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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/HMF/2022/0070**
Property	**:**	**14 Bassett Road London W10 6JJ**
Applicants	**:**	**Chantelle Shokar**
Representative	**:**	**None stated**
Respondent	**:**	**James Barker**
Representative	**:**	**Julian Hunt of Counsel**
Type of application	**:**	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal members	**:**	**Judge Professor Robert Abbey** **Tribunal Member Mr. Christopher Gowman MCIEH.(Professional Member)**
Venue and date of hearing	**:**	**By a video hearing on 30 March 2023**
Date of decision	**:**	**11 April 2023**

DECISION

Decision of the tribunal

(1) The Tribunal determines that a rent repayment order be made in the sum set out below in favour of the applicant, the Tribunal being satisfied beyond reasonable doubt that the respondent has committed

an offence pursuant to s.72 of the Housing Act 2004, namely that a person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part two of the 2004 Act but is not so licensed. Under section 99 of the 2004 Act "house" means a building or part of a building consisting of one or more dwellings.

(2) The total net amount of the rent repayment order is **£3750** of the rent paid by the applicant to the respondent.

Reasons for the tribunal's decision

Introduction

1. The applicant made an application for a rent repayment order pursuant to the terms of s.41 of the Housing and Planning Act 2016 in respect of a property known as the **14 Bassett Road London W10 6JJ**. The applicant seeks a Rent Repayment Order (RRO) for the total sum of £8640. The respondent is the superior titleholder of the property, and the applicant was his residential tenant.

2. The tribunal did inspect the property as it considered the documentation and information before it in the trial bundle and a site visit would enable the tribunal to proceed with this determination taking into account the specific features in dispute. Accordingly, the Tribunal attend at the property the week before the hearing on a dry March day. The Tribunal was able to see the layout of the large townhouse property and was able to see the layout of the room on the right on the hall floor that comprised the area of the building that was subject to different views and interpretation by the parties. The Tribunal also saw the rest of the building that included the large room occupied by the applicant as well as kitchen, laundry and garden areas.

The hearing

3. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice CVP platform with all participants joining from outside the court. A face-to-face hearing was not held because all issues could be determined in a remote hearing. The documents that were referred to were in two bundles of many pages, the contents of which we have recorded, and which were accessible by all the parties. Therefore, the tribunal had before it electronic/digital trial bundles of documents agreed by the applicant and the respondent, in accordance with previous directions. Legal submissions/skeleton arguments were also made available to the tribunal.

4. The hearing of the application took place on Thursday 30th March 2023 by a remote video hearing with the applicant self-represented and the respondent was represented by Mr Hunt of Counsel.

5. Both parties provided extensive trial bundles to assist the Tribunal at the time of the hearing. These bundles consisted of copy deeds documents, tenancy documentation for the property, email letters and other relevant copy documents relating to this dispute.

6. Both sides called witnesses but not all who provided statements in the bundles attended. First, both sides agreed that character witnesses need not be called. Secondly, other witnesses simply did not or could not attend. The Tribunal could read their statements but could only put such weight on them as the Tribunal thought appropriate given that their evidence had not been tested in cross-examination. Georgia Chambers, Jordan Shokar and the applicant all gave evidence in support of the application. Bredan Stack, Mr Japal, Earl Collins, the respondent and the respondent's mother all gave evidence in opposition to the application. The applicant did not cross examine Mrs Barker.

7. Rights of appeal are set out in the annex to this decision and relevant legislation is set out in an appendix to this decision.

Background and the law

8. Section 41 of the Housing and Planning Act 2016 allows tenants to apply to the Tribunal for a rent repayment order. The Tribunal must be satisfied beyond reasonable doubt that a person/company has committed an offence described in Part two of the Act and in that regard section 72 of the 2004 Act states: -

> *72 Offences in relation to licensing of HMOs*
>
> *(1)A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.*
>
> *(2)A person commits an offence if—*
>
> *(a)he is a person having control of or managing an HMO which is licensed under this Part,*
>
> *(b)he knowingly permits another person to occupy the house, and*

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

9. The meaning of a "person having control" and "person managing" is provided by s.263 of the Housing Act 2004. "Person managing" is defined at subsection (3) as:

"[…] the person who, being an owner or lessee of the premises —

receives (whether directly or through an agent or trustee) rents or other payments from—

(i) in the case of an HMO, persons who are in occupation as tenants or licensee of parts of the premises;

(ii) in the case of a house to which Part 3 applies (see section 79(2)),

persons who are in occupation as tenants or licensees of parts of

the premises, or of the whole of the premises;

would so receive those rents or other payments but for having entered into an arrangement […] with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments."

10. Under section 41 (2) (a) and (b) of the 2016 Act 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. The Respondent at the hearing confirmed that he concedes that during the relevant period:

(i) He was the immediate landlord of the Applicant.

(ii) He was a person having control of the subject property for the purposes of section 263 of the Housing Act 2004.

(iii) The subject property fell within a mandatory licensing area as designated by the local Council.

(iv) He did not have the correct type of licence in place, nor did he apply for one.

11. The tenant originally claimed an RRO for the total sum of £8640. The applicant supplied to the Tribunal proof of payment shown in the trial bundle. The Tribunal were satisfied that these payments had indeed been made. There were no rent arrears. The period of this claim is from February 2021 to February 2022.

The Offence

12. Mandatory licensing is required where an HMO is occupied by five or more persons living in two or more separate households. The 2004 Act also provides for licensing to be extended by a local authority to include houses in multiple occupation (HMO)s not covered by mandatory licensing. The property is located within a mandatory licensing area as designated by the local council. Whilst Kensington & Chelsea Council do not operate an additional licensing scheme, some HMOs do need a licence under the mandatory HMO licensing scheme that applies throughout England. A mandatory HMO licence is required if the property meets the standard test, self-contained flat test or converted building test HMO definition in section 254 of the Housing Act 2004 and is occupied by five or more people.

13. For mandatory licensing to apply, the HMO must be occupied by five or more persons, from two or more separate households. The applicant says the respondent committed an offence under section 40(3) of the Housing and Planning Act (HaPA) 2016 by running an unlicensed HMO with at least 5 occupants during her time residing at Bassett Road. The respondent denies this.

14. There being a "house" as defined by statute, then a person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part two of the Act but is not so licensed. The applicant asserted that the respondent has therefore committed an offence under section 72 of the Housing Act 2004 (as amended by the Housing and Planning Act 2016) as the respondent was in control of an unlicensed property.

15. In the light of the above, the Tribunal took time to carefully consider the evidence regarding the absence of a licence and came to the inescapable conclusion that none had been issued by the Council. Therefore, the Tribunal concluded that this was an unlicensed property in relation to this application. However, the respondent asserted that the property did not need to be licensed for two reasons. First, because two occupants, the respondent and his mother resided in a self-

contained unit being the room referred to above. Secondly, the respondent also therefore asserted that at no time were there over four people in two or more households within the subject property.

16. As you enter the house the respondent says there is a self-contained flat (under the definition section in the Housing Act 2004) to the right. This was said to be the private self-contained flat within the definition of the Housing Act 2004 of Marilyn Barker. It was also said to be James Barker's main residence. Consequently, the respondent says that both Mrs Barker and the respondent cannot be counted as residents in the part of the property the applicant says she resided in.

17. The rest of the property is a large rambling London townhouse. The respondent asserts that the self-contained flat is the part the respondent and his mother have as their main residence. As such, the respondent asserts that the people in the self-contained flat do not count for arithmetical reasons for mandatory licencing (but do if there are of course five or more unrelated souls etc in the self-contained flats for which a licence for that self-contained unit would be required).

The tribunal's determination

18. The Tribunal took time to reflect upon the status of the room on the hall floor. The Tribunal did have the benefit of the site visit. The room is a large high ceiling space with a converted area to the rear that contained a small kitchen type space and a toilet and shower area. Above it was a small sleeping area formed from a platform above the kitchen and shower spaces. The door to the room was an internal wooden panelled door that matched the other internal doors within the building. The Tribunal noted that there was no Chubb or Ingersoll lock on the door but there was an original old-style deadlock. There did not appear to be any fire safety work made to this door.

19. The Tribunal heard oral evidence from the respondent who asserted that this room was a self-contained separate unit within the building. The Tribunal was not persuaded of this. It seemed to the Tribunal that this was merely a room within the building that formed part of it, albeit with some limited facilities to the rear including a rather restricted sleeping area. Accordingly, the Tribunal from its own observations from the site visit was of the view that this room was part of the whole building and as such occupants would be included in the calculation of persons for the purposes of calculating whether or not there was an HMO at the property.

20. This being so the Tribunal needed to ascertain whether there were 5 persons in two or more households. The Tribunal turned to the schedule prepared by the respondent that he included in his evidence to show the levels of occupancy during the period the claim. On his

calculations, which the Tribunal accept, it would appear that for some 40 weeks of that period or 76% of the time there were sufficient numbers including Mr and Mrs Barker to take them up to or over the 5-person threshold. To that end the Tribunal is satisfied that for the 40 weeks mentioned above there was an HMO and this was not licensed and as such the respondent has committed the offence set out above.

21. Consequently, the Tribunal had to consider the quantum of the RRO. So, the Tribunal then turned to quantifying the amount of the RRO. The amount of the RRO was extracted from the amount of rent paid by the applicant during the period of occupancy as set out within the trial bundle and as declared at the start of the hearing. In deciding the amount of the rent repayment order, the Tribunal relied upon the leading authority on the Tribunal's approach to quantum *Acheampong v Roman* [2022] UKUT 239 (LC) at [20]. The Upper Tribunal established a four-stage approach the Tribunal must adopt when assessing the amount of any order:

> *"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. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal is expected to make an informed estimate where appropriate.*
>
> *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 whose relative seriousness can be seen from the relevant maximum sentences on conviction) 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 percentage of the total amount applied for 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)."*

22. So, in *Acheampong* the Upper Tribunal decided that the correct calculation process was first, determine the total rent paid during the

relevant period; secondly, deduct any element of the rent which is actually a payment for utilities or other matters which only benefit the tenant (e.g. gas, electricity, internet access); thirdly, assess the seriousness of the offence both in comparison to other types of offence in respect of which a rent repayment order can be made and in relation to the same type of offence; fourthly, assess what proportion of the rent reflects that seriousness; and, finally, make any adjustments necessary (whether up or down) to reflect any wider mitigating or aggravating factors. To produce an RRO that accords with these guidelines the Tribunal will address each item in turn below.

23. At the first stage the applicant is seeking to recover the sum of £8640 for the rent paid for the period between 21 February 2021 and 21 February 2022 on behalf of the Applicant. At the hearing the respondent agreed this amount and so the Tribunal moved to the second stage

24. With regard to potential deductions the applicant was not required under the terms of their tenancy to pay for all utilities and council tax during her tenancy Therefore a deduction from the whole of the rent claimed is appropriate. When asked to estimate this amount the tenant suggested a sum of £50 to £60 per month. This was not challenged by the respondent. The Tribunal took the figure of £60 per month bearing in mind the location and type of property involved for the level of outgoings in this regard. This would give a deduction for the full period of £720 from the rent claimed. So the Tribunal then turned to the third stage.

25. The Tribunal sought to consider the seriousness of the offence both in comparison to other types of offence in respect of which a rent repayment order can be made and in relation to the same type of licensing offence.

26. To that end the Tribunal considered the following factors when determining the seriousness of this licencing offence when compared to other licencing offences:

- The length of the offence (*Aytan v Moore* (2022) UKUT 27 (LC) , (*Hallet v Parker* [2022] UKUT 165).
- A lack of process to keep up to date with the legal obligations (*Aytan v Moore* (2022) UKUT 27 (LC) .
- Fire safety breaches (*Acheampong v Roman*), (*Aytan v Moore* (2022).
- Breach of management regulations.
- Whether the Respondent is a professional landlord (*Aytan v Moore and Wilson v Arrow* (2022) UKUT 27 (LC).

27. The length of the offence was for the forty weeks mentioned above. Clearly, this is not a full period. In regard to fire safety breaches, it seemed to the Tribunal that any fire safety breaches were not especially serious or substantial. There was a minor breach of management regulations in that the landlord's name and address was not displayed within the property.

28. The Tribunal were satisfied that the respondent was not a business landlord. The Tribunal was mindful of the guidance to be found in the case of *Parker v Waller and others* [2012] UKUT 301 (LC). A professional landlord is expected to know better. From the evidence before it the Tribunal took the view that the respondent was a not a professional landlord. As was stated in paragraph 26 of *Parker* a lessor who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional: -

> "*Paragraph (d) requires the RPT to take account of the conduct and financial circumstances of the landlord. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to register will obviously merit a larger RRO than instances of inadvertence – although all HMO landlords ought to know the law. A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.*"

29. Having said that, when considering the amount of a rent repayment order the starting point that the Tribunal is governed by is s.44(4), which states that that the Tribunal must "in particular, take into account" three express matters, namely:

> (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.

The Tribunal must therefore consider the conduct of the parties and the financial circumstances of the respondent. Express matter (c) was not particularly relevant as no such convictions apply so far as the respondent is concerned. Express matter (b) was not relevant because no details of the financial circumstances of the landlord were disclosed by the respondent and therefore could not be considered in this case by the Tribunal.

30. The Tribunal was mindful of the fact that in *Awad v Hooley*, Judge Cooke agreed with the analysis in *Ficcara v James* and said that it will be unusual for there to be absolutely nothing for the FTT to take into

account under section 44(4). Therefore, adopting the approach of the Upper Tribunal in the above cases and starting with the specific matters listed in section 44, the tribunal is particularly required to take into account (a) the conduct of the parties. We will take these in turn.

31. So, we turn to the conduct of the parties. The respondent confirmed that the applicant had complied with the terms of their tenancy agreement by the payment of all rents due. There were some allegations of poor conduct at noisy garden parties on the part of the applicant made by the respondent. However, of greater consequence was the allegation by the applicant that the respondent had failed to declare rental income to HMRC. The respondent through the evidence of Mr Japal confirmed that the rents had been declared to the tax authority and had done so in full and detailed annual accounts. Notwithstanding this evidence the applicant at the hearing seemed reluctant to withdraw this allegation. The Tribunal took note of this conduct and took it into account under s.44(4).

32. The Tribunal also felt that the room occupied by the applicant was of a good size and was well presented. There was a smallish hole in the ceiling but not such that it was a significant issue. So the condition of the room was reasonable and afforded a pleasant aspect too.

33. With regard to the conduct of the respondent, as the Upper Tribunal noted in *Dowd v Martins* [2022] UKUT 249 (LC) at [34], mere compliance with a legal obligation by a landlord does not constitute good conduct – it is simply what is to be expected.

34. It was the case that the landlord should have correctly licenced this property but did not. This is a significant factor in relation to the matter of conduct. It remains the case that this property should have been correctly licenced and regrettably it was not. Therefore, the Tribunal accepts that this aspect of the conduct of the parties should be taken into account when considering the amount or level of the rent repayment order necessary in this case.

35. Consequently, and overall, the Tribunal considered that the property was in reasonably good order even if there were elements of it that were unfinished such as the bathroom to the side of the applicant's room. Therefore, bearing in mind all these factors, the Tribunal started at a 76% level of the rent, £6566. It then decided that there were further reductions that might be appropriate, proportionate and indeed necessary to take account of the other factors in the Act so far as the parties were concerned.

36. As noted above the utility allowance of £720 was appropriate and so this sum was deducted from the 76%. Because the Tribunal did not think this was a particularly serious example of this offence, bearing in

mind the big room and pleasant aspect, the Tribunal thought a further deduction of £1500 would take these matters in to account when coming to a final figure for the order. On top of this the Tribunal thought that there should be a further deduction to take account of the concern the Tribunal had regarding the disproved tax allegation. When taking this into account, the total net amount of the rent repayment order is **£3750** for the rent paid by the applicant to the respondent.

37. Finally, the Tribunal decided in view of the findings set out above and in particular with regard to the conduct of the parties that it would not order the respondent to repay the applicants Tribunal fees for the application and hearing.

Name:	Judge Professor Robert Abbey	Date:	11 April 2023

Annex

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e., give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

72 Offences in relation to licensing of HMOs

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

(2) A person commits an offence if—

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

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

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

(3)A person commits an offence if—

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

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

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

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

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

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

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

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

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

(c) for failing to comply with the condition,

as the case may be.

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

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

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

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

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

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

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

(9) The conditions are—

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

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

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

95 Offences in relation to licensing of houses under this Part

(1)A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.
(2)A person commits an offence if—
(a)he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and
(b)he fails to comply with any condition of the licence.
(3)In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—
(a)a notification had been duly given in respect of the house under section 62(1) or 86(1), or
(b)an application for a licence had been duly made in respect of the house under section 87,
and that notification or application was still effective (see subsection (7)).
(4)In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—

(a)for having control of or managing the house in the circumstances mentioned in subsection (1), or
(b)for failing to comply with the condition,
as the case may be.
(5)A person who commits an offence under subsection (1) is liable on summary conviction to a fine .
(6)A person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
(6A)See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).
(6B)If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct
(7)For the purposes of subsection (3) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either—
(a)the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or
(b)if they have decided not to do so, one of the conditions set out in subsection (8) is met.
(8)The conditions are—
(a)that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or
(b)that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.
(9)In subsection (8) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

s41 Housing and Planning Act 2016

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.

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)....
(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.