FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/HMG/2023/0004**
Property	:	**Ground Floor and Basement, 33, Betterton Street, London WC2H 9BQ**
Applicants	:	**(1) Carl Pearton** **(2) Sheng-Yi Lin** **(3) Ying Yao**
Representative	:	**Mr. M. Phillis of counsel instructed by MSR Solicitors**
Respondents	:	**Betterton Duplex Ltd.**
Representative	:	**Mr. C. Oakes (director)**
Type of application	:	**Application for a rent repayment order by tenants**
Tribunal	:	**Judge S.J. Walker** **Tribunal Member Mr. S. Wheeler MCIEH, CEnvH**
Date and Venue of Hearings	:	**27 February and 15 April 2024 10, Alfred Place, London WC1E 7LR**
Date of Decision	:	**15 May 2024**

DECISION

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(1) The Application for a Rent Repayment Order under section 43 of the Housing and Planning Act 2016 is refused.

(2) The application for an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imbursement by the Respondent of the fees of £300 paid by the Applicants in bringing this application is refused.

Reasons

The Application

1. The Applicants seek a rent repayment order pursuant to sections 43 and 44 of the Housing and Planning Act 2016 ("the Act") for the period of 6 months from 22 July 2022 as set out in their application.

2. The application is dated 20 February 2023 and so is in time. In it the Applicants allege that the Respondent has committed offences as follows;
   (a) an offence contrary to section 72(1) of the Housing Act 2004 ("the 2004 Act") - having control or management of an unlicensed House in Multiple Occupation ("HMO");
   (b) using violence for securing entry and/or harassment of occupiers
   (c) failure to manage an unlicensed HMO

3. At the hearing Mr. Phillis on behalf of the Applicants clarified the offences that the Applicants sought to establish. Only two offences were relied on. These were the offence contrary to section 72(1) of the 2004 Act, and an offence contrary to section 1(3A) of the Protection from Eviction Act 1977 ("the 1977 Act"). He made it clear that there was no suggestion that the Respondent had used violence against the Applicants.

The Hearing

4. The hearing was conducted face-to-face. All parties attended. The Applicants were represented by Mr. Phillis and the Respondent by Mr. Oakes, a director. The Respondent was not legally represented.

5. Oral evidence was given by the First Applicant, Mr. Pearton on behalf of all three applicants, and by Mr. Oakes on behalf of the Respondent.

6. The Tribunal had before it the following document bundles, which were all read and taken into account when reaching its decision;
   (a) the Applicants' indexed bundle numbered to page 201 (bundle A);
   (b) the Respondent's bundle which is in four parts and is numbered to page 162 (bundle R)
   (c) the Applicants' reply comprising 6 pages (bundle AR);and
   (d) a skeleton argument together with further evidence from the Respondent comprising 20 pages.

7. In what follows, references to documents in particular bundles will be by reference to a prefix and the printed page numbers. Thus, for example, page 20 of the Respondent's bundle will be page R20.

8. In the course of the hearing the Tribunal raised with the parties the question of whether or not the Tribunal had jurisdiction under section 44 of the Act to order the repayment of rent if that rent had been paid before a relevant offence had commenced. It drew the attention of the

parties to the Upper Tribunal decision in the case of Kowalek -v- Hassanein Ltd [2021] UKUT 143 (LC) which was subsequently approved by the Court of Appeal at [2022] EWCA Civ 1041.

9. The Tribunal decided that in the interests of fairness to the parties, and, in particular to the Applicants who may be adversely affected by the application of that case, it was appropriate to hear evidence and submissions on all other aspects of the case but to give the parties the opportunity to make written representations about the application of the case of Kowalek. It therefore directed that the Applicants had until 12 March 2024 to send to the Tribunal any written submissions on which they wished to rely in respect of that issue, with the Respondent having until 26 March 2024 to send any written submissions in reply. The Tribunal indicated that it would reconvene on 15 April 2024 to determine the application on the basis of the evidence and submissions heard at the hearing and the further written submissions of the parties only.

10. In the event no submissions were received in respect of the Kowalek issue. The Tribunal reconvened on 15 April 2024, and reached its conclusion on the basis of the material already before it.

The Legal Background

11. The relevant legal provisions are partly set out in the Appendix to this decision.

12. The Tribunal may make a rent repayment order when a landlord has committed one or more of a number of offences listed in section 40(3) of the Act.

The Licensing Offence

13. An offence is committed under section 72(1) of the 2004 Act if a person has control or management of an HMO which is required to be licensed but is not. By section 61(1) of the 2004 Act every HMO to which Part 2 of that Act applies must be licensed save in prescribed circumstances which do not apply in this case.

14. Section 55 of the 2004 Act explains which HMOs are subject to the terms of Part 2 of that Act. An HMO falls within the scope of Part 2 if it is of a prescribed description (a mandatory licence) or if it is in an area for the time being designated by a local housing authority under section 56 of the 2004 Act as subject to additional licensing, and it falls within any description of HMO specified in that designation (an additional licence).

15. To be an HMO of any description the property must meet the standard test under section 254(2) of the 2004 Act. A building meets the standard test if it;

> "*(a) 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 …;
(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;
(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 the 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."

16. By virtue of section 258 of the 2004 Act persons are to be regarded as not forming a single household unless they are all members of the same family. To be members of the same family they must be related, a couple, or related to the other member of a couple.

17. With regard to additional licensing, there was no dispute that the property was in the London Borough of Camden and that the whole of that borough was subject to an additional licensing scheme which designated all HMOs other than those requiring a mandatory licence as requiring a licence.

18. An offence under section 72(1) can only be committed by a person who has control of or manages the property in question. The meaning of these terms is set out in section 263 of the 2004 Act as follows;

"(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.

19. It is a defence to a charge of an offence under section 72(1) of the 2004 Act that a person had a reasonable excuse for committing it (section 72(5)).

The Harassment Offence

20. Section 1(3A) of the 1977 Act states as follows;

"*Subject to subsection (3B) below, the landlord of a residential occupier or an agent of the landlord shall be guilty of an offence if*

(a) he does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or

(b) he persistently withdraws or withholds services reasonably required for the occupation of the premises in question as a residence

and (in either case) he knows, or has reasonable cause to believe, that that conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises"

Subsection (3B) provides for a reasonable excuse defence.

21. It follows that the Applicants must show that the Respondent acted in a way which was likely to interfere with their peace or comfort and which, at the very least, that the Respondent had reasonable cause to believe that those acts were likely to cause them to give up their occupation of the premises or refrain from pursuing any remedy.

22. In the case of either offence an order may only be made under section 43 of the Act if the Tribunal is satisfied beyond reasonable doubt that that offence has been committed.

The Power to Make an Order

23. By virtue of the decision of the Court of Appeal in the case of Rakusen -v- Jepsen and others [2023] UKSC 9 an order may only be made against the immediate landlord of a tenant.

24. By section 44(2) of the Act the amount ordered to be paid under a rent repayment order must relate to rent paid in a period specified in the table set out in that section. If the offence is one of a kind which is committed on a specified date, eg an offence of harassment, then the rent must relate to the period of 12 months ending with the date of the offence. If, on the other hand, the offence is one of a continuing nature, the rent must relate to the period during which the landlord was committing the offence, subject to a maximum of 12 months. By

section 44(3) the amount that a landlord may be required to repay must not exceed the total rent paid in respect of that period.

25. In this case it is necessary to consider section 44(2) in more detail, as was done in the case of Kowalek referred to above. That case considered the situation where rent is paid in respect of a period when the offence is being committed but the rent is actually paid outside that period. The decision of the Upper Tribunal in that case, which is binding on this Tribunal and which was approved by the Court of Appeal, is that the amount of the order is subject to two limitations. The first focuses on the time the rent was paid and the second on the period in respect of which the rent was paid. Paras 29 and 30 of the judgment state as follows;

> *"…. section 44(2) limits the amount of rent which may be the subject of a rent repayment order in two quite different respects. The first limitation focusses on when the payment was made: "the amount must relate to rent paid* during *the period mentioned in the table". The second limitation is provided by the requirement in the table heading that "the amount must relate to rent paid by the tenant* in respect of*" the appropriate period. This focusses on the period in respect of which the payment was made - what the payment was for, not when it was made. Both conditions must be satisfied before a sum paid as rent can be the subject of a rent repayment order.*
>
> *"Where the relevant offence is one of those in rows 3, 4, 5, 6 or 7 of the table in section 40(3) (all of which are offences committed over a period of time, rather than by acts committed on a single occasion) the period mentioned in the table in section 44(2) is "a period, not exceeding 12 months, during which the landlord was committing the offence". The first limitation therefore means that, to be capable of being the subject of a rent repayment order, a sum must have been paid during the period, not exceeding 12 months, when the landlord was committing the offence. In the language of section 44(2), the amount to be repaid must "relate to rent paid during" that period.* ***Rent paid before or after that period is therefore ineligible for consideration****. The sum of £2,000 paid on 28 January 2020 was paid after the end of the period during which the landlord was committing the offence, and so was properly disregarded by the FTT."* (Emphasis added)

26. Section 44(4) of the Act requires the Tribunal to have regard to the conduct of the landlord and tenant, the financial circumstances of the landlord and whether or not the landlord has been convicted of a relevant offence when determining the amount to be paid under a rent repayment order.

Has an Offence Been Committed?

Harassment

27. The Tribunal first considered the alleged offence under the 1977 Act.

28. Mr. Phillis, on behalf of the Applicants, made it clear that their case in respect of this offence was based solely on the content of e-mails sent to them by Mr. Oakes on behalf of the Respondent.

29. Their case is set out at paras 23 to 29 of the First Applicant's witness statement (pages A50 to 51). In essence the complaint is as follows. On 2 October 2022 Mr. Oakes sent an e-mail stating that he had decided to attend the property on 4 October 2022 (page A99). In that he stated that unless it was confirmed that access would be provided, a locksmith would be instructed. Reliance is placed on a comment contained in an earlier e-mail sent on 1 October 2022 where Mr. Oakes says "*If you are intent on an argument, I will have that with you when I attend*" (page A97)

30. Mr. Pearton states that he interpreted this as being very aggressive and suggested that Mr. Oakes wanted a verbal, or possibly even a physical altercation at the property. He further complains that Mr. Oakes repeated his threat to use a locksmith to obtain entry in an e-mail of 3 October 2022, and also that Mr. Oakes had asked for access on 11 October 2022 to enable a contractor to deal with an issue regarding the downpipes and drains.

31. Mr. Pearton states that the repeated demands for access by Mr. Oakes caused the Applicants fear, stress and anxiety.

32. In his submissions, Mr. Phillis argued that it was clear to the Respondent that the e-mails being sent were having a negative effect on the Applicants. Reference was made to an e-mail from Mr. Pearton on 2 October 2022 in which he said that he regarded the e-mails as an unprofessional threat and an attempt at intimidation and that the communication was making them feel stressed and uncomfortable living at the flat (page A100). He invited the Tribunal to draw an inference from the correspondence that there was a real possibility that its effect would be to cause the Applicants to leave the property.

33. The Respondent's position was simply that his communications did not amount to acts which were likely to cause the Applicants to give up their occupation of the property and/or that he did not have reasonable grounds to believe that that would be the case.

The Tribunal's Conclusion

34. The Tribunal was not satisfied to the criminal standard that the Respondent was guilty of this offence. In particular, it was not satisfied that the Respondent had reasonable grounds to believe that the e-mails sent to the Applicants would be likely to cause them to give up their occupation of the property or to exercise any rights.

35. The Tribunal considered the correspondence in context. Firstly, it is clear that the Applicants had raised a number of complaints about the property and were sending e-mails to the Respondent demanding

attention to the defects and/or requesting a reduction in the rent – see for instance the e-mail of 1 October 2022 at page A96. Indeed, even in the e-mail at page A100 relied on by Mr. Phillis to show the effect of the correspondence on the Applicants, these complaints are re-iterated.

36. Secondly, the Tribunal considered the terms of the tenancy agreement. By clause 4.3.10 of the agreement the Applicants agree to;

> "*Permit the Landlord and or his agents or others, after giving 24 hours written Notice and at reasonable hours of the daytime, to enter the Property:*
>
> 4.3.10.1 *to view the state and condition and to execute repairs and other works upon the Property or other properties*"

37. It was clear to the Tribunal that the Respondent was, in the face of substantial complaints from his tenants, seeking to address the problems which had been raised. The Applicants appear to have concluded that they were somehow entitled to "unwind" the tenancy and considered that they were not required to provide access other than at times which were convenient to them. In the view of the Tribunal the Respondent was simply seeking to exercise its right under the terms of the tenancy to obtain access to the property in order to inspect and/or execute repairs. That is entirely reasonable given the complaints raised by the Applicants about the condition of the property.

38. The Tribunal did not accept that the Respondent's actions were aggressive or threatening. His position is made abundantly clear in his e-mail sent on 1 October 2022 at 20:55hrs (page A98), where he draws attention to his right to inspect and denies that he is being aggressive, and states that he would rather arrange access when the Applicants are present but if they were not willing to do so, he would exercise his right in any event.

39. Even if the threat to use a locksmith to gain entry could be regarded as unreasonable, it does not follow from this that the Respondent had reasonable grounds to believe that by making this threat he would cause the Applicants to leave. It is clear that he was not seeking entry in order to remove the Applicants or to do anything that might persuade them to leave. On the contrary, he wished the tenancy to continue and was seeking to address the complaints made by the Applicants about its condition, whereas the Applicants were seeking to bring the agreement to an end by means of having it "unwound".

40. For the reasons given above, therefore, the Tribunal was not satisfied that an offence had been committed under the 1977 Act.

Licensing

41. The Applicants' case in relation to the licensing offence was straight forward. They argued that the property was in an area subject to an additional licensing regime which required all properties containing 3 or more people in 2 or more households to be licensed. All

three Applicants went into occupation of the property on 22 July 2022. They were all single occupiers and were not related to each other. They therefore amounted to 3 people in 3 households and so the property required a licence. No such licence existed, as confirmed by the local authority (page A173). They argued that the Respondent was named as the immediate landlord (page A21) and that rent was paid to the Respondent's agent (page A43).

42. The Respondent accepted that an additional licensing scheme was in force in respect of the property and that no licence had been obtained. In the skeleton argument provided by the Respondent it is argued that the property was not being used as an HMO because the Respondent was unaware of whether or not there was any connection between the Applicants. Reliance is placed on clause 1.5.2 of the tenancy agreement which states as follows;

> "*The property is not let as a House in Multiple Occupation within the meaning of the Housing Act 2004. The property does not require the Landlord to hold a licence to be able to lawfully let it,*"

43. From this it is argued that the Respondent is entitled to assume that the property is not being used as an HMO and that the onus was on the Applicants to raise this as an issue. It was further argued that the Applicants had by signing the tenancy agreement contractually agreed that the property was not being used as an HMO and that the Respondent could rely on that.

The Tribunal's Conclusion

44. The Tribunal rejected the Respondent's arguments. Firstly, whatever the terms of the tenancy agreement, as a matter of law the property was an HMO from the date that it started to be occupied by 3 people in 2 or more households. The Applicants moved into the property on 22 July 2022 and so, from that date onwards, the property was an HMO. The provisions of the 2004 Act cannot be contracted out of. Mr. Pearton's oral evidence, which the Tribunal accepted, was that the property was the main or sole address of all three Applicants, and they only used it for residential purposes.

45. The Tribunal considered the terms of the tenancy agreement. It did not agree that by signing it the Applicants had made an assertion that they were not using the property as an HMO. The agreement is clearly made with three named tenants (clause 1.1.2 at page A21). It contains no declaration or assertion by the tenants that they are related to each other or that they form less than 2 households. It contains no covenant not to use the property as an HMO. Had it done any of these, or if the tenants had falsely represented that they were in fact one household, this could well have been the basis for a reasonable excuse and amounted to a defence under section 72(5) of the 2004 Act. However, that was not the case here.

46. Mr. Oakes accepted that he had made no enquiries either with the Applicants themselves or with his letting agents, Prime London Residential, about what, if any, relationship existed between them. He also stated that he had no formal agency with Prime London Residential. They were not engaged to provide legal advice. Their role was to market the property, find tenants, draft the agreement and have it executed.

47. There is no doubt that the Respondent was a person managing the property as it is the owner of the property (page A41) and is in receipt of the rent, albeit through its agent.

48. The Tribunal considered whether or not the Respondent had established a reasonable excuse. In order to do this it must show on the balance of probabilities that such an excuse existed.

49. When addressing this question, the Tribunal bore in mind that ignorance may be relevant to a reasonable excuse defence, though unless that ignorance was reasonable in all the circumstances, it will not be sufficient.

50. It also bore in mind the approach to such defences set out in the tax case of Perrin -v- HMRC [2018] UKUT 156 (TCC). This sets out a useful framework in which to assess whether or not a reasonable excuse defence is made out. It comprises three steps. Firstly, the Tribunal must establish what facts are relied upon in order to establish the defence, secondly, the Tribunal must decide which of those facts are proven on the balance of probabilities, and then thirdly, it must

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

51. The Tribunal accepted that the Respondent was unaware of the lack of any relationship between the Applicants. However, it was not satisfied that during the period in question that ignorance was objectively reasonable. In reaching that conclusion it bore in mind the following.

52. Firstly, the Respondent is a limited company whose declared objects are the development of building projects. This was also not the first time the property had been let. Secondly, the Respondent's sole director, Mr. Oakes, is not unfamiliar with the law. He states in an e-mail of 2 October 2022 that he practised as a barrister for 10 years (page A99).

53. It was not suggested by Mr. Oakes that the Respondent had any reasonable excuse based on a failure by Prime London Residential.

54. Mr. Oakes informed the Tribunal that the terms used in the tenancy agreement were standard terms and the Tribunal considered it likely that he would have at least read those terms. These make express reference to the property not being an HMO, to the 2004 Act and to the existence of licences under that Act. This is not a case of a landlord who is completely ignorant of any regulatory control of renting or unaware of how to obtain advice if needed. In the view of the Tribunal, it should have been obvious to the Respondent that they would need to keep abreast of the licensing requirements and that they needed to be aware of the possibility that they would come within their scope.

55. It follows, therefore, that the statutory defence did not apply and, therefore, that an offence contrary to section 72(1) of the 2004 Act had been committed by the Respondent from 22 July 2022 onwards.

Jurisdiction to Make an Order

56. There was no doubt that the Respondent was the Applicants' immediate landlord – as is made clear in the tenancy agreement (page A21). It follows that the Tribunal has jurisdiction to make an order against them.

Amount of Order

57. At this point the case of Kowalek becomes significant. As explained above, that case makes it clear that the Tribunal may only order payment of sums of rent which were paid during the period during which the offence was being committed.

58. In this case the tenancy agreement was dated 19 July 2022 (page A21) However, the Tribunal was satisfied that the offence began on 22 July 2022, the day the Applicants moved in – as confirmed at para 9 of Mr. Pearton's witness statement at page A46 and elsewhere. There was no suggestion that any of the Applicants had moved any of their belongings into the property before they moved in. Indeed, the tenancy agreement itself states that the term is from 22 July 2022 onwards (clause 1.6 at page A22).

59. The definition of an HMO in section 254 of the 2004 Act includes the requirement in section 254(2) that the living accommodation is occupied. The Tribunal accepted that once tenants have moved into a property and their belongings are there, it can remain occupied even when the tenants are not physically present. However, it concluded that a property does not become occupied until the tenants have actually taken possession of it. Whilst the tenancy agreement is dated 19 July, the term is stated not to begin until 22 July and nobody moved in until that date. It follows that no offence was being committed until 22 July 2022.

60. This causes difficulties for the Applicants because of the time and manner in which the rent was paid. The agreed rent was £8,000 per month (clause 1.7.1) and the Applicants were only in occupation for 6 months, moving out on 21 January 2023 (para 32 of Mr. Pearton's statement at page A51). However, the rent for the first 6 months was paid as a single lump sum of £48,000. The payment schedule in the agreement states that this sum was payable on the date of signing the agreement (page A34) which was 19 July 2022. In their statement of case (para 10 at page A19) the Applicants state that the 6 months rent in advance was paid on 20 July 2022. This is confirmed by what is described in the Applicants' bundle as the proof of rent being paid, which is a document showing a withdrawal of £57,230.77 on 20 July 2022 (page A44) and by paragraph 31 of Mr. Pearton's witness statement (page A51). As the Applicants paid 6 months' rent before moving in, and moved out after that time, no other rental payments were made.

61. On the basis of this evidence the Tribunal was satisfied that the only rent paid was a lump sum of £48,000. It was satisfied that this sum was paid on 20 July 2022. It follows that the rent was paid before the offence began to be committed. Bearing in mind the decision in Kowalek, which is binding on the Tribunal, it follows that no rent was paid during the time the offence was being committed and so the maximum amount that the Tribunal can order to be paid is zero, which, in effect, means that the Tribunal is unable to make an order.

Alternative Position

62. The Tribunal bore in mind that its decision based on Kowalek is novel in the sense that it concerns payments made before an offence started rather than after an offence ended – which was the situation in that case. Whilst it considered that the reasoning in Kowalek applied equally in both cases, it also considered that it's decision on this point may be wrong. It therefore decided to make findings about the sum that it would have awarded had the rent payment not be made too early.

63. In doing this it had regard to the approach recommended by UT Judge Cooke in the decision of Acheampong -v- Roman and others [2022] UKUT 239 (LC) @ para 20. The first step is to ascertain the whole of the rent for the relevant period.

Rent

64. There is no dispute that this amounts to £48,000. No utilities were included within the rent. It follows that the maximum amount which may be awarded if the Tribunal's primary decision is wrong is £48,000.

Seriousness of Offence

65. As required by the approach recommended in the case of Acheampong the Tribunal then considered the seriousness of the offence both as compared to other types of offence and then as compared with other

examples of offences of the same type. From that it determined what proportion of the rent was a fair reflection of the seriousness of the offence.

66. The offence in question is one contrary to section 72(1) of the 2004 Act. This is, when compared with offences such as unlawful eviction, a more minor offence. This alone would justify a reduction of 15%.

67. The Tribunal also concluded that this was far from being a serious offence of its kind. It considered the impact on the tenants of the absence of a licence. This was not a case where the Applicants had shown that there were any significant safety risks at the property and no other aggravating features were present. The Tribunal therefore considered that there should be a reduction of a further 25%, making a total of 40%.

Section 44(4)

68. The Tribunal then considered whether any decrease – or increase – was appropriate by virtue of the factors set out in section 44(4) of the Act.

69. The Applicants sought to raise a number of faults with the property. When considering these, the Tribunal bore in mind that it was considering questions of conduct rather than condition. In the Tribunal's experience problems often arise in properties which are in no way the fault of the landlord. What is important is how the landlord responds to those problems.

70. In this case, it is clear that the relationship between the parties broke down resulting in the flurry of e-mails between the parties which are included in the papers. The Tribunal considered that neither party had conducted themselves particularly well in the course of that correspondence, but, on balance, no alteration in the amount of the order was required.

71. The Respondent also raised the following issues. Firstly, the tenancy agreement was for an initial fixed term of two years, with a periodic tenancy thereafter (see clause 1.6.1 at page A22). The tenancy agreement expressly provided that no notice to quit may be given by the tenants to expire within the first 12 months (clause 2.5 at page A24). Under the terms of the agreement a further £48,000 in rent fell due on 23 January 2023 which was not paid. The Respondent also argued that the Applicants were guilty of poor conduct because they had moved out without giving notice, had not returned the keys, and had not informed the Respondent that they had left, thereby preventing alternative tenants from being found.

72. In his oral evidence, Mr. Pearton accepted that rent for the period from 22 January 2023 onwards had not been paid. He considered that the agreement should have been unwound and he was taking legal advice. He accepted that the Applicants did not inform the Respondent or the letting agent that they had moved out. With regard to the keys, he said

that they had left them at the property by pushing them through the letter box.

73. The Tribunal was satisfied that by failing to pay the ongoing rent the Applicants were in breach of the terms of their agreement and that this, and the way in which they left the premises, should be taken into account as poor conduct. It therefore decided to make a further reduction of 5% in the amount of the order, bringing it to a reduction of 45%.

74. The Respondent sought to rely on its financial circumstances to justify a further reduction – see para 46 of their statement of case at page R18. They argued that an increase in mortgage costs and an inability to rent the property had caused the company severe financial hardship. Although some evidence was provided to show various transactions in the company's bank account (pages R25 to R36) No company accounts were produced. Mr. Oakes' oral evidence was that there was only £1,780 in the company's current account. However, he said that the property was now being used for AirBnB rentals.

75. The Tribunal was not satisfied that it had sufficient evidence before it from which to justify a further reduction in the amount of the order based on the Respondent's financial circumstances.

76. There was no suggestion that the Respondent had ever been convicted of a relevant offence.

77. Taking all this together the Tribunal concluded that, if its conclusion about the application of the case of Kowalek was wrong, it would have reduced the maximum amount of the order it would have made by 45%. In other words, the order it would have made would have been for £48,000 x 55% = £26,400.

78. The Applicants also sought an order under rule 13(2) of the Rules for the re-imbursement of the fees paid for bringing the Application. The Tribunal concluded that, given that the Applicants had failed in their application, it was not just and equitable to make such an order.

Name: Judge S.J. Walker **Date:** 15 May 2024

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

Appendix of relevant legislation

Housing Act 2004

Section 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.

(2) A person commits an offence if–

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) A person commits an offence if–

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse–

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(1) 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 serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(2) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(3) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

263 Meaning of "person having control" and "person managing" etc.

(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.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 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

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

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

	Act	section	general description of offence
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers

3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

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

Section 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.

Section 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);

(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).

Section 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 paid by the tenant in respect of***
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

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

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account—

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord, and

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

Section 52 Interpretation of Chapter

(1) In this Chapter—

"offence to which this Chapter applies" has the meaning given by section 40;

"relevant award of universal credit" means an award of universal credit the calculation of which included an amount under section 11 of the Welfare Reform Act 2012;

"rent" includes any payment in respect of which an amount under section 11 of the Welfare Reform Act 2012 may be included in the calculation of an award of universal credit;

"rent repayment order" has the meaning given by section 40.

(2) For the purposes of this Chapter an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent.