



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

Case Reference : LON/00BJ/HMF/2022/0153

Property : 10B Comyn Road, London SW11 1PZ

Applicants : Andrew Stubbs

Respondent : Hakan Bal

Type of Application : Application for a rent repayment order by tenants

Tribunal : Judge Nicol
Mrs F Macleod MCIEH

Date and Venue of Hearing : 26th January 2023;
10 Alfred Place, London WC1E 7LR

Date of Decision : 27th January 2023

DECISION

- 1) The Respondent shall pay to the Applicant a Rent Repayment Order in the amount of £3,739.15.**
- 2) Further, the Respondent shall reimburse the Applicant's Tribunal fees of £300.**

The relevant legislative provisions are set out in an Appendix to this decision.

Reasons

1. The Applicant lived at the subject property at 10B Comyn Road, London SW11 1PZ, a 5-room flat, from 28th December 2021 to 8th June 2022. During that time, he paid a total of £3,739.15 for his occupancy.

2. The Applicant seeks a rent repayment order (“RRO”) against the Respondent in accordance with the Housing and Planning Act 2016 (“the 2016 Act”).
3. The hearing of this matter was in person and took place on 26th January 2023. The Applicant attended. The Respondent has not taken part in the proceedings at any time, despite letters, emails, texts and attempted phone calls from both the Applicant and the Tribunal, and did not attend.

The offence

4. The Tribunal may make a RRO when the landlord has committed one or more of a number of offences listed in section 40(3) of the 2016 Act. The Applicant alleged that the Respondent was guilty of having control of a house in multiple occupation which was required to be licensed but was not so licensed, contrary to section 72(1) of the Housing Act 2004 (“the 2004 Act”).
5. Before taking up occupation of the property, the Respondent gave the Applicant a guided tour. Apart from the Applicant’s room, there were four other rooms, all occupied, one by a couple. With the Applicant, this meant there were 6 people in 5 households. There was no shared living space – the shared facilities were the bathroom, WC and kitchen.
6. The Applicant’s occupancy agreement, entitled “Lodger Agreement”, was given to him and signed by the Respondent. It specified the Applicant’s liability as £693 per month. It purported to include a laundry service. The “Shared Areas” were defined as including the bathroom, lavatory and kitchen but “sitting room” was crossed out. Although it gave the Respondent’s address as that of the property, he did not live there.
7. While the Applicant lived at the property, his point of contact was either the Respondent or the agency of which the Respondent was a director, Londonwise Property. He noticed a few matters which were not up to the standard he expected from his previous experience of living in an HMO and so checked whether the local authority, the London Borough of Wandsworth, had a record of the property being licensed. There was no such record and so the Applicant contacted Wandsworth.
8. Correspondence between the Applicant and Ms Laura Curror, an Environmental Health Practitioner on the team representing the London Boroughs of Wandsworth, Merton and Richmond, shows that she inspected the property twice, once without warning to the Respondent and a second time with him in attendance. Ms Curror’s view was that the property was an HMO and she encouraged the Applicant to make his RRO application.
- 9.

10. Therefore, the Tribunal is satisfied so that it is sure that the Second Respondent has committed the offence of having control of the property which was required to be licensed but was not.

Rent Repayment Order

11. For the above reasons, the Tribunal is satisfied that it has the power under section 43(1) of the Housing and Planning Act 2016 to make a RRO on this application. The Tribunal has a discretion not to exercise that power but, as confirmed in *LB Newham v Harris* [2017] UKUT 264 (LC), it will be a very rare case where the Tribunal does so. This is not one of those very rare cases. The Tribunal cannot see any grounds for exercising their discretion not to make a RRO.

12. The RRO provisions were considered by the Upper Tribunal (Lands Chamber) in *Parker v Waller* [2012] UKUT 301 (LC). Amongst other matters, it was held that an RRO is a penal sum, not compensation. The law has changed since *Parker v Waller* and was considered in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC) where Judge Cooke said:

53. The provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in *Parker v Waller*. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances. ...

13. In *Williams v Parmar* [2021] UKUT 0244 (LC) the Upper Tribunal held that there was no presumption in favour of awarding the maximum amount of an RRO. The tribunal could, in an appropriate case, order a lower than maximum amount of rent repayment, if the landlord's offence was relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the tribunal should take into account the purposes intended to be served by the jurisdiction to make an RRO, namely to punish offending landlords; deter landlords from further offences; dissuade other landlords from breaching the law; and removing from landlords the financial benefit of offending.

14. In *Acheampong v Roman* [2022] UKUT 239 (LC) the Upper Tribunal sought to build on what was said in *Williams v Parmar*. At paragraph 15, Judge Cooke stated,

it is an obvious inference both from the President's general observations and from the outcome of the appeal that an order in the maximum possible amount would be made only in the most serious cases or where some other compelling and unusual factor justified it.

15. The current Tribunal finds it difficult to follow this reasoning. Although RROs are penal, rather than compensatory, they are not fines. Levels of

finer for criminal offences are set relative to statutory maxima which define the limit of the due sanction and the fine for each offender is modulated on a spectrum of which that limit defines one end – effectively the maximum fine is reserved for the most serious cases. In this way, the courts ensure that there is consistency in the amount of any fine – each person convicted will receive a fine at around the same level as someone who committed a similar offence in similar circumstances.

16. However, an RRO is not a fixed amount. The maximum RRO is set by the rent the tenant happened to pay. It is possible for a landlord who has conducted themselves appallingly to pay less than a landlord who has conducted themselves perfectly (other than failing to obtain a licence) due to the levels of rent each happened to charge for their respective properties.
17. In the Tribunal's opinion, there is nothing wrong with or inconsistent in the statutory regime for RROs if a particular RRO can't be increased due to a landlord's bad conduct. It is the result which inevitably follows from using the repayment of rent as the penalty rather than a fine. The maximum RRO, set by the amount of the rent, is a cap, not the maximum or other measure of the gravity of the parties' conduct. A landlord's good conduct or a tenant's bad conduct may lower the amount of the RRO and section 44(3) finds expression in that way.
18. Judge Cooke went on in *Acheampong* to provide guidance on how to calculate the RRO:
 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. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.
 - 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 whose relative seriousness can be seen from the relevant maximum sentences on conviction) 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).

19. The whole of the amount paid by the Applicant for his occupation of the property was £3,739.15.
20. In relation to utilities, the Tribunal again finds it difficult to understand Judge Cooke. It is common for a landlord to include some of the utility charges within the rent. However, this does not only benefit the tenant. Landlords do not include such services in the rent out of charitable goodwill but for sound commercial reasons such as increasing the chances of achieving a letting, attracting and retaining desirable tenants, and maintaining control of the identity of suppliers to the property. The same reasoning applies to the provision of furnishings, including white goods, but Judge Cooke does not extend her reasoning to such matters. Obviously, tenants control the rate of consumption of such services but this is necessarily built in to the landlord's calculations when offering them within the rent.
21. Further, the Tribunal cannot identify any support within the statute for this approach to utility charges. Nor does Judge Cooke. On the contrary, the legislation refers to "the rent" and not "the net rent". "Rent" has a clearly defined meaning in the law of landlord and tenant, namely "the entire sum payable to the landlord in money" (see *Megarry on the Rent Acts*, 11th Ed at p.519 and *Hornsby v Maynard* [1925] 1 KB 514). It is also stated in *Woodfall: Landlord and Tenant* at paragraph 7.015 that, "At common law, the whole amount reserved as rent issues out of the realty and is distrainable as rent although the amount agreed to be paid may be an increased rent on account of the provision of furniture or services or the payment of rates by the landlord." Parliament would have had this in mind in enacting the legislation.
22. In any event, there is no evidence as to what was included in the Applicant's payments or what proportion of it might be attributable to utilities. Therefore, there are no deductions to be made on this count.
23. The next step is to consider the seriousness of the offence. While the Respondents' reliance on their agents' advice does not constitute a reasonable excuse for committing the offence, it is relevant to their degree of culpability. It is accepted that the Respondents were well-intentioned and would likely have followed through on their original intention to obtain a licence but for their son having moved on and their agents having misled them.
24. When the Tribunal has the power to make a RRO, it should be calculated by starting with the total rent paid by the tenant within time period allowed under section 44(2) of the 2016 Act, from which deductions are permitted under section 44(3) and (4) – the Tribunal must take into account the conduct of the parties, the landlord's financial circumstances and whether the landlord has been convicted of a relevant offence.

25. On the basis of the Applicants' unopposed evidence, the gravity of the offence in this case is higher up the scale.
- 26.
27. The Respondents provided no evidence, including of their financial circumstances or any conduct by themselves or the tenants.
28. In the circumstances, the Tribunal concluded that the Applicants should be awarded a RRO in the full amount of £4,356.
29. The Applicants paid £300 in Tribunal fees and asked the Tribunal to exercise its power to order the Respondent to reimburse them. The application has succeeded in full. In the circumstances, the Tribunal is satisfied that it is appropriate to order reimbursement of the fees.

Name: Judge Nicol

Date: 27th January 2023

RIGHTS OF APPEAL

1. 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.
2. 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.
3. 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.
4. 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.

Appendix of relevant legislation

Housing Act 2004

Section 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.
- (2) A person commits an offence if—
 - (a) he is a person having control of or managing an HMO which is licensed under this Part,
 - (b) he knowingly permits another person to occupy the house, and
 - (c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.
- (3) A person commits an offence if—
 - (a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and
 - (b) he fails to comply with any condition of the licence.
- (4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—
 - (a) a notification had been duly given in respect of the house under section 62(1), or
 - (b) an application for a licence had been duly made in respect of the house under section 63,and that notification or application was still effective (see subsection (8)).
- (5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—
 - (a) for having control of or managing the house in the circumstances mentioned in subsection (1), or
 - (b) for permitting the person to occupy the house, or
 - (c) for failing to comply with the condition,as the case may be.
- (6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.
- (7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).
- (7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

- (a) For the purposes of subsection (4) a notification or application is “effective” at a particular time if at that time it has not been withdrawn, and either—
- (a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or
 - (b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.
- (b) The conditions are—
- (a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or
 - (b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.
- (c) In subsection (9) “relevant decision” means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

- (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
 - (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 by 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
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).

Section 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 —
- the offence relates to housing that, at the time of the offence, was let to the tenant, and
 - 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—
- the offence relates to housing in the authority's area, and
 - 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.

Section 43 Making of 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 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—
- section 44 (where the application is made by a tenant);
 - section 45 (where the application is made by a local housing authority);
 - section 46 (in certain cases where the landlord has been convicted etc).

Section 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 the 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>
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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
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an offence mentioned in row 3, 4, 5, 6 or 7 a period, not exceeding 12 months,
of the table in section 40(3) 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 paid 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, and
 - (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

Section 52 Interpretation of Chapter

- (1) In this Chapter—
- “offence to which this Chapter applies” has the meaning given by section 40;
 - “relevant award of universal credit” means an award of universal credit the calculation of which included an amount under section 11 of the Welfare Reform Act 2012;
 - “rent” includes any payment in respect of which an amount under section 11 of the Welfare Reform Act 2012 may be included in the calculation of an award of universal credit;
 - “rent repayment order” has the meaning given by section 40.
- (2) For the purposes of this Chapter an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent.