



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BK/HMF/2020/0132**

HMCTS code : **Video**

Property : **Flat E, 30 Porchester Square,
London, W2 6AN**

Applicants : **Ms AnnaValls Massip
Mr Daniele Rosato
Ms Annamaria Eros
Dr Jiakuan Xu
Ms Josefina Bourdieu
Mr Xie Lu
Ms Miaozhi Huang**

Representative : **Mr JL Bolton of Safer Renting**

Respondent : **(1) RTR Management LTD (trading
as FTL Property LTD)
(2) Dr Surinder Kumar**

Representative : **(1) did not appear
(2) Mr Evans, Ubique Legal**

Type of Application : **Application for a rent repayment
order by a tenant**

Tribunal Members : **Tribunal Judge Prof R Percival
Mrs L Crane MCIEH**

**Date and venue of
Hearing** : **28 March 2022
Remote**

Date of Decision : **29 March 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video using CVP. A face-to-face hearing was not practicable and all issues could be determined in a remote hearing.

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:

Tenant	Rent repayment order
Anamaria Eros	£6808
Josefina Bourdieu	£800
Lu Xie	£6808
Daniel Rosato	£2686
Jiakuan Xu	£6630
Zhi Huang	£6630
Anna Massip	£6352

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants together the application and hearing fees in respect of this application in the sum of £300.

The application

1. On 28 July 2020, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 (“the 2016 Act”) for Rent Repayment Orders (“RROs”) under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 8 November 2021. The application had been stayed for a period, awaiting the Upper Tribunal decision in *Gurusinghe and others v Drumlin Ltd* [2021] UKUT 268 (LC).
2. The periods to which the application relates are shown in the following table:

Tenant	Relevant occupation	Total rent paid
Anamaria Eros	01/02/2019 to 30/11/2019	£8010.00
Josefina Bourdieu	15/10/2019 to 30/11/2019	£942.0
Lu Xie	01/02/2019 to 30/11/2019	£8010.00
Daniel Rosato	01/03/2019 to 31/07/2019	£3160

Jiakuan Xu	01/02/2019 to 30/10/2019	£7800
Zhi Huang	01/02/2019 to 30/11/2019	£7800.00
Anna Massip	01/02/2019 to 31/10/2019	£7473.00

3. In accordance with the directions, we were provided with an Applicant's bundle of 319 pages. A witness statement and attachments dated 24 March 2022, comprising 24 pages, were received from the Second Respondent. No material was received from the First Respondent.

The hearing

Introductory

4. Mr Bolton of Safer Renting represented the Applicants. Mr Evans, solicitor, of Ubique Legal represented the Second Respondent. The First Respondent was not represented.

Preliminary issue: hearing in the absence of the First Respondent

5. The First Respondent did not attend, and had not substantively engaged at any time with the Tribunal. The Tribunal considered Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"), Rule 34. We were satisfied that the First Respondent had been notified of the hearing (and had been the recipient of a number of other communications by the Tribunal, including the directions, and by the other parties).
6. Mr Bolton argued that it was in the interests of justice for us to proceed. The application had been made a long time ago, and the First Respondent had had every opportunity to engage and attend. Mr Evans noted that the Companies House website recorded an active strike-out application in respect of the First Respondent. That might explain their non-attendance, and, if so, would not change in the event of an adjournment, he said.
7. We agreed with Mr Bolton that it was clearly in the interests of justice to proceed with the hearing, and we did so in accordance with Rule 34.

Preliminary issue: the admission of the Dr Kumar's witness statement

8. Just before 5.00 pm on Thursday, 24 March 2022, the Second Respondent emailed his witness statement. We raised the issue of whether we should accept the contents of the witness statement and the matters exhibited thereto. The Tribunal had read the statement *de bene esse*.

9. Mr Evans explained that his firm had been instructed at a late date, and, he said, had secured the witness statement as quickly as was reasonable.
10. It transpired that Mr Bolton had not been aware of the witness statement, in the light of its late submission (he had been on leave on Friday 25th). We adjourned to allow him to read the statement.
11. When we reconvened, Mr Bolton said that he was happy that it should be admitted. We agreed to allow the witness statement and attachments in.

Preliminary issue: the correct Respondent

12. In the hearing, we dealt with this issue after dealing with the criminal offence (see below). Mr Evans was neutral as to the criminal offence, and it was therefore convenient to deal with that issue (with Mr Evans' consent) during a period when Dr Kumar was having trouble joining the hearing, but it is more logical to deal with it at this point in this decision.
13. The evidence provided by the Second Respondent in his witness statement was to the following effect.
14. A Ms Wong, resident in Singapore, held a lease from Westminster City Council, the freeholder (as was apparent from the HM Land Registry file extract). Ms Wong was a friend of the Second Respondent, and asked him to act as HMO licensee for the property. He agreed. He subsequently established from Ms Wong that she had let the property to the First Respondent. He exhibited an agreement between Ms Wong and the First Respondent, dated 1 June 2019, to let the flat for £3,900 a month, which, he said, allowed for sub-letting. We note that the agreement was in the wrong form (it was for an assured shorthold), and it contained a term prohibiting sub-letting. He also exhibited bank statements from Ms Wong showing the First Respondent (referred to as FTL) paying the specified rent into her account.
15. Dr Kumar had never, he said, received any rent from the Applicants, or from the First Respondent. To the extent that his name and/or address appeared on tenancy agreements, or in connection with deposit protection, that was a sham, for which he blamed the First Respondent. His name had only started to appear when the local authority commenced action against the First Respondent. He produced (from, he said, Ms Wong) an email apparently including a witness statement from an officer of the First Respondent (although mis-spelling the First Respondent's trading name), purportedly in connection with such proceedings, or an appeal in respect of them. A particular statement made by the First Respondent identifying him as landlord included what was, he said, an invented email address to give a false impression.

16. After the brief adjournment for him to consider the witness statement, Mr Bolton said that it clarified the position as to the proper party against whom an RRO should be made (that is, the First Respondent), and he applied to remove the Second Respondent as a respondent.
17. After adjourning again to consider the application, we allowed it. There were inconsistencies between Dr Kumar's statement and some of the other material available, including a brief and informal witness statement produced by him in December 2020. However, in the first place, it was Mr Bolton's application, and he was entitled to direct it as he chose. Secondly, to the extent that the Tribunal might take a more inquisitorial approach than in purely adversarial proceedings, we could nonetheless see no route in the evidence which would have allowed us to conclude that there was a positive case that the Second Respondent was, indeed, the person having control or management of the property.

The alleged criminal offence

18. Mr Bolton submitted that the property constituted a building or part thereof that should have been licenced, and that it was not, contrary to Commonhold and Leasehold Reform Act 2004, section 72(1), and that accordingly an RRO should be made under Housing and Planning Act 2016, section 40.
19. He argued that there were, at the relevant time, more than five people in separate households living in the six bedroomed flat. The bundle included their tenancy agreements, and evidence of rent in each case.
20. Mr Bolton took us to an email dated 23 June 2020 to Safer Renting's case officer in which an officer of Westminster City Council states that there had been no HMO licence for the property until an application was made on 13 November 2019. That application was not effective, because the proposed licensee (Ms Wong) was not resident in the United Kingdom. As a result, the application was not accepted, and a further application was made on 3 December 2019, in which the Second Respondent was named as the licensee. That application was accepted as effective.
21. We note that the relevant test under section 254 of the 2004 Act was the self-contained flat test. Insofar as the sharing of facilities was concerned, we note that the tenancy agreements expressly state that the kitchen and bathroom (inter alia) were shared.
22. The Tribunal considered whether there might be a reasonable excuse defence (section 72(5)). In the absence of any material at all from the First Respondent, we could see no possible defence.
23. We are satisfied, beyond a reasonable doubt, that the offence was committed, on the material supplied by Mr Bolton. We accept the

evidence that it was the First Respondent who was the immediate landlord of the Applicants. Most (but not all) of the tenancy agreements give “RTR Management” as the contracting party, although it is true that that is against the heading “Landlord/agent”. More importantly, we were supplied with evidence of payment of rent by all of the Applicants. In each case, so far as we could see, wherever a rent payment was to a specified entity, it was to “RTR Management”, or a variant thereof.

24. Mr Kumar’s evidence is that Ms Wong let the property to the First Respondent for a rent of £3,900 a month. Even if the form of that agreement produced by Mr Kumar might give rise to some doubts, the bank statements of Ms Wong’s showing receipt of that monthly sum provides compelling support.
25. We note that in another first instance case brought to our attention by Mr Bolton (21a Lydford Road, London W9 3LU; LON/00BG/HMF/2020/0126, 29 March 2021), the First Respondent admitted that it was operating as the immediate landlord in what seems to have been an “rent to rent” arrangement; and that it had also been subject to a local authority financial penalty for a breach of section 72(1) in that case. We place little reliance on this case, except insofar as it negatives any suggestion that the First Respondent only ever acts as a managing agent rather than an immediate landlord.
26. We expressed some concern that there were no formal witness statements supporting and exhibiting the material upon which Mr Bolton relied. Mr Bolton argued that we should accept the clear documentary material that he had supplied in the bundle. We consider that it is fair to say that the standard directions could reasonably be read as assuming that such documentary material could be provided without the support of witness statements, and we were prepared to proceed on the basis of those materials. However, it would have been better had there been witness statements setting out the facts, if necessary, but, more importantly in this context, exhibiting the specific documents to be relied on to prove factual matters.

The amount of an RRO

27. We declined Mr Bolton’s application to adduce oral evidence from Ms Eros, who attended the hearing. No witness statement had been served.
28. Mr Bolton submitted that there was no evidence of poor conduct by the tenants. With the exception of one relatively small sum, in the context of the overall amount of rent paid, in respect of Massip (£537, in the context of total rent of £8010), there had been no arrears in respect of any of the tenants.

29. On the other hand, Mr Bolton submitted that there was poor conduct on the part of the First Respondent. While he accepted that it did not formally constitute a conviction, and so section 44(4)(c) did not strictly apply, we should take into account the finding of the Tribunal in the 21a Lydford Road case referred to above. One of the points of an RRO is to deter a landlord from further offending (*Williams v Parmar* [2021] UKUT 244 (LC), [2022] HLR 8, paragraph [43]), and so further offending after an RRO should be seen as significantly poor conduct.
30. Mr Bolton also argued that, in that case, there had been virtually no engagement with the Tribunal up until the day of the hearing itself. In this case, the lack of engagement was more serious still, as there had not been even that late attendance.
31. The moderate amount of rent arrears into which Ms Massip fell was not something we consider reaches the threshold of conduct poor enough to affect the amount of an RRO.
32. As to the First Respondent, there is no evidence of poor maintenance, overcrowding or unsafe conditions, as is often the case in RRO applications. There is, nonetheless, the matters advanced by Mr Bolton, which we accept constitute poor conduct. The most important is the persistence in committing the offence, following the previous Tribunal case.
33. The reference to conduct in section 44(4) is, we consider, broad enough to include the conduct of a landlord party before the Tribunal. But even if “conduct” in section 44(4) is to be more narrowly construed than that, the effect of that subsection is to make it mandatory for the Tribunal to consider those matters. It does not exclude us taking other factors into account, and amongst those may be a broader range of conduct, including before the Tribunal.
34. In addition to the Tribunal’s RRO decision in 21a Lydford Road, we are aware of a further appeal decision – presumably an appeal against a local authority financial penalty – in respect of this property, which is referred to in an application for costs under Rule 13 of the Rules, relating to a financial penalty appeal in respect of 21a Lydford Road (LON/00BK/HMB/2020/0042, 22 June 2021, at paragraph [8]). The Tribunal in that case (ie the Rule 13 determination) said that the First Respondent did not comply with Tribunal directions. We have a copy of the Rule 13 decision, but not of the two mentioned therein. Nonetheless, it demonstrates an ongoing pattern of non-compliance by the First Respondent.
35. We conclude that the just and reasonable approach to the RRO is to award each Applicant 85% of the maximum award possible.

36. We also grant the Applicants' application for the reimbursement of the hearing and application fees, £300 in total.

Rights of appeal

37. 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.
38. 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.
39. 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.
40. 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:** 29 March 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.

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
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

	<i>Act</i>	<i>section</i>	<i>general description of offence</i>
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.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
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.