FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AU/HMF/2024/0249**
Property	**:**	**42A Petherton Road London N5 2RG**
Applicant	**:**	**Ms Natasha Copland** **Mr Thomas Moore**
Representative	**:**	**Ms N Taj (BPP Law)**
Respondent	**:**	**Mr Yunus Firat**
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 S Wheeler MCIEH, CEnvH**
Date of hearing	**:**	**5 February 2025**
Date of Decision	**:**	**4 March 2025**

DECISION

Decision of the Tribunal

(1) The Tribunal makes a rent repayment order in favour of the First Applicant in the sum of £1262.66

(2) The Tribunal makes a rent repayment order in favour of the Second Applicant in the sum of £1328.25

(3) The Respondent must pay the above sum to the Applicants by 24 March 2025

(4) The Respondent must also reimburse the applicants for the fees paid in these proceedings of £330 to be paid by 24 March 2025.

Background

1. On 12 June 2024 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 3 March 2023 to 14 July 2023 inclusive and they seek a Rent Repayment Order (RRO) in the sum of £9,335.21 this being 100% of the rent the assert they paid in the relevant period.

The Hearing

2. The First and Second Applicant attended and were represented by Ms Taj of BPP law school. We are very grateful for her assistance. The Respondent attended in person.

   We considered the following documents;

   (i) The Applicants' bundle consisting of 148 pages
   (ii) The Respondent's bundle consisting of 69 pages
   (iii) The Applicants' response to the Respondent's bundle

   In addition in the course of the hearing Ms Copeland provided a photograph of a letter sent by HMRC addressed to Mr Erkin Gurkivarak at the property.

3. We heard oral evidence from Ms Copeland and Mr Moor and from Mr Firat. Mr Gurkivarak did not attend the hearing.

Background

4. The property which is the subject of the application is a lower ground floor flat in a converted Victorian end of terrace house in the London Borough of Islington (LBI). A plan of the flat is included in the Applicant's bundle. It has an unusual layout. It consists of a kitchen, main bedroom, living room/second bedroom, shower room and separate toilet. There is a small room with a window looking out onto the back garden to the rear of the flat leading off the kitchen which may have been a storage room or pantry at some point in the

past. In addition there is a very small room/storage area at the front of the flat which is accessed via a door under a staircase.

5. The Applicants' case is that they occupied the flat together with a third person Mr Erkin Gurkivrak from 3 March 2023 until 14 July 2023, that they formed more than one household and all occupied the property as their only or main residence and that consequently the property was a HMO and required a licence pursuant to an additional licencing scheme introduced by the London Borough of Islington on 1 February 2020. The First and Second Applicant paid rent to the Respondent and consequently they consider that he was the person in control or managing the unlicenced HMO.

6. It is common ground that the Respondent informed both the Applicants and Mr Gurkivrack that they had to vacate the property by a message sent to a WhatsApp group chat which he sent on 1 July 2023. The reason he gave was that he wanted to move back into the flat with his girlfriend. He required that Mr Moore move out by 22 July 2023 and that Mr Gurkivrack and Ms Moore move out by 1 August 2023. He subsequently sent another message on 12 July 2023 stating that he was going to move in 'this Sunday' i.e. 16th July 2023 and asked that that Mr Moore move out before then. Mr Moore responded that he would move out on Saturday 15th July. Ms Copeland moved out on 16th July 2023. In her statement and in her evidence in the hearing she says that the Respondent acted in an intimidating manner in the days and weeks prior to her departure and that this was why she did not want to stay in the premises until 1 August 2023 despite the fact that she had paid rent in full for the whole month of July. This behaviour included entering the property without notice, moving her belongings from a storage cupboard and banging on her door and shouting. It is clear that she found the circumstances of her departure distressing.

7. The Respondent's case is that he rented the flat from 2019 to October 2023. He lived in it with his former girlfriend until the outbreak of COVID in 2020. His relationship broke up and his former girlfriend left. He advertised the second room on Spareroom.com and the Second Applicant moved in on 25 November 2020. His case is that he let various friends stay in the smaller two rooms over the years as his guests. He accepts that one of these friends was Mr Erkin Gurkivrak and that he stayed at the property as his guest at various periods but in particular from 4 April 2023 until August 2023, but it was never his residence. In March 2023 he decided to move out on a temporary basis for work and advertised his old room on-line. At this stage the property was occupied by the Respondent and Mr Moore only. Ms Copeland answered the ad and agreed to take the room from 3 March 2023 for three months. On or about 4 April 2023 Mr Gurkivrak came back to the UK from Turkey, and again Mr Firat permitted him to stay at the property as a guest. He did not pay the Respondent any rent. Mr Firat's case is that he let Mr Gurkivrak stay at the property in the spare room beside the kitchen temporarily as he had nowhere else to stay. He says he was completely unaware of the HMO requirements in Islington and did not in any event regard himself as a landlord, as he himself was paying rent to his landlord pursuant to an assured shorthold tenancy. He says he did not make any profit from subletting the rooms.

8. He accepts that told all three applicants that they would have to move out in July 2023 because he wanted to move back in with his girlfriend. He also wanted Ms Copeland to move out because their relationship had deteriorated significantly. It is clear from his witness statement that as far as he was concerned the flat was still his home and Ms Copeland was at fault for not cooperating with his plans to move back in.

9. The following matters are not in dispute;
   (i) the flat was required to be licenced under LBI's additional licencing scheme if at any time it was occupied by 3 or more persons who did not form one household.
   (ii) The Respondent did not own the flat but was the person to whom the applicants both paid rent.
   (iii) Mr Gurkivrak was not present at the flat until 4 April 2023 and he remained there until a date in August 2023.
   (iv) Mr Moore and Ms Copeland were both residing in the flat from 3 March 2023. Mr Moore moved out on 14th July and Ms Copeland moved out on 16th July.

The Relevant Law

10. 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.

11. Section 263(1) of the 2004 Act provides

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.

12. In *Cabo v Dezotti [2022] UKUT 249 (LC)* the Upper Tribunal confirmed that for the purposes of that section there was no requirement that a person 'having control' of premises should have any propriety interest in them, as long as they receive the rent in respect of the premises.

11. 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.

12. 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.

13. 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);

14. 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*:

"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?"

> *49. The Tribunal then dealt with a particular point which is regularly encountered in HMO licensing cases and which therefore merits attention:*

> > "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."

> *51. … When considering for how long any reasonable excuse persisted, it may find the systematic approach described in Perrin provides a helpful framework".*

15. 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*.

<u>Has the Respondent Committed the Offence</u>

13. The main issue we have to consider is whether we are satisfied that the property was occupied by three or more persons as their main or only residence during the relevant period. We note the contents of Mr Gurkivrack's statement but as he has not attended the hearing we cannot give it any great weight. We are satisfied that from 4 April 2023 Mr Gurkivrack was residing at the property with the Applicants as his only or main residence. It is common ground that he was staying there and he had no other UK address. Ms Copeland told us that as far as she was aware Mr Gurkrivrack was working in a local café. Additionally

he was using the premises as his postal address for official correspondence. Whether or not he was paying rent, we are satisfied that the property was his main residence. We are satisfied beyond all reasonable doubt that the Respondent was the person in control of or managing the premises as he was the person to whom the Applicants paid rent.

Does the Respondent have a Reasonable Excuse

19. We do not accept that the Respondent had a reasonable excuse for not having a licence. 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. It is apparent that Mr Firat considered his agreement with Ms Copeland and Mr Moore to be akin to that of lodger and resident landlord. While this may have been true when he lived in the premises with Mr Moore this ceased to be the case when he moved out and granted a tenancy to Ms Copeland. In our view Mr Firat ought reasonably to have investigated what his legal responsibilities were at this point. However it does not appear that he thought to do so at any stage of her occupation.

20. 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 he had a reasonable excuse.

Amount of RRO

21. 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. 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)

22. 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.

23. 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.

24. 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"*

25. In that case the Upper Tribunal noted that the landlord was not a professional landlord and that he had 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.

26. The Applicants have compiled a schedule of payments in their bundle at page 78. We do not consider that they have correctly calculated the maximum RRO. A RRO can only be made in respect of rent that was both paid when the offence was being committed and that related to the period over which the offence was being committed. This is the period from 4 April 2023 to 14 July 2023. In Mr Moore's case that totals £2,974.67. In Ms Copeland's case this totals £2,843.48. Additionally the Applicants have not given any credit for the sums paid by the Respondent for utilities and council tax during that period. Mr Firat has provided copies of his bank statements showing that he paid council tax of £342.79 and £611.71 to E.on between 4 April 2023 and 14 July 2023. Ms Taj submitted that there was nothing on the statements to show that they related to the property however both Ms Copeland and Mr Moore accept that they did not pay council tax or any utilities and we accept Mr Firat's evidence on this point. This reduces the maximum RRO by £318.17 per applicant, on the basis that the utilites were shared between three occupants.

27. 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. However we accept Mr Firat genuinely did not consider himself to be a landlord, and that he assumed, wrongly that his relationship with the occupants of the flat was not fundamentally altered when he moved out and permitted Ms Copeland to move in. In our view the starting point in this case would be 35% of the rent paid.

28. In our view the actions of the respondent immediately prior to 14 July 2023 are worthy of serious criticism and again stemmed from his erroneous belief that Mr Moore and Ms Copeland were akin to his lodgers rather than his tenants. We accept that he acted in an intimidatory manner without regard to the fact that the property was Ms Copeland's home. There were no relevant financial circumstances which the Respondent wished to draw to our attention. We do not consider that there are any relevant matters of the applicant's conduct to reduce the award.

29. Taking all of the above into account we consider that a rent repayment order of 50% of the maximum during the relevant period is appropriate. This results in a RRO in favour of the Mr Moore in the sum of £1,328.25 and a RRO in favour of Ms Copeland in the sum of £1,262.66.

Name : Judge N O'Brien Date of Decision 4 March 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).