Ltd v Osserman* than that in *Hallett v Parker,* to take two cases at or near each end of the spectrum decided a day apart by the Deputy President, Martin Roger KC.

60. At stage (d), we must consider what effect the matters set out in section 44(4) have on our conclusions so far. Section 44(4) provides that in determining the amount of an RRO, within the maximum, the Tribunal

should have particular regard to the conduct of both parties, and to the financial circumstances of the landlord. We must have particular regard to these matters, but we may also have regard to such us matters as we consider relevant in the circumstances.

61. Accordingly, we consider aspects of the Respondent's conduct which we have not considered under stage (c). Under this heading, we consider the failure to protect the deposit and breaches of the covenant of quiet enjoyment. We then consider the Applicant's conduct. There was no evidence to raise any possible issue in respect of the landlord's financial circumstances.

62. It is uncontested that the Applicant's deposit was not protected. First, this is in itself a significant breach of duty to his tenant. Protection of tenants' deposits is an important element in the regulatory structure provided by Parliament to protect the interests of tenants. Secondly, the tenancy agreement provided by the Respondent to the Applicant is a properly drafted assured shorthold agreement. It is clearly based on a model that has been professionally drafted. It is therefore striking that it makes express provision for the deposit to be held by the landlord, with no mention of the obligation to protect a tenancy. It must have been drafted for use before the provisions for tenancy deposits came into effect. That was in April 2007 (the date of implementation of the relevant provisions in the 2004 Act).

63. This means one of two things. Either the Respondent is so unheeding of his legal obligations as a landlord that he was unaware of the requirement to protect a deposit introduced fourteen years before the date of the agreement. Or he is perfectly well aware of the law, but deliberately used an old form of tenancy agreement in order to flout the obligation in the hope that he would not get caught. Both would be a remarkable failure by a landlord to adhere to his legal duties.

64. The background to the second issue was the circumstances leading to the Applicant leaving the property early. Her evidence was that she lost her job in August 2021. She wished to apply for universal credit, but it was her evidence that she had been told that she needed the energy performance certificate for the property to apply for the benefit. She asked the agent for it, but did not receive a copy. It is not clear to us why she needed this certificate, but it is clear that she was sure that it was necessary for her to make the application. As a result of losing her job, she fell into arrears. Her payment for September 2021 was £500, and that for October £225, instead of £725.

65. The Applicant's evidence was that, even earlier than this, the agent would come into the property unannounced and without notice. She related one instance when the agent came up behind her as she stood at the hob and remarked on the food she was cooking, surprising the Applicant. On another occasion, the agent entered her room, using her

own key, pushing the Applicant's key, that was in the lock on the inside, onto the floor. She later purported to give that key back to the Applicant, saying she had found it in the hall.

66. The most serious incident took place after the Applicant had started to accrue arrears. On that occasion, the agent entered her room, which she unlocked with the agent's key, and entered the room with two other people, while the Applicant was sleeping. At about this time, she also started to receive a large number of threatening emails and Whatsapp messages demanding that she pay the arrears from the agent. It was after this that she left the property (without giving due notice).

67. We turn to the tenant's conduct. Two complaints may be made. Those are that she fell into arrears, and that she did not give proper notice of leaving.

68. The Applicant fell into arrears because she lost her job. She worked as a cleaner. She secured another job reasonably soon (and before she left), but because she was paid in arrears, could not discharge the arrears immediately. She used all the available credit available to her in this period, falling into debt of about £1,000. She was, she said, unable to claim universal credit because she did not have the energy performance certificate, a document that should have been supplied at the start of the tenancy. She explained the situation to the landlord's agent. Rent was due and paid at the end of the month or the beginning of the next month. The fact that she paid £150 in the middle of October 2021 suggests that she was by that time attempting to address the arrears.

69. The fact of being in arrears is clearly a matter which counts against a tenant in terms of conduct. However, in this case, the effect is mitigated. There was an objective and understandable reason why she fell into arrears. She disclosed her position to the landlord. She made part payment. She got into what is for someone in a low paid job considerable debt in order to pay what she could. Further, she was, she said, unable to claim universal credit because of a failure by the landlord to provide the energy performance certificate. We heard no evidence on the matter, but we strongly doubt that a tenant is specifically required to produce this certificate before they can claim universal credit. We might speculate that she had been told that the certificate would be *a* way of establishing residence, and misinterpreted this as a rule. But whatever the real position is, the Applicant clearly genuinely thought that she had to produce it. And the Respondent should have had an energy performance certificate and should have provided it to her. We had no evidence as to whether the arrears had been paid after she left the property.

70. So we accept that the arrears do count as negative conduct of the tenant, and take account of them. We do not see them as a very major factor, however.

71. We do not consider that leaving without proper notice can properly be held significantly against the Applicant. She did so in reaction to a clear and serious breach of the covenant of quiet enjoyment, in circumstances which, taken together, amount to harassment. It does not lie in the mouth of the landlord to object that a tenant left early when the tenant leaves because the landlord is harassing her.

72. The Respondent submitted that it was the agent, not himself, who behaved in an inappropriate way towards the tenant, and that he should not have that conduct attributed to him. We reject that submission. Where a landlord appoints an agent, that agent is engaged to stand in his or her shoes insofar as the relationship with the tenant is concerned. There was no evidence that he was unaware of her conduct, that the conduct was contrary to his instructions, or that it was reasonable in the circumstances for her conduct not to be attributed to him. There was no express evidence as to the relationship between the Respondent and the agent. However, we note that in the 15 August 2021 email referred to above, the agent states that "Kelvin and I lived in this flat 5 years", and she signs herself with the Respondent's surname. Whatever the relationship is, it appears that it was a close one. Had there been clear evidence, it may be that it would have made it harder still for the Respondent to deny that the agent's conduct was unknown to him and should not be attributed to him.

73. We conclude that the matters to be taken into account in respect of stage (d) mean that we should increase the percentage RRO from the point arrived at at stage (c).

74. Our conclusion after stage (d) is that the percentage RRO should be 80%. We had initially come to the view that the stage (c) starting point should be 75%, and that stage (d) warranted an increase of 10%. However, when we reconsidered the total, we came to the conclusion that the overall figure should be 80%. In this, we were influenced by the result of the *Choudhary v Razak* appeal heard with *Acheampong*, in which Judge Cooke awarded a 75% RRO largely on the basis of the lack of protection of a deposit and fire safety issues. Both factors were apparent here, but we considered that this case deserved a higher overall award than that to reflect the additional issues that we have also set out, but not a full 10% higher. However, we did not think it appropriate to reduce the stage (d) increase to 5%, as that would suggest that we had taken too much account of what we consider to be the fairly marginal negative conduct of the Applicant. It would also have been artificial to have adjusted the two figures so that, for instance, that at stage (c) was 72.5% and stage (d) 7.5%. Accordingly, and bearing in mind the close relationship between stages (c) and (d), we prefer in this case to come to 80% as an overall conclusion.

75. We accordingly make an order in the sum of £3,158.

Reimbursement of Tribunal fees

76. The Applicant 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

77. 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.

78. 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.

79. 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.

80. 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:** 8 March 2023

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.