FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AU/HMF/2022/0046**
Property	**:**	**Flat 121, Kerridge Court, Balls Pond Road, London N1 4AN**
Applicants	**:**	**Robert Duncan** **Jack Wellens** **Maxwell Greenhalgh**
Representative	**:**	**Mr Penny, Flat Justice**
Respondent	**:**	**Forhadul Choudhury**
Representative	**:**	**Ms Rafique, Shafique Solicitors**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **S Mason BSc, FRICS**
Date and venue of Hearing	**:**	**21 September 2022** **10 Alfred Place**
Date of Decision	**:**	**25 November 2022**

DECISION

Orders

(1) The Tribunal makes rent repayment orders against the First Respondent to each of the Applicants in the following sums, to be paid within 28 days:

Mr Duncan: £3,602
Mr Wellens: £ 3,137
Mr Greenhalgh: £1,311

(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. Tribunal received an application dated 17 February 2022 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 21 April 2022.

The hearing

Introductory

2. Mr Penny, of Flat Justice, appeared for the Applicants, and Ms Rafique, Shafique Solicitors for the Respondent.

3. The property is a self-contained maisonette, comprising three bedrooms (two doubles and a single), a kitchen and a shower room.

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 the London Borough of Islington ("the Council"). The scheme came into force on 1 February 2021 and will expire in 2026. The scheme applies to the whole of the area of the borough. An application for a licence was made on 10

January 2022, affording the Respondent the defence under section 72(4) of the 2004 Act. The allegation was that the offence had been committed continuously from 1 February 2021 to 9 February 2022.

6. It was not disputed that the flat was an HMO and required to be licenced under the Council's scheme, nor that the defence in section 72(4) was made out on 10 February 2022.

7. For the Respondent, however, Ms Rafique argued that he had a reasonable excuse. The nature of the argument meant that it was appropriate for us to hear it before hearing the detailed evidence, the minimal factual evidence that was necessary for us to determine whether the defence was made out being agreed.

8. First, she argued that Mr Choudhury was ignorant of the requirement for an HMO licence. He relied on a managing agent to manage the property. In his witness statement, Mr Choudhury said that he "trusted them to make sure I have all the right advice regarding any regulatory requirements". He did own another property which he let, but that was a small flat that had always been let on to a single family on an assured shorthold tenancy, and was close to where he lived, in Stevenage

9. Mr Choudhury had initially engaged Maroon in 2013, and had been satisfied with their services. He had had no reason to doubt their competence until January or February 2022.

10. Ms Rafique took us to a form of agreement produced by Maroon. It was not the Respondent's signed agreement with the company. Having lost his original copy, the Respondent asked Maroon to provide him with a copy from their files. Rather than do so, they sent him what we must assume was the then current form, and asked him to sign and return it. He did not do so. He was, however, able to secure a form of agreement from another landlord of his acquaintance who used their services.

11. The parties agreed that we should assume that the relationship between the Respondent and Maroon was governed by an agreement in the same form.

12. The principal clause that Ms Rafique relied on was in paragraph 8 of the agreement, headed "Houses in Multiple Occupation (HMOs)". It reads as follows:

> The Landlord's Property will require a mandatory licence if the accommodation comprises three or more storeys, which is occupied by five or more people who do not form one household and who share kitchen or bathroom facilities. It is the Landlord's responsibility to clarify with their Local Authority as to whether their property is classified as a HMO and if a license is required.

> Monsoon Properties will not be able to manage your property
> If you do not have a license for HMOs.

13. Ms Rafique referred us to *Aytan v Moore* [2022] UKUT 27 (LC), [2022] H.L.R. 29, paragraph [40]. After explaining that a landlord's reliance would rarely give rise to a defence of reasonable excuse, the Upper Tribunal went on to say that, to do so,

> "at the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themself of the licensing requirements without relying upon an agent, for example because the landlord lived abroad."

14. Ms Rafique submitted, first, that we should construe paragraph 8, quoted above, as implying an obligation on the managing agents to inform the landlord if he required an HMO licence.

15. Secondly, the fact that he had had no reason to doubt the professionalism of Maroon meant he had a good reason to rely on them.

16. Finally, he had a good reason to rely on Maroon rather than to inform himself about the licensing requirements in Islington.

17. She further submitted that Mr Choudhury was not properly speaking a professional landlord. We return to this issue below, having heard the evidence, but did not find it necessary to determine it at this stage.

18. We reject Ms Rafique's submissions, and accept those of Mr Penny.

19. We do not consider that this clause in the agreement can properly be construed as implying an obligation on Maroon to inform landlords of the licensing requirements. In the first place, we doubt that such an obligation could, in general, be implied rather than be express, except in particularly clear circumstances. But in any event, the natural reading of this clause is that it is of exactly the opposite intent. The clause expressly states that it is the landlord's responsibility to acquaint themselves with the relevant licensing requirements of the relevant local authority. That this express statement is preceded by a partial and misleading factual reference to licensing criteria cannot possibly be taken to impliedly rewrite the express provision.

20. Secondly, we doubt that a mere lack of complaint is enough to satisfy the *Aytan* requirement for "a good reason to rely on competence and experience of the landlord"; but even if it was, there was clearly no reason why the landlord could not inform himself of the licensing requirements. Ms Rafique suggested that living in Stevenage while owning a property in Islington was analogous to living abroad. We reject any such suggestion. Mr Choudhury had all the avenues open to him available to any other UK based landlord to keep abreast of his legal obligations, including those relating to HMOs. We note, in any event, that we do not take the Upper Tribunal to have meant that even living abroad was necessarily and always a good reason for relying on a managing agent. It is given as an example, and it will frequently not be the case that merely living abroad alone means that a landlord cannot inform themselves of the licensing requirements. Many services which allow landlords to inform themselves of their legal requirements are available virtually to anyone who can maintain a reasonable internet connection.

21. As what we understood to be a secondary submission, Ms Rafique argued that in any event, we should not take the Respondent to have committed the offence until the grace period allowed by the local authority had elapsed. That is a period during which the local authority had bound itself not to take enforcement action, and lasted, she said, until 31 May 2021.

22. We do not accept that the fact that the local authority voluntarily abjured enforcement action for a period can operate as a reasonable excuse for not having a licence during that period. A local authority declining to use its enforcement powers for a period does not mean that the criminal offence was not being committed during that period. As to reasonable excuse, it is not said, for instance, that Mr Choudhury knew about the grace period and mistook it (reasonably) for a period during which he did not have to have a licence (a difficult enough argument to make out, but in any event not one available to Ms Rafique on the facts). Rather, the submission amounts to a claim for a sort of constructive reasonable excuse – if he had known of it, it might have been reasonable for him to have not had a licence until it elapsed. We do not think that that even starts to get off the ground.

23. As (we understood) an alternative submission, Mr Penny argued that a grace period is only effective insofar as an application for a licence is received during the grace period. It does not mean that a local authority would not take enforcement action relating to a failure to licence during the grace period if a licence application is not received and enforcement action commences after the period elapses. We agree with this analysis of how a grace period works, and it would be relevant were the grace period relevant to non-local authority enforcement (ie through an RRO application), although we find that that is not the case.

24. Ms Rafique also wished us to consider the existence of the grace period as relevant to mitigation, if we did conclude that the offence had been committed. We deal with that submission here as a matter of convenience, and reject it for similar reasons. In addition, a voluntary enforcement grace period by which a local authority (may) bind itself cannot bind the tenant-led enforcement mechanism that is an application for an RRO. If we should give some credit for the grace period, the corollary must be that we should not make an RRO if the whole of the period of the application were within a grace period. We do not think that that can have been the intention of Parliament in making, and extending, provision for RROs.

25. Accordingly, we reject the submission that the Respondent had a reasonable excuse for not obtaining a licence, and find, beyond a reasonable doubt, that he committed the relevant offence.

The amount of the RRO

26. We move to consider the evidence in detail, as relevant to the amount of the RRO that we should make.

The evidence

27. The Applicants provided a bundle of 215 pages, with witness statements and exhibits from each of the Applicants, each of whom gave oral evidence. There was also a reply to the Respondent's bundle of 40 pages. Each Applicant produced evidence of both occupancy and rent paid, none of which was contested.

28. Mr Duncan's evidence was that there were three people living in the property. Another tenant called Pablo Lahuerta Boada preceded Mr Greenhalgh, and collected the rent from the other tenants and forwarded it to the landlord. Mr Lahuerta Boada moved out at the end of August 2021 and Mr Greenhalgh moved in on 1 September 2021. There was a certain amount of swopping of rooms at this point.

29. The only room with a fire alarm was the kitchen, which, Mr Duncan said, was not properly attached. There was no fire-fighting equipment in the flat at all (including no fire blanket in the kitchen). There were no smoke or fire alarms upstairs. There were no fire doors in the flat. In cross examination, Mr Duncan agreed that he did not know what was or was not a fire door. But he said he thought that the kitchen door was not a fire door because it was flimsy, and had no self-closing mechanism. He described it as a hollow panel door.

30. Mr Duncan said that he was not given a copy of his tenancy agreement, nor copies of a gas safety certificate (GSC), and electrical installation condition report (EICR), an energy performance certificate (EPC), or any test certificates for the fire alarm or emergency lighting. The landlord's details were not displayed, and he had not been given a copy

of the How to Rent guide. He was unaware of any evidence of a fire risk assessment having been carried out.

31. In respect of the condition of the property, his evidence was that the radiators in both the upstairs and downstairs double rooms did not have knobs to allow adjustment of the heat. As a result, he said, in winter his room was either too hot or too cold. In cross examination, he agreed that the radiator issue in his room had been dealt with in February 2022. He had first complained in November 2021.

32. In early 2022, a damp patch appeared on the ceiling at the bottom of the stair, which got worse until a hole appeared in the plaster, through which water was dripping. He contacted Monsoon via WhatsApp. In the following days, the condition deteriorated further, such that the stairs were wet and covered in plaster. After an initial unsuccessful visit, the hole was repaired a week after (thus, it would appear, something less than two weeks after the first complaint).

33. Appended to Mr Duncan's witness statements were photographs of the hole and a sequence of WhatsApp conversations with the managing agents. The messages show that, due to a family emergency, the tenant who had agreed to meet contractors was unable to do so on 10 February 2022, thus apparently adding somewhat to the delay.

34. Mr Duncan said in his witness statement that in general, there was "an incredibly delayed response" to complaints of disrepair. In his witness statement, Mr Duncan said that, on 3 November 2021, he sent an email detailing several issues. The email, which was exhibited to Mr Duncan's website, refers to the problems with the window in Mr Wellens' bedroom (see below, paragraph [39]), the issues with the radiators referred to above, a dripping outside pipe, worn and damaged floor in the downstairs double bedroom and the general condition of the downstairs bathroom (plaster cracks and deformation, rotting wooden panelling and paint on a ventilator), the hallway and the kitchen (badly fitting cupboards, an oven of an incorrect size, resulting in a void that attracted grime, poor ventilation, exposed nails). He subsequently made a complaint to the Council using a form on its website about the defects. He became aware that the property did not have an HMO licence when he was contacted by a Council official as a result. It was only after that, he said, that he was contacted by the repairs team in relation to work necessary to satisfy the conditions for an HMO licence.

35. As a result, a new circuit board was installed, and, at the date of the witness statement (8 June 2022), he understood that new fire alarms were to be fitted shortly. Ms Rafique put to Mr Duncan that there was an inspection associated with the circuit board. Mr Duncan said he was not aware of it. An EICR had been produced at a late stage by the Respondent, but it was dated March 2022. In re-examination, Mr

Duncan said he had not been shown a document that looked like the EICR before being shown the March 2022 one in the Tribunal.

36. Exhibited to Mr Duncan's witness statement was a table showing the occupancy of the property from February 2021 to January 2022. It showed that at all times there were three occupants of the property (the three Applicants, and for a period Mr Lahuerta Boada)

37. Mr Duncan also produced photographs and a short video film to illustrate the lack of fire alarms and fire-fighting equipment.

38. In addition to endorsing the evidence of Mr Duncan, Mr Wellens' witness statement referred to other elements of disrepair – in respect of the upstairs bathroom, mould, a broken door and a tap not working; the washing machine not draining; the bath not draining; an extractor fan in the kitchen removed, leaving a void; damaged flooring on the upstairs landing; and generally dirtiness/marks on walls and fixtures.

39. A particular issue related to a window in Mr Wellens' bedroom, which would not close properly. He had been told about the problem before he moved in by the person he was replacing, and had been told that it would be fixed before he moved in. In January 2020, his radiator failed, and was not repaired for about a month. During that time, the room was very cold. The window blew open during gales in February 2020, resulting in the handle dropping off. Eventually, he and Mr Lahuerta Boada tied up the window with guitar strings. He elaborated on the Applicant's amateur repairs in cross-examination, explaining that after the handle dropped off completely, they put a screw into the wood of the frame, and tied that up. Mr Wellens persistently complained to the agent, but no repair was made until an unsatisfactory repair in February 2022. In cross-examination, he agreed that on one occasion, someone came to fix the locking handle on the window. The tradesperson said something to the effect that it was an unusual handle, and it was not replaced.

40. Mr Greenhalgh replaced Mr Lahuerta Boada (although not in the same room), and his witness statement endorse those of the other Applicants. It was his radiator which was stuck on its highest setting, leaving him (as he worked at home) with a choice between a room that was too hot, or turning the heating off altogether.

41. The Respondent provided a bundle of 87 pages, including a witness statement from himself. He gave oral evidence.

42. The Respondent's evidence was that he owned the property and had let it since 2013. He engaged Monsoon, the agents, at about that time. They were responsible for finding tenants, preparing the tenancy agreements, colleting rent and dealing with repairs.

43. In his witness statement, the Respondent said that it was only when he received an email from a Council official on 13 December 2021 that he appreciated that the property amounted to an HMO. He spoke to the agents then, who reassured him that it was not a significant problem, and that he should just apply for an HMO licence. He appreciated that the situation amounted to a serious problem only when he received a further email from the official on 4 January 2022, which referred to the potential of a civil penalty notice up to £30,000. The email gave him seven days to apply for a licence, and he did so on 10 January 2022. He had been wholly ignorant of the need to licence the property.

44. His witness statements indicate that he believed that he had EPCs and GSCs in place. He had copies of the last EPC, conducted in February 2021 (older ones were with the agents), and he had, and exhibited, GSCs for each of 2020, 2021 and 2022.

45. Mr Choudhury said that he was not aware of the problems until after the Council had become involved, so in January and February 2022. None of the problems had been brought to his attention by the managing agents. He said that they – the managing agents – claimed that they had only just been alerted to the problems.

46. In respect of the ongoing radiator problem in the downstairs room, he said he had a Homecare contract with British Gas, which he immediately used to deal with the problem. He said that the agents were aware of this contact, which we took as an implied criticism of their failure to call on it. He had never been informed of the window problem in Mr Wellens' room.

47. As to the leak over the stairs, at a time when he was overseas, the agency called him to say that emergency work was necessary, and he told them to go ahead. The work cost £270, which was deducted from the rent passed on by the agents. Asked whether it was normal practice for the agents to call him to ask for approval, or if he wanted to arrange a repair, he said that sometimes they did so, sometimes not. If they were calling on an insurance or a similar scheme, they would go through him.

48. Mr Choudhury visited the flat during this period, that is, late January or early February 2022. He was asked how often he had visited between 2013 and that date, and said he thought he had done so once or twice. In cross-examination, he said that he had trusted the managing agent and as far as he was aware, whenever a problem arose, they dealt with it. As a result, he did not consider it necessary to visit the property himself. He did not trust them any longer, and had decided to manage the property himself or recruit a better managing agent once final work required by the HMO licence had been completed. He said that, were he to be directly managing the property, he would visit regularly and be vigilant about both regulatory requirements and repairs.

49. Mr Choudhury had been informed by the Council that there were problems with the floor in Mr Duncan's room, and arranged for it to be replaced with new timber laminate flooring.

50. In respect of the window in Mr Wellens' room, after Mr Chaudhury became aware of it as a result of his visit, the managing agents made excuses as to why they had not dealt with it. Mr Chaudhury sought to directly arrange a repair. It seems from his evidence that there were some problems securing an appropriate handle for what was an old window, but the problem was overcome and the window repaired.

51. In cross-examination, it appeared that Mr Choudhury accepted that both alarms and fire doors had to be installed during 2022 as a result of HMO licensing requirements, although Mr Choudhury was not entirely sure whether the previous kitchen door was a fire door or not. There was no fire-fighting equivalent. He did say that there was a carbon monoxide alarm in the kitchen.

52. As to his personal circumstances, Mr Choudhury said that, in addition to rental income, he worked as a taxi driver, and had some additional income as an interpreter. He said that his total income from all sources was £30,871 in the tax year 2021/2. His wife is a civil servant, with an annual income of £11,894 in the same year.

53. In cross-examination, Mr Penny put it to Mr Choudhury that his bank statements (which he had exhibited) showed higher income than this in the period from February 2022. Mr Choudhury was not entirely clear why this should be the case, but suggested that some moneys may have come in from other sources, and that (as we understood it), in respect of his taxi income, sums paid in represented total turnover, rather than taxable income. He said that he expected his final income to be at about the same level for the tax year 2022/3 as it was for the previous tax year, as would be his wife's income.

54. Mr Penny asked Mr Choudhury about his other rental property. He had been letting that property since 2007. It had always been let to a single family. For the last three years he had managed the property himself.

55. In relation to his family circumstances, Mr Choudhury's evidence was that he has three children (aged 22, 19 and 8), all in full time education. His eight year old son has Down's syndrome and requires high care. Mr and Mrs Choudhury had to go to a Tribunal to secure an appropriate care plan for his education, at the cost of about £4,000 in legal costs, which they were now paying in instalments.

56. In his witness statement, the Respondent gives a list of monthly expenses totalling £3,253. Amongst the expenses was a figure of £406 for mortgage repayments. It became clear in his oral evidence that this

was in respect of the mortgage on the family home only. Mr Choudhury said that it was a variable mortgage, and was going up.

57. At a late stage, it became apparent that Mr Choudhury did have, in addition to the mortgage on his family home, interest only mortgages on both of the rental properties, the repayments in respect of neither of which had been mentioned in his witness statement. The repayments were £691 per month on the Stevenage property, and £479 per month for 121 Kerridge Court. It seems that Mr Choudhury had not mentioned them in his witness statement as they were paid from the receipts from the two properties.

Submissions on quantum

58. In his submissions, Mr Penny argued that the Respondent should be seen as a professional landlord. As to the proper proportion of the maximum RRO we should award, he relied on *Aytan v Moore*. In that case, the RRO awarded against the professional landlord of a property in respect of which there were no substantial disrepair or other issues, was 85% of the maximum total. Here, there were significant issues of disrepair and fire safety.

59. Mr Penny turned, then, to *Arrow v Moore*, the second case conjoined with *Aytan v Moore*. In that case, the landlord was a professional landlord on a small scale renting out a property that had previously been his home, and who did not make his living from renting. Mr Penny submitted that Mr Choudhury was more professional than Mr Wilson, in that he had two properties and he earned at least a significant proportion of his income from letting. In Mr Wilson's case, the Upper Tribunal laid considerable stress on the failure to provide fire safety measures, which resulted in a 90% award.

60. Mr Penny's submission was, therefore, that before considering the Respondent's financial circumstances, we should have in mind at least 90%, and that an award of 100% would be justified.

61. As to Mr Choudhury's financial circumstances, Mr Penny said he had an interest in three properties against the value of which he could borrow to satisfy a high award. If necessary, he could sell the rental properties. But Mr Penny went on to argue that no reduction for financial circumstances was called for. Mr Penny argued that Mr Choudhury's bank statements indicated a higher level of income than that which Mr Choudhury had indicated, but even without that, the household income, in excess of £40,000, should be sufficient to finance a loan to pay an RRO.

62. As to conduct, even given the poor performance of the managing agent, and their dishonesty as to reporting problems, he should have been

more assiduous in supervising them. He had the option to take legal action against the agents.

63. Ms Rafique referred us to *Hallett v Parker* [2022] UKUT 165 (LC) [32], where the Upper Tribunal notes the desirability of smaller landlords engaging managing agents.

64. As to seriousness, she referred us to [37] of the same case. She argued that the facts of this case were remarkably similar to those in *Hallett*. She argued that there were three key factors which the Upper Tribunal took into account in that case. They were first, that it was the first letting to a group of tenants not constituting a single household, the condition of the property, and the speed of response once the landlord became personally aware of the issues.

65. She said that there had been no licensing requirement when Mr Duncan and Mr Wellan started their tenancy, and no intervening tenant, and thus Mr Choudhury was in the same position as Mr Hallett in that regard, at least in that Mr Choudhury had not realised until contacted by the Council that there were unrelated people sharing the property.

66. Secondly, as to condition, there were three main issues: the radiators, the window, and the leak. All three were addressed as soon as Mr Choudhury became aware. None were really health and safety issues.

67. As to fire safety, Mr Choudhury had lived in the property as the family home. When he left, he let it as it was. The law in relation to fire safety is complicated, and has achieved higher salience in recent times. Mr Choudhury again took proper steps when he personally became aware of the requirements.

68. It would be harsh to attribute all the problems with the property to the Respondent. It was in a fair state for letting. Although the relevant certificates were not given to the Applicants, they were in place.

69. Finally, Mr Choudhury promptly applied for an HMO licence when he became aware of it, and co-operated with the Council.

70. Ms Rafique referred us to another First-tier Tribunal decision involving the same managing agents (LON/00AG/HMF/2018/12; 338 Weedington Road).

71. She also reminded us that when asked to supply their agreement with the Respondent, the managing agent had sent him a standard form agreement and asked him to sign it. This was, she submitted, a further illustration of the attitude and practices of the managing agents.

72. As to the Respondent's financial circumstance, she argued that we should accept the Respondent's figures, which show that he has barely £200 a month not spoken for in terms of expenditure. She described him as a man in serious financial distress, given his family responsibilities. Any further liability arising from a further loan would create yet further financial pressure. Suing the managing agents was not a practical proposition.

73. Ms Rafique submitted that we should confine any RRO to 25%.

Determination

74. About two weeks before we heard the case, the Upper Tribunal decided the case of *Acheampong v Roman and Others* [2022] UKUT 239 (LC), which provides a structure that First-tier Tribunals should follow when coming to conclusions as to the quantum of an RRO. We were not aware of the case when we heard this application, but have taken it into account in structuring our conclusions.

75. The relevant guidance in *Acheampong* is to be found at [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)."

76. 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."

77. We accordingly consider each stage in turn.

Stage (a)

78. 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.

79. The relevant period in respect of which the RRO is sought is from 1 February 2021 to 9 January 2022.

80. It was not contested that none of the Applicants had been in receipt of Universal Credit or Housing Benefit.

81. The amounts claimed for each Applicant, with their periods of occupation, are:

Mr Duncan: £6548.42 (occupation from 1 January 2020 to the present)

Mr Wellens: £5,704.42 (occupation 1 January 2020 to 3 March 2022)

Mr Greenhalgh: £2,384.22 (occupation 1 September 2021 to present)

82. The total claimed is £14,637.06.

83. These figures are not contested.

Stage (b)

84. As noted above, we were not aware of *Acheampong* at the date of the hearing, and so did not ask the parties for evidence or submissions on the payment of utilities. However, the tenancy agreement specifies that it is the tenants responsibility to pay the utilities, and we assume that that was in fact the case. No reduction therefore falls to be made to the RRO at stage (b).

Stage (c) and stage (d)(landlord's conduct)

85. 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.

86. The second is the seriousness of this offence. This is the element that is very closely related to the assessment at stage (d), and that proximity may be particularly marked in this case. Accordingly, we consider here the conduct of the landlord element of stage (d) – that is, as Judge Cooke put it, as an "assessment of the conduct of the landlord specifically in the context of the offence itself".

87. We consider first the physical condition of the flat.

88. The most important point is the lack of appropriate fire safety measures. We conclude that it is more likely than not that the kitchen door was not a fire door. We do not discount entirely the possibility that there was one battery operated fire alarm, but even if there were, the situation as to both fire and smoke alarms was seriously below what is required of an HMO. There was no fire blanket in the kitchen. We reject Ms Rafique's attempts to minimise the significance of these omissions. As the cases make clear, failures in respect of fire safety are to be given considerable weight.

89. There were also the other disrepair issues. Some of the complaints, while no doubt justified, were of relatively minor matters, such as the marks on the walls. But there were some of significance – the radiators, the window in Mr Wellens' room and the leak above the stairs. Despite its significance in starting the process leading to these proceedings, the last of these is perhaps the least significant, in that it was addressed with at least some urgency by the managing agents, even if something under two weeks is longer than good practice might demand. The four months it took to repair the non-functioning radiator in Mr Wellens' room, and the much longer still period in respect of that in Mr Duncan's room, are clearly excessive. We accept Ms Rafique's point that these were not serious threats to health and safety. But they were matters causing considerable inconvenience, and interfered with the tenants reasonable enjoyment of the property.

90. Nonetheless, on the spectrum of conditions that are commonly to be found in unlicensed HMOs, these physical defects were not of the worst by any means.

91. We have considered how we should approach the question of whether Mr Choudhury should be considered a professional landlord or not. Some landlords are very clearly professional – see, for instance, the landlords in *Aytan v Moore*. Others may clearly not be, such as an "accidental" landlord who inherits a property with a sitting tenant. We note that in *Hallett v Parker*, it appears that the Upper Tribunal accepted counsel for the landlord's submission that Mr Hallett was a non-professional landlord (one property let for 15 years, landlord living and working abroad).

92. Mr Choudhury is not in one of other of those two clear categories. The household's income derive from his self-employment (as a taxi driver and interpreter), employment (his wife) and rental income. The latter was an important, but not the overwhelming, element of what is on any account a modest household income.

93. As to his immediate relationship with the properties in terms of management, on the one hand, Mr Choudhury clearly relied (however

unwisely) on his managing agent in respect of Kerridge Court. As in *Hallett v Parker*, the property had been the family home, which had been bought by Mr Choudhury under the Right to Buy legislation. On the other hand, he self-managed his other, nearby property.

94. Rather than considering this question as a binary one – a person either is or is not a professional landlord – we prefer to bear in mind the specific factual circumstances of the landlord in this case, recognising that whatever the label, Mr Choudhury is in an intermediate position as we have described. In doing so, we remind ourselves that not being a "professional landlord" is in any event not a free pass. An "amateur" landlord also has legal responsibilities, and should fulfil them.

95. As to the specific facts of Mr Choudhury's conduct in this case, there can be no doubt that he was badly let down by his managing agent. This is apparent from the facts of this case – we note the (limited) references to the conduct of the managing agent in the 338 Weedington Road case, but it is not necessary to place any reliance them. It is also the case that Mr Penny's criticism that Mr Choudhury did not, during the previous period, exercise adequate supervision of the managing agent, even to the extent of visiting the property with any regularity, is made out. Nonetheless, we believe his evidence that he was very largely unaware of the main issues we have described above. That that is so is consistent with the fact that once he was made aware as a result of being contacted by the Council, he took it upon himself, without significant delay, to not only apply for a licence, but also to remedy the immediate disrepair issues personally. That he did so is to his credit. He is not in the category of landlord who flouts the licensing requirements as a deliberate business model, and we do not doubt that he will adhere to the requirements of the licence in the future.

96. In coming to a conclusion as to what, at this stage, we should assess as the appropriate proportion of the maximum RRO (as required by *Acheampong*), we reject Ms Rafique's submission that the facts of this case closely mirror those in *Hallett v Parker*, in particular as to the fire safety issues and disrepair. However, we do bear in mind the Deputy President's injunction in *Hallett* at [26] that "Tribunals should … be aware of the risk of injustice if orders are made which are harsher than is necessary to achieve the statutory objectives [of the licensing regime]". Absent the fire safety issues, we would have assessed the appropriate proportion at this stage at 50%. However, the absence of adequate fire protection is a more serious aggravating factor than the (medium level) disrepair, and so we conclude a figure of 65% would be appropriate.

Stage (d)(tenants' conduct and landlord's financial circumstances

97. There was, correctly, no criticism from the Respondent of the tenants' conduct.

98. As to Mr Choudhury's financial position, we do not think that Mr Penny was raising a serious challenge to the figures that Mr Choudhury provided, even if there was some potential for somewhat higher income in the tax year starting in April 2022 than there was in previous year. Mr Penny expressly declined to allege that Mr Choudhury had mislead the tax authorities in relation to his income, in our view correctly. We found Mr Choudhury's evidence in general, and his evidence as to his financial circumstances in particular, entirely plausible. His documentary evidence clearly supported his position.

99. We take account of the fact that the household supports three children in full time education, and that one of the children has serious disabilities as a result of Down's syndrome. Mr Choudhury referred to some of the difficulties this caused the household, such as constantly disturbed sleep. The Choudhurys have also had to spend a considerable sum on achieving what a Tribunal found to be a proper level of support for their son in school.

100. Mr Penny is clearly correct to point to the fact that they do have assets, in the form of the family home and two rental properties. They are all subject to mortgages, which, in the case of the rental properties, are interest only. We do not have figures for the equity available were the mortgages to be paid off following sale. We do know that the overall figure for mortgage repayments annually was £18,922. That figure will rise. At least the mortgage on the family house is variable. We do not have the information available to us to come to a reliable conclusion as to the effect selling one of the properties would have on the household's income, but doing so is clearly not something that Mr Choudhury would choose to do unless it were forced upon him, so we can conclude that it would be disadvantageous to some degree.

101. Mr Penny argued that, apart from sale, it would be possible to borrow sufficient to satisfy the level award contended for by the Applicants on the security of the properties. That was not contested by Ms Rafique. But, as Ms Rafique did argue, there is only very limited spare money in the household budget to service new debt.

102. In the context of the specific facts of this case, we think we should reduce the RRO to reflect the financial circumstances of the Respondent. We do so by reducing the proportion by 10%

The final order

103. The final proportion of the maximum is therefore 55%. The final figures for the orders above are subject to minor rounding.

Reimbursement of Tribunal fees

104. 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

105. 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.

106. 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.

107. 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.

108. 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:** 25 November 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.