FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AM/HMF/2022/0167**
Property	**:**	**59A UPPER CLAPTON ROAD LONDON E5 8AY**
Applicants	**:**	**James Boon ; Ioannis Biratsis; Polly Freestone; Ieva Ovcinikovaite; Jodie Pitts; Seth Tonkin**
Representative	**:**	**Legal Road Limited**
Respondents	**:**	**Zuplex Limited (1) & Erbil Eren Aslan (2)**
Representative	**:**	**Mr Pennington Legh for R1, R2 in person**
Type of application	**:**	**Application by tenants for a rent repayment order under Chapter 4, Housing and Planning Act 2016**
Tribunal	**:**	**Tribunal Judge Hansen & Jane Mann MCIEH**
Date of hearing	**:**	**1 March 2023**

DECISION

DECISION

(1) Pursuant to section 43(1) of the Housing and Planning Act 2016 the Tribunal makes rent repayment orders against the Second Respondent and in favour of the Applicants as follows:

James Boon - £1,147.50

Ioannis Biratsis - £535.50

Polly Freestone - £1,147.50

Ieva Ovcinikovaite - £535.50

Jodie Pitts - £1,147.50

Seth Tonkin - £1,147.50

(2) The Tribunal makes an order requiring the Second Respondent to reimburse the Applicants in the sum of £300 in respect of tribunal fees pursuant to paragraph 13(2) of the 2013 Tribunal Procedure Rules. Otherwise no order as to costs.

REASONS

Introduction

1. This is an application for a Rent Repayment Order ("RRO") pursuant to Chapter 4 of the Housing and Planning Act 2016 by 6 former tenants of 59a Upper Clapton Road London E5 8AY ("the Property") in the total sum of £22,644. The application was made on 29 June 2022 and relates to the 12-month period beginning on 21 July 2020 and ending on 20 July 2021. It was common ground that the breakdown of that figure as between the 6 Applicants is correctly set out in paragraph 7 of the First Respondent's Statement of Case dated 18 November 2022. The application names Zuplex Limited as the First Respondent and Erbil Eren Aslan as the Second Respondent. The Second Respondent is (and was at all material times) the registered leasehold proprietor of the Property which is registered at HM Land Registry under title number EGL455254. The First Respondent is a company which, according to their letterhead, is involved in sales, lettings, management, mortgages and land & development. For the reasons set out below, the Tribunal is entirely satisfied that the Second Respondent is the landlord for the purposes of the RRO application and the First Respondent is

and was at all material times acting as the Second Respondent's agent. As was recently confirmed by the Supreme Court in *Rakusen v Jepsen* [2023] UKSC 9 at [38]: "*… there is no suggestion that RROs can be made against property agents. RROs can only be made against landlords*". The correct Respondent to the RRO application is therefore the Second Respondent alone and we dismiss the application as against the First Respondent.

The Statutory Framework

2. Section 40(1) of the Housing and Planning Act 2016 states that the FTT has power to make an RRO when the landlord has committed an offence to which Chapter 4 relates, which offences are specified in a table in subsection (3). The offences include control or management of an unlicensed HMO (house in multiple occupation) under section 72(1) of the Housing Act 2004.

3. Section 43 of the 2016 Act provides:

> *"(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).*
>
> ……..
>
> *(3) The amount of a rent repayment order under this section is to be determined in accordance with –*
>
> *(a) section 44 (where the application is made by a tenant);*
>
> *(b) section 45 (where the application is made by a local housing authority);*
>
> *(c) section 46 (in certain cases where the landlord has been convicted etc)."*

4. Section 44 of the 2016 Act provides:

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

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

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

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

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

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

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

(b) the financial circumstances of the landlord; and

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

5. The table referred to in s.44(2) specifies that in the case of an offence of controlling or managing an unlicensed HMO, the amount "*must relate to rent paid by the tenant in respect of ... a period, not exceeding 12 months, during which the landlord was committing the offence*".

6. Section 46 of the 2016 Act provides:

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

(2) Condition 1 is that the order –

(a) is made against a landlord who has been convicted of the offence, or

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

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

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

(b) in favour of a local housing authority.

(4) ……..

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

Who is the Landlord?

7. There was much debate in the statements of case and written evidence as to whether the landlord was the First or the Second Respondent. However, having heard the evidence, the Tribunal were in no doubt at all that the Second Respondent is the landlord. It is the Second Respondent who has the proprietary interest in the Property and the other evidence overwhelmingly points to him being the landlord, and the First Respondent his agent. A person without a proprietary interest in land *can* grant a tenancy of that land and can be a landlord: see *Bruton v London & Quadrant* [2000] 1 AC 406. But that is not this case. Nor is there any evidence or suggestion even that the Second Respondent had sub-let the Property to the First Respondent who had then in turn underlet the Property to the Applicants. We heard evidence from the Second Respondent, Mr Asan, the sole director of the First Respondent and Mr Boon, one of the tenants. Whilst the Second Respondent and Mr Asan did not agree about everything, it was common ground that they had agreed that the First Respondent would "*become the property management and lettings agency for 59A Upper Clapton Road, London E5 8AY for a monthly fee*" (see para 8 of Second Respondent's statement dated 21 October 2022. The Second Respondent also expressly accepted in evidence that he had appointed the First Respondent to act as his managing agent in relation to the Property and that the First Respondent was responsible for finding tenants, collecting the rent on his behalf and attending to the day-to-day management of the Property. The bank statements in evidence show that the First Respondent collected the rent and paid it on, less an agreed monthly fee of £100, to the Second Respondent's nominee, who happened to be his father. Mr Boon's evidence was also consistent with the First Respondent being the managing

agent (see e.g. para 2 of his statement dated 29 September 2022). In short, the evidence all pointed to that conclusion, subject only to one point: whilst the tenancy agreement dated 3 August 2019 identified the landlord as "Mr Eren Aslan" and the First Respondent as the managing agent, there were two further tenancy agreements in evidence in which the landlord was identified as "Zuplex Ltd": see e.g. tenancy agreement dated 3 September 2020. However, Mr Asan said in evidence that this was an administrative mistake by one of his team in the office. He also said that insofar as the agreements were signed by the First Respondent, they were so signed for and on behalf of the Second Respondent and that this was authorised by the Second Respondent. We accept this evidence. What matters is the substance, not the form and it is quite clear to us on the totality of the evidence that the landlord was the Second Respondent.

Has a relevant Offence been committed?

8. Having resolved that issue, the next issue to consider is whether the tribunal is satisfied beyond reasonable doubt that the landlord has committed one or more of the offences specified in the table under s.40(3).

9. The relevant offence in this case is the offence of being a person having control of or managing an HMO which is required to be licensed under Part 2 of the Housing 2004 Act ("the 2004 Act") but which is not so licensed, contrary to section 72(1) of the 2004 Act.

10. For a person to commit that offence they must have control of, or be managing an HMO. Section 254(2) of the 2004 Act contains the standard test of an HMO. A building or a part of the building meets the standard test if the following conditions are met: (a) it must consist of one or more units of living accommodation not consisting of a self-contained flat or flats; (b) the living accommodation must be occupied by persons who do not form a single household; (c) they must occupy the living accommodation as their only or main residence or be treated as so occupying it; (d) their occupation of the living accommodation must constitutes the only use of it; (e) rent must be payable by

at least one of the occupiers; and (f) two or more of the households who occupy the living accommodation must share one or more basic amenities.

11. Part 2 of the 2004 Act provides for HMO licensing. It does not apply to all HMOs but only to those which fall within a prescribed description (section 55(2), 2004 Act). The Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018 ("the 2018 Order") provides, at Article 4, that an HMO which satisfies the standard test will be of a prescribed description it is occupied by five or more persons living in two or more separate households.

12. It was, in fact, common ground that at all material times the Property was not licensed but should have been on the basis that it fell within the prescribed description of HMO specified in Article 4 of the 2018 Order and was in any event located within the London Borough of Hackney's Additional Licensing Scheme which was in force from 1 October 2018. The effect of these provisions is as follows. Firstly, all privately rented properties in Hackney occupied by 5 or more people making up two or more households require an HMO license. Secondly, all privately rented properties in Hackney occupied by 3 or 4 people making up two or more households also require a license.

13. Notwithstanding any admission or concession on the part of the Second Respondent, the Tribunal is satisfied beyond reasonable doubt that the relevant offence was committed. The Property is described by the landlord as a two-bedroomed maisonette with access to a garden, although we note and accept Mr Boon's evidence that it was advertised and occupied as a three-bedroomed property by three couples paying rent who did not form a single household and shared bathroom and kitchen facilities. Mr Boon also confirmed it was his only or main residence and the same was true of the other Applicants. This was their home at the time. At all material times the Property was not licensed but should have been.

14. The Second Respondent did not, in terms, raise a defence of reasonable excuse. However, mindful of what the Deputy Chamber President said in *IR Management Services Ltd v Salford City Council* [2020] UKUT 81 (LC) ("*the*

issue of reasonable excuse is one which may arise on the facts of a particular case without an appellant articulating it as a defence (especially where an appellant is unrepresented). Tribunals should consider whether any explanation given by a person managing an HMO amounts to a reasonable excuse whether or not the appellant refers to the statutory defence"), we have considered for ourselves whether we can be satisfied so as to be sure that the Second Respondent indeed committed a relevant offence and, in so doing, have considered whether he had a reasonable excuse for failing to obtain a license. Having done so, for the reasons set out below, we are satisfied beyond reasonable doubt that the Second Respondent has indeed committed an offence under s.72(1) of the Housing Act 2004 as he was a person having control of or managing an HMO which was required to be licensed but was not so licensed. Whilst we have decided that the Second Defendant did not have a reasonable excuse, the fact that he relied on an agent is, in our judgment, a highly relevant factor in determining the amount of any RRO: see e.g. *Hallett v Parker* [2022] UKUT 165 (LC).

15. The Tribunal is therefore satisfied that it has jurisdiction to make a RRO against the Second Respondent and that it is appropriate to do so.

Amount of RRO

16. In considering the correct approach to quantifying the amount of an RRO, the Chamber President, Fancourt J, said this in *Williams v Parmar* [2021] UKUT 244 (LC):

> *23. The offence of having control of or managing an unlicensed HMO is not an offence described in s. 46(3)(a) and accordingly there was no requirement in this case for the FTT to make a maximum repayment order. That section did not apply. The amount of the order to be made was governed solely by s.44 of the 2016 Act. Nevertheless, the terms of s.46 show that, in cases to which that section does not apply, there can be no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44 or s.45. The terms of s.44(3) and (4) similarly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in*

s.44(2), though the amount must "relate to" the total rent paid in respect of that period.

24. It therefore cannot be the case that the words "relate to rent paid during the period …" in s. 44(2) mean "equate to rent paid during the period…". It is clear from s. 44 itself and from s. 46 that in some cases the amount of the RRO will be less than the total amount of rent paid during the relevant period. S.44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and s. 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.

25. However, the amount of the RRO must always "relate to" the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary "starting point" for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).

26. In this regard, I agree with the observations of the Deputy President of the Lands Tribunal, Judge Martin Rodger QC, in Ficcara v James. [2021] UKUT 0038 (LC), in which he explained the effect of the Tribunal's earlier decision in Vadamalayan v Stewart [2020] UKUT 0183 (LC). Vadamalayan is authority for the proposition that an RRO is not to be limited to the amount of the landlord's profit obtained by the unlawful activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in s. 44(4).

…
40. It seems to me that the FTT took too narrow a view of its powers under s. 44 to fix the amount of the RROs. For reasons already given, there is no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s. 44(4), though the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

41. In my judgment, the FTT also interpreted s. 44(4)(a) too narrowly if it concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord", so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the FTT should take into account the purposes intended to be served by the jurisdiction to make an RRO: see [43] below.

42. The landlord in this appeal faces an initial difficulty that the argument that the FTT erred by misinterpreting the breadth of its discretion is not a ground of appeal for which permission has been sought or granted. Despite that, Mr Colbey advanced his case succinctly and clearly and the tenants, with some assistance from the Tribunal, were able to participate fully in arguing the point, to the extent that, as non-lawyers, they were able to do so. They were fully able to make observations about whether the FTT had gone wrong in awarding them too high a figure. Their skeleton argument also ranged more widely than the narrow question of the interest-only mortgage repayments. I do not consider that they were disadvantaged by the fact that a ground of appeal had not spelt out the argument that the landlord advanced at the hearing. In those circumstances, I consider that it is just to allow the landlord to raise the point without notice and I grant permission for an amended Ground B to include the argument that I have summarised.

43. Mr Colbey argued that the FTT was wrong to regard the amount of rent paid as any kind of starting point and that the orders should have been made on the basis of what amount was reasonable in each case. He relied on guidance to local authorities issued under Chapter 3 of Part 2 of the 2016 Act, entitled "Rent Repayment Orders under the Housing and Planning Act 2016: Guidance for Local Authorities", which came into force on 6 April 2017. Notably, this is guidance as to whether a local housing authority should exercise its power to apply for an RRO, not guidance on the approach to the amount of RROs. Nevertheless, para 3.2 of that guidance identifies the factors that a local authority should take into account in deciding whether to seek an RRO as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. Although those are identified in connection with the question whether a local authority should take proceedings, they are factors that clearly underlie Chapter 4 of Part 2 of the 2016 Act generally.

44. The FTT erred in construing its powers too narrowly, in the respects that I have identified.

17. The offence of having control of or managing an unlicensed HMO is not an offence which obliges the Tribunal to make a maximum repayment order. The amount of the order to be made is governed solely by s.44 of the 2016 Act and we remind ourselves that in cases to which the terms of s.46 do not apply, there is no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44. As Fancourt J observed in *Williams v. Parmar*, the terms of s.44(3) and (4) clearly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must "relate to" the total rent paid in respect of that period.

18. Under s.44(3) the amount which the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of universal credit paid to any person in respect of rent under the tenancy during that period. In the present case it is common ground that the amount of rent in respect of the relevant 12-month period is £22,644. It was common ground that there are no deductions to be made in respect of benefits or utilities. Thus the figure claimed is £22,644. In determining the amount of the RRO we take into account, in particular, the conduct of the landlord and the tenants, the financial circumstances of the landlord and whether the landlord has at any time been convicted of an offence to which Chapter 4 applies.

19. We begin with the conduct of the landlord and the tenants. The landlord did not license the Property in circumstances where a license was required. However, he entrusted the letting and management of the Property to the First Respondent who he believed was a reputable letting agent. The First Respondent at no time advised the Second Respondent that a license was required. Ultimately, it was the London Borough of Hackney who contacted the First Respondent on 20 July 2021 to advise of the need for a license. The First Respondent immediately forwarded that message to the Second Respondent, and the Second Respondent applied on the very next day for a license. That license application is still pending but there is no evidence that

this is for any other reason other than a delay on the part of the Council in inspecting the Property. The Second Respondent is not naïve but nor is he an experienced or large-scale landlord. He works in the technology sector as a programme manager. He owns two other properties apart from the property he lives in and the Property that is the subject of this claim. However, neither is let out as an HMO and he was at great pains to point out in both his written and oral evidence that he reasonably relied on the First Respondent as "*the subject matter experts in the field of property management and lettings*".

20. We have carefully considered this aspect of the case and whether this affords the Second Respondent a reasonable excuse. The burden is on the Second Defendant to establish to the civil standard that he had a reasonable excuse. We are unpersuaded that he did and we find that he did not have a reasonable excuse for the following reasons. Firstly, we are not satisfied on the facts of this case that engaging a managing agent absolved the Second Respondent of *all* responsibility for ensuring compliance with the law in relation to the licensing of HMOs. He said in his oral evidence that he had made it clear to the Mr Asan that the Property was not to be let as an HMO but we reject this evidence. We found the Second Respondent in general a credible and straightforward witness but on this issue he did not persuade us. That may have been his intention and it is not what he said in his written evidence: cf. para. 21 of his statement dated 21 October 2022. Secondly, and in any event, he accepted in evidence that he knew as early as 2017 or 2018 that there were five tenants in the Property and that he knew in 2019 that there were 6 tenants in the Property. He said he was not provided with copies of the tenancy agreements but he could easily have asked his agent for a copy and he also visited the Property on at least two occasions when he could have made his own enquiries. In our judgment, it would or should have been obvious to the Second Respondent from 2019 at the latest that the Property was being occupied by 5 or more persons comprising two or more households who were occupying the Property as their only or main residence. Thirdly, whilst he suggested that Mr Asan and/or the First Respondent effectively embarked on a frolic of their own, he was more than happy to accept the rent and must be taken to have ratified the tenancies that the First Respondent had arranged.

Fourthly, it is not difficult to find out what the licensing requirements were in Hackney at material time. A google search would have revealed the answer quite readily. Finally, whilst we accept that the Second Respondent is not a sophisticated or particularly experienced landlord, he accepted in evidence that he knew something about HMOs and suggested that his father had been "stung" in the past in his dealings with an HMO. For all those reasons we do not accept that the Second Defendant had a reasonable excuse but we do consider that his engagement of, and reliance on, an apparently reputable letting agent is highly significant and amounts to important mitigation. We have already adverted to the fact that the Second Respondent applied immediately for a license following the communication from Hackney on 20 July 2021. This is demonstrative, we find, of the fact that the Second Respondent is generally a responsible and responsive landlord. The tenants made no complaints in their written evidence about the landlord's conduct or the condition of the Property save in relation to an allegation that they were given short notice to quit (6 weeks as opposed to 2 months). However, we find that the short notice was given by the First Respondent unilaterally and not at the suggestion or instigation of the Second Respondent. We are not prepared to count this against the Second Respondent. In his oral evidence, Mr Boon said that "*on the whole we liked the location and the property*" but then suggested that the tenants had had some problems getting repairs attended to promptly. This seems to have been something of an afterthought and the other evidence suggested that repairs were generally attended to with a reasonable degree of alacrity. Again, we do not consider that there is an adverse conduct issue in relation to attending to repairs. On the contrary, we are satisfied that the Property was in good condition at all material times and would have been licensed, if an application had been made, once it had been inspected.

21. We find that the tenants have been model tenants and make no reduction to reflect their conduct.

22. We consider next the financial circumstances of the landlord. Belatedly, the landlord suggested that he would struggle financially if we made a RRO in the amount claimed and he invited us to consider his financial circumstances.

However, he put in no proper evidence to make out a case of hardship and our brief questioning of him revealed that there was net equity of about £750,000 in the properties that he owns. We therefore consider that there is no reason to reduce the amount of the RRO on account of the landlord's financial circumstances.

23. Finally, there is no suggestion that the landlord has previously been convicted of any offence to which Chapter 4 of the 2016 Act applies. This is to his credit and fits with our assessment of him as a responsible landlord.

24. We bear in mind the purpose of the legislative provisions: to punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. However, in our judgment, whilst the offence was persistent in the sense that it extended over a considerable period of time, we consider the offence considerably less serious than many other offences of this type and we find very significant mitigation in the facts as we find them (see paras 14-18 above) but specifically in the fact that the Second Respondent engaged an apparently reputable letting agent who, in the ordinary course, would have been expected to flag up and deal with any licensing requirements if the Property was to be let out as an HMO but failed to do so: see e.g. *Ekwezoh v LB Redbridge* [2021] UKUT 180 (LC) at [50].

25. In all the circumstances, the Tribunal makes a rent repayment order in favour of the Applicants in the total sum of £5,661, being 25% of the sum of £22,644 identified above, split between the 6 Applicants as follows:

James Boon - £1,147.50
Ioannis Biratsis - £535.50
Polly Freestone - £1,147.50
Ieva Ovcinikovaite - £535.50
Jodie Pitts - £1,147.50
Seth Tonkin - £1,147.50

26. The Applicants also applied for an order under paragraph 13(2) of the 2013 Tribunal Procedure Rules for the reimbursement of the application fee and the hearing fee which together total £300. We have a discretion. Having regard to our conclusions above, we consider it appropriate to make the order sought. There was also an application for legal costs which we refuse. This is generally a no-cost jurisdiction unless there has been unreasonable conduct and we are not persuaded that there has been.

Name: Judge W Hansen **Date:** 14 March 2023