FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BB/HMF/2022/0122**
Property	:	**66 Creighton Avenue Upton Park London E6 3DS**
Applicants	:	**Marie-Claire Minter (1)** **Daisey Davies (2)** **Vivienne Carnegie (3)** **Grace Kemp (4)** **Fatemeh Hashimi (5)**
Representative	:	**George Penny of Flat Justice Community Interest Company**
Respondent	:	**Kevin Lenehan**
Representative	:	**-**
Type of application	:	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	:	**Mrs E Flint FRICS** **Mr A Fonka FCIEH CEnvH M.Sc**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of hearing	:	**6 March 2023**
Date of decision	:	**17 March 2023**

DECISION

The tribunal determines that the applicants are entitled to a Rent Repayment Order against the respondent, Kevin Lenehan in the sums set out below, payable within 28 days of the date of this decision. The reasons for our findings are set out below.

In addition, we order that the respondent do repay to the applicant the sum of £300 in respect of the fees paid to the tribunal. Such sum to also be paid within 28 days of the date of this decision.

Background

1. This was an application made by Marie -Claire Minter, Daisy Davies, Vivienne Carnegie, Grace Kemp and Fatemeh Hashimi for a Rent Repayment Order (RRO) under the Housing and Planning Act 2016 (the HPA) The respondent is Kevin Lenehan, the property is 66 Creighton Avenue Upton Park London E6 3DS (the Building).

2. The building is a two storey terrace house comprising a communal living room and kitchen, four bedrooms and a shared bathroom/wc. One of the bedrooms is on the ground floor.

3. On 17 June 2022 the Application for a RRO was sent to the tribunal. The grounds of the application were as follows: The Property is in the London Borough of Newham (LBN) which has an Additional Licensing scheme in operation since 1 January 2018 (expiring 31/12/2022) requiring all HMOs with 3/+ occupants in the designated area of the borough to have an HMO licence. The property only had a Selective Licence which is the wrong licence for the property. This is an offence listed in s40(3) of the HPA at line 5: an offence under HA s72(1).

4. The amounts to be repaid were stated to be as follows:
   Vivienne Carnegie (VC), tenancy period: 04/02/2019 - 04/03/2022. >12 months @ 465.25 per calendar month. 12 x 465.25 = £5583.
   Marie-Claire Minter (MCM) tenancy period: 20/01/2020 - 10/12/2021 >12 months @ 427.25 per calendar month = £5127
   Daisy Davies (DD) tenancy period: 04/01/2020 - 04/03/2022 >12 months @397.25 per calendar month. 12 x 397.25 = £4767
   Grace Kemp (GK), tenancy period: 11/01/2020 - 04/03/2022 >12 months @360.25 per calendar month. 12 x 360.25 = £4323
   Fatemeh Hashimi (FH), tenancy period 04/01/2022 - 04/03/2022. 2 months @427.25 per calendar month. 2 x 427.25 = £854.50
   Grand Total: £20,645.50

5. In addition, the applicants applied for the award of the fees paid under rule 13(2) of the Tribunal rules 2013, namely the £100 application fee and £200 hearing fee, a total of £300.

6. The Tribunal sent the Respondent (landlord) copies of the application with supporting documents. Directions were issued on 24 October 2022, listing the application for hearing on 6 March 2023. The Applicant responded according to the timetable set out in the Directions however, the Respondent did not respond to the Directions and on 23 January 2023 the tribunal notified him that it was minded to bar him from defending the application. No response was received to this notification and on 2 February 2023, the tribunal issued a Debar Order which barred the Respondent from defending the proceedings.

7. A face to face hearing was held on 6 March 2023. All the Applicants attended and were represented by Mr George Penny of Flat Justice Community Interest Company, while the Respondent attended the hearing in person.

8. Prior to the commencement of the hearing, we were provided with an Applicant's two hundred and nine page electronic bundle, and a skeleton argument by Mr Penny. The Respondent had also sent to the Tribunal a 3 page statement of case accompanied by three pages of photographs, and two further witness statements from the Respondent.

Hearing

9. At the start of the hearing the Tribunal asked Mr Lenehan why he had not complied with the Directions and/or the Debar Notice which had provided that he could apply for the Notice to be set aside within 28 days of the Notice. Mr Lenehan said he was confused by the moving timetable and had spent most of his time in the intervening period repairing his house. He did not understand what the Debar Order meant.

10. Mr Penny asserted that lifting the Debar Order would undermine the Tribunal's powers to deal with non-compliance with Directions and that it would be prejudicial to the Applicants if the Tribunal allowed the Respondent to serve his case so late in the day. Mr Penny added that he had been unable to provide a response because to the Respondent's late submissions as there were no new Directions providing an alternative date for the applicant's response. He accepted that the Respondent had served his statement of case and witness statements on 7 February and that in the normal course of events the applicants would have been given 14 days to respond. With reference to the correspondence from the Tribunal, he asserted that Mr Lenehan could not cross examine the witnesses or make submissions because he had been barred from taking part in the proceedings. He referred.

The Tribunal's decision

11. The Tribunal considered the points raised, the contents of the Debar Order and subsequent correspondence and reluctantly decided that Mr Lenehan was not able to take part in the proceedings but could observe the hearing.

Reasons for the Tribunal's decision

12. Mr Lenehan had been on notice since the Directions were issued on 24 October that the case was to be heard on 6 March 2023. On 20 January the Tribunal directed that "*Unless the Respondent serves his bundle on the Applicants and on the Tribunal by 4 pm on 30 January 2023, the Tribunal may debar the Respondent from taking further part in these proceedings and determine the application on the Applicants' evidence alone."*

13. On 2 February the tribunal served a Debar Order. In accordance with paragraph 5 of that Order, in the following form:

    I now ORDER that the Respondent be debarred from further participation in the proceedings pursuant to rule 9(3)(a) as applied by rule 9(7) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, and the application will be determined on the Applicants' evidence alone.

    The Respondent may make an application in writing to set aside this order within 28 days after the date on which this notice is sent to it.

    Any such application must:

    (a) be delivered by email, copied to the Applicants' representative;

    (b) make good the failure to comply with directions; and

    (c) provide an explanation for the Respondent's failure to comply with both the directions 8 and 9 of the Directions dated 24 October 2022, and with the Tribunal's notice of 20 January 2023.

14. Mr Lenehan provided his evidence on the evening of 7 February but did not apply to overturn the Order.

15. Mr Penny stated the Property is subject to an Additional Licensing Scheme ("Scheme") which came into force on 1 January 2018, expired on 31 December 2022. The Scheme established by the Council, applied across the designated area where the property was located and applied to all HMOs with three or more occupants from two or more households. A failure to license a property as required by this scheme is an offence under s.72(1) of the Housing Act 2004. Not licensing such a property is an offence listed in s.40 of The Housing and

Planning Act 2016 as amenable to a Rent Repayment Order. At all times during the applicants' occupation of the Property, there were three or more persons in occupation of the Property, each forming a separate household. At no time during the applicants' occupation of the Property was an Additional Licence in force.

16. He called each of the applicants in turn to give evidence.

17. Miss Carnegie explained that she obtained her room through a website, viewing the room by video initially, she was to share the house with three other girls. She had paid her deposit to the lead tenant and understood that if she wanted to move out her deposit would be repaid by whoever replaced her in the house. She accepted that she would be expected to find a replacement. She was not given a written tenancy agreement and did not ask because she did not know about it. In November 2019 the lead tenant moved out and she became the lead tenant which involved collecting the monthly outgoings including the rent, cost of broadband, gas and electricity bills, and their contributions to the monthly food bill from the remaining occupants. She was not sure if the landlord was aware each time the tenants changed as he was not involved in the process. The occupants interviewed prospective tenants. The first time she had met the landlord was when she had become the lead tenant. She was not sure if she had told the landlord the names of the other tenants.

18. The landlord visited occasionally, usually at their request to deal with repairs. There had been problems with a blocked kitchen drain, the wc and water ingress into the neighbour's property. Miss Carnegie acknowledged that the landlord would not have necessarily known who was moving into the property but that he would have been aware from their looks that the four occupants were not members of the same family.

19. The tenants cooked for each other every day, sharing the cost of food and other household expenses. There was no door between the living room and kitchen. Miss Creighton, as did all the subsequent witnesses confirmed that they did not have a tenancy agreement and that their deposits were not in a protection scheme. However, the landlord had returned their deposits when they left the property.

20. Miss Minter moved into the house in January 2020 and occupied the ground floor bedroom. They were 3 others living at the property before her. She confirmed that she knew the landlord's name and had spoken to him in July 2020 when she contacted him regarding the blocked wc and again in July 2021. She had paid the cleaner's husband to unblock the kitchen sink and deducted the cost from the rent. She was unsure exactly what the exact rent was because she paid a sum inclusive of the rent, food shop, gas, electricity and wifi. She informed the landlord when she was moving out and confirmed that Miss Carnegie was still the lead tenant.

21. Miss Minter confirmed that the only smoke detector at the property was in the hallway.

22. Miss Davies moved into the house in January 2020. 4 others were in occupation at this point. She had viewed the house in November 2019. She paid a monthly amount to Miss Carnegie to cover the rent and household bills including food. She did not see any safety certificates whilst living at the property.

23. She had not known about the licensing scheme until she was looking for somewhere else to live. During the time she lived at the house an electrician had changed a socket in her bedroom and the electric light in the bathroom following a routine inspection; not because of any complaint. No certificates were provided following this work.

24. Miss Davies confirmed that she had not had any communication with the landlord until after she had left the property.

25. Miss Kemp moved in during January 2020. 3 others were residing at the property at this point. She thought the landlord knew there was a change in occupancy: the house had originally been let to family members who had moved out one by one. Therefore, the landlord knew we were new tenants.

26. During lockdown she had contacted the landlord regarding her bed; he arranged a replacement. She also contacted the landlord regarding the plumbing issues which were resolved to an extent although they kept recurring. There was no heating or hot water over the Christmas period. Miss Minter solved the problem, subsequently a gas engineer attended to sort it out. When asked about her experience living at the property, she said that living at the house had been a positive experience most of the time as she got on well with the other girls. When asked about the landlord, she said he was responsive to complaints to start with but that this had changed later on.

27. Miss Hashimi (Kim) said that she had moved into the house on 4 January 2022 after seeing the room on Spareroom.com. She knew that Miss Carnegie was not the landlord. She had wanted to stay in the house longer but could not do so as the landlord wanted possession so that he could carry out repairs to the house. The landlord had asked her to leave within two weeks but agreed she could stay for the month because she had already paid a month's rent. She had to move out on 4 March 2022 against her wishes. She did not remember there being much wrong about the property apart from the funny washing machine. The landlord had returned her deposit.

28. The tenants had only found out that there was damp in the living room when the landlord came to inspect. The damp had not affected her bedroom.

29. In submissions Mr Penny said that the Applicant's evidence showed that an offence had been committed. The freeholder was the person managing and

having control of the house. He accepted that the landlord may not have known the names of all the occupants but he was aware that the occupants changed over time. This was evidenced by the various texts he had received over the years. He referred to the statutory definition of a HMO (s77) and single household (258). This was a household of unrelated people; their cooking and eating together does not make them a single household under the statutory definition.

30. Mr Penny referred the Tribunal to Williams v. Parmar [2021] UKUT 244 (LC) as the leading case in the present line of authority. In Acheampong v. Roman [2022] UKUT 239 (LC) the Upper Tribunal set out a four-stage approach to the calculation of quantum in the case of a successful RRO at Para. 20:

    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 will be able to make an informed estimate.
    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 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).

31. He stated that the rent was not inclusive of any utility bills therefore no deduction should be made on that account. He asserted that this was a serious offence particularly in relation to fire safety. Moreover, the lack of tenancy agreements or protection of the deposits are aspects of poor management.

32. He asserted that the correct award is the full amount applied for of £20,645.50, broken down as follows:

    a. Vivienne Carnegie, 12 months @ £465.25, (12 x 465.25) = £5,583.
    b. Marie-Claire Minter, 12 months @ £427.25, (12 x 427.25) = £5,127.
    c. Daisy Davies, 12 months @ £397.23, (12 x 397.23) = £4,767.
    d. Grace Kemp, 12 months @ £360.25, (12 x 360.25) = £4,323.
    e. Fatemeh Hashimi, 2 months @ £427.25, (2 x 427.25) = £854.50.

33. He also made an application for the Respondent to repay the Applicant's application and hearing fees for the proceedings.

The Tribunal's decision and reasons for that decision

34. We have considered all the evidence and submissions and find that the criteria necessary to support a RRO has been met. The Building was previously subject to a Selective Licence for one household of up to nine people which although correct when it was issued was an incorrect licence at the commencement of the Applicants occupation. The landlord had not simply ignored the entire licensing system although he had failed to recognise the consequences of the changed occupation. He ought to have realised that the house had become a House in Multiple Occupation.

35. There were a number of fire safety issues: only one smoke detector, no door between the kitchen and living room, no fire doors or fire blanket in the kitchen. It is noted that this was a standard 2 storey property and that none of the doors had locks fitted. This means that each room provided a possible escape route in the case of a fire. The occupants lived as if they were joint tenants, eating and cooking together. Consequently, the fire risk was low: this was not a house where all the internal doors were locked and each individual lived as a separate household.

36. The deposit paid to the landlord had not been protected. It was however confirmed that the landlord did return the deposit for the Applicants who had paid to him. We note that some of the Applicants allege that not all of the deposit was returned. The Applicants had themselves not asked the landlord the reason for an incomplete refund. Some of the Applicants had their deposit returned in full by the incoming tenants.

37. We have no evidence of the landlord's financial circumstances but recognise from the evidence of the Applicants that the property suffered from damp and that the landlord had asked them to leave so the works could be carried out properly.

38. Having made these findings we need to consider what level of RRO is appropriate in this case. In *Williams v Parmar* [2021] UKUT 244(LC) it is clear that 100% of the rent paid during a period of twelve months can be awarded.

39. In *Wilson v Arrow* [2021] UKUT 27 (LC) the property was let by a landlord described as "not an investor in multiple properties. He has rented out a house that used to be his home" and "does not make a living from rent." The Upper Tribunal noted that the "compelling factor in the case was the absence of important fire safety features, in particular fire doors and alarms" making a 90% award seemingly on the strength of that issue alone.

40. The circumstances of this case are different. It involved a non-professional landlord who let a single property that was in reasonable condition with fire safety shortcomings that were not of a serious nature. He failed to obtain the correct licence rather than not obtain a licence, at all. We therefore consider his offence to be at the lower end of any rational scale of seriousness.

41. The starting point is the rent paid as set out above. Taking into account all the factors set out above the Tribunal determines the Rent Repayment Order in the sum of 60% of the total rent paid.

42. The amounts to be repaid are as follows:

Vivienne Carnegie,	60% x £5,583 =£3,349.80.
Marie-Claire Minter,	60% x £5,127 = £3076.20.
Daisy Davies,	60% x £4,767 = £2860.20.
Grace Kemp,	60% x £4,323 - £2,593.80.
Fatemeh Hashimi,	60% x £854.50 = £512.70.

42. The Applicant sought repayment of the application and hearing fees totalling £300. In view of the decision set out at paragraph 41 the order is made for the repayment of the fees.

Mrs E Flint 17 March 2023

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

Housing and Planning Act 2016

40Introduction and key definitions

(1)This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has 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 by that landlord.

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

(4)For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41Application 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.

43Making of 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 has 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 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).

44Amount 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 the 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 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

47Enforcement of rent repayment orders

(1)An amount payable to a tenant or local housing authority under a rent repayment order is recoverable as a debt.

(2)An amount payable to a local housing authority under a rent repayment order does not, when recovered by the authority, constitute an amount of universal credit recovered by the authority.

(3)The Secretary of State may by regulations make provision about how local housing authorities are to deal with amounts recovered under rent repayment orders.

56 General interpretation of Part

In this Part—

- “body corporate” includes a body incorporated outside England and Wales;
- ““housing” means a building, or part of a building, occupied or intended to be occupied as a dwelling or as more than one dwelling;

letting”— (a)includes the grant of a licence, but
b) except in Chapter 4, does not include the grant of a tenancy or licence for a term of more than 21 years,

and “let” is to be read accordingly;

“tenancy”— (a)includes a licence, but
b) except in Chapter 4, does not include a tenancy or licence for a term of more than 21 years.