FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/HMF/2022/0001**
Property	:	**Floor 2, 35-37 William Road, London NW1 3ER**
Applicant	:	**Leo Sims** **Alexander Burr** **George Starkey-Midha**
Representative	:	**In person (Mr Sims as principle spokesperson)**
Respondent	:	**Global 100 Limited**
Representative	:	**Mr Owen**
Type of Application	:	**Application for a rent repayment order by a tenant**
Tribunal Members	:	**Tribunal Judge Prof R Percival** **Mr S Wheeler MCIEH, CEnvH**
Date and venue of Hearing	:	**12 September 2024** **10 Alfred Place**
Date of Decision	:	**23 September 2024**

DECISION

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Orders

(1) The Tribunal makes rent repayment orders against the Respondent to the Applicants in the sum of £3,427 each, to be paid within 28 days.

(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. On 21 December 2021, 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.

2. Directions were originally given on 27 January 2022. The case was stayed thereafter to await first the Upper Tribunal, and then the Court of Appeal decisions in *Global 100 Ltd v Jimenez and others* [2023] EWCA Civ 1243, [2024] 1 WLR 1775. After the stay was removed, further directions were given on 30 May 2024.

The hearing

Introductory

3. All three Applicants attended. Mr Sims acted as principal spokesperson. Mr Burr assisted with some additional evidence and submissions.

4. The property is a five storey office block. The Applicants occupied as licensees of the Respondent, a well known company providing property guardians. There is a description of the property guardian concept at *Global 100 Ltd v Jimenez and others*, paragraph [4].

The alleged criminal offence

5. The Applicants allege that the Respondent was guilty of the 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.

6. It was not disputed that the property was in an additional licence area of the London Borough of Camden. The Applicants accepted that the criminal offence ceased on 15 January 2021, when the Respondent applied for an HMO licence.

7. The same property was the subject matter of *Global 100 Ltd v Jimenez and others* but concerned different applicants, occupying a different floor.

8. The only issue in relation to the property in the Upper Tribunal ([2022] UKUT50 (LC), [2022] HLR 25) and the Court of Appeal concerned whether, in the light of the function of property guardians, the criterion for a property to be an HMO in Housing Act 2004, section 254(2)(d), the sole use requirement, was made out. Both the Upper Tribunal and the Court of Appeal found that it was.

9. Mr Owen submitted before us that the Respondent was not a "person having control" of the property (he withdrew an earlier indication of reliance on the only or main residence criterion in section 254(2)(c), given the evidence provided by the Applicants in reply).

10. Section 263 defines "person having control" and "person managing" an HMO. Insofar as relevant to this submission, the section is in the following terms:

> (1) In this Act "person having control", in relation to premises, means ... 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."

11. Mr Owen submitted that the issue was capable of being raised before us. It had not been decided on appeal. The only finding that the Respondent was a person having control had been at first instance by another constitution of this Tribunal, which is not binding upon us.

12. It was agreed that the licence fees paid by the Applicants was "rent" for the purposes of the HMO provisions in the 2004 Act.

13. Mr Owen argued that it was a matter of fact whether or not the property was let at a rack-rent, and the Applicants had not provided any evidence that the rent paid by the Applicants was, indeed, a rack-rent (as defined in subsection (2)), by, for instance, expert evidence from a valuer. To argue that the rent they paid was necessarily a rack-rent was a circular argument which was not capable of persuading us beyond a reasonable doubt that the criterion was made out.

14. We put to Mr Owen that, even if we could not be sure that the rent paid was a rack-rent, the conditional element in the formulation ("or who would so receive it if the premises were let at a rack-rent") was made out.

15. Mr Owen argued that the Respondent would not be entitled to receive the rack-rent, because of the arrangement whereby the guardians protected the property and so paid comparatively less than could otherwise be achieved, could not amount to a rack-rent. They were not entitled to the rack-rent because they were only entitled to what they could receive from the guardians.

16. We reject this submission.

17. In the first place, we do not think that the argument from what the Respondent received is impermissible and circular.

18. In the Court of Appeal, a second case was conjoined with *Jimenez*, to wit *Global Guardians Management Ltd and others v Hounslow London Borough Council*. In that case, this Tribunal had upheld financial penalties imposed on the Respondent, and made RROs in favour of licensee guardians, in relation to another property. The grounds of appeal argued in that case were broader than those in relation to this property in *Jimenez*. The Court of Appeal considered a similar argument to that put by Mr Owen in relation to the property concerned in that case, a building that had previously been an old people's home. The Court of Appeal said this, having set out the specific arrangements in relation to that property:

> Global 100 was not acting as a charity and was in the business of making money. The property guardians were willing licensees of the living accommodation and Global 100 was a willing licensor. The evidence of the transactions between Global 100 and the property guardians is, at the least, some evidence of the market value of the accommodation and the FTT and Upper Tribunal were entitled to rely on it to find the rack-rent of the property. There was nothing to suggest that anything more could be obtained from letting or licensing the property. In any event, as Global 100 was the only person who could charge the guardians for living in the property, if the property had been let at a rack-rent, it would be Global 100 who "would so receive" the rack-rent for the purposes of section 263(1) of the Housing Act 2004.

19. In doing so, the Court of Appeal was expressly rejecting the argument made by counsel for the Respondent that the Upper Tribunal had been wrong to come to that conclusion on similar reasoning, and that such reasoning was circular (paragraph [61]).

20. First, we find as a fact, on the criminal burden of proof, that the actual rent achieved was, indeed, the rack-rent. Not only is the Respondent as described in the Court of Appeal's judgment, it is also well known to be a very major player in the guardianship market, as evidenced by the substantial body of case law in a number of fields generated by its operations. Mr Owen provided us with the Respondent's "Property Protection Proposal", a document he said was treated as the lease. That document describes the Respondent as "the UK's leading Guardian Company", an assessment we do not doubt. As the Court of Appeal noted, there is no need for expert evidence to come to the conclusion that the Respondent's entire business model depends on it identifying and charging at least the rack-rent. If a surveyor were to be instructed, the only market that he or she could realistically identify would be one substantially dominated by the Respondent. A surveyor assessing a market price for guardianship licences would necessary largely rely on what the Respondent actually charged (for the nature of the relevant market, see below).

21. Secondly, that the Respondent is the person entitled to a rack-rent, were one to be charged, follows from the last sentence in the paragraph from the Court of Appeal judgment quoted above. There is no reason to suppose that the Court of Appeal's conclusion as to that does not apply, for the same reasons, to the property in this case. We are bound by it.

22. There is no dispute that the Respondent is the lessee of the property, and that the purpose of the lease included providing accommodation for the guardians. We reject Mr Owen's argument, the necessary implication of which is that, given the constraints of the guardian model, the property could never be let at a rack-rent. The "net annual value" referred to in section 263(2) must be in a market which reflects the actual property and the actual basis of a letting. It would make the very concept of a rack-rent useless if, for instance, the rack-rent would be what could be achieved in a completely different market, for instance, the market for office space. So the rack-rent relevant for these purposes must be the rack-rent attainable for this property, for this use. That includes the constraints of the guardian model. This conclusions follows, we consider, a matter of law.

23. As a result, we find that the property is an HMO, and that the criminal offence is made out, such facts as we find being to the criminal standard.

The amount of the RRO

24. 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)."

25. 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.

26. 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."

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

28. The parties agreed that the total rent for these purposes was that for ten months and 12 days, the relevant period being from 4 March 2020 to 15 January 2021 The sum in relation to each was £5,246.58.

29. In respect of utilities, at stage (b), it was agreed that the Respondent had paid for the relevant utilities.

30. No specific figures as to utilities were available. Mr Owen suggested that the approach taken by another constitution of this Tribunal in respect of another property might assist the Tribunal in assessing the proper allowance for utilities. That decision was by Judge Vance, in *Aston Grange Care Home*, LON/00BH/HMF/2021/0211 and /0214, dated 11 June 2024.

31. We concluded that that case was of limited assistance to us. The figure of £773 for each Applicant (albeit for a full year) in *Aston Grange Care Home* seems to us to be a very high one, and may be explained by some particular feature of that property. The uncontradicted evidence of the Applicants in our case was that there was no central heating at the property, and they were only supplied with electric fires for heat in November 2020. There was no gas at the property. Aiming to come to a sensible figure, albeit a guesstimate, we consider that about £30 to £35 per month per Applicant feels about right. We conclude we should allow a figure of £350 for each Applicant.

32. This brings the full per Applicant figure to £4,896.58.

33. 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 (see *Ficcara v James* [2021] UKUT 38 (LC), paragraphs [32] and [50]: *Hallet v Parker* [2022] UKUT 239 (LC), paragraph [30]; *Daff v Gyalui* [2023] UKUT 134 (LC), paragraphs [48] to [49] and the discussion in *Newell v Abbott and Okrojeck* [2024] UKUT 181 (LC), paragraphs [34] to [39]).

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

35. Mr Owen did not contest the Applicants evidence as to conditions at the property.

36. In an email dated 16 December 2020, an officer of the Council set out the results of an inspection the previous week by officers of the Council and the London Fire Brigade. The email records the recommendations made as including the provision of a full L1 fire alarm system, the provision of additional 13 amp plug sockets in the kitchen area, the clearance of obstructions in the stairwells and the maintenance of the stairway clear of obstructions and combustible material, and the remedying of a fault with the door to the second floor flat.

37. It appears that at some point in the new year, an L1 fire alarm was installed. We take from this that for all of the period for which the application for an RRO applies, there was not an appropriate fire alarm system.

38. Thereafter, the Applicants' evidence was that the new fire alarm system malfunctioned, with repeated false alarms, at which time "general fault" appeared on the control panel. Inevitably, residents started to ignore the false alarms.

39. Additional 13 amp plug sockets were not installed. The Applicants told us that there was only one double socket in the main area of the flat, from which they ran all appliances using extension cables.

40. The residents together did themselves clear the staircase, in, they thought, February 2021.

41. The door to the flat locked electronically, but throughout the period covered by the RRO application, and thereafter, the door would randomly unlock itself when the Applicants were absent. The fault was never satisfactorily remedied. As a result, the Applicants were concerned about security, as they did not know the guardians in the other flats, and expressed concern as to the behaviour or character of the guardians in one of the other flats in particular. As a result, they were reluctant to leave the flat unoccupied, and did not do so unless it was unavoidable.

42. The Respondent is, as we have indicated, the major provider of the guardian model. It has, on its own account, thousands of guardians in residence at any one time. In *Daff v Gyalui* [2023] UKUT 134 (LC), the Upper Tribunal deprecated the use of a binary distinction between professional/non-professional landlord. Rather, "[t]he penalty appropriate to a particular offence must take account of all of the relevant circumstances" (paragraph [52]). The size and leading nature of the landlord is, we consider, clearly relevant to our assessment of the seriousness of the issues faced by the Applicants in relation to fire safety and security in the flat, and aggravates it.

43. In this case, there is nothing further to take into account at stage (d). Insofar as the Applicants criticise the conduct of the Respondent, that constitutes the issues we have described in relation to seriousness at stage (c). The Respondent does not maintain any criticism of the conduct of the Applicants. The Respondent confirmed that there was no issue as to its financial circumstances.

44. In assessing the quantum of the RROs at stages (c) and (d), we have taken account of the guidance provided by the Upper Tribunal, including particularly where the Upper Tribunal has substituted its own redetermination. The key cases are set out in (with respect) a most helpful manner in the course of the re-determination in *Newell v Abbott and Okrojeck* [2024] UKUT 181 (LC) from paragraph [47] to [57]. We do not repeat that material here, but have been guided by it.

45. In that case, following his discussion of the individual authorities, and having noted that the upper end (not the norm) of RRO determination is at 85% or 90% of the total rent paid, the Deputy President said at paragraph [57]

> "Factors which have tended to result in higher penalties include the offence as committed deliberately, or by a commercial landlord or an individual with a larger property portfolio, or were tenants have been exposed to poor or dangerous conditions …".

46. As we have indicated, the Respondent is certainly a large landlord with a substantial portfolio. Fire safety failings are particularly important aggravating features, which put tenants in danger. We also consider the failure, in this case, to provide the basic security of a working lock on what was effectively the front door of the flat to be an important failure to secure adequate provision.

47. The Applicants argued before us that an appropriate comparator was *Wilson v Arrow*, heard with *Aytan v Moore* [2022] UKUT 27 (LC), in which a percentage of 90% had been awarded. We do not think that this case is as serious as that. First, the fire safety failures in that case were more serious than those in this. Secondly, the Respondent in this case rectified the deficiencies reasonably quickly, although the repeated failure of the system thereafter detracts somewhat from the force of that point.

48. Rather, we see the case as sitting somewhere between, at the upper end, *Irvine and Metcalf* [2023] UKUT 283 (LC), and, probably, *Choudhury v Razak* (a case heard with *Acheampong*), both at 75%, and *Hancher and David* [2022] UKUT 227 (LC), at 65%. The operation of an HMO in deliberate defiance of the requirement for a licence by a substantial landlord was important in *Irvine*. It is true that the Respondent did not seek to licence the property until January 2021, but it is not right to describe that as a deliberate failure in the sense of operating a business model that knowingly and deliberately flouted the law. The Respondent had a wrong, but not fanciful, case that it did not require a licence during the relevant period. The fire safety failings in *Choudhury* are not very clearly set out, but in addition the deposits were not protected and there were no gas or fire safety certificates.

49. On the other hand, the defects, including those in relation to fire safety, put this case in a more serious category than *Hancher and David*. The fire safety issues, so far as there were any in that case, were confined to means of escape, and no great emphasis was put on them, and there was no equivalent to the security issue here.

50. We therefor determine that an appropriate percentage in this case is 70% of the maximum possible RRO.

Reimbursement of Tribunal fees

51. The Applicants 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.

Rights of appeal

52. 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.

53. 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.

54. 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.

55. 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:** **23 September 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.