FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/HMF/2023/0137**
HMCTS	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 12, 131 Clapton Common, London, E5 9AB**
Applicants	**:**	**Bentley Howell**
Representative	**:**	**In person**
Respondent	**:**	**Clapton Investments Ltd**
Representative	**:**	**Dilwar Azad (Counsel) instructed by Simon Noble Solicitors**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Sections 40, 41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Richard Waterhouse FRICS**
Date and Venue of Hearing	**:**	**13 December 2023 and 19 February 2024 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**26 February 2024**

DECISION

Decision of the Tribunal

1. The Tribunal makes a Rent Repayment Order against the Respondent in the sum of £9,120 which is to be paid by 22 March 2024.

2. The Tribunal determines that the Respondent shall also pay the Applicants £300 by 22 March 2024 in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. In this decision, we refer to the following documents upon which the parties seek to rely:

   (i) Applicant's Bundle of Documents ("A.__")
   (ii) Respondent's Bundle of Documents ("R1.____")
   (iii) Witness Statement of Sam Gratt. As this statement is not numbered, the tribunal uses the electronic numbering ("R2.__").

2. By an application, dated 19 June 2023, the Applicant seeks a Rent Repayment Order ("RRO") against the Respondents pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The application relates to the accommodation known as Flat 12, 131 Clapton Common, London, E5 9AB ("the Flat"). 131 Clapton Common ("the Property") is a four storey semi-detached property with 18 rooms.

3. The Applicant applied for a Rent Repayment Order in the sum of £12,480 contending that the Respondent had committed the following offences: (i) failure to comply with an improvement notice contrary to section 30(1) of the Housing Act 2004 ("the 2004 Act") and (ii) control or management of an unlicensed HMO contrary to section 72(1) of the Act.

4. On 7 August 2023, Tribunal gave Directions pursuant to which the parties have filed their bundles of documents. The Directions stated that any witness would be expected to attend to be questioned about their evidence, unless their statement had been agreed by the other party. The application was listed for a video hearing on 13 December 2023.

5. On 13 December 2023, this Tribunal started to hear this application. The Applicant, Mr Bentley Howell, appear in person. Mr Dilwar Azad, Counsel, instructed by Simon Noble Solicitors, appeared for the Respondent. The Respondent had served a witness statement from Mr Sam Gratt, from the managing agents, Cityestates Ltd. Mr Gratt did not attend the hearing. Mr Azad was unable to give any explanation as to why he had failed to attend.

6. It became apparent to the Tribunal that we had no option but to adjourn the application if we were to determine it fairly and justly. We have had

due regard to the overriding objective in rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). There was a substantial dispute of fact between the parties, namely whether the Respondent had granted the Applicant a self-contained flat or whether he had shared a kitchen with the other tenants. The Applicant contended that the plan of the first floor of the property (at R1.9) was not accurate. This seemed to be confirmed by the tour of the first floor which he provided on his smart phone. There was also an issue as to whether the Respondent had installed a kitchen after the tenancy had been granted to the Applicant. The Tribunal was satisfied that the Tribunal could only resolve this dispute of fact at an oral hearing at which the relevant witnesses were present to be questioned.

7. The Applicant opposed the adjournment stating that he was in a position to proceed and that he had taken a day off work for the hearing. The Tribunal notified the Applicant that he could seek a penal costs order against the Respondent under rule 13((1)(b) of the Tribunal Rules if he could establish that the Respondent had acted manifestly unreasonably in the conduct of the proceedings.

8. The following matter were clarified at the hearing on 13 December 2023:

(i) On 15 November 2021, the Applicant was granted a tenancy of the Flat for a term of 12 months from 23 November 2021 at a rent of £960 pm. He remains in occupation of the Flat.

(ii) On 7 November 2022, the Respondent applied for an HMO licence. Any offence of control or management of an unlicenced HMO would cease on this date (section 72(4)(b) of the 2024 Act).

(iii) The Applicant's claim for a RRO is therefore limited to the period 23 November 2021 to 6 November 2022.

(iv) The Applicant no longer sought a RRO in respect of any failure to comply with an improvement notice.

9. The Tribunal gave further Directions for the parties to file further evidence to address the factual dispute as to the layout of the property. The Tribunal directed the Respondent to address the following: (a) an explanation as to why Mr Gratt did not attend the hearing on 13 December 2023; (b) to provide lay out plans of the four floors of the property reflecting the position in November 2021 when the tenancy was granted and the current situation after the kitchen was installed; (c) any additional evidence relating to the physical layout of the flat (including any photographs); (d) full particulars relating the alleged installation of a kitchen, including a description of when and where the kitchen was installed including any invoices in respect of the said work; and (e) all relevant correspondence

with Hackney relating to the application for an HMO licence and the payment of council tax.

10. The Applicant has filed an Updated Bundle of Documents. This includes witness statements from Shaha Kamal Ali (the tenant of Flat 17); Dean Murray (the tenant of Flat 8); and Monday Olise (a Private Sector Housing Officer with Hackney Council).

11. The Respondent has filed a witness statement from Mr Gratt. He has exhibited witness statements from Jon Pratt (Flat 11) and Lisa Cendrowska (Flat 14). Mr Gratt addresses the issues raised by the Tribunal as follows:

(a) He was unable to attend the hearing as he was in Israel.

(b) The layout plans which were directed have not been provided. Mr Gratt has provided a plan dated 1 May 2014 (at R2.4) marked "proposed floor plan". This differs from the plan in the original Bundle (at R1.9) which was also dated 1 May 2014, but marked "existing floor plan". Mr Gratt provided no explanation for the difference.

(c) Additional evidence relating to the physical layout of the flat: Mr Gratt provided two witness statements and a number of photographs.

(d) Full particulars relating the alleged installation of a kitchen, including a description of when and where the kitchen was installed including any invoices in respect of the said work: None of these particulars have been provided.

(e) All relevant correspondence with Hackney relating to the application for an HMO licence and the payment of council tax: This has not been provided.

12. The Tribunal sent out listing questionnaires so that a hearing could be arranged for the convenience of all the parties. On 17 January 2024, the Tribunal notified the parties of the new hearing date. On 13 February, the Respondent applied for an adjournment on the ground that "their client" would not be available to attend the hearing. No explanation was provided as to why he would not be available. On 14 February, the Tribunal refused this application.

The Adjourned Hearing

13. The Applicant, Mr Bentley Howell, appear in person. Mr Azad appeared for the Respondent.

14. None of the other tenants who had provided witness statements attended. In its Directions of 7 August 2023, the Tribunal had stressed that all

witnesses were expected to attend so their evidence could be tested. The Tribunal indicated that it would have regard to all the evidence, but considerably less weight would be given where the evidence was in dispute and a witness was not present to give their evidence.

15. Mr Howell gave evidence. He is a barber. The Tribunal asked him a number of questions to amplify his evidence. He was able to explain the significance of the photographs provided by Mr Gratt. Mr Howell was cross examined by Mr Azad. We are satisfied that Mr Howell was a witness of truth who did his best to assist the Tribunal.

16. Mr Azad applied for Mr Gratt to give evidence by video from Canada. The Tribunal refused this request. The Tribunal had not been given any prior warning that this application would be made and no arrangements had been made. Further, the Respondent had had no regard to the "Guidance Note for Parties: Giving Evidence from Abroad" which had been highlighted in the Directions.

17. The Tribunal has had regard to the two witness statements provided by Mr Gratt. We regret that we can give little credence to them. Different and inconsistent explanations are given about the first floor kitchen in each statement. We reject his evidence that the kitchen was built in late 2022. We are satisfied that the kitchen had always been there. Further, Mr Azad was unable to provide any explanation as to why the Respondent had applied for a HMO licence on 7 November 2022, if its case was that the property was not an HMO. We also found a number of the emails that Mr Gratt had sent to the Applicant to be unduly aggressive.

18. Mr Azad had been instructed late and had only limited instructions. We granted him a short adjournment so that he could study the Applicant's Supplementary Bundle with which he had not been provided by his Instructing Solicitor. Mr Azad took every point on behalf of his client that was open to him. Mr Azad stressed that these were quasi criminal proceedings and that the offence had to be proved beyond reasonable doubt.

19. In our Directions, the Tribunal had indicated that we might need to inspect the Property. Given that Mr Howell's oral evidence was uncontradicted, we did not consider it necessary for us to do so. Mr Howell had also prepared a video recording of the physical layout of the Property. Again, we did not consider it necessary to view this.

The Housing Act 2004 ("the 2004 Act")

20. The 2004 Act introduced a new system of assessing housing conditions and enforcing housing standards. Part 2 of the Act relates to the licencing of Houses in Multiple Occupation ("HMOs") whilst Part 3 relates to the selective licensing of other residential accommodation. The Act creates

offences under section 72(1) of having control and management of an unlicenced HMO and under section 95(1) of having control or management of an licenced house. On summary conviction, a person who commits an offence is liable to a fine. An additional remedy was that either a local housing authority ("LHA") or an occupier could apply to a FTT for a RRO.

21. 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."

22. By section 254(8), "basic amenities" mean "(a) a toilet, (b) personal washing facilities, or (c) cooking facilities".

23. 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.

24. At the material times, the London Borough of Hackney had also introduced an Additional Licensing Scheme which applied to all HMOs in the Borough.

25. Section 72 specifies a number of offences in relation to the licencing of HMOs. The material parts provide:

"(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–

……

(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)).

……

(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.

26. Section 263 provides:

"(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."

27. It is to be noted that there may be more than one person who may commit an offence under section 95 as having "control of" or "managing" a house. In such circumstances, it will be for the LHA to determine who is the appropriate person to hold a licence. However, when it comes to the making of a RRO, this can only be made against the "landlord".

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

28. 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.

29. 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 *Kowelek v Hassanein [2022] EWCA Civ 1041; [2022] 1 WLR 4558,* Newey LJ summarised the legislative intent in these terms (at [23]):

"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."

30. Section 40 provides:

> "(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."

31. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". These include: (i) failure to comply with an improvement notice contrary to section 30(1) of the Housing Act 2004 ("the 2004 Act") and (ii) control or management of an unlicensed HMO contrary to section 72(1) of the Act.

32. 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.

33. 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)."

34. 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.

35. 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."

The Background

36. The property at 131 Clapton Common is a large semi-detached house on four floors, including a basement. There are currently a total of 18 flats. The Applicant occupied Flat 12 pursuant to a tenancy agreement dated 15 November (at A.11). The tenancy was for a term of 12 months from 23 November 2021 at a rent of £960 per month.

37. The Respondent has provided two sets of plans of the first and second floors, dated 1 May 2014. This was shortly after the Respondent Company had been incorporated. We are satisfied that neither set of plans accurately describe the physical layout of the Flat in November 2021. There is a significant difference between the plan which the Respondent produced for the hearing on 13 December 2023 (at R1.9) and that annexed to Mr Gratt's witness statement (at R2.4). The plan at R1.9 purports to be "existing floor plan", whilst that at R2.4 is marked "proposed floor plan". It is the plan at R2.4 that accurately records the location of the door into the Flat. This is to the right of the door into the kitchen. It is thus apparent that the kitchen is not within the demise of the Flat. It is rather accessible

to any of the tenants on that floor, and to any of the other tenants on the basement, ground and second floors. Mr Howell also added that neither plan accurately record the location of the facilities in his shower room/toilet, the shower and toilet being on the opposite sides to those recorded.

38. We are satisfied that the physical layout of the Property has been as follows since May 2021:

(i) There are five flats in the basement (Flats 1-5). There is a communal kitchen in the basement for all tenants to use. There is also a washing machine in the communal passageway.

(ii) There are five flats on the ground floor (Flats 6-10). There is a communal kitchen for all tenants to use.

(iii) There are four flats on the first floor (Flats 11-14). There is a communal kitchen for each tenant to use. We are satisfied that all tenants have access to this kitchen. There have been no separate cooking facilities in Flat 12, the Applicant's flat. Flats 11, 13 and 14, had limited cooking facilities in their flats. However, they all had the option to use the shared kitchen. They exercised this right and stored their crockery and food in the communal kitchen. We accept Mr Howell's evidence that he was reluctant to store his food in the communal kitchen, because other tenants used it. He therefore tended to keep this in his room.

(iv) There are four flats on the second floor (Flats 15-18). There is a communal kitchen for each tenant to use. We are satisfied that all tenants have access to this kitchen. There have been no separate cooking facilities in Flat 12, the Applicant's flat. Flat 17, occupied by Mr Ali, had no separate cooking facilities. His sole option was to use the communal kitchen. Flats 15, 16 and 18, had limited cooking facilities in their flats. However, they all had the option to use the shared kitchen.

39. The four tenants who have provided statements, moved into the Property prior to November 2021. In July 2015, Mr Murray moved into Flat 8. In July 2017, Ms Cendrowska moved into Flat 14. In May 2021, Mr Pratt moved into occupation of Flat 11. It is unclear when Mr Ali took up a tenancy of Flat 17. However, in March 2021, he agreed to move into Flat 12. This was to enable the landlord to convert his kitchen into a communal kitchen. By this date, a communal kitchen had been created on the first floor, by moving the door into Flat 12. Thus what had been a separate kitchen enjoyed by Flat 12, had become a communal kitchen. It seems that at the same time, communal kitchens were created on the basement and ground floors. On 13 May 2021, Mr Ali was able to return to Flat 17.

40. The Tribunal had directed the Respondent to provide full particulars relating to the installation of these kitchens. It has failed to do so. Mr Ali

states that the landlord had been told to remove the cooking facilities from the studio flats. However, this did not occur. When he returned to Flat 17, he was the only tenant on the second floor who had no cooking facilities in his flat. He argued that he should have a reduction in his rent. The landlord did not agree to this.

41. The Respondent's case is that the Mr Howell had sole use of the kitchen on the first floor. In his original witness statement ([6] at R1.2), Mr Gratt stated that each room had its own kitchen. This was clearly incorrect. He relied on the plan at R1.9 to suggest that the kitchen was within the demise of Flat 12. This assertion was untrue. In his second witness statement (at R2.1), he concedes that the kitchen is in the communal area, but states that only the Applicant made use of this. We do not accept this. He has provided witness statements from Mr Pratt (Flat 11 at R2.6) and Ms Cendrowska (Flat 14 at R2.7) who state that they have self-contained kitchens in their flats. The photos at R2.11 (Flat 14) and R2.12 (Flat 13) indicate that there were kitchen facilities in these rooms. However, we are satisfied that all the tenants had access to, and used, the communal kitchens. The extent to which they decided to do so, was a matter for the individual tenant.

42. We reject Mr Gratt's evidence that the first floor kitchen was installed in "late 2022". We accept that on 7 November 2022, an application was made for an HMO licence. This application has not yet been determined.

43. Mr Howell did not occupy the Flat between 9 January 2023 and 9 July 2023. He suggested that this was because of a sewage smell which rendered the Flat uninhabitable. Mr Howell arranged for contractors to attend in March 2023 (at A.7) and July 2023 (at A.4-6). However, the earliest date on which he complained to his landlord seems to be July 2023 (at A.55). Mr Howell stated that he stayed with his mother during this period whilst there was a custody dispute concerning his son. We suspect that the smell rather arose through the Flat being empty, the "u bend" in the sink emptying of water, thereby permitting smells to permeate the Flat. Rent arrears accrued during this period, which have now been cleared. The managing agents agreed to credit £710 in respect of the sewage smell.

44. On 20 April 2023, matter were brought to a head when Hackney sought to bill Mr Howell for council tax, backdated to the commencement of his tenancy (see A.89). Had this been an HMO, council tax would have been payable for the Property. However, Hackney had decided to treat this as 18 flats in respect of which council tax was demanded at the lowest band. Mr Howell learnt that this was an unlicenced HMO and made the current application.

Issue 1: Has an Offence been Committed?

45. Mr Azad, relying on the decision in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, argued that the burden of proof is a high one. The Tribunal is satisfied beyond reasonable doubt that the Respondent 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 18 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 four kitchens.

(ii) The Property fell within the prescribed description of an HMO that required a licence (see [14 above):

(a) it was occupied by five or more persons;

(b) it was occupied by persons living in two or more separate households; and

(c) it met the standard test under section 254(2) of the 2004 Act.

(iii) The Property required an HMO licence. However, no HMO licence had been obtained.

(iv) The Respondent was the person "having control" of the Property as it was in receipt of the rack rent . It was also the person "managing" the Property being the owner of the Property who received rent from the tenants.

(v) On 7 November 2022, an application was made for an HMO licence. Upon this application being made, the offence ceased. The licence application has not yet been determined.

(vi) The offence was committed between 15 November 2021 and 6 November 2022.

Issue 2: The Assessment of the RRO

46. 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. It was agreed that Mr Howell paid rent of £11,400 over the relevant period of 11.5 months. Mr Howell was not in receipt of universal credit.

47. In *Acheapong v Roman* [2022] UKUT 239 (LC); [2022] HLR 44, Judge Elizabeth Cooke has given guidance on the approach that should be adopted by Tribunals (at [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."

48. 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%).

49. We consider this offence to be at the top end of the scale. This is a professional landlord. The Property had been converted to create 18 bedsits. The managing agents took an aggressive approach in their emails when Mr Howell indicated that an HMO licence was required. The Respondent has put forward no mitigation.

50. We have regard to the following:

(a) the conduct of the landlord. We have considered this in assessing the seriousness of the offence.

(b) The conduct of the tenant: Mr Azad accepted that there are no factors which would justify any reduction.

(c) the financial circumstances of the landlord: No evidence has been adduced on this.

(d) whether the landlord has at any time been convicted of an offence to which this Chapter applies. 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 rather have been an aggravating factor.

51. We assess the RRO in this case at 80% of the total rent of £11,400, namely £9,120. This must be paid by 22 March 2024.

Refund of Fees and Costs

52. The Tribunal is satisfied that the Respondent should refund to the Applicant the tribunal fees of £300 which he has paid in connection with this application.

53. On the morning of the hearing, the Respondent submitted a Form N260 Statement of Costs seeking costs in the sum of £8,964. This application is hopeless. The Applicant has succeeded in his application for a RRO. The Civil Procedure Rules do not apply to proceedings before this Tribunal which are governed by the Tribunal Rules. This is normally a "no costs" jurisdiction. There can be no suggestion that Mr Howell acted unreasonably in bringing this application, as required by Rule 13(1)(b) of the Tribunal Rules.

Judge Robert Latham, 26 February 2024

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.