FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2021/0032**
Property	**:**	**Flat 13, Lakeview Estate, Old Ford Road, London E3 5TB**
Applicant	**:**	**Efstathios Portaritis**
Representative	**:**	**Flat Justice CIC**
Respondent	**:**	**Derek Patrick Burgess**
Representative	**:**	**Mr DA Burgess, Respondent's father**
Type of Application	**:**	**Application for a rent repayment order by tenants**
Tribunal	**:**	**Judge Nicol** **Mrs L Crane MCIEH**
Date and Venue of Hearing	**:**	**9th August 2021;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**11th August 2021**

DECISION

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1) **The Respondent shall pay to the Applicant a Rent Repayment Order in the amount of £6,300.**

2) **The Respondent shall further reimburse the Applicant his Tribunal fees totalling £300.**

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

Reasons

1. The Applicant was a tenant at the subject property at Flat 13, Lakeview Estate, Old Ford Road, London E3 5TB, a 2-bedroom flat with shared bathroom, toilet and kitchen facilities. The rent was £525 per month.

2. The Respondent is the leaseholder of the property. He manages it himself with the substantial assistance of his father, Mr Derek A Burgess. It is the only property either of them let out to tenants.

3. The Applicant seeks a rent repayment order against the Respondent in accordance with the Housing and Planning Act 2016 ("the 2016 Act") in the sum of £6,300 (12 months x £525).

4. There was a face-to-face hearing of the application at the Tribunal on 9th August 2021. The attendees were:

   - The Applicant;
   - Mr George Penny from Flat Justice, representing the Applicant; and
   - Mr DA Burgess, the Respondent's father, representing him in accordance with written authority provided by email.

5. The documents available to the Tribunal consisted of the following in electronic form:

   - A bundle compiled by Flat Justice;
   - A bundle compiled on behalf of the Respondents;
   - A reply, also from Flat Justice.

6. Mr DA Burgess also provided, in paper form:

   - A letter dated 5th January 2009 from Mr Jawed, a consultant at the Royal London Hospital, stating that the Respondent had sustained severe injuries from a motorbike accident. Mr DA Burgess further stated that this happened on the way to his work at a good job with Price Waterhouse Coopers but the resulting disabilities had prevented him from continuing with his career. Mr DA Burgess and his wife downsized, and took on a substantial mortgage, to provide the Respondent with funds to buy and let out the subject property. The Respondent now lives with his parents.
   - A print-out from the HM Revenue & Customs website purporting to show that the Respondent's taxable income for the year 2020-21 was £13,653.

7. Mr Penny provided a short written skeleton argument. He also wrote to the Tribunal by letter dated 7th August 2021, ahead of the hearing, saying the Applicant was concerned for his safety if he were to be at the Tribunal at the same time as the Respondent because, on 14th February 2021, he texted the Applicant to say, "U don't know it yet but u made the wrong choice against the wrong person." As Judge Nicol was leaving the

Tribunal building after the hearing, one of the security guards alleged that Mr DA Burgess had threatened the Applicant.

8. These allegations have not formed any part of the Tribunal's reasoning for its determination, not least because the latter allegation happened after the hearing. Also, it is far from clear that the offending text was intended as a threat of violence as opposed to expressing a determination to oppose any legal proceedings. However, it is important for the Respondent and his father to understand that any threats or harassment are not acceptable and, if any were proved to have happened, the Applicant has serious legal remedies available to him against them. At the very least, it is very ill-advised to say anything that could be construed as a threat or as harassment.

The offence

9. The Tribunal may make a rent repayment order when the landlord has committed one or more of a number of offences listed in section 40(3) of the 2016 Act. The Respondent was under the impression that the local authority had to have prosecuted him first because the local authority, the London Borough of Tower Hamlets, had told him that in a letter. In fact, that advice is incorrect.

10. The Applicant alleged that the Respondent was guilty of having control of and managing a House in Multiple Occupation (HMO) which is required to be licensed but is not so licensed, contrary to section 72(1) of the Housing Act 2004 ("the 2004 Act").

11. The Applicant says that Mr Glen Johnson and Ms Louise Garrett occupied the other two rooms at the property while he was there from 16th January 2020 to 20th January 2021. The Respondent argued that the Applicant's tenancy started earlier, on 4th January 2020, but nothing turns on that.

12. Mr Christopher Vincent, Housing Standards Officer with the Environmental and Trading Standards department of the London Borough of Tower Hamlets, provided the following information in an email dated 2nd December 2020:

    (a) He inspected the property on 26th November 2020.

    (b) The property is a 2-bedroom flat occupied by 3 persons, each occupying a room as bedsit accommodation. The living room is being used as a separate room occupied by a tenant.

    (c) On that basis, the property is required to be licensed under the Tower Hamlets Additional Licensing scheme.

    (d) He understood the property to have been occupied as such for a period of more than 6 months.

    (e) The property requires smoke detectors in each of the rented rooms, a heat detector in the kitchen, an upgraded smoke detector in the hallway,

fire doors, with thumb turn locks, to the kitchen and the rented rooms, a basin within the WC and heat level control valves to the radiators.

(f) There was water damage to kitchen units and worktop.

(g) As an HMO, the property should have contact details for the landlord clearly displayed in the common area, clear identification for each room, dedicated/allocated cupboards in the kitchen and regular cleaning by or on behalf of the landlord of the common parts.

(h) The Respondent had been informally given a chance to address these matters.

13. The Respondent did not dispute that the property should have been licensed and that it was not. Mr DA Burgess accepted at the hearing that the offence had been made out although he emphasised that the Additional Licensing scheme had only come into effect after the property had first been let, albeit before the Applicant became a tenant. He said that it had never been his son's intention to create an HMO but he accepted the property was a licensable HMO and that he knew of the circumstances which made it one.

14. The Tribunal is satisfied so that it is sure that the required elements of the offence of having control of an HMO which is required to be licensed but is not so licensed have been made out.

15. Mr DA Burgess protested that the licensing scheme was introduced purely to help a financially-stressed local authority raise funds. However, all he had to support this was cynicism, rather than evidence. It is the Tribunal's understanding that the income from any such licensing scheme is used to fund that scheme itself so that it does not provide the authority with any more income than it already had.

16. Mr DA Burgess also pointed out that the majority of the building in which the subject property is located is let by Clarion Housing Association which is not subject to the HMO regime, despite some properties being let to multiple individuals or families pursuant to the local authority's temporary housing duties to homeless persons. However, this is an objection to the legislation itself and is not a matter for the Tribunal.

17. The Tribunal is satisfied that there is no basis for the Respondent to claim that he had a reasonable excuse for permitting the HMO to exist without obtaining a licence.

Rent Repayment Order

18. 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 Rent Repayment Orders on this application. The Tribunal has a discretion not to exercise that power. However, 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.

19. 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.

20. The law has changed since *Parker v Waller* and was considered in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC) where Judge Cooke said:

> 9. In *Parker v Waller* … the President (George Bartlett QC) had to consider the provisions of sections 73 and 74 of the 2004 Act, which gave the FTT jurisdiction to make rent repayment orders; but they have been repealed so far as England is concerned and now apply only in Wales.
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> 10. Section 74(5) of the 2004 Act provided that a rent repayment order in favour of an occupier had to be "such amount as the tribunal considers reasonable in the circumstances". … With regard to orders made in favour of an occupier, therefore, he said at paragraph 26(iii):
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> > "There is no presumption that the RRO should be for the total amount received by the landlord during the relevant period unless there are good reasons why it should not be. The RPT must take an overall view of the circumstances in determining what amount would be reasonable."
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> 11. But the statutory wording on which that paragraph is based is absent from the 2016 Act. There is no requirement that a payment in favour of the tenant should be reasonable. … Paragraph 26(iii) of *Parker v Waller* is not relevant to the provisions of the 2016 Act …
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> 12. That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent.
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> 13. In *Parker v Waller* the President set aside the decision of the FTT and re-made it. In doing so he considered a number of sums that the landlord wanted to be deducted from the rent in calculating the payment. The President said at paragraph 42:
>
> > I consider that it would not be appropriate to impose upon [the landlord] an RRO amount that exceeded his profit in the relevant period.
>
> 14. It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament's intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord's profits was – as the President acknowledged at his paragraph 26 – not the only purpose of a rent repayment order

even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied.

15. That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord has spent on the property during the relevant period. That expenditure will have repaired or enhanced the landlord's own property, and will have enabled him to charge a rent for it. Much of the expenditure will have been incurred in meeting the landlord's obligations under the lease. The tenants will typically be entitled to have the structure of the property kept in repair and to have the property kept free of damp and pests. Often the tenancy will include a fridge, a cooker and so on. There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order.

16. … the practice of deducting all the landlord's costs in calculating the amount of the rent repayment order should cease.

19. The only basis for deduction is section 44 itself and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence.

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. …

21. On the basis of the decision in *Vadamalayan*, 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).

22. In *Ficcara v James* [2021] UKUT 38 (LC) the Upper Tribunal judge, Martin Rodger QC, expressed concerns (at paragraphs 49-51) whether it is correct to use the full amount of rent paid as the "starting point".

However, he said that this issue is a matter for a later appeal. In the meantime, the Tribunal must follow the guidance in *Vadamalayan*.

23. In *Awad v Hooley* [2021] UKUT 0055 (LC) Judge Cooke also expressed concerns (at paragraph 40) that using the total rent as the starting point means it cannot go up, however badly a landlord behaves, thereby limiting the effect of section 44(3). However, with all due respect, this stretches too far the analogy between RROs on the one hand and criminal penalties or fines on the other.

24. Levels of fines in each case 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. However, an RRO is penal but not a fine. The maximum RRO is set by the rent the tenant happened to pay, not by the gravity of the offence. 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.

25. 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, as happened in *Awad v Hooley* when the tenant withheld their rent, and that is how section 44(3) may find expression.

26. The amount paid by the Applicant in rent was £6,300 (12 months x £525 monthly rent). In considering the amount of the rent repayment order, 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. The Respondent has not been convicted of any such offence.

27. The Applicant accused the Respondent of the following defaults:

(a) The issues identified by Mr Vincent in his letter of 2nd December 2020 (referred to above);

(b) The Respondent did not provide a copy of the Gas Safety Certificate and, on the Applicant's request for one, instead provided a British Gas checklist;

(c) The Respondent appeared to admit not having provided an Electrical Installation Condition Report;

(d) He had also not provided a How to Rent Guide;

(e) There was no evidence of any fire risk assessment;

(f) There were no fire fighting devices such as fire blankets or extinguishers; and

(g) The Respondent did not protect the Applicant's deposit.

28. The Respondent claimed to have not had any complaints against him since he started letting the property in 2012 but that carries little weight if the allegations are true. Mr DA Burgess said that the allegations were denied, save that he admitted that there was no fire risk assessment or fire fighting devices because the Respondent had only complied with general fire safety regulations for tenanted properties, rather than the additional requirements for an HMO. He tried to introduce further evidence of the existence of a Gas Safety Certificate and an Electrical Installation Condition Report but he had no excuse for why they were not in the Respondent's bundle and the Tribunal refused to hear that further evidence because it was simply too late in the proceedings to allow it in.

29. In any event, the Tribunal obtained little assistance from the allegations. The fact that the Respondent failed to licence the property without anything approaching an excuse is more than sufficient to establish that the management of the property was deficient. Mr DA Burgess indicated that legal representation was expensive but obtaining basic advice from a solicitor or a professional managing agent is not. At the very least, joining a landlords' representative organisation would provide access to useful information. The Respondent cannot rely on his inexperience, his ignorance or the complexity of current regulations to avoid his obligations as a landlord.

30. Mr DA Burgess sought to emphasise his son's limited financial circumstances. From the limited evidence he put forward, the Tribunal accepts that the Respondent was in a tragic motor accident which has had debilitating long-term consequences. Further, his taxable income for the most recent full year was clearly low. However, the Tribunal has not seen any accounts for this or any other year or an income and expenditure account which would give a fuller picture. There is simply insufficient evidence to support any suggestion that the Respondent cannot afford to pay an RRO of the amount claimed. It may well be difficult to pay but a penal sum is supposed to have an impact – it would not be much of a sanction if it were only ever set at a rate that could be paid easily.

31. Moreover, if the Respondent finds it difficult to pay the RRO, his full financial circumstances could be considered during any enforcement process, at which point his ability to pay should be taken into account. Fuller evidence may be provided at that point.

32. In the circumstances, the Tribunal is satisfied that there is no basis for reducing the amount claimed and that a RRO should be made for £6,300.

33. The Applicant also sought reimbursement of his Tribunal fees, £100 for the application and £200 for the hearing, under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Given the fact that the application has been successful, and in the light of all the circumstances of this case, the Tribunal has concluded that it is appropriate to order reimbursement.

Name: Judge Nicol **Date:** 11th August 2021

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.

(1) 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.

(2) 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.

(3) 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 —

(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.

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—

(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).

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.

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 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.