FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/HMF/2024/0097.**
Property	**:**	**Flat 2, 169 Clapham Road, London, SW9 0PU**
Applicants	**:**	**Jack Brown** **Emma Hemelik** **Steve Hajiyianni**
Representative	**:**	**In person.**
Respondents	**:**	**Lexadon Limited.**
Representative	**:**	**Amar Hothi**
Type of Application	**:**	**Application for a rent repayment order by tenant - Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Rachael Kershaw BSc**
Date and Venue of Hearing	**:**	**10 October 2024 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**16 October 2024**

DECISION

Decision of the Tribunal

1. The Tribunal makes a Rent Repayment Orders against the Respondent in the sum of £15,290 which is to be paid by 8 November 2024.

2. The Tribunal determines that the Respondent shall also pay the Applicants £320 by 8 November 2024 in respect of the tribunal fees which they have paid.

The Application

1. On 16 April 2024, the Applicant tenants issued an application seeking a Rent Repayment Order ("RRO") against the Respondents pursuant to section 41 of the Housing and Planning Act 2016 ("the 2016 Act"). The application relates to Flat 2, 169 Clapham Road, London SW9 0PU ("the Flat").

2. On 15 May 2024, the Tribunal gave Directions, pursuant to which:

(i) The Applicants have provided their Statement of Case and evidence (153 pages) references to which will prefixed by "A1.__". The three Applicants provided witness statements and exhibited a large number of emails.

(ii) The Respondent has provided its Statement of Case and evidence (63 pages) references to which will prefixed by "R.__". This includes a witness statement from Mt Hothi.

(iii) The Applicants have provided a Reply (7 pages) references to which will prefixed by "A2.__".

The Hearing

3. The three Applicants appeared in person. They all gave evidence and were cross-examined by Mr Hothi. Mr Jack Brown is a student at Kings College studying for a PhD in English. Mr Steve Hajiyianni is a student at Queen Mary's College studying for a PhD in Health Data and Science. Ms Emma Hemelik works as a Policy Officer for Mind. English. They have been assisted by the London University Students Office.

4. Mr Hothi appeared for the Respondent. He was accompanied by Ms Aaliyah Eggay. Mr Hothi is the Operations Director of the Respondent Company. However, this is a job title; he is not a director of the Company. He took up his post in March 2021. The Respondent has a portfolio of some 750 properties, of which some 174 require HMO licences. Most of the properties are situated in the London Borough of Lambeth ("Lambeth").

5. The Applicants are seeking a RRO in the sum of £25,479.96 over the period 17 November 2022 to 16 November 2023. Mr Hothi accepted that the Respondent had control or management of the Flat over this period; that an HMO licence was required under Lambeth's Additional Licencing Scheme, and that the Flat was not licenced. He accepted that the Respondent did not have a defence of reasonable excuse. The sole issue is therefore the quantum of any RRO, if the Tribunal is satisfied that a RRO should be made. The parties agreed that it was not necessary to apportion any RRO between the Applicants; they are looking for a single RRO. It was also agreed that the rent was paid in full and there are no deductions that need to be made.

The Housing Act 2004 ("the 2004 Act")

6. The 2004 Act introduced a new system of assessing housing conditions and enforcing housing standards. Part 2 of the 2004 Act relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed. HMOs are defined by section 254 which includes a number of "tests". Section 254(2) provides that a building or a part of a building meets the "standard test" if:

> "(a) it 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 (see section 258);
>
> (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 (see section 259);
>
> (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 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."

7. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 prescribes those HMOs that require a licence. Article 4 provides that an HMO is of a prescribed description if it (a) is occupied by five or more persons; (b) is occupied by persons living in two or more separate households; and (c) meets the standard test under section 254(2) of the 2004 Act.

8. Section 56 permits a local housing authority ("LHA") to designate an area to be subject to an additional licencing scheme. On 9 December 2021, Lambeth introduced an Additional Licencing Scheme whereby all property shared by three people or more who are not all related and shared facilities require a licence (at A.38).

9. Section 263 provides:

> "(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."

10. Section 63 provides for making applications for an HMO licence:

> "(1) An application for a licence must be made to the local housing authority.
>
> (2) The application must be made in accordance with such requirements as the authority may specify.
>
> (3) The authority may, in particular, require the application to be accompanied by a fee fixed by the authority."

11. Section 64 deals with the grant or refusal of a licence. It is to be noted that there may be more than one person who may be the appropriate licence holder. In such circumstances it is for the LHA to determine who is the most appropriate person to hold the licence.

12. Section 72 specifies a number of offences in relation to the licencing of HMOs. The material parts provide:

> "(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.
> ……..
>
> (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) (a temporary exemption notice), 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).
>
> ….
>
> (8) 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 …. grant a licence, in pursuance of the notification or application.

13. It is to be noted that there may be more than one person who may commit an offence under section 95 as having "control of" or "managing" a house. However, when it comes to the making of a RRO, this can only be made against the "landlord".

<u>The Housing and Planning Act 2016 ("the 2016 Act")</u>

14. Part 2 of the 2016 Act introduced a raft of new measures to deal with "rogue landlords and property agents in England". Chapter 2 allows a banning order to be made against a landlord who has been convicted of a

banning order offence and Chapter 3 for a data base of rogue landlords and property agents to be established. Section 126 amended the 2004 Act by adding new provisions permitting LHAs to impose Financial Penalties of up to £30,000 for a number of offences as an alternative to prosecution.

15. Chapter 4 introduces a new set of provisions relating to RROs. An additional five offences have been added in respect of which a RRO may now be sought. In the decision of *Kowelek v Hassanein [2022] EWCA Civ 1041; [2022] 1 WLR 4558,* Newey LJ summarised the legislative intent in these terms (at [23]):

> "It appears to me, moreover, that the Deputy President's interpretation of section 44 is in keeping with the policy underlying the legislation. Consistently with the heading to part 2, chapter 4 of part 2 of the 2016 Act, in which section 44 is found, has in mind "rogue landlords" and, as was recognised in *Jepsen v Rakusen* [2021] EWCA Civ 1150, [2022] 1 WLR 324, "is intended to deter landlords from committing the specified offences" and reflects a "policy of requiring landlords to comply with their obligations or leave the sector": see paragraphs 36, 39 and 40. "[T]he main object of the provisions", as the Deputy President had observed in the UT (*Rakusen v Jepsen* [2020] UKUT 298 (LC), [2021] HLR 18, at paragraph 64; reversed on other grounds), "is deterrence rather than compensation". In fact, the offence for which a rent repayment order is made need not have occasioned the tenant any loss or even inconvenience (as the Deputy President said in *Rakusen v Jepsen*, at paragraph 64, "an unlicensed HMO may be a perfectly satisfactory place to live") and, supposing damage to have been caused in some way (for example, as a result of a failure to repair), the tenant may be able to recover compensation for it in other proceedings. Parliament's principal concern was thus not to ensure that a tenant could recoup any particular amount of rent by way of recompense, but to incentivise landlords. The 2016 Act serves that objective as construed by the Deputy President. It conveys the message, "a landlord who commits one of the offences listed in section 40(3) is liable to forfeit every penny he receives for a 12-month period". Further, a landlord is encouraged to put matters right since he will know that, once he does so, there will be no danger of his being ordered to repay future rental payments."

16. Section 40 provides:

> "(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."

17. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". The seven offences include the offence of "control or management of unlicenced HMO" contrary to section 72(1) of the 2004 Act.

18. Section 41 deals with applications for RROs. The material parts provide:

> "(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.

19. Section 43 provides for the making of RROs:

> "(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)."

20. Section 44 is concerned with the amount payable under a RRO made in favour of tenants. By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which then follows. The table provides for repayment of rent paid by the tenant in respect of a maximum period of 12 months. Section 44(3) provides (emphasis added):

> "(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.

21. Section 44(4) provides:

> "(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."

22. Section 47(1) provides that an amount payable to a tenant under a RRO is recoverable as a debt.

23. In *Acheapong v Roman* [2022] UKUT 239 (LC); [2022] HLR 44, Judge Elizabeth Cooke gave guidance on the approach that should be adopted by Tribunals:

> "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).
>
> 21. I would add that step (c) above is part of what is required under section 44(4)(a). 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."

24. These guidelines have recently been affirmed by the Deputy President in *Newell v Abbott* [2024] UKUT 181 (LC). He reviews the RROs which have been assessed in a number of cases. The range is reflected by the decisions of *Simpson House 3 Ltd v Osserman* [2022] UKUT 164 (LC) and *Hallett v Parker* [2022] UKUT 165 (LC), the Deputy President distinguished between the professional "rogue" landlord, against whom a RRO should be made at the higher end of the scale (80%) and the landlord whose failure was to take sufficient steps to inform himself of the regulatory requirements (25%).

25. The Deputy President provided the following guidance (at [57]):

> "This brief review of recent decisions of this Tribunal in appeals involving licensing offences illustrates that the level of rent repayment orders varies widely depending on the circumstances of the case. Awards of up to 85% or 90% of the rent paid (net of services) are not unknown but are not the norm. Factors which have tended to result in higher penalties include that the offence was committed deliberately, or by a commercial landlord or an individual with a larger property portfolio, or where tenants have been exposed to poor or dangerous conditions which have been prolonged by the failure to licence. Factors tending to justify lower penalties include inadvertence on the part of a smaller landlord, property in good condition such that a licence would have been granted without additional work being required, and mitigating factors which go some way to explaining the offence, without excusing it, such as the failure of a letting agent to warn of the need for a licence, or personal incapacity due to poor health."

26. The Deputy President added (at [61]):

> "When Parliament enacted Part 2 of the 2016 Act it cannot have intended tribunals to conduct an audit of the occasional defaults and inconsequential lapses which are typical of most landlord and tenant relationships. The purpose of rent repayment orders is to punish and deter criminal behaviour. They are a blunt instrument, not susceptible to fine tuning to take account of relatively trivial matters. Yet, increasingly, the evidence in rent repayment cases (especially those prepared with professional or semi-professional assistance) has come to focus disproportionately on allegations of misconduct. Tribunals should not feel that they are required to treat every such allegation with equal seriousness, or to make findings of fact on them all. The focus should be on conduct with serious or potentially serious consequences, in keeping with the objectives of the legislation. Conduct which, even if proven, would not be sufficiently serious to move the dial one way or the other, can be dealt with summarily and disposed of in a sentence or two."

The Background

27. On 9 May 2008, the Respondent acquired the freehold of 169 Clapham Road ("the Building") for £1.75m. The Building is a townhouse situated in a Conservation Area. There are five self-contained flats with a shared garden.

28. On 17 November 2021 (at R.1), the Respondent granted the Applicants an assured shorthold tenancy ("AST") of the Flat for a term of 12 months at a rent of £1,993.33 per month. On 21 October 2021 (at R.34). the Respondent had sent the Applicants the "How to Rent" Booklet, an EPC, an electrical safety certificate and a gas certificate. Their deposit was protected in a Rent Deposit Scheme.

29. There is a plan of the Building at R.45. The Flat had two bedrooms. Mr Brown occupied the bedroom on the lower ground floor. Ms Hemelik and Mr Hajiyianni, who were in a relationship, occupied the bedroom on the ground floor. The kitchen/dining room is on the lower ground floor, whilst there is a living room on the ground floor. There was also a bathroom and a separate toilet.

30. On 9 December 2021 (at A.38), Lambeth introduced an Additional Licencing scheme which applied to all properties "occupied by three or more persons forming two or more households under one or more tenancies or licences". Lambeth advertised the Scheme before it was introduced. Letters were also sent to a number of the landlords of a number of properties. However, Lambeth did not send one in respect of this Flat. Mr Hothi described how the Respondent faced significant difficulties in identifying which properties in its portfolio required a licence and training staff to apply for licences.

31. On 17 November 2022 (at A1.19), the Respondent granted the Applicants a second AST for a term of twelve months at an increased rent of £2,123.33 per month.

32. Matters came to a head when this AST was coming to an end. The Respondent was asking for an increase in the rent of £600 per month. The Applicants were not willing to pay this. On 17 November 2023, when their fixed term expired, they remained in occupation paying the rent of £2123,33 per month. They learnt that the Flat required an HMO licence and on 12 December 2023, Lambeth confirmed that no licence was in place.

33. On 17 February 2024, the Applicants surrendered their tenancy. On 16 February, the Respondent carried out a Check Out Report (at R.53-56). A modest deduction of £37 was made from their deposit in respect of four items.

34. Mr Hothi states that the Respondent learnt that it needed a licence on 15 November 2023. It applied for a licence which was granted on 11 April 2024. The Flat is now let to two individuals, so no licence is required. On 16 April, the Applicants applied for a RRO.

35. The Applicants made a number of complains about the condition of the Flat. However, we are mindful of the observations by the Deputy President in *Newell v Abbott* (at [25] above), and deal with these briefly:

(i) There was some disrepair to the windows, particularly in Mr Brown's bedroom. Mr Brown first complained on 18 November 2021 (at R1.102). Further complaints were made on 26 January 2021 and there are photos at A1.105. The venetian blind was broken. A pain of glass was cracked. There was secondary glazing. The upper pain of this needed to be propped up with a piece of wood. There was also an upstairs window which did not open. The windows were draughty. It seems that windows elsewhere in the Building were in a worse condition. On 19 Julyn 2023 (at A1.119), the tenant of Flat 5, encouraged the tenants to send an email collectively to Lambeth to urge the authority to impose an Improvement Notice.

(ii) There was also mould growth in the bathroom. On 22 April 2022 (at A1.109), Mr Brown complained that this had first appeared in February. The tenants had hoped that it would resolve itself with the warmer weather. There are photos at A1.110. It seems that the fan was replaced, but this did not resolve the situation.

(iii) The Respondent allowed the carbon monoxide and fire alarms to expire. It seems that they had a limited lifespan. However, they continued to work, albeit that the tenants needed to replace a battery.

(iv) Contractors left the back gate open. In March 2022 (AT a1.116), Ms Hemelik's bicycle was stolen from the communal hallway. Other items were stolen from the garden. The Tribunal is not satisfied that the Respondent can be held liable for this.

(v) Contractors entered the Flat without giving adequate notice. There was one occasion when Ms Hemelick came out of the shower to find that a contract had entered the Flat and left a note for the tenants.

(vi) There was an issue as to whether the Respondent had breached the Tenants Fees Act 2019 by requiring them to professionally clean the carpets before they left (see A1.116). The Flat had been professionally cleaned before the tenancy was granted. The tenants were required to give up the Flat in a similar condition. They had the Flat professionally cleaned at a cost of £209. Mr Hothi stated that he did not require the tenants to professionally clean the flat. However, had they failed to leave the Flat in a satisfactory condition, the Respondent could have made a deduction from

their deposit. It is not appropriate for this Tribunal on a RRO application to make a finding as to whether there was any breach of the 2019 Act.

36. The Applicants rely upon the fact that the Respondent was fined £175,000 in 2014 under the Proceeds of Crime Act for renting flats without proper planning permission in Lambeth. Mr Hothi accepted that this fine had been imposed, but stated that this was before he had any involvement in the Respondent Company. This is not an offence to which the relevant Chapter of the 2016 Act relates.

37. The Applicants also rely to the fact that on 22 April 2024, a Tribunal imposed a RRO of £10,108.80 (30% of the rent) for a section 72(1) offence in respect of an HMO in Lambeth. The Tribunal notes that this RRO was imposed after the date of the alleged offence in the current case.

38. Mr Hothi submitted that the Respondent was a family run company which valued its staff. It had not sought to evade the law. It had rather found it difficult to put all the structures and training in place to ensure that any property that required a licence, was licenced. It was a genuine mistake that this Flat had not been licenced. All the Respondent's portfolio of HMO are now licenced.

The Assessment of the RRO

39. The Applicants argued for a RRO at the highest level, recognising that it would not be appropriate for the Tribunal to make a RRO of 100% of the rent. Mr Hothi argued for a RRO at 30% of the rent. He argued that the Respondent had made a genuine mistake in failing to licence the Flat.

40. We are first required to consider the seriousness of the offence. The Upper Tribunal considers licencing offences to be less serious than other offences for which RROs can be imposed. This is a professional landlord which owns a number of properties. It should have had proper arrangements in place to ensure that any property that required a licence, was licenced. The offence was committed over a period of 2.25 years. A licence was not required at the commencement of the tenancy; however, the tenancy was renewed. We consider the offence to be serious, but not the most serious.

41. We have regard to the following:

(a) The conduct of the landlord. There was some disrepair which was significant, but not substantial. The landlord had complied with the statutory requirements at the commencement of the tenancy. Only a modest deduction was made from the tenants' deposit.

(b) The conduct of the tenants: There is no criticism of the conduct of the tenants.

(c) The financial circumstances of the landlord: The Respondent has a substantial portfolio of 750 properties on which some 174 required licences.

(d) Whether the landlord has at any time been convicted of an offence to which this Chapter applies: We have regard to the fact that this is not an isolated case and that a RRO has been imposed in respect of another HMO.

42. We assess the RRO at 60% of the relevant rent of £25,479.96 and make a RRO in the sum of £15,290 which must be paid by 1 November 2024. We also order the Respondent to reimburse to the Applicants the tribunal fees of £320 which they have paid.

Robert Latham
16 October 2024

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.