FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/HMF/2023/0065**
Property	**:**	**Flat 37 Forest Croft, SE23 3UN**
Applicant	**:**	**Molly Richards** **Florence Izen-Taylor** **Lilly Kroll**
Representative	**:**	**Mr. McGowan (Justice for Tenants)**
Respondent	**:**	**Cinzea Greaves**
Representative	**:**	**None**
Type of application	**:**	**Application for a rent repayment order by tenant – sections 40, 41, 43, & 44 Housing and Planning Act 2016**
Tribunal members	**:**	**Judge Sarah McKeown** **Mr. S. Wheeler MCIEH, CEnvH**
Date and Venue of hearing	**:**	**17 April 2024 at 10 Alfred Place, London, WC1E 7LR**
Date of decision	**:**	**25 April 2024**

DECISION

Decision of the Tribunal

(1) The Tribunal is satisfied beyond reasonable doubt that the Respondent landlord committed an offence under Section 72(1) of the Housing Act 2004

(2) The Tribunal has determined that it is appropriate to make a rent repayment order.

(3) The Tribunal makes a rent repayment order in favour of the First Applicant against the Respondent, in the sum of £5,375, to be paid within 28 days of the date of this decision, as follows:

(a) Ms. Kroll - £1,725;
(b) Ms. Izen-Taylor - £1,900;
(c) Ms. Richards - £1,750.

(4) The Tribunal determines that the Respondent shall pay the Applicants an additional £300 as reimbursement of Tribunal fees to be paid within 28 days of the date of this decision.

Introduction

2. This is a decision on an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 ("the 2016 Act").

Application and Background

3. By an application dated 8 February 2023 (A24) the Applicants applied for a Rent Repayment Order("RRO") in respect of the rent paid for tenancies for the following periods and in the following amounts:

(a) Molly Richards: from 07/07/22-06/11/22 - £4,086.14 – A63;
(b) Florence Izen-Taylor: from 07/04/22-06/11/22 - £4,400 – A62;
(c) Lilly Kroll: from 07/04/22-06/11/22 - £4,036.14 – A61;

Total - £12522.28

4. The application was brought on the ground that the Respondent had committed an offence of having control or management of an unlicensed House in Multiple Occupation ("HMO") for failing to have a HMO licence ("licence") for Flat 37 Forest Croft, SE23 3UN ("the Property"), an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act").

5. The Property is a three bedroom self-contained flat. The Respondent was the Applicants' landlord and is the registered proprietor of the Property (A180).

6. The Property was rented to Ms. Kroll, Ms. Izen-Taylor and another from 7 July 2018. The other person left the Property in July 2020 and on 7 July 2020, Ms. Richards moved in, and the Respondent entered into a tenancy agreement (A36) with the Applicants for a rent of £1,700 per month, to commence on 7 July 2021 (and to expire on 6 July 2022, and to be monthly thereafter). Thereafter, the constitution of the household was as follows:

(a) Ms. Izen-Taylor (Room 1);
(b) Ms. Kroll (Room 2);
(c) Ms. Richards (Room 3).

7. There was an Addendum to the Tenancy Agreement (A35) said to be between the Applicants as Tenants and the Respondent as Landlord, dated 5 July 2022. It was said that, with effect from 7 July 2022, the tenancy would lapse into a periodic tenancy, but the rent would increase to £1,850 per calendar month.

8. The Applicants moved out of the Property on 6 November 2022.

9. On 23 May 2023 the Tribunal issued Directions for the determination of the application (A17), providing for the parties to provide details of their cases and the preparation of a hearing bundle.

Documentation

10. The Applicant has provided a bundle of documents comprising a total of 291 pages (references to which will be prefixed by "A__"). The Applicants' bundle include: Applicants' statement of case (A2); witness statement of Ms. Richards (A210); witness statement of Ms. Izen-Taylor (A216); witness statement of Ms. Kroll (A224).

11. The Respondent has provided a bundle of documents comprising 39 pages ("R__"). The Respondents' bundle includes (R3) her "Statement of Reasons for Opposing Application".

12. There is also a Supplemental Bundle from the Applicants, which contains its "Response to Respondent's Submission".

13. The Tribunal has had regard to these all these documents, but primarily to the documents to which it was referred during the hearing.

The Position of the Parties

14. The Applicant contends, in summary, as follows:

(a) The Property was within an additional licensing area as designated by the London Borough of Lewisham, which had an additional licensing scheme (which came into force on 5 April 2022);
(b) The Property met all the criteria to be licensed under the designation;
(c) The Respondent was the Applicants' landlord, is the beneficial owner of the Property and is a person with "control" of the Property for the purpose of s.263 HA 2004;
(d) No licence was held and no application for a licence was made at any time during the Applicants' tenancies;
(e) The Property suffered from a number of issues: mould and dampness in the living room; inadequate ventilation in the living room; mould and dampness in Ms. Richards' room;
(f) There was a lack of fire-fighting equipment at the property;
(g) There was no living room door which led to noise disturbance.

15. The Respondent (R3) accepts that she was the landlord of the Property and let the Property to Applicants. She also accepts that from 5 April 2022-6 November 2022 she was in breach of the requirements to obtain a HMO licence and she therefore committed an offence under s.72(1) HA 2004. She acknowledges that the Applicants are entitled to a RRO, but raises various issues in relation to quantum:

(a) She had previously offered to settle the claim for 30% of the maximum Rent Repayment Amount claimed;
(b) The Respondent did not know she had to apply for a licence until 13 October 2022, at which time she contacted the local authority. She made attempted to make an online application on 26 October 2022. She details the reason why the application was not pursued;
(c) She did not make any outgoing payments (such as utility bills) on behalf of the Applicants during the relevant period;
(d) It is not the case that she did not apply for a licence in order to profit from renting a substandard property and the suggestion that she avoided paying in excess of £43,000 was excessive;
(e) She has never been prosecuted or convicted of any offence relevant to s.44(4);

(f) The mould in the living room was contributed to by the Applicants drying clothes without adequate ventilation, which was raised with them by the Property Manager. She did agree to fit a door to the sitting room (the delays in doing so were not her fault);

(g) The Respondent was not promptly alerted to the issues of mould or the damage to the wardrobe door; she was never asked to provide a de-humidifier;

(h) She acted promptly in dealing with the issues raised with her;

(i) The Property was (at least) in "fairly good condition";

(j) The Applicants have not suffered physical or economic hardship as a result of the absence of the licence;

(k) The Respondent is not a professional landlord and she has no future intention to let the Property as a HMO;

(l) The Respondent details her personal circumstances.

The Hearing

16. All of the Applicants attended the hearing, represented by Mr. McGowan. The Respondent attended, and represented herself, but was supported by her husband (who made submissions on her behalf, as set out below).

17. At the start of the hearing, the Respondent produced a report from Rosewood concerning the damp at the premises (dated February 2022) and sought to rely on it. The Applicants had no objection to this, so the Tribunal has had regard to it.

18. Mr. McGowan then outlined the issues, which were said to be as follows:

(a) The Respondent had admitted the offence (R3, para. 3);

(b) The Respondent did not seek to advance any defence of reasonable excuse (R1, para. 1.2);

(c) The Respondent had accepted that the Applicants were entitled to a RRO (R1, para. 1.3);

(d) Pursuant to the case of *Acheampong v Roman* [2022] UKUT 239 (LC), the Tribunal has had consider the total amount of rent paid, whether deductions are appropriate and the seriousness of the offence (s.44(4)). In terms of those factors: the

Respondent admitted the contents of the rent schedules (A61-63); the Respondent admitted the Applicants paid the utilities (R5, para. 8.1); the Applicants were happy to accept what the Respondent stated (R6, para. 10.1-10.2) about the fact that she is able to make payment, the fact that she did not advance financial circumstances did not necessarily mean the Tribunal should make an award of 100% and the Respondent had not been convicted of a relevant offence;

(e) The material issues were seriousness of the offence and conduct.

19. The Respondent agreed that these were the material issues.

20. Ms. Kroll (whose witness statement is at A224) gave evidence and confirmed her witness statement. She was asked about (A290-1) which was the listing of the Property for subsequent tenants. She confirmed that it was listed in October shortly after the Applicants had given their notice to end the tenancy. She said that they had accessed the listing before they had contacted the Respondent's agent about the requirements for a HMO. She confirmed that there were smoke alarms in the Property in the living room, kitchen and (she thought) in the hallway. She confirmed the layout of the Property was that, on walking into the hallway, the kitchen door was on the left: it had glass panels and had two half-doors that opened inwards to kitchen.

21. Ms. Izen-Taylor (whose witness statement is at A215) gave evidence and confirmed her witness statement. She was asked about the mould in the Property and she said that she did not recall it being a problem before January 2022. She said there the person who lived in the Property before Ms. Richards had only lived there for 18 months rather than 2 years as she moved out 6 months before the end of the tenancy, but even before that she was only at the Property about 50% of the time. Ms. Richards moved in at the height of the Covid pandemic. and they were working from home. Despite this, there was no real issue with the mould until January 2022, which she thought may have been a particularly cold winter. She said that it was first reported in January 2022 (A234) and it had been a problem for about two weeks at that point. She said they had taken steps to address it during that time, and whilst Ms. Richards had said in her statement that they had tried not to do much to it, Ms. Izen-Taylor thought that that was after Rosewood had come out (on 14 February 2022). She said that the email of 23 January 2022 (A234) set out the steps they had taken to try to reduce the spread of mould, but it had got worse quite quickly. She stated that the works recommended in the report were not carried out. Her evidence was that the person who visited the Property for the purpose of the report said that they would make a recommendation for increased ventilation or a dehumidifier, but she admitted that they never personally requested such measures. She said the damp was most prevalent in the two upper corners of room, where the external walls met at a right-angle, at the top and bottom corners. She said that some of the damp was not visible as it was behind a wooden chest and shelves.

22. Ms. Roberts (whose witness statement is at A210) gave evidence and confirmed her witness statement. She confirmed that she was happy enough with the Property to sign the tenancy agreement in 2021. She accepted that the first report of an issue with the wardrobe in her room was on 1 June 2022 (A221). It was put to her that it must have been an issue for some time but had not been reported and she said that it the door had been stiff, but this had not been a "huge issue". As soon as there was a crack, she had reported it. She confirmed the damp was first reported in January 2022 (A219, A234) and said that they had started noticing it couple of weeks before, it had formed very quickly and they were worried about cleaning if off, in case someone needed to inspect it. She said that some of the mould was hidden and only became apparent whilst they were cleaning and moving furniture. There had been some mould at earlier times, but it had been cleaned off. When asked if there had been a change in circumstances she said that there had "maybe" been an increase in working from home.

23. The Respondent gave evidence. She was told that her "Statement of Reasons for Opposing Application" (R1) would stand as her evidence. She was then asked questions by Mr. McGowan. She confirmed that she used an agent to let the Property. She was asked about when she discovered she needed a licence (R2, para. 3.2) and taken to the listing of the Property (A290). She said that she did not recall when the Property was re-listed. She was asked about the listing stating "no HMO" and she said that she was aware that if the Property was let with three people or more it would be a HMO and that if she let the Property on a new tenancy, it would be a HMO and she would have to get a licence. She said that she only became aware on 13 October 2022 that the current tenancy meant that the Property would need a licence. She denied that she was seeking to avoid having a licence. It was put to her that her agent was aware that the Property needed a licence before 13 October 2022. She said that this would appear so, that she had a conversation with the person responsible for marketing the Property, who mentioned that there was a requirement for a licence for any new tenancy, but the Respondent denied that she knew needed one for the current tenancy until it was raised by the Applicants, and that she then called the local authority that morning, who told her that she needed a licence, so she started the application for a licence. She was taken to R2, para. 3.2 and it was put to her that she was aware of the need for a licence. She said that when she marketed the Property, she was told that if it was to be let to three or more people, it would be a HMO, so she decided to let it to no more than two people. She stated that she knew she would need a licence if there was a new tenancy, but she was not aware of the requirement for the Applicants' tenancy. She asked why she would not get a licence if it was required?

24. The Respondent said that the email at R19 (28 January 2022) was the first time she was aware of a request for a door to be installed to the living room. She was asked how she had responded and she said that the flat had never had a living room door, and two of the Applicants had lived at the Property since 2018, so it had surprised her and she asked if the Applicants would be prepared to contribute to the cost of the door. She said that on reflection, that was stupid and she had reflected and then wrote to her agent

saying that she would install a door (at her own cost). She said that at the time she was in a bad personal situation, and having reflected, it made sense to put the door in. She said it then took an "eternity" for the work to be done (R20-37). She denied that she had changed her position because of a complaint about mould on 28 January 2022 (R17), she said that had nothing to do with it. It was put to her that her response (R17-18) was as part of a response to the mould complaint, she denied this and said that the issue of the door was "just tacked on". She accepted that the door was not installed until 20 June 2022 (R20) but said that the delays were not down to her, she said she could not get contractors, and denied she was dragging her feet. It was put to her that she contributed to the delay, but she denied this, stating that she had asked for a quotation for the cost, which took a long time, then she wanted a second quote, that also took a long time, measurements were not passed on, Covid was a factor, as were her personal circumstances. She said that she had taken her "eye off the ball" but her agent had chased the work, but a quotation had been lost by a contractor.

25. The Respondent said that if she had been asked, she would have provided a dehumidifier, but the Rosewood report was essentially a "marketing" report, pushing its ventilation system. She said that this was the first time that damp had been raised as an issue, and she wanted to find out a little more about it. She said that she wanted to explore if cleaning would, she raised an issue of clothes being dried in the living room (which was not a laundry room) and ventilation. She was taken to R17-18 and it was put to her that she had suggested that the mould was the Applicants' fault and that her position was that she did not want to instruct a damp expert. The Respondent said that she wanted to find if other matters would solve the issue. She said in hindsight perhaps she should have agreed to get a report (initially) but she said that she did not know what was happening. She was taken to the email at A234 and she said that if she had seen this, she would have supplied a dehumidifier and she probably would have acted differently. She denied that she was avoiding the issue. She was asked if she should have asked what had been done before suggesting that the Applicants were amiss: she said that she thought she should have asked, but that this was the first time she had heard of any damp. She said she had personal circumstances at the time, but that she should probably have "been more on it". She did say that the Applicants should have raised it as an issue earlier and if they had mentioned it at the outset, it would have been helpful. The Respondent said that she thought that she should have looked into a proper damp specialist, but that this was the first time that she had been notified of damp (despite the Property being rented for 4 years) and she wanted to check how it could be dealt with, she did not know that the Applicants were doing all the things they had set out in the email.

26. In respect of the Rosewood report, the Respondent said that it was "pushing" their system and she did not know what tests had been done. She said that she would not seek to avoid doing the right things in the Property. The Respondent was taken to R29 and asked what made her make these suggestions: she said that she could not remember, but Rosewood was putting forward their system and she did not know if there was a problem with the

building. She did say that using the living room to dry clothes was not ideal. She said that if the Applicants said on 23 January 2022 that they had stopped drying clothes in the living room she accepted that. She was taken to A234 but she said she did not remember that email. She said that if it had been established what action the Applicants were taking, that she would have suggested a different cause of action, that until then it had been a happy tenancy and she asked why she could not want to do that? It was put to her that she picked the option which cost less, and she said that it was not down to that, it was down to the right thing to do, she had to pause and think and it was her intention to do the correct thing. It was put to her that the cost in the report (£1,320) was more expensive than the Applicants cleaning the walls, which she agreed with, but said that her decision was not driven by cost, that she would try one thing, but if it was not effective, she would try the other thing. She was asked why she obtained the report if she was going to "ignore" it and she said that she did not intend to ignore it, she got the report, but it was not "in-depth", she did not think it would address the problems. She said that if it had said to provide a dehumidifier, she would have done that. She confirmed that there was no cost for the report but she said that that was not the issue. The Respondent was taken to R17-18 and it was put to her that she changed her mind about obtaining a report once she knew it would be free to obtain and she disagreed with this. She said that she changed her mind as it seemed that getting a report may help to isolate the issues, but having had the report, it did not so this. She said that it was not a financial issue and she would do the right things, but she did not know what tests the maker of the report had carried out and she would need a more "in-depth" report. It was put to her that the right thing to do would be to get another report, but she said she did not know if they damp issue went away, she could not remember. She said that she did not know if it was raised again (and that she was not trying to duck her responsibility). She was taken to A255 (an email from the current tenant) and the Respondent said that the mould issues had been dealt with as before the current tenant moved in, the Property was repainted with mould-suppressing paint. It was put to her that her messages suggested that the mould was a new issue and her response was that she had dealt with damp before the current tenant moved in, it appeared to come back, so she get in an expert and did mould treatment, but this only worked for 8-9 months. She then had discussions with the freeholder and the building had been degrading, there was wate ingress from the external walls, which was a matter for the freeholder. She had discovered this from the freeholders managing agent, who she had chased to take action. She said that a dehumidifier had been supplied and works carried out, but mould was raised as an issue last month, so someone was sent in to the Property again to do a mould-wash and re-paint.

27. It was put to the Respondent that these were things that were not done for the Applicant, and the Respondent said that it was a fair question. She said that her response to the Applicants to ventilate the Property was not an aggressive response, that ventilation was important. She said that she was sorry if they were made to feel that it was their fault, that was not her intention, but she could understand how that might come across. She said that if she had understood that they were not drying their clothes in the living

room, she would have been kinder in her response. She said that until then, she had always responded to any issues raised, she would not have left it drift. She said she "dropped balls" in those months and it was not good, but it was a reflection of what was happening elsewhere.

28. The Respondent admitted that there were no fire doors in the Property and no fire alarms in bedrooms. She said that she was not aware that the Property was a HMO, that it was adequately equipped until April 2022, and when it changed in April 2022, the Respondent was unaware. The Respondent was asked about the effect on the Applicants, and she said that they were under the same risk as they had been in the past. She was taken to the document at A184 and she accepted the statistics. She said that she was aware of cl. 9.5.4 in the tenancy agreement (A51) and that there were carbon dioxide alarms and smoke alarms in the kitchen and living room. She stated that she was aware of the requirement of cl. 10.3.2.

29. The Respondent accepted that she had never obtained a licence for the Property, but that she had filled out the application, the local authority's system was difficult, she spoke to someone on the telephone, who put her in touch with Martin, who told her that there was no need for her to go ahead with the application. She said that she did not want to let the Property out as a HMO. In response to questioning from the Tribunal, the Respondent confirmed that she was not aware that the Property was a HMO from the moment it was rented and that she was not a member of any landlord association.

30. The Respondent admitted that she had not had works done in respect of fire doors in the Property.

31. It was put to the Respondent that she had financially benefitted from the breaches in respect of the property as there are things that she should have done which were not done. The Respondent said that, if it was put that way, she agreed, but she had not intended to avoid her obligations, and that if she had had to pay money to have fire doors put in, she would have done it.

32. The Respondent confirmed that she rented out another property, which was a two bedroom flat. The Property is currently rented out for £1,800 per month and the other flat is rented out for £1,650 per month.

The Respondent's submissions

33. The Respondent's husband made submissions on her behalf, which were as follows:

34. The Respondent accepted that she was liable to receive a RRO and regretted not complying with the requirements. She was not raising a defence of reasonable excuse, but she was not a rogue landlord. She accepted that she should have taken steps to inform herself of the statutory requirements when they became applicable. She had been relying on the managing agent to update her knowledge of relevant requirements but she appreciated that that was not an excuse in its own right. She had not knowingly breached the requirements. In the case *Daff v Gyalui* [2023] UKUT 134 (LC) para. 53, whilst the landlord was at fault for the lack of licence, there were contributing factors such as illness and there was no evidence that she had deliberately sought to avoid her responsibilities. The Respondent acted quickly to address the situation once she discovered that she needed a licence. She had been very accommodating of the Applicants needs in terms of short notice at the end of their occupation. She did take steps to address the issues with the door, damp and wardrobe. The request about the door was made before the licensing requirements came into force and it was some time after the Property had first been rented. There were delays in getting the living room door installed and in dealing with the damp and the wardrobe, but they were not down to the Respondent: she had done her best to chase them and she had had personal issues at the time. Further, the situation was made more difficult because of Covid. It was noted that in *Aytan v Moore* [2022] UKUT 027 (LC) the Tribunal did consider the failure to install fire alarms etc was serious, but in the instant case, there were smoke alarms an although there had not been compliance with the fire safety requirements, there had been compliance in material respects. It was denied that the conduct was serious enough to justify a substantial award. Reference was made to *Hallett v Parker* [2022] UKUT 165. para. 30 which said, among other things, that a full award was reserved for more serious offences. Reference was also made to *Acheampong v Roman* [2022] UKUT 239 (LC), paragraph 20(c). In *Sinkov v Jia* (LON/00BG/HMF/2022/0063), it was said that the starting point was 70% but in that case the award was reduced to 40%. It was said that the instant case was at about the same level. This was contrasted with the case of *Mohamud-Siryad v Akhtar Khan* LON/00AE/HMF/2022/0068, in which the landlord's conduct was described as very poor.

<u>The Applicant's submissions</u>

35. The Applicant relied primarily on the conduct of the Respondent and the seriousness of the offence. It was said that they were not really separate issues, although it could be said that fire safety may fall more naturally within the context of seriousness, and the issue of damp may fall more naturally within the context of conduct of the Respondent.

36. It was said that the *Sinkov* case was very different as in that case the landlord had waived the notice requirements and allow the tenant to leave early: in the present case, the Respondent had only increased the rent by £150 rather than £200 per month, and this was no equivalent.

37. It was said that *Daff v Gyalui* was of limited application as in this case there were no circumstances relating to limited means.

38. In respect of the damp and mould, it was said that the Respondent's immediate response was to blame the Applicants (R18) and she was reluctant to obtain an expert report. She had denied she was cutting corners, but it was submitted that she had only agreed to get a report once it was said that it would be free. Once she had the report, which was inadequate, she did not obtain a further report, but just reiterated her initial suggestions. It was said that the issue was never remedied, as evidenced by the fact that the new tenants raised the same issue. The Respondent's evidence was that steps were taken to remedy the damp for the new tenants that were not taken for the Applicants.

39. In respect of the living room door, the only inference the Tribunal was asked to draw was that when the installation of the door appeared to be a cost-effective solution to the damp, then the Respondent was amenable to it.

40. It was acknowledged that there was only a breach of fire safety requirements as from 5 April 2022, but it was said that the Applicants had been exposed to a risk for 4 years. The Tribunal raised the issue that there was nothing to show there was a requirement for there to have been smoke detectors in the bedrooms, and this was accepted by the Applicants. It was said that fire doors were required, but were not in place. It was said that it was relevant that the Applicants had been exposed to risk, and that the Respondent had benefitted from the breach (in not having to incur the expense of installing the fire doors). Reference was made to *Aytan* and it was said that that case mentioned (para. 64) the absence of important fire safety features. It was said that when asked by the Tribunal, the Respondent did not know what her obligations were and she had no steps to keep herself up to date with her obligations. It was said that the Applicants were exposed to a heightened fire safety risk and that the Respondent did not appreciate the seriousness and so a RRO was required and it was suggested that it be 80% of the rent.

Statutory regime

41. The statutory regime is set out in Chapter 4 of Part 2 of the 2016 Act.

42. Rent repayment orders are one of a number of measures introduced with the aim of discouraging rouge landlords and agents and to assist with achieving and maintaining acceptable standards in the rented property market. The relevant provisions relating to rent repayment orders are set out in sections 40-46 Housing and Planning Act 2016 ("the 2016") Act, not all of which relate to the circumstances of this case.

43. Part 2 of the Housing Act 2004 ("the 2004 Act") introduced licensing for certain HMO's. Licensing is mandatory for all HMO's which have three or more storeys and are occupied by five or more persons forming two or more households. "House in Multiple Occupation" is defined by s.254 Housing Act 2004. The Licensing of Houses in Multiple Occupation Order 2006 details the criteria under which HMOs must be licensed. The criteria were adjusted and renewed by the Licensing of Houses in Multiple Occupation Order 2018 which came in force on 1 October 2018 and since 1 October 2018 the requirements that the property must have three or more storeys no longer applies. The Local Authority may designate an area to be subject to additional licencing where other categories of HMO's occupied by three or more persons forming two or more households are required to be licenced.

44. So far as is relevant to the present application, the Act provides as follows:

40 Introduction 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…
(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
…			
5	Housing Act 2004	Section 72(1)	Control or Management of an unlicensed HMO
…			

45. Section 40 gives the Tribunal power to make a rent repayment order where a landlord has committed a relevant offence. Section 40(2) explains that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant (or where relevant to pay a sum to a local authority).

41 Application for a 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
…

46. Section 41 permits a tenant to apply to the First-tier Tribunal for a rent repayment order against a person who has committed a specified offence, if the offence relates to housing rented by the tenant(s) and the offence was committed in the period of 12 months ending with the day on which the application is made.

43 Making 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);
…

47. Under section 43, the Tribunal may only make a rent repayment order if satisfied, beyond reasonable doubt in relation to matters of fact, that the landlord has committed a specified offence (whether or not the landlord has been convicted). Where reference is made below to the Tribunal being satisfied of a given matter in relation to the commission of an offence, the Tribunal is satisfied beyond reasonable doubt, whether stated specifically or not.

48. It has been confirmed by case authorities that a lack of reasonable doubt, which may be expressed as the Tribunal being sure, does not mean proof beyond any doubt whatsoever. Neither does it preclude the Tribunal drawing appropriate inferences from evidence received and accepted. The standard of proof relates to matters of fact. The Tribunal will separately determine the relevant law in the usual manner.

49. Where the application is made by a tenant, and the landlord has not been convicted of a relevant offence, s.44 applies in relation to the amount of a rent repayment order, setting out the maximum amount that may be ordered and matters to be considered. If the offence relates to HMO licensing, the amount must relate to rent paid by the Applicants in a period, not exceeding

12 months, during which the Respondents were committing the offence. This aspect is discussed rather more fully below.

44 Amount of order: tenants
(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
(2) 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 repaid by the tenant in respect of
…	
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 repaid 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.

Determination of the Tribunal

50. The Tribunal has considered the application in four stages-

(i) whether the Tribunal was satisfied beyond reasonable doubt that the Respondent had committed an offence under section 72(1) of the 2004 Act in that at the relevant time the Respondent was a person who controlled or managed an HMO that was required to be licensed under Part 2 of the 2004 Act but was not so licensed.
(ii) whether the Applicant was entitled to apply to the Tribunal for a rent repayment order.

(iii) Whether the Tribunal should exercise its discretion to make a rent repayment order.
(iv) Determination of the amount of any order.

Was the Respondent the Applicant's landlord at the time of the alleged offence?

51. It is not disputed, and the Tribunal finds as a fact, that the Respondent was the landlord of the Applicants as the Property was let to the Applicants from about 2020 and, as at 5 April 2022, the Applicants were the tenants of the Respondent.

Was a relevant HMO licensing offence committed during the period 5 April 2022-6 November 2022 and by whom?

52. The Tribunal applies, as it must, the criminal standard of proof (s.43(1)).

53. It is not in dispute that, during the relevant period(s), the Property was subject to an additional licencing scheme, that it was a "HMO" (s.254-259) and, pursuant to the Housing Act 2004 ("the 2004 Act") and the regulations made under it, the Property required a licence in order to be occupiable by three or more persons living in two or more separate households. It is also not disputed that the Property was, at the material times, occupied by three people living in more than two separate households.

54. Section 72(1) of the 2004 Act is one of those listed in section 40 of the 2016 Act in respect of which the First-tier Tribunal may make a rent repayment order. The section provides that:

"A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed… but is not so licensed".

55. Section 61(1) states:

"Every HMO to which this Part applies must be licensed under this Part unless-
(a) a temporary exemption notice is in force in relation to it under section 62, or
(b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4".

56. Section 55 states:

"(1) This Part for HMOs to be licensed by local housing authorities where-

(a) HMOs to which this Part applies (see subsection (2)), and
(b) they are required to be licensed under this Part (see section 61(1)).
(2) This Part applies to the following HMOs in the case of each local housing authority-
(a) any HMO in the authority's district which falls within any prescribed description of HMO, and
(b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation".

57. The Respondent accepts that there was no licence in place in the statement of case (R6). Given that admission, the Tribunal had no difficulty in finding that there was no licence, but in any event, on the evidence, the Tribunal would have found (applying the criminal standard) that there was no licence in place during as at 5 April 2022 and there was none in place at the time the Applicants left the Property.

58. Where the Respondent would otherwise have committed an offence under section 72(1) of the 2004 Act, there is a defence if the Tribunal finds that there was a reasonable excuse pursuant to section 72(5). The standard of proof in relation to that is the balance of probabilities.

59. The offence is strict liability (unless the Respondent had a reasonable excuse) as held in *Mohamed v London Borough of Waltham Forest* [2020] EWHC 1083. The intention or otherwise of the Respondent to commit the offence is not the question at this stage, albeit there is potential relevance to the amount of any award. The case authority of *Sutton v Norwich City Council* [2020] UKUT 90 (LC) in relation to reasonable excuse held that the failure of the company, as it was in that case, to inform itself of its responsibilities did not amount to reasonable excuse. The point applies just the same to individuals.

60. The Upper Tribunal gave guidance on what amounts to reasonable excuse defence was given in *Marigold & Ors v Wells* [2023] UKUT 33 (LC), *D'Costa v D'Andrea & Ors* [2021] UKUT 144 (LC) and in *Aytan v Moore* [2022] UKUT 027 (LC):

(a) the Tribunal should consider whether the facts raised could give rise to a reasonable excuse defence, even if the defence has not been specifically raised by the Respondent;
(b) when considering reasonable excuse defences, the offence is managing or being in control of an HMO without a licence;
(c) it is for the Respondent to make out the defence of reasonable excuse to the civil standard of proof;
(d) a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least, the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the

landlord had good reason to rely on the competence and experience of the agent; and in addition, there would generally be a need to show that there was a reason why the landlord could not inform him/herself of the licensing requirements without relying upon an agent (e.g. because the landlord lived abroad).

61. The Respondent does not seek to raise a reasonable excuse defence, but the Tribunal is mindful of the guidance set out above.

62. The Tribunal received no evidence that the Respondent intended the Property not to be licensed where it was required to be. The Respondent said that she had not realised that a licence was needed. It is noted that the Respondent used an agent, but there is no evidence of a contractual obligation on the agent to keep the Respondent informed of licensing requirements; there is no evidence that the Respondent had a good reason to rely on the competence and experience of the agent; there is no evidence of a reason why the Respondent could not inform herself of the licensing requirements without relying upon an agent. Taking everything into account, there is nothing which the Tribunal found to demonstrate a reasonable excuse.

63. Therefore, the Tribunal determines that the circumstances of the Respondent's failure to hold an HMO licence at the time of the material tenancy do not objectively amount to a reasonable excuse and so do not provide a defence to the HMO licensing offence, which the Tribunal finds beyond reasonable doubt to have been committed.

64. The Tribunal finds that the offence was not committed for the entirety of the Applicant's tenancies, but it was committed from 5 April 2022 until 6 November 2022.

65. The next question is by whom the offence was committed? The Tribunal determined that the offence was committed by the Respondent, being a person within the meaning of s.71(1) Housing Act 2004, being the person who had control or was managing the Property during the material time.

Should the Tribunal make a RRO?

66. Given that the Tribunal is satisfied, beyond reasonable doubt, that the Respondent committed an offence under section 72(1) of the 2004 Act, a ground for making a rent repayment order has been made out.

67. Pursuant to the 2016, a rent repayment order "may" be made if the Tribunal finds that a relevant offence was committed. Whilst the Tribunal could determine that a ground for a rent repayment order is made out but not

make such an order, Judge McGrath, President of this Tribunal, said whilst sitting in the Upper Tribunal in the *London Borough of Newham v John Francis Harris* [2017] UKUT 264 (LC) as follows:

"I should add that it will be a rare case where a Tribunal does exercise its discretion not to make an order. If a person has committed a criminal offence and the consequences of doing so are prescribed by legislation to include an obligation to repay rent housing benefit then the Tribunal should be reluctant to refuse an application for rent repayment order".

68. The very clear purpose of the 2016 Act is that the imposition of a rent repayment order is penal, to discourage landlords from breaking the law, and not to compensate a tenant, who may or may not have other rights to compensation. That must, the Tribunal considers, weigh especially heavily in favour of an order being made if a ground for one is made out.

69. The Tribunal is given a wide discretion and considers that it is entitled to look at all of the circumstances in order to decide whether or not its discretion should be exercised in favour of making a rent repayment order. The Tribunal determines that it is entitled to therefore consider the nature and circumstances of the offence and any relevant conduct found of the parties, together with any other matters that the Tribunal finds to properly be relevant in answering the question of how its discretion ought to be exercised.

70. Taking account of all factors, the evidence and submissions of the parties, including the purpose of the 2004 Act, the Tribunal exercises its discretion to make a rent repayment order in favour of the Applicants.

The amount of rent to be repaid

71. Having exercised its discretion to make a rent repayment order, the next decision was how much should the Tribunal order?

72. In *Acheampong v Roman* [2022] UKUT 239 (LC) at [20] the Upper Tribunal established a four-stage approach for the Tribunal to adopt when assessing the amount of any order:

(a) ascertain the whole of the rent for the relevant period;
(b) subtract any element that represents payment for utilities;
(c) consider the seriousness of the offence, both compared to other types of offences in respect of which a rent repayment order may be made and compared to other examples of the same type of offence. What proportion of the rent is a fair reflection of the seriousness of this offence? That percentage of the total amount applies for is the starting point; it is the default penalty in

the absence of other factors, but it may be higher or lower in light of the final step;
(d) consider whether any deductions from, or addition to, that figure should be made in light of the other factors set out in section 44(4)".

73. In the absence of a conviction, the relevant provision is section 44(3) of the 2016 Act. Therefore, the amount ordered to be repaid must "relate to" rent paid in the period identified as relevant in section 44(2), the subsection which deals with the period identified as relevant in section 44(2), the subsection which deals with the period of rent repayments relevant. The period is different for two different sets of offences. The first is for offences which may be committed on a one-off occasion, albeit they may also be committed repeatedly. The second is for offences committed over a period of time, such as a licensing offence.

74. At [31] of *Williams v Parmar* [2021] UKUT 244 (LC) it was said:

"... [the Tribunal] is not required to be satisfied to the criminal standard on the identity of the period specified in s.44(2). Identifying that period is an aspect of quantifying the amount of the RRO, even though the period is defined in relation to certain offences as being the period during which the landlord was committing the offence".

75. The Tribunal is mindful of the various decisions of the Upper Tribunal in relation to rent repayment order cases. Section 44 of the 2016 Act does not, when referring to the amount, include the word "reasonable" in the way that the previous provisions in the 2004 Act did. Judge Cooke stated clearly in her judgement in *Vadamalayan v Stewart and others* (2020) UKUT 0183 (LC) that there is no longer a requirement of reasonableness. Judge Cooke noted (paragraph 19) that the rent repayment regime was intended to be harsh on landlords and to operate as a fierce deterrent. The judgment held in clear terms, and perhaps most significantly, that the Tribunal must consider the actual rent paid and not simply any profit element which the landlord derives from the property, to which no reference is made in the 2016 Act. The Upper Tribunal additionally made it clear that the benefit obtained by the tenant in having had the accommodation is not a material consideration in relation to the amount of the repayment to order. However, the Tribunal could take account of the rent including the utilities where it did so. In those instances, the rent should be adjusted for that reason.

76. In *Vadamalayan*, there were also comments about how much rent should be awarded and some confusion later arose. Given the apparent misunderstanding of the judgment in that case, on 6th October 2021, the judgment of The President of the Lands Chamber, Fancourt J, in *Williams v Parmar* [2021] UKUT 0244 (LC) was handed down. *Williams* has been applied in more recent decisions of the Upper Tribunal, as well as repeatedly by this Tribunal. The judgment explains at paragraph 50 that: "A tribunal

should address specifically what proportion of the maximum amount of rent paid in the relevant period, or reduction from that amount, or a combination of both, is appropriate in all the circumstances, bearing in mind the purpose of the legislative provisions."

77. The judgment goes on to state that the award should be that which the Tribunal considers appropriate applying the provisions of section 44(4). There are matters which the Tribunal "must, in particular take into account". The Tribunal is compelled to consider those and to refer to them. The phrase "in particular" suggests those factors should be given greater weight than other factors. In *Williams*, they are described as "the main factors that may be expected to be relevant in the majority of cases"- and such other ones as it has determined to be relevant, giving them the weight that it considers each should receive. Fancourt J in *Williams* says this: "A tribunal must have particular regard to the conduct of both parties includes the seriousness of the offences committed), the financial circumstances of the landlord and whether the landlord has been convicted of a relevant offence, The Tribunal should also take into account any other factors that appear to be relevant."

78. The Tribunal must not order more to be repaid than was actually paid out by the Applicants to the Respondent during that period (ignoring for these purposes a provision about universal credit not of relevance here). That is entirely consistent with the order being one for repayment. The provision refers to the rent paid during the period rather than rent for the period.

79. It was said, in *Williams v Parmar*, by Sir Timothy Fancourt [43] that the *Rent Repayment Orders* under the Housing and Planning Act 2016: Guidance for Local Authorities identifies the factors that a local authority should take into account in deciding whether to seek a Rent Repayment Order as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. It was indicated [51] that the factors identified in the Guidance will generally justify an order for repayment of at least a substantial part of the rent. It was also said that a full award of 100% of the rent should be reserved for the most serious of cases (see also *Hallett v Parker* [2022] UKUT 165).

80. The Tribunal has carefully considered the amount of the rent for the relevant period of the licencing offence that should be awarded.

<u>Ascertain the whole of the rent for the relevant period</u>

81. The relevant rent to consider is that paid during "a period, not exceeding twelve months, during which the landlord was committing the offence".

82. The Applicants seek an order for the maximum rent paid as set out above. The Tribunal raised an issue that the rent paid on 4 March 2022 and 4 April 2022 were paid before the material date of 5 April 2022 (when the

licensing requirements came into force) and referred to the case of *Kowalek v Hassanein Ltd* [2022] EWCA Civ 1041. In that case, the tenants application for a RRO included a claim for the repayment of rent in the sum of £2,000 which had been paid the day after the landlord applied for its licence. The First-tier Tribunal made a RRO but held, among other things, that the £2,000 was outwith the scope of that order, since it was not "rent paid during the period mentioned in the table" contained in s.44(2) 2016 Act, namely "a period, not exceeding 12 months, during which the landlord was committing the offence". The Upper Tribunal dismissed the tenants' appeal and the matter was the subject of a second appeal. The Court of Appeal held, among other things that, on a true construction of s.44(2) of the 2016 Act, in order to be recoverable under a RRO, the rent in question had both to have been paid to discharge indebtedness which had arisen during the relevant period of offending by the landlord and in fact paid during that period.

83. The Applicants conceded that the rent paid on 4 March and 4 April 2022 could not be included in calculating the rent paid during the relevant period. The rent paid was therefore:

(a) Ms. Kroll - £3,450;
(b) Ms. Izen-Taylor - £3,800;
(c) Ms. Richards - £3,500.

Total: £10,750.

Deductions for utilities?

84. The Applicants were liable for all charges in respect of supply and use of utilities, as accepted by the Respondent and so no deduction for utilities is made.

Seriousness of the offence

85. In *Williams v Parmar* [2021] UKUT 244 (LC) it was said that "the circumstances and seriousness of the offending conduct of the landlord are comprised in the 'conduct of the landlord', so the First Tier Tribunal may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness of mitigating circumstances or otherwise".

86. As the Upper Tribunal has made clear, the conduct of the Respondent also embraces the culpability of the Respondent in relation to the offence that is the pre-condition for the making of the Rent Repayment Order. The offence of controlling or managing an unlicensed HMO is a serious offence, although it is clear from the scheme and detailed provisions of the 2016 Act that it is not regarded as the most serious of the offences listed in section 40(3).

87. In *Daff v Gyalui* [2023] UKUT 134 (LC) it was highlighted that there will be more and less serious examples within the category of offence: [49].

88. The Tribunal determines that the relatively less serious offence committed by the Respondent should be reflected in a deduction from the maximum amount in respect of which a RRO could be made.

89. The Tribunal notes that this case concerns additional licensing for a small HMO occupied by three friends. A licencing offence is at the lower end of the offences that may be subject to a RRO. The failure to have an additional licence is less serious than a failure to have a mandatory licence, but more serious than failure to have a selective licence. The Tribunal notes, however, that it was incumbent on the Respondent to have sufficient knowledge of the legislative and licensing requirements and the Respondent admitted that she did not have a system in place to ensure that she did have such knowledge.

90. The Tribunal also notes, however, that there were issue concerning fire safety: there should have been fire doors fitted to the living room and the kitchen and this did create a risk, particularly in respect of the kitchen door as this is near the entrance door to the Property. This did create an increased risk to the Applicants in the event of a fire. It is noted that there is no evidence that additional smoke alarms/detectors were required and so the Tribunal proceeds on the basis that there were no failings in this regard.

Conduct

91. The Tribunal takes into account the conduct of the landlord and the tenant, the financial circumstances of the landlord and whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies when considering the amount of such order. Whilst those listed factors must therefore be taken into account, and the Tribunal should have particular regard to them, they are not the entirety of the matters to be considered: other matters are not excluded from consideration. Any other relevant circumstances should also be considered, requiring the Tribunal to identify whether there are such circumstances and, if so, to give any appropriate weight to them.

92. The Respondent is not a professional landlord, and the Tribunal is satisfied that the Respondent's failure was due to inadvertence and negligence rather than a deliberate act on her part. The Respondent sought to remedy her default as soon as she discovered that she had not met her legal obligations. The Tribunal is satisfied that the Respondent does not fit the description of a rogue or criminal landlord. The Respondent took into account that the fact that the Respondent acknowledged the lack of licence, her apologies over her failure to licence the Property and the remorse she demonstrated during the hearing.

93. In terms of mould, the Respondent did take action. Criticisms were made of her, but the Tribunal does not find it appropriate to make any adjustment to the amount of the RRO in respect of this for the following reasons:

(a) The Property was let, to two of the Applicants, from July 2018, but mould was not raised as an issue until 23 January 2022 (A234);

(b) The response (A242) was that the Applicant as not averse to installing a door to the living room (which had been raised as an issue) and was going to get a quote, but the Applicants were asked to take steps "in the meantime";

(c) steps were taken for a survey by a damp specialist (A241) and Rosewood did attend in February 2022 and produced a report;

(d) It was not unreasonable to consider the report and take a view on whether the recommendations would be of assistance. It was noted that, the Tribunal, taking account of its expertise it would not have followed the advice in that report (this was conveyed to the parties);

(e) There was no evidence of further complaints about mould from the Applicants and the evidence of the Respondent was that, when the issue was raised by the current tenant, steps were taken to address it.

94. The Tribunal takes account of the missing living room door when considering fire safety (above). The Tribunal finds that the Respondent did act to deal with the issue concerning the wardrobe door in Ms. Richards' bedroom and does not find it appropriate to make any adjustment to the amount of the RRO in respect of this.

95. In summary, although criticisms were made of the Respondent, the Tribunal determines that such behaviour cannot be regarded as sufficiently significant to warrant further adjustment of the amount of the Rent Repayment Order.

Whether the landlord has been convicted of an offence?

96. Section 44(4)(c) of the 2016 Act requires the Tribunal to take into account whether the Respondent has at any time been convicted of any of the offences listed in section 40(3). The Respondent has no such convictions.

Financial circumstances of the Respondent

97. In terms of the financial circumstances of the Respondent, the Tribunal noted the rental value of the Property during the material period, the

fact that the Property is currently rented, and the Respondent has another Property which is rented at the moment.

98. The Tribunal makes no deduction, taking account of the financial circumstances of the Respondent.

The amount of the repayment

99. The Tribunal determines that, in order to reflect the factors discussed in paragraphs 89-92 above, the maximum repayment amount identified in paragraph 84 above should be discounted by 50% (i.e. the RRO is 50% of the rent paid in the material period). The Tribunal therefore orders under s.43(1) of the 2016 Act that the Respondent repay the Applicants the sums as follows:

(a) Ms. Kroll - £1,725;
(b) Ms. Izen-Taylor - £1,900;
(c) Ms. Richards - £1,750.

Total: £5,375

100. The Tribunal has had regard to all the circumstances in setting a time for payment, including the amount of the RRO. The Respondent said that the amount could be paid within 28 days and so the Tribunal orders repayment in 28 days from the date of this decision.

Application for refund of fees

101. The Applicants asked the Tribunal to award the fees paid in respect of the application should they be successful, namely reimbursement of the £100 issue fee and the £200 hearing fee. The Tribunal does order the Respondent to pay the fees paid by the Applicants, in the sum of £300.

Judge Sarah McKeown
25 April 2024

Rights of appeal

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

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

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

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

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

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