First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/OOHA/HMF/2021/0020**
Property	**:**	**8 Hayes Place,** **Bath,** **BA2 4QW**
Applicants	**:**	**(1) Adam William Cooper Lloyd-James** **(2) Emily Mary Merrifield** **(3) Rowan Alexander Vincent** **(4) Rhiannon Jordan Grinter**
Represented by		**Represent Law UK (solicitors)**
Respondents	**:**	**(1) Graham Stephen Joy** **(2) Chris Silver (otherwise known as Chris da Silva)**
Application	**:**	**Applications by tenants for Rent Repayment Orders following an alleged offence committed by the Respondents for having control or management of an unlicensed House in Multiple Occupation ("HMO") – Section 43 of the Housing and Planning Act 2016 ("the 2016 Act")**
Date of application	**:**	**28th July 2021**
Tribunal	**:**	**Bruce Edgington (lawyer chair)** **Bruce Bourne MRICS** **Patricia Gravell**
Date of decision	**:**	**25th October 2021**

DECISION

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1. The claim against the 2nd Respondent Chris Silver (otherwise known as Chris da Silva) be and is hereby dismissed.

2. Tribunal makes Rent Repayment Orders against the 1st Respondent Graham Steven Joy which are payable on or before 4.00 pm on the 22nd November 2021 in favour of:

   (a) the 1st Applicant Adam William Cooper Lloyd-James in the sum of £453.79

(b) the 2nd Applicant Emily Mary Merrifield in the sum of £567.18 in respect of the rent paid by her on behalf of herself and the 3rd Applicant, Rowan Alexander Vincent and
(c) the 4th Applicant Rhiannon Jordan Grinter in the sum of £262.16.

3. No order as to costs save that the 1st Respondent shall re-pay to the Applicants' solicitors the fee of £100 paid to the Tribunal in respect of this application by the same date i.e. by 4.00 pm on the 22nd November 2021.

Reasons

Introduction

4. Rent Repayments Orders ("RROs") require landlords and/or other people in control of properties who have broken certain laws to repay rent paid either by tenants or by local authorities and are intended to act as a deterrent to prevent offending landlords profiting from breaking such laws.

5. The orders were originally made pursuant to the **Housing Act 2004** ("the 2004 Act") but this application is made under the later provisions contained in the 2016 Act. Section 41(1) of the 2016 Act says that "*A tenant…..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*".

6. Section 40 of the 2016 Act sets out the offences and prefaces the definition by saying "*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*". One of those offences described is under section 72(1) of the 2004 Act i.e. "*control or management of unlicensed HMO*" and this is the offence relied upon by these Applicants.

7. The Tribunal made a directions order on the 7th September 2021 timetabling the case to a video hearing because of the Covid pandemic. The Applicants had already agreed that an oral hearing was not necessary as the matter could be determined on the papers and they recently confirmed such agreement. The Respondents have also now agreed.

8. The directions order required the Respondents to file and serve their evidence by the 28th September 2021 but they failed to do so. When questioned about this the 1st Respondent e-mailed the Tribunal on the 12th October to say that he had COVID in early September and had only just recovered. He said that he was 'convalescing until 12th November' and wanted an adjournment of the hearing fixed for the 27th October so that he could take advice and respond fully to the application. He said that he was in the 'vulnerable group with diabetes, a quadruple PCR heart condition, high blood pressure and currently under Liverpool Heart and Chest Hospital Consultants'.

9. The Applicants objected to an adjournment. In essence the Respondents' case seemed to be that the Applicants had deliberately contrived a situation to enable the application for RROs to be made and that no such orders should be made. They had made no suggestion that the offence of controlling or managing an HMO without a licence had not been committed.

10. The evidence supplied by the Applicants included a statement from an officer in the relevant local authority containing a statement of truth which gave clear evidence that this property required an HMO licence at the commencement of the tenancies granted to the Applicants and that an application for such a licence was received on the 23rd September 2020. This evidence has never been contested by the Respondents, i.e. they clearly realised that the property needed an HMO licence and accepted that it did not have one. Thus it appeared clear, and was uncontested, that an offence had been committed which meant, in accordance with the 2016 Act and the case law, that the only matter to be determined was the amount of any such order.

11. In view of this the Tribunal wrote to the parties wondering whether they could agree that the case be dealt with on the papers, which is what the Applicants had said from the outset. This was (a) partly due to the 1st Respondent's health situation because there was no clear evidence about when he would be recovered enough for an oral hearing and (b) the fact that only a relatively small amount of rent had been paid whilst the offence was being committed. In other words, proportionality was a relevant, although not the overriding, factor.

12. The Respondents accepted this and agreed to the matter being resolved on the papers. They then sent a series of e-mails and statements to the Tribunal and the Applicants were able to respond to these. They then made an application for a costs order under rule 13(1)(b) of the **Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013** ("the 2013 Rules"). The amount of such costs is said to be £3,587.16. No application has been made under sub-rule 13(2) but the Tribunal can, and does, order that the initial fee of £100 paid to the Tribunal shall be paid back to the Applicants' solicitors.

13. The Applicants' positions with regard to rent paid is:

    (a) The 1st Applicant, Mr. Lloyd-James, occupied from 8th August to 12th October 2020 and paid rent of £600 per calendar month. He paid a total of £1,277.42 plus a rent deposit of £600. The Upper Tribunal case of **Kowalek v Hassanein Ltd.** referred to below determined that monies paid as rent deposit could not form a 'repayment' of rent if they did not become rent when the offence was being committed. The HMO licence application was received by the housing authority on the 23rd September 2020 which is when any offence stopped being committed. Thus, the rent paid between 8th August and 22nd September was 46 days @ £19.73 per day = £907.58. The daily rate is calculated by multiplying the monthly rent by 12 and then dividing that figure by 365.

    (b) The 2nd and 3rd Applicants, Ms. Merrifield and Mr. Vincent, occupied from 8th August to 8th October 2020 and paid joint rent of £750 per calendar month which came out of Ms. Merrifield's bank account. The rent paid between 8th August and 22nd September was 46 days @ £24.66 per day = £1,134.36.

    (c) The 4th Applicant, Mr. Grinter, occupied from 25th August to 25th October 2020 and paid rent of £550 per calendar month. The rent paid between 25th August and 22nd September was 29 days @ £18.08 per day = £524.32.

Jurisdiction

14. Section 41 of the 2016 Act says that the Tribunal has jurisdiction if "*the offence was committed in the period of 12 months ending with the day on which the application is made*". In this case, the evidence is that all 3 of the Applicants' tenancy agreements were dated 5th August 2020 and all except Mr. Grinter started to occupy on the 8th August 2020. He occupied from 25th August. The evidence from Paul Carroll, an Environmental Health Officer from Bath and North East Somerset Council, is that the property required an HMO licence on the 8th August.

15. If an application for an HMO is made, then as from the date of the receipt of the application, this provides a defence to any alleged offence (section 72(4) of the 2004 Act). Until an application for a licence is made, the offence continues to be committed on a daily basis. In this case, the evidence is that the application for an HMO licence was received by the council on the 23rd September 2020. The Tribunal has to be satisfied that an offence has been committed using the criminal standard of proof i.e. beyond a reasonable doubt.

16. Section 44 of the 2016 Act says that the RRO can "*relate to rent paid during….a period, not exceeding 12 months, during which the landlord was committing the offence*".

17. The Applicants' evidence from the local authority is that there were 5 residents and the e-mails attached to the 1st Applicant's statement do confirm that someone called Emily Ganderton was living there on the 28th July 2020. She was joined by the Applicants. It is clear from the tenants' addresses as stated in the occupation agreements that they all came from different addresses. In other words they were all from different households when they came to live at the property.

The Evidence

18. The Applicants all filed written statements, including statements of truth, which recorded that both Respondents were named in the tenancy agreements as landlords although the Land Registry evidence is that only Graham Stephen Joy is the freehold owner. There was some evidence, particularly from Mr. Lloyd-James and Mr. Grinter, that the property was not in the best of condition and that Graham Joy was not as helpful as he could have been. However all 4 Applicants say that the property was in good condition at the end of the tenancies.

19. The rent they had each paid in the 12 month period was as stated above.

Conclusion as to Primary Liability

20. The Tribunal is reminded of the words of Judge Cooke in the Upper Tribunal case of **Paulinus Chukwuemera Opara v Marcia Olasemo** [2020] UKUT 96 (LC) when she criticised a First-tier Tribunal of being over cautious in considering the words 'beyond reasonable doubt'. She said this:

> "*…For a matter to be proved to the criminal standard it must be proved 'beyond reasonable doubt'; it does not have to be proved 'beyond any doubt at all'. At the start of a criminal trial the judge warns the jury not to speculate about evidence that they have not heard, but also tells*

them that it is permissible for them to draw inferences from the evidence that they accept…".

21. On the evidence produced and discussed above, the Tribunal is satisfied beyond a reasonable doubt that an offence was being committed by the 1st Respondent as freehold owner of the building between the 8th August and 22nd September 2020. The application for an HMO licence was received on the 23rd September when the defence to the offence came into being.

Discussion as to Amount Payable

22. On the question of quantum, the 2016 Act changed the way in which Tribunals should consider the calculation of an RRO. Under the 2004 Act, the Tribunal's calculation had to be tempered by a requirement of reasonableness. For example, the landlord should only be ordered to repay any profit element from the rent. As was confirmed in the Upper Tribunal case of **Vadamalayan v Stewart** [2020] UKUT 183 (LC), section 44 of the 2016 Act says, in effect, that the Tribunal should no longer consider such matters as what profit would have been earned by the rent paid. In other words, expenses incurred by the landlord as a result of obligations to keep a property in repair, insured etc. under the terms of an occupancy agreement would have had to be incurred in any event and should not be deducted.

23. The starting point is therefore the actual rent paid during the relevant period. Such matters as the parties' conduct or the landlord's financial circumstances can be used to assess any claim. There is no actual evidence of financial hardship on the part of the 1st Respondent. He has been asked to give any details of financial hardship on 2 occasions. He says that he is a pensioner receiving £700 per month but he adds "*without my wife's income and her assistance, I would struggle somewhat*". At the last minute, he has provided some evidence of his own modest income in addition to his pension but he has still given no details of his wife's income and assistance.

24. As to the parties' behaviour, the 1st Respondent simply says that "*we did not have any understanding of HMO license regulations until the council contacted us after the lodgers were given notice. We are not professional landlords, we do not own properties*". He goes on to say that the application for an HMO licence was withdrawn because they decided not to let out their house any longer. It has now been sold.

25. The Applicants make some fairly harsh allegations about the 1st Respondent and his behaviour. Strangely, the allegations in paragraph 9 of the statements of both Mr. Lloyd-James and Mr. Grinter are identical in every detail alleging that he was "*rude, dishonest and showed severe reluctance to carry out repairs/maintenance*". There are 7 sub-paragraphs with identical wording which the Tribunal has some difficulty in accepting. How 2 people who do not appear to have known each other before can relate a series of facts covering more than one side of A4 paper in identical language in 2 witness statements is hard to believe.

26. In order to answer allegations made by the 1st Respondent, the Applicants' solicitors submitted 3 recordings of conversations which took place on the 18th August 2020 i.e. 10 days after the first 3 Applicants started occupation. The 1st Respondent has taken objection to the use of these recordings and the Tribunal will therefore only refer to the

parts that support the 1st Respondent's case. These conversations are clearly being recorded and the 1st Applicant introduces himself, the 3rd Applicant, the 1st Respondent and at least one other, who cannot be identified, as being present. They last about 55 minutes.

27. The conversations talk about what is happening at the property and how it is to be managed long term. They are in friendly terms and bear no relationship to the wording in the 2 written statements referred to above. There are no demands for work to be done. The 1st Respondent says that he is definitely not living at, and will not be living at the property despite what is said in the occupancy agreements and the conversations are really discussions about how the day to day management is to be undertaken.

Conclusion as to the Amount of any Order

28. The Tribunal is aware of another First-tier Tribunal case relating to the top floor flat at 9 Dover Place, Bristol BS8 1AL. This is the case of **Ahmed and others v Rahimian** CHI/00HB/HSD/2020/0002 which was determined by Regional Judge Tildesley OBE.

29. Another First-tier Tribunal decision is not binding on this Tribunal. However, this Tribunal agrees with that decision and reasoning. It sets out at length the law and reasons for a determination of about half of the maximum amount which could have been awarded i.e. £10,000 ordered as opposed to the maximum of £19,803 which could have been awarded.

30. Judge Tildesley OBE in **Ahmed** said, in awarding £10,000 (paragraphs 102 & 103);

> "*This is not a case which justifies an award of the maximum amount of £19,803.00. The Tribunal normally considers such an award where the evidence shows that the landlord was a rogue or criminal landlord who knowingly lets out dangerous and sub-standard accommodation. The Respondent did not meet that description….The Tribunal here is dealing with two sets of decent honourable persons who are separated by the fact that the Respondent failed to licence the HMO and thereby committed an offence…*"

31. In the subsequent Upper Tribunal case of **Kowalek v Hassanein Ltd.** [2021] UKUT 143 (LC), the Deputy Chamber President considered another First-tier Tribunal ("FtT") case where such Tribunal had awarded about 50% of the total rent paid. The points on which permission to appeal were granted did not include a consideration of the proportion of rent to be repaid but, nevertheless, the Upper Tribunal, in reciting the FtT's determination, made no comment to suggest that the proportion was incorrect in a case where the general conduct of the parties was not particularly bad on either side.

32. This Tribunal determines that a similar proportion of the rent paid should be ordered in this case. Despite the slight conflict between the parties about some relatively small problems with the property, there is no question of the 1st Respondent being a rogue or criminal landlord letting out dangerous and sub-standard accommodation. The 1st Respondent accepted without reservation that an HMO licence should have been applied for and it was applied for within a fairly short time.

33. As far as the 2nd Respondent is concerned, the Tribunal has some difficulty in understanding why he was included as a Respondent. It is clear from the bank statements provided that all the rent was paid to the 1st Respondent and as these are rent re-payments orders, it is difficult to see what evidence there is to suggest that rent was paid by the Applicants to the 2nd Respondent. The application as far as the 2nd Respondent is concerned is therefore dismissed.

Costs

34. The law relating to rule 13(1)(b) of the 2013 Rules was fully considered in the Upper Tribunal case of **Willow Court Management Company (1985) Ltd. v Alexander** [2016] UKUT 290 (LC) which dealt with 3 separate appeals. The Deputy Chamber President and the First-tier Tribunal President, in her role as an Upper Tribunal Judge, sat together and gave guidance as to how to interpret rule 13(1)(b) of the 2013 rules.

35. The first issue to be determined is whether the Respondent acted unreasonably in conducting his defence or the proceedings themselves. Even if unreasonable behaviour is determined, the rule says that the Tribunal **may** make a costs order. The reason for this is that First-tier Tribunal proceedings are not what is commonly referred to as 'costs shifting' proceedings. In other words there is no general rule, as in the courts, that the losing party pays the costs of the winning party. Nor is there a rule that unreasonable behaviour must result in a costs order.

36. The Applicant submits that the unreasonable behaviour is, in summary, that he failed to comply with the Tribunal's directions order, has been untruthful about his means and has attempted to mislead the Tribunal.

37. In the main case dealt with by the Upper Tribunal in **Willow Court**, the management company lost and the other party felt that costs should be awarded under rule 13. The First-tier Tribunal agreed and made the order. In allowing the appeal against that order, the Upper Tribunal said:

> "*61. In reaching its conclusion on costs we consider that the Tribunal erred in two important respects. Firstly, it accorded too much weight to the fact that the Management Company lost at the substantive hearing. Secondly it applied a standard of unreasonableness which fell well below the threshold that we consider to be applicable in these cases*
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> *62. Although in some cases, the fact that a party has been unsuccessful before the Tribunal in a substantive hearing might reinforce a view that there has been unreasonable behaviour, that failure cannot be determinative on its own. The residential property division of the First-tier Tribunal is a costs shifting jurisdiction by exception only and parties must usually expect to bear their own costs…*"

38. It went on to say:

> "*66. We also consider that the decision of the FTT in this case illustrates why a staged approach to awarding rule 13 costs is required. Here the FTT decided that there had been unreasonable behaviour (stage 1) but*

did not then go on to consider whether, in its discretion, it ought to make an order or not (stage 2). Instead it appears that having found unreasonable behaviour the FTT moved straight to considering the quantum of the costs….".

39. The first thing to be determined is the nature of the alleged unreasonable conduct. Willow Court confirmed that the definition of unreasonable conduct is still, in essence, that set out by the then Master of the Rolls in **Ridehalgh v Horsefield** [1994] Ch 205. At pages 232 and 233 in that judgment, 'unreasonable' is said to be "*conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But cannot be described as unreasonable simply because it leads in the event to an unsuccessful result*".

40. In this case, the Applicants have started the process and the statement of case supporting the application asks for orders that 3 months' rent is repaid to each Applicant. At that time, they knew that the application for an HMO licence had been lodged on the 23rd September 2020 and therefore 3 months' rent was not liable to be repaid. The harsh allegations in 2 of the Applicants' statements are not supported by the Applicants' recordings of conversations between the 1st Respondent and at least 2 of the Applicants.

41. Furthermore, the statement of case lodged with the application asks that rent repayment orders be made in favour of both Emily Mary Merrifield (not Merrfield as the solicitors keep saying) and Rowan Alexander Vincent for 3 months at £750 per month. The occupation agreement provided in respect of those 2 Applicants is a single agreement with those Applicants being required to pay a total of £750 per month in rent. The bank statements show that only Ms. Merrifield paid the rent although she presumably obtained half of this back from Mr. Vincent. This is not known and not relevant when considering a rent re-payment order.

42. Accordingly, there were matters to be resolved by the Tribunal and if the Respondents had done absolutely nothing i.e. there had been no conduct, let alone unreasonable, then the Applicants would have had to pay for the hearing and any representation. In view of the wording of the application and the statements, the Respondents would clearly have been justified in making representations. As it is, the Respondents have withdrawn the need for a hearing but ask the Tribunal and the Applicants to consider written representations.

43. The Tribunal is not satisfied that any conduct on the part of the Respondents has satisfied the **Ridehalgh** test. The Tribunal therefore finds that the Respondents did not act unreasonably in defending or conducting the main proceedings. Even if the Tribunal had been so satisfied, it finds that the costs claimed by the Applicants have not been more than they would have had to incur in any event. Furthermore, the Applicants' solicitors have not considered the proper test as set out in **Willow Court**.

44. It is a 2 stage process whereby if unreasonable behaviour is proved then there has to be a calculation of the amount of additional costs actually caused by such behaviour. The cost of preparing the application and the evidence in support, for example, would clearly

not be claimable in this case. Also, the fact that the Respondents were clearly entitled to make submissions and prepare evidence about the unjustified parts of the claim plus the concession by the Respondents that a hearing was not needed would have to be taken into account.

45. In these circumstances, the rule 13(1)(b) application is refused.

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Judge Edgington
25th October 2021

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. 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.

iv. 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.