FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/HMF/2022/0128**
Property	**:**	**Flat 2 74 Leander Road London SW2 2LJ**
Applicant	**:**	**(1) Ms Emily Gardner** **(2) Ms Francesca Sadler** **(3) Ms Aisha Ryan**
Representative	**:**	**Mr Peter Elliot (Justice for Tenants Ref 17119)**
Respondent	**:**	**Mr Fernando Brown**
Representative	**:**	**n/a**
Type of application	**:**	**Application for a rent repayment order by tenant** **Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016.**
Tribunal	**:**	**Judge N O'Brien, Mr A Fonka FCIEH**
Date of hearing	**:**	**28 January 2025**
Date of Decision	**:**	**14 February 2025**

DECISION

Decision of the Tribunal

(1) The Tribunal makes a rent repayment order in favour of the Applicants in the sum of £10,834

(2) The Respondent must pay the above sum to the Applicants by 14 March 2025

(3) The Respondent must also reimburse the applicants for the fees paid in these proceedings of £320 to be paid by 14 March 2025

Background

1. On 24 June 2022 the tribunal received an application under section 41 of the Housing and Planning Act 2016 (HPA 2016) from the Applicants for a rent repayment order (RRO). The Applicants assert that the Respondent their former landlord, committed an offence of managing or operating a dwelling required to be licensed pursuant to s.61 of the Housing Act 2004 (HA 2004) but which was not so licensed. The Applicants' case is that the Respondent committed the offence from 9 December 2021 to 8 June 2022 inclusive and seek a Rent Repayment Order (RRO) for that period in the sum of £14,446.03 this being 100% of the rent paid by the applicants attributable to the period over which they assert the offence was being committed

2. The final determination of this matter has been delayed. The tribunal initially issued directions to prepare this matter for a final hearing in 2023. The Respondent did not comply with the directions. At a case management hearing on 23 October 2024 Mr Brown informed the tribunal that he could not access the email address which the Applicants supplied with their application, which belonged to his son, and had not received any of the prior directions issued by the Tribunal. Further directions were issued by the tribunal and the matter was listed for a final hearing on 28 January 2025.

The Hearing

3. The First Applicant attended with the Applicants' representative Mr Elliot of Justice for Tenants. The Respondent attended in person and was assisted by his son for part of the hearing. Unfortunately the Respondent's son persisted in suggesting answers to his father when he was giving his evidence and was asked to leave the tribunal room.

   We considered the following documents;

(i) The Applicants' bundle of 275 pages;
(ii) The Respondents' bundle of 12 pages;
(iii) The Applicants' response to the respondent and accompanying bundle;

In addition we were shown some additional documents in the course of the hearing. They were the complete EICR for the property and the complete EPC.

4. We heard oral evidence from Ms Gardner and from the Respondent.

Background

5. The property which is the subject of the application is a 3-bedroomed flat in a converted 3 storey Victorian house situated in the London Borough of Lambeth (LBL). The flat occupies the first and second floor of the building. The respondent is the freehold owner of the entire building. On 9 December 2022 LBL introduced an additional licencing scheme for houses in multiple occupation (HMOs) which were not subject to mandatory licencing pursuant to the s.55 of the Housing Act 2004.

6. The Applicants' case is that they occupied the premises from 4 September 2021 to 3 September 2022. They formed more than one household and occupied the property as their only or main residence and that consequently the property required a licence from the date on which the additional licencing scheme was introduced, 9 December 2021, until the date the Respondent applied for a licence; 8 June 2022.

7. The Respondent's case is that only one of the three Applicants signed the tenancy agreement and he is unsure who was living there during the relevant period. His case is that he was unaware of the fact that LBL had introduced a new additional licencing scheme. He says that as soon as he was made aware of the existence of the scheme he applied for a licence.

8. The following matters are not in dispute;
   (i) the property was required to be licenced under LBL's additional licencing scheme if at any time it was occupied by 3 or more persons who did not form one household from 9 December 2022 to 8 June 2023
   (ii) The Respondent was owner of the premises and the person to whom rent was paid.
   (iii) The Respondent applied for the requisite licence on 8 June 2023 and that any offence ceased to be committed on that date.

The Relevant Law

9. The power of local authorities to designate particular areas as being subject to an additional licencing regime is contained in sections 56 to 60 of the 2004 Act. By virtue of s.72(1) of the 2004 Act a person commits an offence if they are in control of or manage a HMO which is required to be licenced by virtue of Part 2 of the Act but is not so licenced. In proceedings against a person for an offence

under s72(1) of the 2004 Act it is a defence that he had a reasonable excuse for having control of managing the house without the required licence; s72(5)(a) of the 2004 Act. It is also a defence in proceedings against a person for an offence under s72 (1) that the person had duly made an application for a licence at the material time.

10. Section 40 of the HPA 2016 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…

(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.

10. Section 41 of the HPA 2016 provides

(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.

11. Section 43 of the HPA 2016 provides;

(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);

12. Section 44(2) of the 2016 Act provides that where the First-tier Tribunal decides to make a RRO under s.41(1) in favour of a tenant, the order may be made in relation to rent paid over the period not exceeding 12 months during which the landlord was committing the offence.

13. In *Marigold v Wells [2023] UKUT 33 (LC)*, the Upper Tribunal considered that the guidance on the defence of reasonable excuse provided by the Tax and Chancery Tribunal in the case of Perrin v HMRC was relevant to the issue of reasonable defence in the context of licencing offences:

> "*48. The Tribunal in* Perrin *concluded its decision with some helpful guidance to the FTT, much of which is equally applicable in the sphere of property management and licensing. At paragraph 81 it said this*:
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> > "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way. 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?"
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> *49. The Tribunal then dealt with a particular point which is regularly encountered in HMO licensing cases and which therefore merits attention:*
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> > "82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."
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> *51. … When considering for how long any reasonable excuse persisted, it may find the systematic approach described in Perrin provides a helpful framework".*

14. The tribunal must consider whether the Respondent has a reasonable excuse whether or not he raises it as a defence If it is raised by the Respondent the burden is on him or her to prove it to the civil standard (i.e. on the balance of probabilities) and not the criminal standard (beyond all reasonable doubt); see

Thurrock Council v Palm View Estates [2020] UKUT (LC) 355.

The Respondent's Defence

14. The Respondent resisted the application on the grounds he had a reasonable excuse for the entirety of the relevant period. Firstly he says that he did not know how many people were living in the property throughout the material time. The Respondent in his evidence said that he was unaware of the identity and number of people living in the property at the material time. He points to the fact that the copy of the tenancy agreement which the Applicants have included with their documents only bears the signature of the Second Applicant. Secondly, he says that he was not aware of the introduction of the additional licencing scheme until June 2022.

Findings of the Tribunal- Reasonable Excuse

19. We do not accept that the Respondent had a reasonable excuse for not having a licence. Firstly we reject his contention that he was unaware of the number of people living in the property. We note that while the version of the tenancy agreement which we have seen only bears the signature of Ms Sadler, it contains the printed names of the other two applicants. Ms Gardner told us in her evidence that all three signed the agreement via DocuSign and the signed agreement was then forwarded to the Respondent for him to sign. The Respondent has not disclosed his copy of the tenancy agreement. Furthermore the Second Applicant has exhibited a number of screenshots from a WhatsApp group called '74 Leander' The group consisted of the three Applicants and the Respondent's son Michael Brown. We are satisfied that the Applicants occupied the property as they assert, and that the Respondent knew how many persons were residing there and who they were.

20. Secondly, we do not consider that the fact that the Respondent may have been unaware of the requirement for a licence amounts to a reasonable excuse. In our view it was incumbent on him as a landlord to stay abreast of any regulatory changes relevant to his let properties. Further the Applicants have exhibited an email from a Mr Richard Umelo, a licencing and housing standards case officer employed by LBL dated 22 June 2022. In it he states that the council's HMO team received an email from the Respondent on 28 January 2022 asking if *'a three person HMO required a licence'*. Mr Umelo states that the HMO team responded in the affirmative on 18 February 2022, however there was no further communication from that email address or from the Respondent until the Respondent applied for a licence on 8 June 2022 via that same email address.

21. In our view the foregoing indicates that the Respondent was aware that this property might require a licence if occupied by three unrelated persons certainly by January 2022 if not before, and was aware that it definitely required a licence by 18 February 2022.

22. We are therefore satisfied to the criminal standard that the Respondent has committed an offence pursuant to s.72 of the Housing Act 2004. We are not

satisfied that the defence of reasonable excuse has been made out by the Respondent.

Amount of RRO

23. In the case of Acheampong *v Roman [2022] UKUT 239 (LC)* the Upper Tribunal set out a 4-stage test which the tribunal must apply when considering how much to order a landlord to pay by way of an RRO. In summary the tribunal must;

    1. Ascertain the whole of the rent for the relevant period.

    2. Subtract any element of that sum that represents payment for utilities that only benefit the tenant. It is for the Landlord to supply evidence of these, but an experienced Tribunal will be able to make an informed estimate.

    3. Consider seriousness both compared to other types of offences for which an RRO can be made and examples of the same type of offence. What proportion of the rent (after deductions as above) is a fair reflection of the seriousness of the offence? This is the starting point. It is also the default penalty in the absence of any other factors but maybe higher or lower in light of the final step.

    4. Consider deductions or additions in light of section 44(4) factors (conduct of landlord and tenant, financial circumstances of landlord and any previous convictions of the landlord in relation to offences set out in section 40)

24. In *Kowalek v Hassanien Ltd [2022] EWCA Civ 1041; [2022] 1 W.L.R. 4558* the Court of Appeal held that when calculating the maximum recoverable under a rent repayment order, the rent in question had both to have been paid to discharge indebtedness which had arisen during the relevant period of offending by the landlord and in fact paid during that period. The effect of this decision is that rent paid by the tenant at a time when no offence was being committed cannot be included in the calculation of the maximum amount of a rent repayment order even if it had been paid in order to satisfy a liability which accrued during the period when an offence was committed.

25. In the case of *Simpson House 3 Ltd v Osserman [2022] UKUT 164 (LC)* the Upper Tribunal considered that in deciding the level of any RRO, the tribunal should distinguish between the rogue landlord against whom a RRO should be made at the higher end of the scale and the landlord whose failure was to take sufficient steps to inform themselves of the regulatory requirements.

26. In ***Newell v Abbot* [2024] UKUT 181 (LC)** the Upper Tribunal, having reviewed a number of recent authorities on the correct approach to quantification, observed at para 57;

"This brief review of recent decisions of this Tribunal in appeals involving licencing 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 whether the tenants have been exposed to poor or dangerous conditions which have been prolonged by the failure to licence. Factors which tend to justify lower penalties include inadvertence on the part of the smaller landlord, property in good condition such that a licence would have been granted without one 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"

27. In that case the Upper Tribunal noted that the landlord was not a professional landlord and that he had committed the offence of controlling an unlicenced HMO through inadvertence rather than deliberately. The property was in reasonably good condition during the tenants' occupation. It made a RRO equating to 60% of the net rent paid.

28. The Applicants have compiled a schedule of payments in their bundle at page 125. The following payments were made between 9 December 2022 and 8 June 2022. The Second and Third Applicants transferred their share of the rent to the First Applicant who then paid the rent on behalf of all three. The rent paid during the relevant period was £14,446.03. None of the applicants received relevant benefit such as housing benefit or the housing element of universal credit. The Applicants were responsible for payment of council tax and all utilities. Therefore the maximum RRO in this case is £14,446.03

29. While we bear in mind the important public policy reasons underpinning the HMO licencing regime, we consider that this is a less serious offence when compared to the other offences in respect of which a RRO can be made. These include unlawful eviction and harassment. We bear in mind that the purpose of the legislation is deterrence; it is not relevant that the applicants have not suffered any personal loss as a result of the failure to obtain a licence. In our view the starting point in this case would be 60% of the rent paid. However there are aggravating factors in this case which merit a higher award.

30. In our view the Respondent displayed a lackadaisical approach to compliance with his legal obligations as a landlord. We note that the property suffered from a serious infestation of cockroaches and was also affected by mice and ants. The cockroach infestation was particularly unpleasant. The presence of cockroaches was reported to the Respondent shortly after the start of the tenancy. He did not engage the services of professional pest controllers but rather supplied the applicants with traps and poison in an effort to deal with the problem. In or

about December 2021 he replaced the floor covering in the kitchen which, while it reduced the problem, did not eliminate it. In addition, the only shower in the property was not working when the applicants moved into the property and was not repaired for 6 weeks. The window in the second bathroom would not fully close and there was water penetration which led to damp and mould in the Second Applicant's bedroom caused by defective gutters. The Respondent failed to deal with this issue when it was reported and the Applicants had to contact the council before he took steps to resolve the situation.

31. The Respondent told us that he owns 4 other properties which he lets out. While this is not a large portfolio, the Respondent is not in the same category as a landlord who only rents out one property. We further note that this is not his first offence. A RRO was made against him by the Tribunal in 2021 in respect of another property.

32. There are mitigating factors. The Respondent told us that he supplied the Applicants with the 'How to rent' booklet, an EPC, a gas safety certificate and a valid EICR at the start of the tenancy. The Applicants have no recollection of this, however the Respondent has supplied the tribunal with copies of these documents and it seems likely to us that, as he had them at his disposal, he probably did serve them. It is common ground that the deposit was protected in an approved scheme. He completely replaced the fittings in the shower room,and fitted new flooring in the kitchen to try to address the cockroach infestation. He was a member of the National Residential Landlords Association. While he was not as responsive as he should have been to his tenant's concerns, he cannot be described as a 'rogue landlord'.

33. There were no relevant financial circumstances which the Respondent wished to draw to our attention.

34. We do not consider that there are any relevant matters of the Applicant's conduct. They paid their rent on time. The Respondent considered that they did not keep the property clean but in our view this was an attempt by him to deflect blame for the prolonged cockroach infestation. Ms Gardner steadfastly denied, when questioned by the Respondent, that she and her former flatmates failed to keep the flat clean, and we accept her evidence.

35. Taking all of the above into account we consider that a rent repayment order of 75% of the rent paid by the Applicants during the relevant period is appropriate.

Name : Judge N O'Brien Date of Decision 14 February 2025

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).