FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/HMF/2024/0130**
Property	**:**	**127 Vassall Road, London SW9 6NJ**
Applicants	**:**	**(1) Georgina Perrin** **(2) Phoebe Scott** **(3) Caitlin Ware** **(4) Sarah Buckman**
Representative	**:**	**Mr Leacock, Justice for Tenants**
Respondent	**:**	**Zinbake Investments ltd**
Representative	**:**	**Mr Cutler of counsel**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms F Macleod MCIEH**
Date and venue of Hearing	**:**	**16 October 2024** **10 Alfred Place**
Date of Decision	**:**	**22 January 2025**

DECISION

Orders

(1) The Tribunal make a rent repayment order against the First Respondent in favour Applicants in the sum of £22,430, to be paid within 28 days, to be distributed between the Applicants in accordance with their percentage contributions to the total rent, unless they agree otherwise.

(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 4 March 2024, 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. Directions were given on 17 June 2024.

The hearing

Introductory

2. Mr Leacock of Justice for Tenants represented the Applicants, all of whom attended. The Applicant's primary evidence was given by Ms Scott. Ms Buckman also gave oral evidence. Mr Cutler of counsel represented the Respondent. Mr Qureshi, the director of the Respondent, gave evidence.

3. The property is a terraced house with four bedrooms.

The alleged criminal offence

4. 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.

5. The Applicants case is that the property was situated within an additional licensing area as designated by London Borough of Lambeth.

6. The Respondent did not contest that the property was in the relevant additional licence scheme area, nor that the property was not licensed at the relevant time. The Respondent submitted, however, that it had a reasonable excuse.

7. Mr Cutler argued that it was an important feature of the case that the licencing requirement had been introduced during the pandemic, when attention was diverted elsewhere. Mr Qureshi's evidence was that he was an NHS pharmacist during the pandemic, and worked long hours as a result. Covid was an important part of the background.

8. Reeds Rains Ltd, an estate agents and letting agent, acted for the Respondent. We did not have a copy of the contract between the Respondent and Reeds Rains, but Mr Qureshi gave evidence that on occasion, the agents had provided him with information on licencing matters. Mr Qureshi's evidence was that he had come to rely on Reeds Rains to inform him of legal issues. The evidence was that Reeds Rains had taken responsibility for providing documents to the tenants at the outset of the tenancy.

9. As a result, Mr Cutler said, responsibility for Reeds Rains to inform the Respondent of the licencing obligation had become incorporated into the contract by conduct. There was, he argued, a term implied into the contract by the adoption of responsibility by Reeds Rains for informing Mr Qureshi of the Respondent's regulatory obligations.

10. We reject Mr Cutler's submissions. Applying the three tests set out in *Aytan v Moore* [2022] UKUT 27 (LC), [2022] HLR 29 at [40], we do not accept that Reeds Rains were under a contractual duty to inform Mr Qureshi of the Respondent's regulatory duties. We did not have a copy of the agreement, and without that, we are not prepared to assume that there was an express term to that effect (and indeed Mr Cutler did not invite us to do so). The burden of proof is on the Respondent. It presumably has a copy of the contract, but did not produce it. We know that it is rare for contracts between managing agents, and still less letting agents, to include such a clause.

11. Neither are we prepared to imply a term into the contract between Reeds Rains as contended for by Mr Cutler. We cannot conceive that, on ordinary principles, business efficacy or the officious bystander test would lead us to make such an implication. We did not have the benefit of extended submissions in relation to Mr Cutler's argument about the adoption or assumption of responsibility. We did not understand Mr Cutler to be relying on tortious liability (which we doubt would be relevant to the test anyway) or misrepresentation, and do not see a route to implying such a term on that basis.

12. We also consider that the other tests are not met. Other than the fact that Mr Qureshi engaged Reeds Rains, we have no evidence to support a specific reason why he should have good reason to rely on their competence and experience (mere contacting with them cannot be enough). As to there being a reason why the landlord could not inform himself, Mr Cutler relied on the context of the Covid pandemic. We do

not think this is made out, for the same reasons that we reject it as a freestanding basis for a reasonable excuse below.

13. The pandemic was a circumstance in general shared by everyone in the jurisdiction. We appreciate that it must have impacted Mr Qureshi more than the general population, given his occupation. But that must also apply to millions of key workers in the UK. No doubt there are some people among the key worker category – clinicians in intensive care units, perhaps – for whom the intensity of the pandemic might have meant that anything else would be driven from their minds. But we do not accept that for most key workers the pandemic prevented them joining a landlord's association and reading its bulletins (Mr Qureshi did so, but only after the events in question and then as a condition of an HMO licence), engaging with local authority landlords' fora, or just reading the local authority's website. None of these steps are onerous.

14. We find that the Respondent has not satisfied us, on the balance of probabilities, that it had a reasonable excuse for not licensing the property, and accordingly find, on the criminal standard, that the offence is made out.

15. We see no reason not to exercise our discretion to make an RRO, a discretion to be exercised against making an order only very rarely (*London Borough of Newham v Harris* [2017] UKUT 264 (LC); *Ball v Sefton Metropolitan Borough Council* [2021] UKUT 42 (LC).

The amount of the RRO

16. In considering the amount of an RRO, the Tribunal will take the approach set out in *Acheampong v Roman and Others* [2022] UKUT 239 (LC) at paragraph 20:

> "The following approach will ensure consistency with the authorities:
> (a) Ascertain the whole of the rent for the relevant period;
> (b) Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. …
> (c) Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made … and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:
> (d) Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4)."

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

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

> "I would add that step (c) above is part of what is required under section 44(4)(a) [conduct of the parties]. It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked."

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

20. The Applicants' occupation history and rent calculation was not contested by the Respondent. Their occupation periods and rent paid are set out below:

Ms Scott: 1 April 2022 to 29 March 2023; total rent £9,227.80
Ms Perrin: 31 March 2022 to 29 March 2023; total rent £7,025.04
Ms Buckman: 30 April 2022 to 28 March 2023; total rent £9,142.95
Ms Ware: 1 April 2022 to 29 March 2023; total rent £9,108.74

21. The rent was paid by Ms Scott on behalf of all of the Appellants. The total rent is £34,504.53.

22. The utilities were paid by the Applicants under their tenancy agreements, so no deductions fall to be made at stage (b).

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

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

25. We do so mindful of the strictures in *Newell* at paragraph [61]. Our 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."

26. We are not "required to treat every such allegation with equal seriousness or make findings of fact on them all".

27. We heard evidence about leaks in the sink in the bathroom, and in the downstairs lavatory, when it was flushed. Our conclusion on this evidence is that there were leaks, there were attempts to rectify the issues and attendance by a plumber, but rectification proved problematic. This we think comes within the Deputy President's category of "occasional defaults and inconsequential lapses which are typical of most landlord and tenant relationships", which Parliament cannot have intended the Tribunal to audit (also at [61]). It is not (again in the Deputy President's terms) possible that it would "move the dial", and we do not feel obliged to come to specific factual conclusions in respect of it.

28. However, we take a different view of the issues relating to fire safety.

29. As to smoke alarms, the Applicants' case was the alarm in the hall outside the kitchen was faulty, in that it sounded whenever the oven was used. The Respondent arranged for a handyman ("Roy") to attend to test it (after the Appellants had initially removed it, as they agreed). Roy could not find a fault, and took the alarm away, after which it was not returned. The Respondent's initial case was that it was the Applicants who removed the alarm and, impliedly, disposed of it. However, in cross examination, Mr Qureshi modified this to say that the Applicants had not told him that Roy had taken the alarm away, and he was not aware that it was missing until the sign-out inventory.

30. We accept the Applicants' account. At this point, it is convenient to give some account of how we perceived the reliability of the witnesses. We found Ms Scott, who gave the primary evidence for the Applicants, to be clearly honest and helpful. Her answers were straightforward, and she was careful to say when she could not properly answer a question, including when it was not to the Applicants' advantage to do so. Similarly, there was nothing in the evidence of Ms Buckman which led us to doubt her honesty or reliability.

31. Mr Qureshi was more combative in his evidence. There were occasions when his evidence appeared to us to be at variance with contemporaneous documents. As an example, at one point during the issues relating to leaks, there was a telephone conversation between

him and Ms Scott. In his oral evidence, Mr Qureshi denied that he showed any hostility during the conversation. Ms Scott exhibited a series of notes made shortly after the conversation, in which she sets out an account which indicates that he was indeed hostile (including, for instance, a direct quote that the Applicants were "monkeying around", a threat to not renew their tenancy, and that he raised his voice and talked over her). We think it highly unlikely that Ms Scott sat down after the phone call and made an entirely duplicitous set of notes. Taking into account this, among other conflicts, in a contest of credibility, we incline towards the Applicants, especially where they are unanimous as to a matter.

32. They were unanimous that Roy took the alarm away. By the end of the evidence, Mr Qureshi was not really in a position to gainsay this assertion – all he could say was that the Applicants had not told him that Roy had done so. He went further, however, and asserted that it was the tenants' responsibility to ensure that the alarm was in place, not his.

33. The issues with fire safety went further, however. Mr Qureshi asserted that the three smoke alarms (that in the hall, and two others on the other floors) were wired-in, rather than battery operated. But at the end of Mr Qureshi's evidence, it was not contested that, in addition to the missing hall smoke alarm, there were no fire doors at all, and no heat detector or fire blanket in the kitchen. The means of escape was through the kitchen, via two doors, both of which had mortice locks rather than thumb locks always openable from within. There was no fire safety signage.

34. The nature of a landlord has been held to be relevant to the seriousness of the offence. In some cases, it has been argued that there is a distinction to be drawn between "professional" and "non-professional" landlords, seriousness being aggravated in the case of the former. The proper approach is as set out by the Deputy President in *Daff v Gyalui* [2023] UKUT 134 (LC), at paragraph 52:

> "The circumstances in which a landlord lets property and the scale on which they do so, are relevant considerations when determining the amount of a rent repayment order but the temptation to classify or caricature a landlord as "professional" or "amateur" should be resisted, particularly if that classification is taken to be a threshold to an entirely different level of penalty. … The penalty appropriate to a particular offence must take account of all of the relevant circumstances."

35. Mr Qureshi said that he owned (through the Respondent) and managed four other properties. While avoiding the caricature deprecated by the Deputy President, this amounts to a potentially significant portfolio of rental properties, such that at the very least, Mr

Qureshi cannot be categorised as an occasional, accidental or amateur landlord.

36. In the light of our findings of fact above, we assess the stage (c) starting point at 65% of the total rent.

37. At stage (d), we must consider what effect the matters set out in section 44(4) have on our conclusions so far. Section 44(4) provides that in determining the amount of an RRO, within the maximum, the Tribunal should have particular regard to the conduct of both parties, and to the financial circumstances of the landlord. We must have particular regard to these matters, but we may also have regard to such us matters as we consider relevant in the circumstances.

38. As Judge Cooke noted in *Acheampong*, there is a close relationship between stages (c) and (d). Insofar as we have already made findings as to the smoke alarm in the hall and fire safety more generally, we do not double count them in considering the section 44(4) matters.

39. Insofar as it was an attack on the Applicants' conduct, we reject the Respondent's suggestion that, when the Applicants' were away for a long weekend, they let the property on AirBnB. We prefer the Applicants' explanation that Ms Scott's mother stayed during that period.

40. The Respondent did not claim that its financial circumstances were relevant to our determination, and there was nothing in its evidence or the facts more generally to alert us to the possibility.

41. We therefore conclude that there is nothing at stage (d) to alter the dial we have set at 65% at stage (c).

42. 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 percentage reductions in making a redetermination. The key cases are set out in (with respect) a most helpful manner in the course of the re-determination in *Newell* from paragraphs [47] to [57]. We do not repeat that material here, but have been guided by it.

43. Our conclusion puts the percentage as under that in *Choudhury v Razak* (which included other significance matters in addition to similar fire safety failings), and the same as that in *Daff*. While the facts in *Daff* are different from those here, we come away with an impression of overall similar culpability.

Reimbursement of Tribunal fees

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

Rights of appeal

45. 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.

46. 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.

47. 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.

48. 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:** 22 January 2022

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.