FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/HMF/2024/0070**
Property	:	**Flat 19, Normandy Court, 32-33 Kensington Gardens, London, W2 4BG**
Applicant	:	**Alessandro Ciminata**
Representative		**Justice for Tenants**
Respondent	:	**Kiptonview Ltd**
Type of Application	:	**Application for a rent repayment order by tenant**
Tribunal	:	**Judge Nicol** **Mrs L Crane MCIEH**
Date and Venue of Hearing	:	**3rd September 2024;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**5th September 2024**

DECISION

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(1) The Respondent shall pay a Rent Repayment Order to the Applicant in the sum of £5,280.

(2) The Respondent shall further reimburse the Applicant his Tribunal fees of £300.

Relevant legislation is set out in the Appendix to this decision.

Reasons

1. The Applicant was a tenant from September 2012 until June 2023 at Normandy Court, 32-33 Kensington Gardens, London W2 4BG, a 5-storey building of 36 bedsits with shared facilities.

2. The Respondent purchased the freehold of the property on 24th June 2022 and became the Applicant's landlord.

3. The Applicant seeks a rent repayment order ("RRO") against the Respondent in accordance with the Housing and Planning Act 2016 ("the 2016 Act"). The application was made to the Tribunal on 6th February 2024.

4. The Tribunal issued directions on 8th April 2024. There was a face-to-face hearing of the application at the Tribunal on 3rd September 2024. The attendees were:

   - The Applicant; and
   - Mr Cameron Neilson, Justice for Tenants, accompanied by Mr Ryan Leacock, representing the Applicant.

5. The documents available to the Tribunal consisted of:

   - A bundle of 184 pages from the Applicant; and
   - A bundle of 12 pages from the Respondent.

Respondent's non-attendance

6. The Respondent did not attend the hearing nor send a representative. Under rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, if a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

   (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
   (b) considers that it is in the interests of justice to proceed with the hearing.

7. The Respondent engaged with the proceedings by providing their own bundle. On 28th May 2024 the Tribunal case officer emailed notification of the hearing date to the Respondent using the same email address he had used on other occasions, including in sending the directions and an email mentioning the hearing in passing. The Tribunal is satisfied that reasonable steps have been taken to notify the Respondent of the hearing.

8. The Respondent has not contacted either the Tribunal or the Applicant about not attending the hearing. The brevity of their submissions and their bundle indicates that they do not attach a high priority to these proceedings. There is no reason to think that their non-attendance is anything other than their own choice.

9. If the hearing were postponed, both the Tribunal and the Applicant would be substantially inconvenienced and there is no reason to think that there is any better prospect of the Respondent attending any adjournment date. In the circumstances, the Tribunal is further satisfied that it is in the interests of justice to proceed with the hearing in the Respondent's absence.

The offence

10. The Tribunal may make a RRO when the landlord has committed one or more of a number of offences listed in section 40(3) of the 2016 Act. The Applicant alleged that the Respondent was guilty of having control of or managing an HMO (House in Multiple Occupation) which is required to be licensed but is not so licensed, contrary to section 72(1) of the Housing Act 2004 ("the 2004 Act").

11. It is apparent from the Respondent's submissions and bundle that it is not in dispute that the property is an HMO which must be licensed in accordance with the mandatory licensing scheme under the 2004 Act. The local authority, the City of Westminster, granted the most recent licence on 29th September 2023.

12. Prior to the Respondent purchasing the property, its predecessor-in-title had a suitable licence for the property. It is not known when it was due to expire but the Respondent's agents, City Relay, stated in an email dated 16th August 2022 that they were aware it was not transferable to them so that they needed to apply for a new one.

13. In the same email on 16th August 2022 City Relay asked The HMO Licensing Company for assistance with applying for a new licence. By email dated 18th August 2022 The HMO Licensing Company said they would help and quoted a price.

14. However, it wasn't until 3rd November 2022 that The HMO Licensing Company acknowledged that they had been instructed to apply for a licence on behalf of the Respondent. Before making the application, they asked City Relay to provide relevant documents and information. The email ended with the following caveat:

> *Please note that provision of these documents is mandatory and the application may be considered incomplete without them, but absence of these forms should not delay the submission of the application to Westminster Council.*

15. Therefore, as at November 2022, the Respondent knew that the property needed a licence but had yet to apply for one. Nevertheless, in an email to the Applicant dated 9th November 2022, City Relay stated, "New tenants started to move into the building last weekend …"

16. City Relay replied to The HMO Licensing Company on 16th November 2022 saying they were chasing some of the certificates. The HMO

Licensing Company emailed straight back suggesting that City Relay send what they have and progress would be made from there.

17. The license application was eventually made on 12th February 2023.

18. It is clear that all the elements of the offence under section 72(1) of the 2004 Act were present from the date of the Respondent's purchase of the property on 24th June 2022 until they applied to Westminster for a licence on 12th February 2023. However, in their submissions they asserted that the process of applying for a licence started as early as possible and they provided all the documentation necessary in order to have the application submitted. Although they did not couch their submissions in these terms, their assertion engages the two defences under section 72 of the 2004 Act:

    (a) Firstly, under sub-section (4)(b), it is a defence that an application had been duly made for a licence. Although the Respondent began the process of contemplating an application on 16th August 2022, it cannot realistically be suggested that this was the same as making the application. An application must, at the very least, involve making contact with the relevant local authority and would normally include completing whatever formal process they have for receiving an application but there is no evidence that any contact was made with Westminster by or on behalf of the Respondent prior to 12th February 2023. The HMO Licensing Company were the Respondent's agents, not Westminster's, so that the emails between them and City Relay provided in the Respondent's bundle are essentially just the Respondent's internal emails. They provide useful evidence but not of any application having been made prior to 12th February 2023.
    (b) Secondly, under sub-section (5), it is a defence if the accused "had a reasonable excuse for having control of or managing the property" when it was unlicensed.

19. If they had been present at the hearing, the Tribunal would have expected the Respondent to argue that the process by which they contemplated, compiled and then submitted their licence application provided them with a reasonable excuse. The Upper Tribunal in *Marigold v Wells* [2023] UKUT 33 (LC); [2023] HLR 27, at paragraph 48, approved the following test from *Perrin v HMRC* [2018] UKUT 156 (TCC) when considering a "reasonable excuse" defence:

    (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
    (2) Second, decide which of those facts are proven.
    (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the

taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

20. The facts are set out above and the documents provided in the Respondent's bundle are sufficient to establish them. The problem is that there are substantial gaps in the information which the Tribunal would have looked to ask questions about if the Respondent had attended, including the following:

(a) Why did City Relay wait until 16th August 2022 to consider applying for a licence?
(b) Why did they wait a further 2½ months to instruct The HMO Licensing Company?
(c) Why did they then wait a further 3 months to make the application?
(d) In relation to the documents, why did they not rely, at least initially, on those versions of the documents provided by the vendor during the purchase or conveyancing process, including tenancy agreements, gas and electricity certificates and fire risk assessments?
(e) Why did they not prepare for the licence application before the conveyancing process was complete so that they could make it on day one of the transfer to the Respondent?
(f) If they were concerned that they were not in a position to make a licence application, why did they not apply for a Temporary Exemption Notice?

21. It was within the Respondent's power to provide this information in their bundle but they did not do so. Licensing is not some bureaucratic hurdle to be attended to when a landlord feels like getting round to it. It is important to understand why a failure to licence is so serious. The process of licensing effectively provides an audit of the safety and condition of the property and of the landlord's management arrangements, supported wherever and whenever possible by detailed inspections by council officers who are expert in such matters. It is not uncommon that landlords are surprised at how much a local authority requires them to do to bring a property up to the required standard. In the absence of comprehensive expert evidence or evidence that the local authority has inspected and is satisfied, a Tribunal will rarely, if ever, be able to assure itself that a property meets the relevant licensing standards.

22. If a landlord delays applying for a licence, that audit process does not happen. As a result, the landlord can save costs or put off significant expenditure. The prospect of such savings is a powerful incentive not to get licensed. Delaying getting licensed means that important health and safety requirements may get missed, at least for a time, to the possible serious detriment of the occupiers. The purposes of RROs include disincentivising the avoidance of licensing and disabusing landlords of the idea that it would save money.

23. The Respondent purchased the property for £8.75m. It is possible to infer from this that the Respondent has substantial means and so should have been able to attend to, obtain professional advice on and pay for the licence application promptly and expeditiously. The evidence available to the Tribunal suggests they did not do so.

24. The Tribunal is not satisfied that the Respondent has established a reasonable excuse for the period from 24th June 2022 to 12th February 2023. Therefore, the Tribunal is satisfied so that it is sure that the Respondent committed the offence of managing and/or having control of the property when it was let as an HMO despite not being licensed.

Rent Repayment Order

25. For the above reasons, the Tribunal is satisfied that it has the power under section 43(1) of the 2016 Act to make a RRO on this application. The Tribunal has a discretion not to exercise that power. However, as confirmed in *LB Newham v Harris* [2017] UKUT 264 (LC), it will be a very rare case where the Tribunal does so. This is not one of those very rare cases. The Tribunal cannot see any grounds for exercising their discretion not to make a RRO.

26. The RRO provisions have been considered by the Upper Tribunal (Lands Chamber) in a number of cases and it is necessary to look at the guidance they gave there. In *Parker v Waller* [2012] UKUT 301 (LC), amongst other matters, it was held that an RRO is a penal sum, not compensation. The law has changed since *Parker v Waller* and was considered in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC) where Judge Cooke said:

> 53. The provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in *Parker v Waller*. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances. …

27. In *Williams v Parmar* [2021] UKUT 0244 (LC) Fancourt J held that there was no presumption in favour of awarding the maximum amount of an RRO and said in his judgment:

> 43. … "Rent Repayment Orders under the Housing and Planning Act 2016: Guidance for Local Authorities", which came into force on 6 April 2017 … is guidance as to whether a local housing authority should exercise its power to apply for an RRO, not guidance on the approach to the amount of RROs. Nevertheless, para 3.2 of that guidance identifies the factors that a local authority should take into account in deciding whether to seek an RRO 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.

> 50. I reject the argument … that the right approach is for a tribunal simply to consider what amount is reasonable in any given case. 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. A tribunal must have particular regard to the conduct of both parties (which includes the seriousness of the offence committed), the financial circumstances of the landlord and whether the landlord has at any time been convicted of a relevant offence. The tribunal should also take into account any other factors that appear to be relevant.

28. In *Acheampong v Roman* [2022] UKUT 239 (LC) the Upper Tribunal sought to build on what was said in *Williams v Parmar*. Judge Cooke provided the following guidance on how to calculate the RRO:

> 20. The following approach will ensure consistency with the authorities:
>
> a. Ascertain the whole of the rent for the relevant period;
>
> b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.
>
> c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:
>
> d. Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

29. The Applicant seeks a RRO for the full amount of rent he paid in the period from 24th June 2022 to 12th February 2023. His rent was £200 per week. Both parties provided evidence that it was paid in full and on time. The whole of the rent for the relevant period was £6,600.

30. In relation to utilities, the Respondent provided three energy bills but they appeared to be charges only for the electricity supply to the common parts. There was no indication what costs were incurred in providing utilities to the Applicant's accommodation. With all due respect to Judge Cooke, it is not possible to calculate this without

significantly more information, particularly given the unusual nature of the building. In any event, it is the Respondent's case that utilities were not included within the rent. In the circumstances, the Tribunal is not satisfied that there is any basis for deducting anything in relation to utilities.

31. The next step is to consider the seriousness of the offence. The Respondent failed, without any reasonable excuse, to apply for a licence for just short of 8 months, even taking in new tenants during that period. Taking into account all the circumstances, the Tribunal concluded that this was a serious and deliberate default which warrants a proportionate sanction.

32. Further, under section 44(4) of the 2016 Act, in determining the amount of the RRO the Tribunal must, in particular, take into account the conduct of the respective parties, the financial circumstances of the landlord, and whether the landlord has at any time been convicted of any of the relevant offences. The Respondent has not provided any information on their financial circumstances (although see paragraph 23 above) and the Applicant is not aware of any previous convictions.

33. The Applicant submitted that there was a number of aggravating factors arising from the Respondent's conduct:

(a) The property had a heating system but it was not fully operative. The Applicant complained about it to City Relay a number of times but they failed to fix it and only mitigated it by the provision of portable heaters on 15th December 2023.
(b) The corridor and shared toilet were consistently cold, partly due to the toilet window being cracked and broken.
(c) The Applicant's room had a ceiling leak and mould. Again, City Relay failed to remedy the problems.

34. Mr Neilson conceded that the fact that there used to be a licence and a licence was ultimately granted, while the Respondent did make some efforts to apply for a licence in the meantime, constituted mitigating circumstances. He argued, however, that little weight should be attached to these matters in the circumstances. City Relay's emails refer to carrying out works in the building which, together with the problems listed in the paragraph above, mean that the Tribunal cannot be sure that the condition of the property was sufficiently adequate for a licence to be granted before it actually was. The Tribunal accepts this because, again, it was open to the Respondent to provide information on these matters but they chose not to do so.

35. In contrast, there is no evidence or suggestion that the Applicant's conduct was anything other than exemplary.

36. In conclusion, this is not the worst case but the Respondent's offence should be acknowledged appropriately. The Tribunal has decided that the maximum amount should be reduced by 20% to £5,280.

37. The Applicant also seeks reimbursement of the fees of £300 he had to pay the Tribunal. They would not have been incurred but for the Respondent's offence and so the Tribunal orders the reimbursement.

Name: Judge Nicol **Date:** 5th September 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).

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.

(a) 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.

(b) 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.

(c) 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).

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.