FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AU/HMF/2022/0278**
HMCTS	**:**	**V: CVPREMOTE**
Property	**:**	**28 Thornhill Bridge Wharf, Caledonian Road, London, N1 0RU**
Applicants	**:**	**Anshu Choudhary** **Charlotte Weekly**
Representative	**:**	**Cameron Neilson (Justice for Tenants)**
Respondent	**:**	**Equinox Re Ltd**
Representative	**:**	**Richard Granby (Counsel)**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Appollo Fonka FCIEH**
Date and Venue of Hearing	**:**	**25 May 2023 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**5 July 2023**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. We have had regard to the documents specified at [6] below.

Decision of the Tribunal

1. The Tribunal makes Rent Repayment Orders against the Respondent which are to be paid by 2 August 2023, in the sums of:

(i) £1,810 in favour of Anshu Choudhary; and

(ii) £1,600 in favour of Charlotte Weekly.

2. The Tribunal determines that the Respondent shall also pay the Applicant £300 by 2 August 2023 in respect of the tribunal fees which she has paid.

The Application

1. By an application, dated 27 September 2022, the Applicants, Ms Anshu Choudhary and Ms Charlotte Weekly, seek Rent Repayment Orders ("RROs") against the Respondent, Equinox Re Ltd ("ERL") pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The application relates to the 28 Thornhill Bridge Wharf, Caledonian Road, London N1 ORU ("the Maisonette"). The Applicants seek RROs in respect of the offence of control or management of an unlicenced HMO.

2. Ms Choudhary is seeking a RRO in the sum of £7,255.8 for the period 21 January to 22 November 2021. She occupied a room in the Flat from 4 September 2020 to 29 June 2022. Her agreement is at A.115-141. A schedule of her rent payments is at A.200. A copy of her bank statements which confirm the payments which she has made are at A.210-252.

3. Ms Weekly is seeking a RRO in the sum of £4,286.34 for the period 5 January to 22 November 2021. She occupied a room in the Flat from 4 September 2020 to April 2022. Her agreement is at A.73-114. A schedule of her rent payments is at A.201. A copy of her bank statements which confirm the payments which she has made are at A.253-302. For part of this period, she was in receipt of universal credit. Details of the relevant sums paid in respect of rent is at A.202-203.

4. Vankat Venkatakrishnan and Lorenzo Bianco were named as applicants in the application form. They are no longer proceedings with their applications.

5. The Applicants initially also issued their application against Robert Francis Blencowe and Jean Angela Blencowe ("the Freeholders") who acquired the freehold interest in the Maisonette on 8 May 1987 (at A.26). On 4 April 2023, the Applicants withdrew their application against them.

6. On 15 December 2022, a procedural judge gave Directions pursuant to which the parties have filed the following:

(i) Applicant's Bundle (359 pages). References: "A.___"
(ii) Respondent's Bundle (108 pages). References: "R.___"
(iv) Applicant's Response to Respondent's Submissions (6 pages): "A2.___"

The Hearing

7. Mr Cameron Neilson, from Justice for Tenants, appeared for the Applicants. Mr Richard Granby (Counsel) appeared for the Respondent. Mr Darwin, from his instructing solicitor, Keystone Law, also attended the hearing. We are grateful to the assistance provided by both Mr Neilson and Mr Granby.

8. Both Ms Anshu Choudhary and Ms Charlotte Weekly gave evidence and were cross-examined. Mr Karim Abdallah, a property manager employed by the Respondent, also gave evidence.

9. Mr Granby provided a Skeleton Argument. He notes that the application is not well drafted. It is hard to distinguish between points that are said to establish liability and general complaints that go to quantum. It is apparent that significant passages of the Applicants' Statement of Case are "cut and pasted" from other cases handled by Justice for Tenants.

10. Mr Granby's Skeleton Argument discusses the consequences of the Company Voluntary Agreement ("CVA") entered into by the Respondent Company on 7 September 2021. On 13 June 2022, the Respondent was discharged from the CVA. Mr Granby argues that the Applicants, as parties with potential claims for RROs, were creditors for the purpose of the CVA. They are therefore unable to claim a RRO for the period prior to 7 September 2021. Their claim must therefore be restricted to any period after this date.

11. There are three issues which the Tribunal is asked to determine:

(i) Whether we are satisfied beyond reasonable doubt that the Respondent has committed an offence under section 72(1) of the Housing Act 2004 of having control or management of an unlicenced HMO. The Respondent has raised a defence of reasonable excuse.

(ii) The impact, if any, of the CVA.

(iii) The amount of any RRO, assessed under section 44 of the Housing and Planning Act 2016.

The Housing Act 2004 ("the 2004 Act")

12. The 2004 Act introduced a new system of assessing housing conditions and enforcing housing standards. Part 2 of the 2004 Act relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed. HMOs are defined by section 254 which includes a number of "tests". Section 254(2) provides that a building or a part of a building meets the "standard test" if:

> "(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
>
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
>
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
>
> (d) their occupation of the living accommodation constitutes the only use of that accommodation;
>
> (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
>
> (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

13. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 prescribes those HMOs that require a licence. Article 4 provides that an HMO is of a prescribed description if it (a) is occupied by five or more persons; (b) is occupied by persons living in two or more separate households; and (c) meets the standard test under section 254(2) of the 2004 Act.

14. On 1 February 2021, an Additional Licencing Scheme introduced by the London Borough of Islington ("Islington") came into effect. This applies to all HMOs in the borough which are not covered by the mandatory licencing scheme. On 22 October 2020, formally designated this scheme and issued a Public Notice about the Scheme.

15. Section 263 provides (emphasis added):

"(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–

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

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(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; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) 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;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

16. Section 72 specifies a number of offences in relation to the licencing of HMOs. The material parts provide (emphasis added):

"(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.
.....

(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) (a temporary exemption notice), 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).

....

(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 .... grant a licence, in pursuance of the notification or application.

17. In the recent decision of *Marigold v Wells* [2023] UKUT 33 (LC) ("*Marigold*"), Martin Rodger KC, the Deputy Chamber President, gave guidance on the approach that should be adopted by First-tier Tribunals when considering the defence of "reasonable excuse". He gave the decision of the Upper Tribunal, Tax and Chancery Chamber, in *Perrin v HMRC* [2018] UKUT 156 (TCC), as a useful example.

"48. The Tribunal in Perrin concluded its decision with some helpful guidance to the FTT, much of which is equally applicable in the sphere of property management and licensing. At paragraph 81 it said this:

"81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did

(or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(I have omitted a fourth step because it is referable to a specific provision of the Finance Act 2009 and has no equivalent in the 2004 Act).

49. The Tribunal then dealt with a particular point which is regularly encountered in HMO licensing cases and which therefore merits attention:

> "82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

The Housing and Planning Act 2016 ("the 2016 Act")

18. Part 2 of the 2016 Act introduced a raft of new measures to deal with "rogue landlords and property agents in England". Chapter 2 allows a banning order to be made against a landlord who has been convicted of a banning order offence and Chapter 3 for a data base of rogue landlords and property agents to be established. Section 126 amended the 2004 Act by adding new provisions permitting LHAs to impose Financial Penalties of up to £30,000 for a number of offences as an alternative to prosecution.

19. Chapter 4 introduces a new set of provisions relating to RROs. An additional five offences have been added in respect of which a RRO may now be sought. In the recent decision of *Kowelek v Hassanein [2022] EWCA Civ 1041; [2022] 1 WLR 4558,* Newey LJ summarised the legislative intent in these terms (at [23]):

> "It appears to me, moreover, that the Deputy President's interpretation of section 44 is in keeping with the policy underlying the legislation. Consistently with the heading to part 2, chapter 4 of part 2 of the 2016 Act, in which section 44 is found, has in mind "rogue landlords" and, as was recognised in *Jepsen v Rakusen* [2021] EWCA Civ 1150, [2022] 1 WLR 324, "is intended to deter

landlords from committing the specified offences" and reflects a "policy of requiring landlords to comply with their obligations or leave the sector": see paragraphs 36, 39 and 40. "[T]he main object of the provisions", as the Deputy President had observed in the UT (*Rakusen v Jepsen* [2020] UKUT 298 (LC), [2021] HLR 18, at paragraph 64; reversed on other grounds), "is deterrence rather than compensation". In fact, the offence for which a rent repayment order is made need not have occasioned the tenant any loss or even inconvenience (as the Deputy President said in *Rakusen v Jepsen*, at paragraph 64, "an unlicensed HMO may be a perfectly satisfactory place to live") and, supposing damage to have been caused in some way (for example, as a result of a failure to repair), the tenant may be able to recover compensation for it in other proceedings. Parliament's principal concern was thus not to ensure that a tenant could recoup any particular amount of rent by way of recompense, but to incentivise landlords. The 2016 Act serves that objective as construed by the Deputy President. It conveys the message, "a landlord who commits one of the offences listed in section 40(3) is liable to forfeit every penny he receives for a 12-month period". Further, a landlord is encouraged to put matters right since he will know that, once he does so, there will be no danger of his being ordered to repay future rental payments."

20. Section 40 provides (emphasis added):

> "(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."

21. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". By section 56, a tenancy includes a licence. The seven offences include the offence of "control or management of unlicenced HMO" contrary to section 72(1) of the 2004 Act.

22. Section 41 deals with applications for RROs. The material parts provide:

> "(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.

23. Section 43 provides for the making of RROs:

"(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)."

24. Section 44 is concerned with the amount payable under a RRO made in favour of tenants. By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which then follows. The table provides for repayment of rent paid by the tenant in respect of a maximum period of 12 months. Section 44(3) provides (emphasis added):

"(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.

25. Section 44(4) provides:

"(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."

26. Section 47(1) provides that an amount payable to a tenant under a RRO is recoverable as a debt.

The Background

27. The Maisonette at 28 Thornhill Bridge Wharf was constructed with three bedrooms and two bathrooms in a gated private development overlooking the Regents Canal. The three bedrooms are on the ground floor with a reception room, dining room and kitchen on the first floor. There is a small private patio garden. The Applicant has provided particulars when Savills were instructed to market it for rent (at A.310-314). The first floor open plan living room was subsequently partitioned off to create a fourth bedroom. Robert and Jean Blenclowe ("the Freeholders"), acquired their interest on 8 May 1987 (see A.25-27).

28. By an agreement, dated 11 April 2019, the Freeholders let the Maisonette to ERL for a term of 36 months commencing on 23 April 2019 at a rent of £2,925 per month. The agreement is described as a "Company Letting Agreement". By Clause 5.1, the Tenant covenants to use the Property as a single private dwelling and not to use it or any part of it for any purpose or to allow anyone else to do so. However, by Clause 5.3, the Landlord provides ERL with express consent to receive paying guests.

29. On 4 September 2020, Ms Choudhary, Ms Weekly and Ms Ayushi Dangre moved into occupation of the Maisonette. They were all students at the London School of Economics. They had seen the Maisonette advertised on SpareRoom. This was during the time of the Covid lockdown. They were unable to visit the Maisonette in person; they were rather sent a video. Ms Choudhary occupied Room A (the first floor rear living room). Ms Weekly occupied Room C (the bedroom at the rear left of the Maisonette).

30. Ms Weekly's agreement with ERL (also described as Myrooms) is at R.17-41. The term of the agreement is from 4 September 2020 until 29 October 2021 at a fee of £902.41 per month. The "Room" is described as "bedroom number Room C or such other bedroom in the Property as the Myrooms may allocate from time to time in accordance with clause 2.2.4". Under Clause 2.2.4, Myrooms is entitled at any time on giving not less that 14 days' notice to require the Client to transfer to a comparable room elsewhere within the Property or any other comparable room in Myrooms' portfolio of properties.

31. Mr Abdallah described how ERL trades under the business name "Myrooms". Its business is to provide accommodation in the form of a bedroom within a flat and then grant access to the common parts of the flat to its "clients". It currently manages 50 flats. Prior to Covid-19, ERL had been managing 155 flats with more than 600 clients. The locations of the flats are usually in the central parts of London and its clients are typically young professionals or overseas students. The offer is made on-line and ERL only trade on-line. Potential clients are able to choose where they want to live, how much they want to spend and how long they want to stay. If the client, having made a selection, then wants to move within the first 7 days of the contract, they can do so without charge or other penalty.

At other times they can also ask to move. The offer is said to be a flexible business model which is attractive to clients. Mr Abdallah described it as "rent to rent".

32. The Respondent states that the status of ERL's agreements have been considered by the Courts on three occasions and on each occasion the Courts have found them to be licence agreements. The decision of DDJ Hayes in *Equinox Re Limited v Mason* (Central London County Court, dated 3 September 32021) is at R.42. The regime of RROs applies equally to licences as to tenancies (section 56 of the 2016 Act). It is therefore not necessary for this Tribunal to consider this issue further.

33. The Tribunal is satisfied that at all material times, each of the four rooms in the Maisonette were occupied by different people. The Applicants had a number of complaints about the condition of the Maisonette. They complain that there were no fire doors. There was an ongoing problem of black mould in the downstairs bathroom. ERL arranged for this to be washed down, but it returned. For some four months, they were unable to use the downstairs toilet. There are a number of text messages at A.332-339.

34. Initially, there were no locks to their rooms. Locks were later provided. Ms Choudhary complained that the handyman and cleaners came into her room without knocking. She also complained that she had been unable to gain access into her room. However, it became apparent that she had forgotten the combination for her lock. Unfortunately, these sharing arrangements inevitably create a lack of privacy and personal space for those forced to accept this type of accommodation. Both Applicants only took up this accommodation because of the chronic shortage of affordable housing in London.

35. The Maisonette did not initially require an HMO licence. There were only four occupants, so it did not fall within the mandatory scheme (see [13] above). However, a licence was required when Islington's Additional Licencing Scheme came into effect 1 February 2021. The Respondent argues that it was the responsibility of the freeholder to obtain a licence. We consider this further when we consider the defence of "reasonable excuse".

36. Before the onset of Covid-19, ERL was the tenant of some 155 flats with more than 600 clients occupying individual rooms. As a result of the pandemic, the void rate increased from 5% to 45%, whilst a number of owners required the return of their properties. ERL recognised that the position was unsustainable and in December 2020 began exploring insolvency options that would provide protection from creditors.

37. In May 2021, ERL started discussions with Insolvency Practitioners about entering into a CVA. This exercise required a large amount of preparation because of the importance of ensuring that at the time of any meeting of

creditors, there was support for the proposal. ERL therefore negotiated rent reductions with as many creditors as possible.

38. On 16 August 2021, the Proposal was issued to creditors. On 7 September 2021, at a virtual meeting, the CVA was approved (at R.51-53). Thereafter, relying on section 5(2)(b) of the Insolvency Act 1986, the Respondent contends that all creditors' claims, including those from creditors' who did not have knowledge of the proposal, or of the meeting were bound by the proposal. The effect of the CVA was that all creditors with claims up to the date of the approval were bound by the proposal and would be required to prove their claims in the context of the CVA. Accordingly, all claims due up to 7 September 2021 fell to be analysed and paid under the CVA. The terms of the proposal were that creditors would be paid 48p in the pound. The proposal was then varied so that a one off payment of £103,500 would be made to cover all claims from creditors. On the 13 June 2022, the Supervisor of the CVA gave notice that the CVA had been fully implemented, as varied by a creditor's decision procedure completed on 13 May 2022 (at p.55).

39. On 24 August 2021, Islington wrote to the Freeholders about the need for an HMO licence. They passed this letter on to ERL. Before applying for a licence, ERL required an EICR, a new EPC, and a new gas safety certificate. A number of these documents had to be obtained by the leaseholders. On 24 November 2021, ERL submitted the HMO application on behalf of the leaseholders.

Issue 1: Has an Offence been Committed?

40. Our starting point is section 263 of the 2004 Act (see [15] above). We are satisfied that the ERL falls within the statutory definitions of the "person having control" of the Flat as it received the rack rent.

41. The Tribunal is satisfied beyond reasonable doubt that ERL committed an offence under section 72(1) of the 2004 Act. We are satisfied that:

(i) The Property was an HMO falling within the "standard test" as defined by section 254(2) of the 2004 Act which required a licence (see [37] above):

> (a) it consisted of four units of living accommodation not consisting of self-contained flats;
>
> (b) the living accommodation was occupied by persons who did not form a single household;
>
> (c) the living accommodation was occupied by the tenants as their only or main residence;
>
> (d) their occupation of the living accommodation constituted the only use of the accommodation;

(e) rents were payable in respect of the living accommodation; and

(f) the households who occupied the living accommodation shared the kitchen, bathroom and toilet.

(ii) The Flat required a licence under Islington's Additional Licencing Scheme which came into effect on 1 February 2021.

(iii) ERL had not licenced the HMO as required by section 61 of the 2004 Act. This is an offence under section 72(1).

(iv) The offence was committed between 1 February and 24 November 2021, the date on which an application for a licence was made. That application has still not been determined.

42. ERL raise the defence of "reasonable excuse" for having control of the Maisonette without an HMO licence (see [16] above). Mr Granby frames ERL's defence in two ways. First, ERL understood that under Islington's Additional Licensing Scheme, ERL did not have sufficient interest to apply for a license as it did not have five or more years left to run on the term of its own tenancy. ERL refer to an extract from Islington's website (at R.16) which refers to a licence being valid for a maximum of 5 years. Mr Granby suggests that ERL should be afforded a reasonable period of time in which to arrange for the Freeholders to apply for a licence. Mr Granby asks the Tribunal to have particular regard to the period "19/20 August – 23 November 2021". The Respondent has provided some of the correspondence at R.86-105. However, this is not complete.

43. Secondly, Mr Granby suggests that ERL was effectively paralysed by its financial collapse caused by Covid-19, which led to the CVA.

44. We have regard to the guidance given by the Deputy President in *Marigold* (see [17] above). We accept the evidence given by ERL on this issue. However, viewed objectively, we do not accept that a reasonable excuse has been established.

45. On 1 February 2021, Islington's Additional Licencing Scheme came into effect. The scheme would have been formally designated some months previously. Consultation would have preceded this designation. Islington would have issued a Public Notice publicising its scheme. ERL has been managing a large number of properties in London under its business model. It has acted on professional advice and has devised a sophisticated licence agreement. Any owner leasing a property to ERL would expect it to be aware of its statutory obligations. Equally, the Tribunal would have expected ERL to keep abreast of the licencing requirements

46. It is not sufficient for ERL to suggest that this was the responsibility of the Freeholders. The 2004 Act is drafted widely so that any person having control or management of an HMO will commit an offence if an HMO

which requires a licence, is not licenced. Any person having control or management of an HMO may apply for a licence. It is for the local housing authority to determine who is the appropriate person to hold the licence.

47. Neither was it sufficient for ERL to wait for Islington to alert the Freeholders that a licence was required. However, having been alerted that a licence was required, ERL should have been aware that it was committing an offence. It should have ensured that an application was made immediately, either by itself or by the Freeholder. Alternatively, it could have applied for a Temporary Exemption Notice under section 62 of the 2004 Act.

48. We have had regard to the practical problems caused by Covid-19 and the financial difficulties face by ERL. However, during this period, ELR was collecting substantial rents from the four persons occupying the Maisonette. They continued to have control of the Maisonette. ELR must satisfy us, on a balance of probabilities, that they had a reasonable excuse for continuing to have control of a HMO which required to be licenced, but which was not so licenced. ERL has not so satisfied us.

Issue 2: The Impact of the CVA

49. On 7 September 2021, ERL entered into a CVA. Mr Granby argues that the CVA precludes the Applicants from claiming any RRO prior to this date. If he is wrong on this, he contends that it would preclude them from enforcing it as a debt in the County Court. Section 47(1) of the 2016 Act provides that a RRO is enforceable as a debt. Mr Granby accepts that the Applicants are entitled to claim RROs in respect of any rent payable for the period 7 September 2021 and 24 November 2021 (when the Freeholder made an application for a licence).

50. Mr Granby's starting point is section 5(2) of the Insolvency Act 1986 which provides:

> "(2) The voluntary arrangement—
>
> (a) takes effect as if made by the company at the time the creditors decided to approve the voluntary arrangement, and
>
> (b) binds every person who in accordance with the rules—
>
> (i) was entitled to vote in the qualifying decision procedure by which the creditors' decision to approve the voluntary arrangement was made, or
>
> (ii) would have been so entitled if he had had notice of it, as if he were a party to the voluntary arrangement."

51. Mr Granby argues that those entitled to vote at a creditors meeting includes creditors in respect of a debt for an unliquidated amount. Future, contingent and unliquidated debts are all capable of being included within a CVA. He relies on *Doorbar v All Time Securities Limited* [1996] 1 WLR 456) and *Re T&N Limited* [2005] EWHC 2870 (Ch); [2006] 1 WLR 1728. In the latter case, David Richards J held that anyone who had a potential claim (in that case having been exposed to dangerous quantities of asbestos dust but not, as of the date of the CVA, having suffered any harm) were creditors for the purpose of a CVA.

52. He concludes by arguing that the Applicants are bound by the CVA. He relies upon the following texts: (i) The Law of Insolvency 5th Ed at 15-038; (ii) Palmer's Company Law at 14.439; and (iii) Sealy and Milman 25th Ed 15-038). The Editors of Sealy and Milman summarise the law in these terms:

> "Where a voluntary arrangement is approved, whether with or without modifications, so that it has effect under s.4A, the approved arrangement takes effect as if made by the company at the time the creditors decided to approve the voluntary arrangement, and binds every person who in accordance with the rules was entitled to vote in the qualifying decision procedure, or would have been so entitled if he had had notice of it, as if he were a party to the voluntary arrangement, regardless of whether or not he was actually aware of or participated in the procedure. The provisions of s.5(2) of the Act, as amended by the Insolvency Act 2000, have the effect of causing all creditors who would have been eligible to vote to be bound even though they did not have notice of the decision procedure, nor the opportunity to participate and to vote. This applies equally to those creditors whose very existence was unknown to the nominee at the time of sending out notices of the meeting, and to those whose notices did not reach them in time to enable them to participate. This change in the law was effected in the interests of minimising the prospects for an otherwise acceptable CVA to be undermined by creditors who escape being bound due to lack of notice of proceedings. Admittedly, this entails the suppression of a customary principle of natural justice. However, s.6 of the Insolvency Act provides a right to challenge either the approved voluntary arrangement itself or the manner by which its approval was obtained. This right is exercisable only within the period of 28 days beginning with the first day on which each of the reports of the outcome of the decision procedures is made to the court 94 and is exercisable only by one of the persons mentioned in s.6(2) of the Insolvency Act."

53. This is a specialist area of the law and Mr Granby admitted that he was making his submissions with some trepidation. Mr Neilson approached the issue with equal trepidation. He did not come armed with any additional authorities. He rather argued, relying on [51], [64] and [65] of the judgment in *Re T&N Limited*, that the CVA would only bite when there

was a contingent liability at the date of the bankruptcy. Whilst he accepted that a contingent liability could arise under a statute, he contended that no contingent liability could arise where the subsequent liability is created by the exercise of a judicial discretion.

54. The Tribunal does not find this issue to be straight forward. This is a complex and specialist area of the law. However, there seems to be a public interest in minimising the prospects for an otherwise acceptable CVA to be undermined. This would be the effect were the Applicants now to be entitled to pursue a RRO in respect of rent paid prior to the bankruptcy. The Tribunal is therefore satisfied that the CVA precludes the Applicants from claiming any RRO prior to 8 September 2021. However, we are also satisfied that this is an issue that merits the consideration of the Upper Tribunal.

55. Mr Granby finally argues that, even if the CVA does not prevent the Tribunal determining the application, any award for the period before 8 September 2021 would be unenforceable. Enforcement would be a matter for the County Court on another day.

Issue 3: The Assessment of the RRO

56. The 2016 Act gives the Tribunal a discretion as to whether to make an RRO, and if so, the amount of the order. We are satisfied that this is an appropriate case for a RRO to be made.

57. Section 44 provides that the period of the RRO may not exceed a period of 12 months during which the landlord was committing the offence. The amount must not exceed the rent paid by the tenant during this period, less any award of universal credit.

58. Having determined the maximum award, section 44(4) of the 2016 Act requires us to take into account the following factors:

> (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.

59. However, before applying the statute, we are now required to apply the judicial gloss applied to it by the Upper Tribunal in *Acheapong v Roman* [2022] UKUT 239 (LC); [2022] HLR 44. In a number of recent decisions, the Upper Tribunal has caused uncertainty for both tribunal judges and the parties who appear before this tribunal which this tribunal discussed in *965 Fulham Road, SW6 5JJ* (LON/HMG/2022/0018). Until the matter

is reviewed by the Court of Appeal, we are obliged to have regard to the guidance provided by Judge Elizabeth Cooke at [18] to [21]:

> "18. It is easy to say what the FTT should not do: it should not take the whole rent (less any payments for utilities) and regard that as the starting point subject only to deductions made in light of the factors in section 44(4) of the 2016 Act.
>
> 19. What should it do instead?
>
> 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 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).
>
> 21. I would add that step (c) above is part of what is required under section 44(4)(a). 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."

60. In the recent decisions of *Simpson House 3 Ltd v Osserman* [2022] UKUT 164 (LC) and *Hallett v Parker* [2022] UKUT 165 (LC), the Deputy President distinguished between the professional "rogue" landlord, against whom a RRO should be made at the higher end of the scale (80%) and the landlord whose failure was to take sufficient steps to inform himself of the regulatory requirements (25%). The Upper Tribunal has recently confirmed that a professional landlord should be held to a higher standard than others (see *Daff v Gyalui* [2023] UKUT 134 (LC) at [51]).

61. Ms Choudhary paid a total rent of £6.919.19 between 1 February and 22 November 2021 (see A.200). We were told that £2,422.89 relates to the rent paid after 7 September 2021 (and £4,349 before that date).

62. Ms Weekly was in receipt of universal credit. When this is deducted, the net rent which she paid between 1 February and 22 November 2021 was £4,286.34 (see A.201). We were told that £2,167.14 relates to the rent paid after 7 September 2021 (and £2,119.20 before that date).

63. The Tribunal would normally make deductions for the council tax and water charges paid by the landlord. However, under the terms of the CVA, no further sums are payable by ERL until 1 April 2022. Therefore, no deduction needs to be made.

64. The Respondent has produced three electricity bills (at R.59-64), namely £79.25 (10 to 30 September 2021); £522.19 (1 to 31 October 2021) and £155.47 (1 November to 30 November 2021). We are dealing with a 2.5 month period between 7 September and 22 November 2021. Taking a figure of £200 pm, we assess the electricity cost over this period at £500 for the Maisonette or £125 per occupant. The Respondent has produced one bill for gas (at R.66) in the sum of £164.74 for the period 7 September to 24 November 2021. We compute the deduction to be £40 per occupant.

65. The relevant "net" rent paid over the period 7 September to 22 November 2021 is therefore £2,257.89 (£2,422.89 less £165) for Ms Choudhury and £2,002.14 (£2,167.14 less £165) for Ms Choudhury.

66. We have decided to make an award of 80% of these sums, namely £1,810 for Ms Choudhary and £1,600 for Ms Weekly. In adopting this figure of 80, we have regard to the following:

(i) The offence of failing to licence this HMO was a serious one. Adaptions had been made to create a fourth bedroom. We are concerned about the means of escape in the event of fire. We are dealing with a professional landlord which manages a large number of properties. High rents are charged for rooms under a rent to rent scheme which has been devised to protect the freeholder from any liability RROs and to deny the occupants their rights as tenants.

(ii) There has been no criticism of the conduct of the Applicants.

(iii) We have had regard to the financial circumstances of the Respondent. However, this has been reflected by the fact that we have found that the Applicants have no right to claim for RROs prior to the CVA.

(iv) There is no evidence that the Respondent has been convicted of any offence. However, we give limited weight to this. LHAs are under

considerable financial pressures and are only able to take action in limited cases. A conviction would have been an aggravating factor.

67. The Applicants have paid tribunal fees of £300. We are satisfied that this sum should be refunded to the Applicants by the Respondent.

Robert Latham
5 July 2023

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 Tribunal 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 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.

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.