FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/HMK/2020/0038P**
Property	**:**	**12 Hadley St, London NW1 8SS**
Applicants	**:**	**Esme Roberts, Kate Algar, Megan Li, Christopher Duffy and Paul Clayton**
Representative	**:**	**In person**
Respondents	**:**	**Nathaniel Thomas Jones**
Representative	**:**	**Byroni Kleopa of counsel instructed by Jaffe Porter Crossick LLP Solicitors**
Type of application	**:**	**Application for a rent repayment order**
Tribunal	**:**	**Judge Adrian Jack, Tribunal Member Sue Coughlin MCIEH**
Date of Hearing	**:**	**12 November 2021**

DECISION

Covid-19 pandemic:
Description of hearing: This has been a remote hearing which has not been objected to by the parties. The form of hearing was **V: CVPREMOTE**. The Tribunal had an electronic bundles and written submissions from both sides.

After the case was heard and after the Tribunal had reached its decision, the Tribunal was told by staff that there was another case where the respondent was appealing against financial penalties imposed by the local counsel. The Tribunal has not looked at any documentation concerning that matter and has ignored the existence of the other case. As stated, the Tribunal determined this matter before the existence of the other case was brought to its attention.

The application, the property and the law

1. The applicants by an application made on 1st December 2020 apply for a rent repayment order ("RRO") under section 41 of the Housing and Planning Act 2016. Pursuant to section 40(1) of the 2016 Act, the Tribunal has the power to make an RRO where the landlord has committed a specified offence. The offences are set out in section 40(3). These include having control or management of an unlicensed house in multiple occupation ("HMO"), which is an offence contrary to section 72(1) of the Housing Act 2004.

2. Section 72 provides, so far as material:

> (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… 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…
> (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…

3. The property comprises a house over three floors. When it was let to the tenants it was configured to provide five bedrooms. The tenants had not previously known each other and were otherwise unrelated. With effect from 8th December 2015, it has been a requirement of the

London Borough of Camden that all HMOs within the borough be licensed. At all material times the property was unlicensed.

4. By an agreement in writing dated 20th August 2018 between "Crown London Lets & Co" as landlord and Esme Roberts, Megan Li, Kate Algar, Paul Clayton and Craig Williams as tenants, the property was let for a term of one year. At the end of the agreement Mr Williams moved out and was substituted by Christopher Duffy. By an agreement dated 20th October 2019 the same landlord let the property to the four original tenants plus Mr Duffy for a further year.

5. The property came to be in a poor state of repair with burst pipes and a leaking roof. This in turn rendered the electrics dangerous. The front door swelled, which made entry and exit difficult and was a risk in the event of fire. The landlord provided a gas safety certificate, albeit tardily, but an electricity safety certificate was never provided. The tenants moved out on 20th June 2020.

6. Subsequent to the tenants leaving, Camden Council did license the property, but only for occupation by two persons. This is because the configuration of the property made exiting in the case of a fire a danger to occupiers.

7. It was conceded by Ms Kleopa, counsel for the respondent, that, but for the defence under section 72(5), an offence had been committed by him under section 72(1). However, she argued that he did have a reasonable excuse under section 72(5). As she put it in her skeleton argument:

> "11. The Respondent was advised by the Agent that the Property would be occupied by a single family which would not have required a[n] HMO license. The Agent was employed for the letting and management of the Property pursuant to the Management Agreement. The Agent was responsible for, inter alia:
>
> a. Advising on Health and Safety and legislative matters;
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> b. Preparation of the AST;
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> c. Arrangement of electric and gas safety checks and
>
> d. Maintenance of the Property.
>
> 12. After handing over the Property to the Agent for management, the Respondent had no direct dealings with the Applicants other than receiving rent. A copy of the relevant bank statements are [exhibited].
>
> 13. The Applicants purport to have corresponded with the Respondent (under the name Nigel Jones). This is incorrect. Firstly, the Respondent's name is Nathaniel Jones. Secondly, on the evidence provided by the Applicants at Exhibit K, the

Applicants addressed their messages to 'David'. This is clearly not the Respondent despite the label of the contact as 'Nigel Landlord'. David is an employee of the Agent who was managing the Property pursuant to the Management Agreement. The Applicants set out in the Application the email address londoncentralco@gmail.com and the contact number 07448715399 as belonging to the Respondent. This is incorrect, the Respondent's email address is [a Hotmail address is given] and contact number is [a different mobile number is given]. It is clear that the Applicants were contacting the Agent. The Applicants never contacted the Respondent directly.

14. The Agent did not pass on any communications to the Respondent regarding any issues at the Property. The Respondent has attempted to contact the Agent by telephone and the Respondent's solicitor has attempted by email to discuss these matters but no response has been received.

15. It is submitted that the Respondent was misled by the Agent. The Respondent would not have needed to apply for a[n] HMO had the Property been occupied by a single family as he was led to believe was the case by the Agent. Had the Respondent been made aware of the various issues at the Property by the Agent and/or the Applicants then he may have been able to ascertain that the Property was not occupied by a single family and made the necessary HMO licence application. It is the actions and/or omissions of the Agent that led to the failure to understand that there was a need to obtain a[n] HMO licence. The failure to obtain a[n] HMO license was not as a result of the Respondent's ignorance.

16. It is submitted that as a result of the above the Respondent has a defence of reasonable excuse and the Tribunal therefore cannot find beyond reasonable doubt that the Respondent committed an offence."

8. We agree that proving an offence under section 72(1) must be proved to the criminal standard, so that we are sure. We do not agree that the applicants have any burden in respect of the defence under section 72(5). It is for the landlord to prove on balance of probabilities that he had a reasonable excuse for having control of or managing the house in the circumstances mentioned in section 72(1): *IR Management Ltd v Salford City Council* [2020] UKUT 81 (LC), [2020] HLR 24. We consider we should follow the Upper Tribunal decision in preference to the earlier cases of *City of Westminster v Mavroghenis* (1983) 11 HLR 56, *Polychronakis v Richards & Jerrom Ltd* [1998] JPL 588, [1998] Env LR 347 and *Rowland v Thorpe* [1970] 3 All ER 195, which were all on materially different legislation.

9. In this regard we note that section 72(1) is an offence of strict liability: *Regina (on the application of Mohamed and another) v Waltham*

Forest London Borough Council [2020] EWHC 1083 (QB), [2020] 1 WLR 2929. The applicants do not have to prove any particular state of mind, or knowledge, on the part of the landlord. Quite apart from Ms Kleopa's concession, we are sure that, unless the respondent can prove on balance of probability the defence under section 72(5), he is guilty of the offence under section 72(1).

Reasonable excuse

10. We turn then to the question of reasonable excuse. The tenants' case is that they learnt of the availability of the property from a website called "Spare Room". They did not know each other prior to their agreement to live in the same house together. They were shown the property by a man named "David", who they originally understood to be the landlord. The 2018 agreement was signed in the presence of David and a man whom they understood to be called "Nigel Jones". Nigel Jones signed the tenancy agreement as "N Jones". They identified the respondent, Nathaniel Jones, who appeared at the hearing by CVP, as the man who signed the tenancy agreement.

11. Ms Kleopa objected to this form of identification. The tenants purporting to identify the respondent as the man who signed the tenancy was, she submitted, effectively a "dock identification", which is prohibited in criminal cases. The current application was a quasi-criminal matter with the criminal standard of proof. The Tribunal, she submitted, should not allow the tenants to identify the respondent simply from seeing him on CVP.

12. In our judgment, this submission has an air of unreality about it. In criminal investigations, when an issue of identification arises, the police are obliged to follow Code D issued under the Police and Criminal Evidence Act 1984, which provides for matters such as police line-ups (now-a-days mostly done with video clips of people looking similar to the suspect) for identification purposes. There is no means of that occurring in this Tribunal, yet it cannot be that identification evidence cannot be adduced before this Tribunal unless Code D is observed.

13. Further a failure by police to observe the protocols gives the Court the power to exclude the evidence under section 78 of the 1984 Act. It is at least questionable whether the power given to the Tribunal by rule 18(6)(b)(iii) of our Procedure Rules to exclude evidence where it would be "unfair" to admit it goes as far as section 78. In particular, in a criminal case the Court will in balancing a risk of injustice occurring always favour the defendant over the prosecution, since the risk of injustice to a defendant is much greater than the injustice to the prosecution from a breach of Code D; in a civil case, the Court or Tribunal must balance the interests of both parties evenly.

14. However, we do not need to determine this issue as regards the law of criminal evidence. The defence of reasonable excuse is something

decided on the ordinary civil test. There is in our judgment no need to import detailed (and unworkable) criminal norms into Tribunal procedure. We agree with Ms Kleopa that it is not wholly satisfactory to decide issues of identification where the parties are only participating by CVP, however, the Tribunal in our judgment has to do the best it can based on such evidence as it before it.

15. We shall therefore determine the question as to whether it was the respondent who signed the tenancy agreement on ordinary principles. This will involve us considering the applicants' evidence against the respondent's denial of having been there. We shall have to make a decision on this after taking a holistic view of the evidence in the round. We remind ourselves that it is important not to attach too much weight to a witness's demeanour.

Determination of the facts

16. In the current case, there is no evidence, beyond the oral testimony of the respondent, that Crown London Lets & Co exists at all. On its face, it appears at best to be a trading name. Certainly, no incorporated company has been identified with that name or anything similar. The respondent says he received a flyer from the firm to which he responded. The flyer was not in evidence. The respondent produces a management agreement with the firm (named as "Crown UK Lets") dated 29th August 2018, but it has no address, telephone number or VAT number on it.

17. The respondent says that the firm was providing full management services, including arranging repairs when necessary. His contact at the firm was called David, whom he met twice at the property. He paid a commission to the firm in October 2018 of £2,000 in cash. He did not receive any receipt for this cash payment. He did not know why the firm did not charge a 10 per cent commission, which is what was recorded in the agency agreement. He was not aware that the tenants had changed in October 2019. He never paid any further commission to the firm on the 2019 renewal. The firm never charged him for any repairs and never asked for a float for minor repairs.

18. In the exhibit to his witness statement he produces a bank statement dated 14th November 2019 which shows a cash withdrawal of £2,000 on 17th October 2019. The respondent accepted that this was unrelated to the property. There is no evidence of a £2,000 cash withdrawal at any date in 2018. He said he thought he declared the rental income for tax (with the £2,000 claimed as a deduction), but did not produce any tax return or tax assessment to bear this out.

19. The tenants' case is that the landlord appeared to take steps to conceal his identity. There are admittedly differences of recollection. Ms Roberts thought that "David" and the respondent, who had given his name as Nigel Jones, were the same person. Mr Clayton thought they were brothers. At any rate, if the tenants rang the number they had

been given when problems arose, they spoke to various people at what appeared to be a small construction company run by the respondent and members of his family. When the roof leaked, this company sent a young man whom they understood to be the respondent's son. The respondent denied having a son.

20. Looking at the evidence holistically, we prefer the evidence of the applicants to that of the respondent. We do not accept that there is a firm called Crown London Lets & Co or Crown UK Lets. The respondent's description of the financial arrangements with the firm is extremely implausible. We cannot accept that a firm providing what the respondent says was a full management service would only take a one-off commission of £2,000. Firstly, that sum is far too low for the services ostensibly being supplied. Secondly, no float was taken nor money demanded for the modest repairs which were done. Thirdly, any managing agent would charge a fresh commission for the renewal of a tenancy for another year. As we have pointed out, there is no independent evidence of the firm's existence at all.

21. We do not need to resolve whether "David" was an alias of the respondent or a relative. We accept the evidence of the applicants that it was the respondent who signed the 2018 and 2019 tenancy agreements when he attended at the property. The respondent's case that he never attended the property at all whilst it was let is improbable. We attach little weight to the differences in the various signatures on different documents: they are all more or less illegible squiggles.

22. We reject the respondent's case that he was unaware that the property was let to five separate individuals rather than one family. We therefore also reject his case that he did not believe he required a licence for an HMO.

23. We have a discretion under section 43(1) of the 2016 Act as to whether, once we have found a relevant offence proven, it is right to make an RRO at all. In our judgment, however, this was a bad case of a landlord failing to obtain the necessary licence. We consider it appropriate to make an order. Accordingly, the respondent is in principle liable for an RRO.

The amount of the rent repayment order

24. We turn then to the amount of rent repayment order which we should make. Section 44 of the 2016 Act provides:

> "(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…

(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."

25. The maximum is the amount of the rent paid in the relevant period less the appropriate figure for universal credit. In the current case none of the tenants received universal credit. Further the tenants paid the utilities bills and the council tax, so there are no further deductions to consider. It is agreed that the amount of rent paid in the period July 2019 to June 2020 was £51,996. However, it is not automatic that the Tribunal makes an order in that amount. That figure is just the maximum. Further Craig Williams was not a party to the application, so we cannot order any rent repayment in respect of his contribution.

26. The payments made were:

Month	K.Algar	E.Roberts	P.Clayton	M.Li	C.Duffy	C.Williams	Total
June 2020	£940	£855	£900	£805	£833 -		£4333
May 2020	£940	£855	£900	£805	£833 -		£4333
April 2020	£940	£855	£900	£805	£833 -		£4333
March 2020	£940	£855	£900	£805	£833 -		£4333
Feb 2020	£940	£855	£900	£805	£833 -		£4333
Jan 2020	£940	£855	£900	£805	£833 -		£4333
Dec 2019	£940	£855	£900	£805	£833 -		£4333
Nov 2019	£940	£855	£900	£805	£833 -		£4333
Oct 2019	£940	£833	£900	£805 -		£855	£4333
Sept 2019	£940	£833	£900	£805 -		£855	£4333
Aug 2019	£940	£833	£900	£805 -		£855	£4333
July 2019	£940	£833	£900	£805 -		£855	£4333

27. Fancourt J, the President of the Lands Chamber of the Upper Tribunal held in *Williams v Parmar* [2021] UKUT 0244 (LC):

"24. It… cannot be the case that the words 'relate to rent paid during the period…' in section 44(2) mean 'equate to rent paid during the period…' It is clear from section 44 itself and from section 46 that in some cases the amount of the RRO will be less

than the total amount of rent paid during the relevant period. Section 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and section 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.

25. However, the amount of the RRO must always 'relate to' the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary 'starting point' for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in section 44(4).

26. In this regard, I agree with the observations of the Deputy President of the Lands Tribunal, Judge Martin Rodger QC, in *Ficcara v James* [2021] UKUT 0038 (LC), in which he explained the effect of the Tribunal's earlier decision in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC). *Vadamalayan* is authority for the proposition that an RRO is not to be limited to the amount of the landlord's profit obtained by the unlawful activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in section 44(4)."

28. We accept Ms Kleopa's submission that the "starting point" is not the full amount of the rent received. However, it is certainly open to the Tribunal to make a 100 per cent order in an appropriate case. We need to look at the factors in section 44(4).

29. Ms Kleopa in her skeleton says:

23. It is submitted that there is no conduct on behalf of the Respondent that is reprehensible for the purposes of any RRO.

24. The allegations made in relation to disrepair have not been evidenced. There is no evidence that the Respondent and/or the Agent were ever put on notice of the purported disrepair and the Respondent was therefore not given an opportunity to repair the issue within a reasonable period. It is submitted that given the

evidential gaps in the Applicants case, comments in relation to disrepair should not be given any weight.

25. The Respondent received a letter from the Council dated 14 January 2021 informing him that the Property required a[n] HMO license… The Respondent actioned this immediately. In February 2021 he was arranging for gas and electricity safety certificates to be procured… and the application for a licence was made on 9 March 2021. A copy of the HMO License is [exhibited].

26. The Respondent is clearly not a rogue landlord. As soon as he was made aware of the need for a HMO license, the Respondent instructed solicitors and made an application for a HMO licence. This is indicative of his conduct as a landlord. Notably, the licence application was made 5 months before he was made aware that the Applicants had made this Application.

Conduct of the Tenant

27. The Applicants are clearly litigious. They issued a claim against the Respondent in the County Court for alleged failure to protect the deposit. This matter is still ongoing and a hearing to set aside the default judgment has been listed for 30 November 2021.

28. The Applicants made this Application and failed to serve a copy on the Respondent at the correct address for service. The Respondent was therefore not made aware of the Application until 5 August 2021, 9 months after the Application was made and two weeks before the Application was listed for trial. The Applicants knew that the Property address was not the address at which the Respondent resided as this was his rental property. As a result, the Respondent had to make an application dated 9 August 2021 for the hearing to be vacated and for new directions to be issued. Amended directions were issued by Judge Carr on 16 August 2021.

Financial Circumstances of the Landlord

29. The Property is subject to a mortgage in the sum of £250,000 of which monthly payments are made in the sum of £1,550. He also paid fees to the Agent in the sum of £2000.

30. The Respondent is in a difficult financial position. The rental income from the Property was the Respondent's sole income. The Respondent moved in with his mother at her property in order to be her full-time carer in summer 2018. Unfortunately, the Respondent's mother passed away in early September 2021 (which coincided with the Respondent finding out about this Application). The Respondent did not pay rent to

his mother but does pay expense and bills which he continues to do.

31. Given these circumstances, the Respondent would find it impossible to make payment of any RRO.

Landlord Conviction

32. The Respondent has not been convicted of any offence and a HMO license has in fact been granted."

30. We do not consider that the Respondent's belated application for an HMO licence is on the particular facts of this case a mitigating factor. This is because an HMO licence would never have been granted for the occupation of the property by the five tenants. As Camden Council says:

> "This property is not suitable for use as a[n HMO] due to the ground floor layout where the stairs to the upper floor is accessed from the living room. This effectively makes all first and second floor bedrooms 'Inner Rooms'. The layout of the flat presents a significant fire risk and therefore the maximum permitted number [of occupants] is two."

31. We reject the respondent's case that the tenants did not inform him of the need for repairs. We find on balance of probabilities that they did.

32. We also reject the respondent's case in the skeleton that there is a £250,000 mortgage on the property. We have seen the land register for 12 Hadley St. The property is unencumbered. In evidence the respondent said that the mortgage was in fact over his mother's property. If that is right, then we assume it will be paid off as part of the winding up of her estate following her sad passing. We do not accept that the respondent has adequately proven that he is impoverished. As we noted he has not produced any tax returns, so we do not know what his income has been. Given the amount of rent he was receiving from the property in the tax years 2018-19 and 2019-2020, he was obliged to make tax declarations. Even if he had shown that he lacked other income, the property is unencumbered, so he should have no difficulty raising a loan in order to satisfy an RRO.

33. As to the tenants' conduct, we fail to see how the tenants can be described as "clearly litigious". The only litigation is their claim for return of their deposit, a claim which can only be brought in the County Court. Moreover, the respondent has adduced no evidence before us as to what possible defence he might have to the tenants' claim to their deposit.

34. As to the address for service of the respondent, the respondent gave no address for service on the tenancy agreements. The Hadley Street address was the only address they knew for the respondent. Given that they had understood him to have called himself Nigel Jones rather than

Nathaniel Jones, attempts to find a different address would have been difficult. His address on the land register for the property was out of date. The applicants flagged up in their application that the respondent had not lived at the property whilst they were living there. It is not reasonable in our judgment to expect them to have done more.

35. We note in this context that, if the procedural rules which apply in the civil courts applied in the Tribunal, there would have been good service. By CPR rule 6.8(a) service can be effected at a place where the defendant carries on business, in this case the business of running an HMO. Further CPR rule 6.9(2) Table para 1 allows service at a defendant's last known residence. The respondent accepted that Hadley Street had been the family home at which he had resided. In any event, there has in fact been no prejudice to the respondent from the application coming to his attention late. He has been able fully to defend himself.

36. We accept that the respondent has no convictions. This is in our judgment the only mitigating factor.

37. Looking at the matter in the round and weighing these matters we consider that this is a bad case of a landlord running an unlicensed HMO. It is appropriate in the exercise of our discretion to award 100 per cent of the maximum. Accordingly, we make a rent repayment order in the sum of £51,996 less £3,420 (Mr Williams' contribution), a total of £48,576.

Costs

38. We have a discretion as to who should pay the fees payable to the Tribunal. These comprise an issue fee of £100 and a hearing fee of £200. The applicants have won. In these circumstances in our judgment it is appropriate that the respondent should pay these costs.

DETERMINATION

a) The Tribunal makes a rent repayment order whereby the respondent shall pay the applicants £48,576.00, divisible between the applicants as set out in the table in paragraph 26 above.

b) The respondent shall pay the applicants the fees payable to the Tribunal in the sum of £300.

Name: Judge Adrian Jack **Date:** 25 November 2021