FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AE/HMF/2023/0269**
Property	**:**	**23 Elm Way, London NW10 0NG**
Applicants	**:**	**Daniel Ferreres Ondó** **Kamil Skaza** **Nicolas Ferjencik**
Representative	**:**	**Mr E Ross of counsel**
Respondent	**:**	**Ms Uzma Rafiq and Taj Rafiq**
Representative	**:**	**Mr M Nazeer, IEC solicitors**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms L Crane MCIEH**
Date and venue of Hearing	**:**	**29 April 2024** **10 Alfred Place**
Date of Decision	**:**	**2 May 2024**

DECISION

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Orders

(1) The Tribunal makes rent repayment orders against the Respondents to each of the Applicants in the following sums, to be paid within 28 days:

Daniel Ferreres Ondó: £4,500
Kamil Skaza: £4,500
Nicolas Ferjencik: £4,500

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants together the application and hearing fees in respect of this application in the sum of £300.

The application

1. The Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for Rent Repayment Orders ("RROs") under Part 2, Chapter 4 of the Housing and Planning Act 2016 dated 9 November 2023. Directions were given on 7 December 2023.

The hearing

Introductory

2. The Applicants were represented by Mr Edward Ross of counsel. The Respondents by Mr M Nazeer, IEC Solicitors.

3. The property is in a semi-detached house in Neasden, which appears to be of post-war construction. The house has been converted in two flats. The property was a flat or maisonette comprising the first and second floors of the house. It consisted of five bedrooms, two of which with en suite bathrooms, a kitchen and two shared bathroom/WCs.

4. The relevant period in respect of which the Applicants claim RROs is from 1 September 2022 to 31 August 2023.

Preliminary issues

5. As a preliminary issue, the Tribunal observed that Zain Rafiq, who has appeared as a respondent up to this point, is not recorded as one of the freeholders, nor does the name appear as a landlord on the Applicants' tenancy agreement, unlike those of the other two Respondents. Both parties agreed that we should remove him as a Respondent, and we do so.

6. Until the day of the hearing, the Respondents had failed to engage at all with the Tribunal, and had not provided a bundle or any other material. On the day, Mr Nazeer appeared, with Mr Mehmood Syed, the Respondent's managing agent.

7. The hearing took place on a Monday. Mr Nazeer told us that he had been instructed at 5.00pm the previous evening, and had only been able to take brief instructions on the telephone. He made an application that we should adjourn, to allow time for him to take witness statements and submit a bundle. He said that the Respondents would pay the costs of today, and that therefore the Applicant would not be prejudiced.

8. Mr Ross opposed the application for the Applicants. The Respondents had given no explanation as to why they had entirely failed to adhere to the Tribunal's directions, in particular to provide a bundle nearly two months ago. His clients were present and ready to proceed, and had been expecting an unopposed application. If the Respondents were to be allowed an adjournment to file a bundle, it was likely that the Applicants would wish to respond, and such a level of delay was not in the interests of justice and was, having regard to the overriding objective in Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules"), rule 3, it was not proportionate for us to allow it.

9. We agree with Mr Ross' submissions. No reason had been advanced as to why the Respondents had not adhered to the directions or otherwise contacted the Tribunal, and any disadvantage they might suffer was of their own making.

10. We established with Mr Nazeer that he was sufficiently instructed to make submissions, and to cross examine the Applicants. We stipulated that, in doing so, he could not seek to introduce or refer to evidence that was not before the Tribunal.

11. We are grateful for both representatives' assistance, and commend Mr Nazeer for making effective submissions and cross examination under what were for him difficult conditions.

The alleged criminal offence

12. The Applicants allege that the Respondents were guilty of having control of, or managing, an unlicensed house in multiple occupation contrary to Housing Act 2004 ("the 2004 Act"), section 72(1). The offence is set out in Housing and Planning Act 2016, section 40(3), as one of the offences which, if committed, allows the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

13. The Applicants case is that the property was required to be licenced. The basis of the requirement is not expressly stated in the Applicants' bundle, but they have pleaded, and provided evidence, that it was occupied by five people throughout the relevant period. It therefore falls within the category of mandatory licencing (sections 55 and 61 of the 2004 Act and Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018).

14. The Applicants evidence was that none of the five occupants constituted members of a household with any of the others, and that they shared cooking, bathing and lavatory facilities. We were provided with an assured shorthold tenancy signed by each of the five occupants covering the relevant period. In oral evidence, Mr Ferreres stated that all of the tenants in the property throughout the relevant period were occupying as their only or principal home. The Applicants provided evidence by way of an emails from the local authority's private rented sector team and a screen shot of the authority's on line licence register that the property was not licenced.

15. Mr Nazeer conceded that the offence was made out.

The amount of the RRO

16. In considering the amount of an RRO, the Tribunal will take the approach set out in *Acheampong v Roman and Others* [2022] UKUT 239 (LC) at paragraph 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. …
> (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 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)."

17. We add that at stage (d), it is also appropriate to consider any other of the circumstances of the case that the Tribunal considers relevant.

18. In respect of the relationship between stages (c) and (d), in *Acheampong* Judge Cooke went on to say at paragraph [21]

> "I would add that step (c) above is part of what is required under section 44(4)(a) [conduct of the parties]. 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."

19. As to stage (a), by sections 44(2) and (3) and section 51 of the 2016 Act, the maximum possible RRO is the rent paid during a period of 12 months, minus any universal credit or Housing Benefit paid during that period.

20. The Applicants' evidence was that none of them were in receipt of the specified benefits.

21. The total rent paid was £500 a month each, amounting therefore to a total of £6,000 for the relevant period.

22. The tenancy agreement imposed the obligation to pay for utilities on the tenants. The evidence was that they paid the energy bills in the ordinary way. As to the water bill, they paid the neighbour £20 each month. Accordingly, nothing falls to be subtracted from the total at stage (b).

23. In assessing the seriousness starting point under stage (c), there are two axes of seriousness. The first is the seriousness of the offence, compared to the other offences specified in section 41 of the 2004 Act. The offence under section 72(1) is significantly less serious than those in rows 1, 2 and 7 in the table in section 40 of the 2016 Act, and we take that into account. It is, nonetheless, much the most common offence to come before the Tribunal.

24. We turn to the seriousness of the offence committed by the Respondents compared to other offences against section 72(1).

25. The evidence relevant to seriousness, and our conclusions thereon, is as follows.

26. The fire safety provision was inadequate. There were two alarms apparent, one in the kitchen (on the first floor) and one in the hall on the second floor, which Mr Ferreres thought smoke alarms. The Applicants could say no more than that, so there was no evidence as to whether they were mains wired, or battery operated. There was no alarm in the communal hall. We are prepared to conclude that the alarms were wired.

27. However, we think it unlikely that the alarms were integrated with those in the other property, as they should have been. Our conclusion depends in part on another serious failing in the fire safety precautions, which is the failure to undertake a fire safety assessment. If there had been an assessment, it would have required integration of the alarms, and an alarm in the communal hall. If a landlord is, in general, headless of his or her legal obligations (as we conclude the Respondents were), and no fire safety assessment had been undertaken (which the evidence indicates), then we think it inherently unlikely that such a landlord would think to install such a system.

28. There was also no fire blanket it the kitchen. We disregard the absence of fire extinguishers, a further point noted by the Applicants, as it is unlikely that a fire risk assessment would have required them.

29. It was the opinion of the Applicants that none of the doors were fire doors, having regard to a description of fire doors provided to them by the solicitor they initially consulted. One of them, vividly, described the doors as being of the kind that would break if you kicked it. By chance, as Mr Ross pointed out to us, it was possible to zoom in on the door to Mr Skaza's room in the photograph provided to illustrate a leak (see below). Mr Skaza's evidence was that all the other doors in the flat, including the flat's front door giving access to the communal hall, were of the same description. Looking at the door, it appears to us to be a standard internal room door, not rated as a fire door, and that, on the balance of probabilities, is what we conclude it is. As Mr Ross noted, at least the external door to the communal hall should have been a fire door.

30. The Respondents did not protect the Applicants deposits. The tenancy agreement stipulates that the deposits would be protected by the My Deposit scheme. The Applicants provided evidence from that scheme that their deposits had not been protected, and their evidence was that they had never received deposit protection certificates. Separate proceedings were in train before the County Court in relation to the deposits. We reject Mr Nazeer's submission that we should wholly disregard the issue of tenancy deposits, given those proceedings. We can, we consider, take account of the un-contradicted evidence of the Applicants, and should give it some weight, while recognising that the central forum for the vindication of the Applicants' rights in connection with the deposits is the County Court.

31. The Respondents failed to produce an Energy Performance Certificate (EPC), a Gas Safety Certificate or the "How to Rent" booklet at the outset of the tenancy or at all. That all three were required to be provided is not contested.

32. Not doing so is a breach of regulatory requirements by the Respondents, which we take into account.

33. Much more serious is the fact that the EPC, which the Applicants were able to consult on the local authority's website, showed an energy rating of F. A property (with irrelevant exceptions) with such a rating may not be let at all.

34. Finally, there was some disrepair. Both Mr Skaza's and Mr Ferjencik's rooms suffered from leaks when it rained. In both cases, during and after heavy rain, water dripped through the ceilings. Complaints were made, the Applicants said, throughout the tenancy, but no repairs were carried out. The leaks appear to us to have been of limited seriousness – Mr Ferjencik said that their extent was such that, when he got up after a rainy night, he wiped up the water from the laminate floor with a cloth. We were provided with photographs of the staining on the ceilings, which showed staining consistent with this description.

35. As to the general state of the property, Mr Ferjencik, who had started living in the property in September 2020, a year earlier than the other two Applicants, said that it looked as if it had been recently refurbished at that time, and all of the Applicants agreed that the condition of the property was in general of a reasonable quality. We can see from one of the photographs provided that the decorative state of Mr Skaza's room on his departure was good (the ceiling stains aside).

36. Nonetheless, our overall impression is of landlords who had made no attempt to inform themselves of their legal obligations as landlords, or who had done so, but then not discharged those obligations.

37. The poor fire safety provision, the letting of a property with an EPC rating of F, together with the wholesale ignoring of other regulatory requirements, puts this case towards the upper end of the seriousness scale for offences contrary to section 72(1).

38. In coming to our conclusion as to the proper assessment of the quantum RRO at this stage, we have considered *Acheampong*, *Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8; *Aytan v Moore* [2022] UKUT 27 (LC); *Hallett v Parker* [2022] UKUT 239 (LC); *Hancher v David and Others* [2022] UKUT 277 (LC); and *Dowd v Martins and Others* [2022] UKUT 249 (LC). In particular, we see this as somewhat more serious than *Hancher v David*, but not quite as serious as *Choudhury v Razak* (reported with Acheampong).

39. Accordingly, at stage (c), we assess the RRO at 70% of the total possible.

40. As Judge Cooke noted in *Acheampong*, there is a close relationship between stages (c) and (d). Insofar as we have already made findings as to the Respondents' attitude towards regulatory obligations and their

conduct as it relates to the leaks and their repair, we do not double count them in considering the section 44(4) matters

41. The Appellants stopped paying rent immediately after the end of the relevant period, for varying periods of between about two and a half and three and a half months, apparently as a result of the dispute over the deposits and the failure to licence the property. It is, of course, a basic obligation on a tenant to pay the rent, and they should have done so. However, the Applicants' decision to not pay must be seen in the context of disputes, the origins of which lie with the defaults of the Respondent. So we think we should take account of the failure to pay rent, but not to see it as weighing as heavily as rent arrears usually would do.

42. It was Mr Ferreres' evidence that the Respondents' agent, Mr Syed, emailed the Applicants on 26 December 2023 accusing them of blackmail and extortion. This followed a meeting at which the Applicants outlined their case to Mr Syed, during the course of which Mr Syed offered them money, although Mr Ferreres said that no offer was actually made. With the email was included an invoice, addressed to all three of them, and exhibited to Mr Ferreres' witness statement. It claimed £1,000 as outstanding for October, £2,500 for November, and for December £9,300, described as "rolling at £300 a day". As to the conduct of Mr Syed, we accept the evidence of the Applicants. Mr Ferreres characterised this invoice as intimidating and harassing.

43. We agree with Mr Ferreres' assessment. Set against the history of the wholesale failure of the Respondents to adhere to their obligations as landlords, this invoice, and the charges associated with it, appear to us to be most reprehensible. The claimed charge for December has no possible basis, and can only be interpreted as an attempt (albeit cack-handed) to intimidate tenants making valid and genuine complaints.

44. Had it not been for the failure of the Applicants to pay their rent for the last period, we would have added 10% to reflect this conduct. As it is, we add 5%.

45. In the result, we conclude that the RRO should be set at 75% of the maximum possible.

Reimbursement of Tribunal fees

46. The Applicant applied for the reimbursement of the application and hearing fees paid by the Applicants under Rule 13(2) of the Rules. In the light of our findings, we allow that application.

Application for costs

47. The Applicants had provided a costs schedule shortly before the hearing. The total costs claimed, including VAT, was in the sum of

£7,104. Mr Ross said he was instructed to apply for costs under rule 13(1)(b) of the 2013 Rules. He argued in particular that it was unreasonable for the Respondent to fail to take any part in the proceedings and then turn up on the day of the hearing, conceding the breach of the criminal offence. Had they done so earlier, then the costs associated with proving the offence could have been saved, and so a costs order that at least addressed those costs should be made.

48. We refuse the application.

49. The threshold set for unreasonable behaviour in the context of rule 13 set in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC), [2016] L& TR 34 is a high one, effectively that the conduct of the party concerned is vexatious, abusive, frivolous or otherwise ill-motivated (adopting the approach in *Ridehalgh v Horsefield* [1994] Ch. 205).

50. The reason for the failure of the Respondent's failure to engage with the Tribunal is not known. Mr Nazeer, in his application for an adjournment, merely adverted to the fact that they are lay people without experience of litigation. There is nothing in this that allows us to conclude that their conduct was ill-motivated in the requisite sense.

51. But the fact that the Respondents failed to engage with the application for an RRO before the day of the hearing only benefitted the Applicants, in respect of both liability and quantum. Their evidence was uncontradicted. As to the criminal offence, we would in all events have had to be satisfied that all the elements of the offence were made out as the condition precedent for the making of an RRO.

52. We do not consider that the Applicants are able to show that the conduct of the Respondents has been unreasonable, and we do not think that their conduct has prejudiced the Applicants in any event

Rights of appeal

53. 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 London regional office.

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

55. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application

for permission to appeal to proceed despite not being within the time limit.

56. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 2 May 2024

Appendix of Relevant Legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

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

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

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

	Act	*section*	*general description of offence*
7	This Act	section 21	breach of banning order

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

41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if –

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if –

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a 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 had 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 with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

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 this table.

If the order is made on the ground that the landlord has committed	*the amount must relate to rent paid by the tenant in respect of*
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed –

(a) the rent 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,

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.