FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/HMF/2022/0089**
Property	**:**	**48 Hopton Road, London, SW16 2EN**
Applicants	**:**	**(1) Yasmin Thorman** **(2) Chloe Johnson** **(3) Rebecca Brown** **(4) Katherine Johnson** **(5) Chloe Thompson** **(6) Maisie Whalley**
Representative	**:**	**Mr C Neilson, Justice for Tenants**
Respondent	**:**	**Ms F M Woram**
Representative	**:**	**Mr T Morris of counsel**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mr A Lewicki BSc (Hons), MBEng, FRICS**
Date and venue of Hearing	**:**	**4 November 2022** **10 Alfred Place**
Date of Decision	**:**	**21 February 2023**

DECISION

Orders

(1) The Tribunal makes a rent repayment order against the First Respondent to Ms Yasmin Thorman of £12,300, to be paid within 28 days.

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

The application

1. On 15 March 2022, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for Rent Repayment Orders ("RROs") under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 31 May 2022.

2. In accordance with the directions, we were provided with an Applicant's bundle of 289 pages and a reply of 182, and a Respondent's bundle of 112 pages.

The hearing

Introductory

3. Mr Neilson of Justice for Tenants represented the Applicants. Mr Morris of counsel represented the Respondent.

The alleged criminal offence

4. The property is a three-storey detached house. During the relevant period, there were six bedrooms, a kitchen and four bathrooms.

5. The Applicants allege that the Respondent was guilty of the having control of, or managing, an unlicensed house in multiple occupation contrary to Housing Act 2004 ("the 2004 Act"), section 72(1). The offence is set out in Housing and Planning Act 2016, section 40(3), as one of the offences which, if committed, allows the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

6. The Applicants case is that the property was at all times occupied by five or more persons living in two or more persons and satisfied the standard test under section 254(2) of the 2004 Act, and therefore required a mandatory licence (Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018, article 4).

7. The Respondent accepted that the property required an HMO licence at the relevant time, and was not licensed. It was not argued that there was a reasonable excuse.

8. The only issue that did arise in respect of the commission of the criminal offence was that the Respondent argued that there was a period during which there were not five or more people for whom the property was their only or main residence, and that accordingly, during that time, an HMO licence was not required and so the offence was not committed.

9. We heard evidence from each of the Applicants as to their occupation of the property. The Applicants were all young professional women. Two of the Applicants said that they had spent Christmas 2020 with their parents, expecting to spend only the Christmas and new year period there. However, in both cases, London was affected by the partial ("third tier") lockdown imposed in early January 2021, and they were thus required to (or in any event, did), stay at their parents' homes. Although neither of the Applicants could give exact dates for the period they spent at their parents' houses, Mr Morris suggested that, taking a broad brush approach, we should proceed on the basis that that period lasted for two months. Two of the three other Applicants visited their parents' homes for a short period over Christmas and the new year, but Mr Morris did not submit that these visits compromised the status of the property as their only or main residence.

10. In evidence, the two Applicants who had spent periods of up to about two months away from the property said that most of their clothes and possessions remained at the property, they did not change their address for correspondence, so, for instance, bills were sent to the property, they remained registered to vote, and with a GP, there, and always intended to return.

11. Mr Neilson argued that the proper approach to the standard of proof in this context was that it was for the Applicants to prove to the criminal standard that, for at least one day during the relevant period, the property constituted an HMO. That, he argued, founded our jurisdiction to consider the matter. Once we had been convinced to the requisite standard that that was the case, the standard of proof in respect of the proper period to be fixed for the duration of the criminal offence was the civil standard. He cited *Williams v Parmar* [2021] UKUT 244 (LC) at paragraph [31], for the proposition that a First-tier Tribunal

> "is not required to be satisfied to the criminal standard on the identity of the period specified in section 44(2). Identifying that period is an aspect of quantifying the amount of the RRO, even though the period is defined in relation to certain offences as being the period during which the landlord was committing the offence."

12. We find this proposition difficult to understand, and if it were necessary, we would consider ourselves bound by the later account of the nature of the criminal offence in section 72(1) set out by the Deputy President in *Marigold and Others v Wells* [2023] UKUT 33 (LC) at paragraph [40]:

> "The offence of having control of or managing an unlicensed HMO contrary to section 72(1) of the 2004 Act is a continuing offence which is committed by the person having control or managing on each day the relevant HMO remains unlicensed".

13. The necessary implication of the Deputy President's explanation is that, for a period to be one "during which the landlord was committing the offence" (section 44(2) of the 2016 Act), it is required that we find that the offence was committed on every day during that period, and to make such a finding, we must apply the criminal standard of proof.

14. However, it is not necessary for us to take that approach. Mr Morris argued that we need not consider the issue. The burden of proof was relevant to proving facts. The question before us was one of law – during the agreed physical absences, was the property the Applicants only or main residence? We accept Mr Morris' argument. There is no factual dispute. Rather, it is the legal consequence of uncontested factual evidence that is in issue.

15. As to the substance, Mr Morris argued that the relevant test was whether the property was the relevant Applicants' "only or main residence" at the relevant time (the definition of the standard test in section 254(2)(c) of the 2004 Act). He cited the following passage from *Ujima Housing Association v Ansah* (1998) 30 HLR 831 at paragraph [23]:

> "The respondent was no longer in physical occupation of Flat B and the onus was upon him to establish that he was still occupying the flat as his principal home. Whether he was doing so is not, in my judgment, to be determined by the subjective intention or motives of the person claiming still to have an assured tenancy, but by an objective assessment of his actions and intention."

16. That case concerned the expression "only or principle home" in respect of assured tenancies under the Housing Act 1988. Mr Morris submitted that the meaning of the two terms must be the same. He also quoted a passage in the Encyclopaedia of Housing Law at 1-4182.307 to the effect that in an HMO-like setting, if a person was physically absent from the property and was staying elsewhere, it was much more likely that the other property was his or her main residence than would be the case in the context in which the security of tenure of the first property was in issue.

17. Our understanding of Mr Morris' submissions in their final form was that he moved away from the identification of "only or main residence" with "only or principal home". Rather, he came to argue that the notion of "objective assessment of … intention" was not relevant to the question of "residence" in the context of this legislation. It was, he argued, that where one was residing, or living, was a matter of objective fact. In discussion of hypothetical examples, he asserted that if someone owned two properties, a main house and a holiday home, and went to the holiday home for two or three months in the summer, and while there undertook their ordinary work, they would, during that period, be residing, or living, in the holiday home, and thus it would, for that period, be their residence.

18. We reject Mr Morris' submissions. We think the correct approach is, at least when one is considering a period away from the property in question of the sort, and length, at issue here, to judge whether a person intends to return to the property in question. Insofar as *Ujima* emphasises "objective assessment", it is a judgement to be made by considering objective indicia of attachment to a place as one's home, rather than (merely) an assertion of a subjective mental state of intending.

19. Even if Mr Morris is right that the holiday-home stayer is living in or residing at the holiday home for the summer, and that that means that it is his or her residence then, that is not sufficient to make out the Respondent's case. For it to be possible for somewhere to be one's *main* residence, it must be possible to have more than one residence. So, in the first place, a residence (noun) cannot be confined to where one is living or residing (in Mr Morris' sense) at any one time. Secondly, even if the two Appellants were residing at their parents' house, and so it was (a) residence of theirs, the property was also a residence of theirs. The question would then become which was their main residence. And the answer can only be the one they stayed at most of time, that they considered their permanent home, where they kept their possessions, provided as their postal address and so forth.

20. Further, even if it were conceded that a move away for this sort of period of time might raise the issue in normal times ("might", as the question would in any event require further investigation), these were not normal times. All over the country – indeed, perhaps at somewhat different times, all over the world – people were staying away from their only or main residence as a result of the global Covid-19 pandemic. In our view it is immaterial whether, as a matter of strict law, the Applicants were permitted to return to their home, or whether the guidance in force at the time suggested they should not travel, or merely that, in the circumstances of the pandemic, members of an extended family would want stay together for a longer period than would usually be the case for a visit. For any of those reasons, a comparatively protracted absence from a property could not be properly interpreted as a relinquishing of that property as one's home.

That was the case here, and we have no hesitation in rejecting the submission that the Applicants were, in these unique circumstances, away so long that the property was no longer their main or only residence as a matter of substance.

21. But in any event, the objective indicia available to us suggest that the Applicants concerned did indeed have a settled intention to return to what they still regarded as their permanent home. Each visited their parents with a bag of clothes appropriate for a normal, brief visit. There was no question of making arrangements about post, the electoral roll, their GP and so on that would indicate an intention to move. The fact that they stayed longer than was originally envisaged was clearly because of what amounts to emergency circumstances. There may be other circumstances in which it might be clear that someone had moved away, but had not made such arrangements, but this is not that case.

22. We conclude that, beyond a reasonable doubt, the Respondent was guilty of the offence in section 72 of the 2004 Act on every day of the relevant period.

The discretion to make an RRO

23. Mr Morris submitted that the making of an RRO, once the criminal offence was established, was discretionary, and we should exercise our discretion not to do so. As Mr Morris correctly points out, section 44(3) of the 2016 Act provides that the tribunal "may" make an RRO where we are satisfied to the criminal standard that a relevant offence has been committed, and we have a discretion to make or not make an order*: Newham London Borough Council v Harris* [2017] UKUT 264 (LC).

24. We decline Mr Morris' invitation to exercise our discretion not to make an order.

25. At paragraph 30 of the case to which we were referred, Judge McGrath said

> it will be a very rare case where a Tribunal does exercise its discretion not to make an order. If a person has committed a criminal offence and the consequences of so doing are prescribed by legislation to include an obligation to repay rent or housing benefit then the Tribunal should be reluctant to refuse an application for a rent repayment order.

While this case concerned the pre-2016 Act jurisdiction, we consider that the principle that the Tribunal should be very slow to exercise a discretion not to make an order continues to apply.

26. To the extent that Mr Morris relied on the fact that the letting agent advised the Respondent that she did not need a licence (see paragraph

55 below), he does so on a basis that evidently would not pass the stipulations as to when such advice could amount to a reasonable excuse set out in *Aytan v Moore* [2022] UKUT 27 (LC), [2022] HLR 29 at paragraph [40]. He was, in our view, clearly right not to make a reasonable excuse argument. We do not exclude the possibility that bad advice by an agent could be relevant to the exercise of our discretion to make or not make an RRO, but the circumstances would have to be very exceptional for us to do so, where the bad advice did not amount to a reasonable excuse, and we cannot envisage circumstances in which that might occur.

27. Otherwise, he relies on the personal circumstances of the Respondent. Even where, as is the case here, the personal circumstances of the landlord are exceptional, the first call must be to consider them in the context of the amount of an RRO, given the express terms of section 44(4) of the 2016 Act, and our undoubted general discretion to take account of any relevant matters beyond those specified in that sub-section. This is not, we conclude, a case in which the circumstances of the Respondent are *so* extreme that we should take the truly exceptional step of exercising our discretion not to make an RRO.

The amount of the RRO

28. In considering the amount of an RRO, the Tribunal will take the approach set out in *Acheampong v Roman and Others* [2022] UKUT 239 (LC) at paragraph 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. …
> (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 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)."

29. We add that at stage (d), it is also appropriate to consider any other circumstances of the case that the Tribunal considers relevant.

30. In respect of the relationship between stages (c) and (d), in *Acheampong* Judge Cooke went on to say at paragraph [21]

> "I would add that step (c) above is part of what is required under section 44(4)(a) [conduct of the parties]. It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked."

31. As to stage (a), by sections 44(2) and (3) of the 2016 Act, the maximum possible RRO is the rent paid during a period of 12 months, minus any universal credit (or Housing Benefit – section 51) paid during that period.

32. In the light of our findings as to the criminal offence, the result is that the relevant period for the purposes of section 44(2) is for the whole of the period from 15 June 2020 to 14 June 2021.

33. None of the Applicants were in receipt of the relevant benefits.

34. Ms Thorman took responsibility for paying the rent to the Respondent, collecting contributions from each of the other Applicants to do so. The way in which the Applicants put the claim in the statement of case is that the total rent for the period paid by Ms Thorman "is claimed on behalf of herself and the other Applicants". That total is £49,200.

35. Where a single tenant paid over the whole of the rent of the property, albeit on behalf of the other tenants, we think that it is permissible, in terms of section 44(2), for a single RRO to be made in favour of the paying tenant. Since the rent was actually received by the landlord in that form, we consider that it is capable of amounting to the "rent paid during the period" to which the RRO must "relate". It is also the case that the making of individual RROs in respect of each of the tenants, which would relate to their real contribution to the rent, would properly reflect the terms of section 44(2). In situations like that in this case, such orders would more closely represent the real financial state of affairs between the tenants. In effect, each tenant individually paid their own rent, which was then transferred to the landlord via the bank account of the single paying tenant.

36. In general, we consider that the latter option is the more appropriate one. In addition to more closely reflecting the real economic relations involved, it would avoid the necessity of a further stage of redistribution of funds from the paying tenant to the others, which could itself, not inconceivably, give rise to disputes.

37. However, we did not canvass this issue with the parties, and the application was clearly put to us in the terms of the first option. Accordingly, we think we should adjudicate it on that basis, and make a

single RRO for the combined rent in favour of the paying tenant, Ms Thorman.

38. The calculation of the sum is not challenged by the Respondent. The maximum possible RRO is £49,200.

39. As to stage (b), the tenancy agreement provided that the Applicants pay all utility bills, so there is no deduction to be made for payment by the landlord.

40. We turn to stage (c). In assessing the seriousness starting point under stage (c), there are two axes of seriousness. The first is the seriousness of the offence, compared to the other offences specified in section 41 of the 2004 Act. The offence under section 72(1) is significantly less serious than those in rows 1, 2 and 7 in the table in section 40 of the 2016 Act, and we take that into account.

41. We turn to the seriousness of the offence committed by the Respondents compared to other offences against section 72(1), the second axis of seriousness covered by stage (c).

42. We heard considerable evidence in relation to fire safety and disrepair. The Applicants also submitted that we should treat the Respondent as a professional landlord. Although for the reasons given in paragraph 30 above, the distinction is somewhat arbitrary, we deal with complaints about work being done during the course of the tenancy under stage (d) rather than stage (c).

43. As to fire safety, the Applicants case was that there were no fire doors, no fire escape notices, and no mains-wired smoke alarms. There was also no carbon monoxide alarm.

44. The Respondent's case was that acceptable fire safety measures were in place. The smoke alarms, which had been installed during a refurbishment in 2016, were, she said, mains-wired, with battery backup. A carbon monoxide alarm was not required, as there was no solid fuel combustion installations in the property. She accepted, however, that the HMO requirements for fire doors were not satisfied. She argued, however, that the doors were of solid Victorian hard-wood manufacture. She said in her witness statement that she had been advised that such doors generally offered 20 minutes fire protection. The doors did not have self-closers.

45. We accept the Respondent's evidence as to the smoke alarms. It is inherently unlikely that, given the general quality of the 2016 refurbishment, that anything other than mains-wired alarms would have been installed. We believe the Respondent when she says that that is what she specified at that time. Mistaking mains-wired alarms with a

backup battery for battery-only alarms may well be an understandable mistake for the Applicants to make. We also accept her evidence as to the necessity, or otherwise, of a carbon monoxide alarm.

46. We are satisfied that this was not a situation where a landlord was cynically ignoring fire safety arrangements to save money. We also acknowledge that a modern, inter-related mains-wired smoke alarm system, such as the one installed in the property, is probably the most important single fire safety feature. Further, a detached house is at the lower end of the spectrum of accommodation in terms of the risk of fire, compared to, for instance, a flat with similar levels of occupation. On the other hand, we were provided with a summary of the requirements of the local authority when licencing HMOs, which showed that fire doors with self-closers were required for "risk rooms". We were not told what the authority would have considered "risk rooms", but it would certainly have included the door to the kitchen, and probably those to the bedrooms. The summary specified thirty-minute fire doors. Fire doors are an important, often critical, means of reducing the risk of death or serious injury if a fire does occur.

47. We do not think the lack of signage was of any great import in an ordinary detached house, in which the means of escape would be sufficiently obvious.

48. As to disrepair, the main point made by the Appellants related to a hole in the ceiling of one of the bedrooms. The room above the hole was a bathroom. A photograph provided by the Applicants shows a rectangular hole in the ceiling through which the void between floor above and ceiling can be seen. We were not given measurements, but from the context (a recessed LED light), it appears to have been about 400mm long and perhaps 250 or 300mm wide.

49. The hole was evident when the Applicants viewed the property in September 2019, and at that point the Respondent said it would be repaired. It remained, however, until a short time before the Applicants moved out. Its position below the bathroom meant that the bedroom was noisy when the shower in the bathroom was in use, and allowed smells to enter.

50. The Respondent's evidence was that the hole had been opened as a result of a leak reported by the previous tenants. The Respondent wanted to ensure the ceiling dried out, and to monitor the shower. She said, both in her witness statement and orally, that she did not know why it had taken so long to have it repaired. She agreed that she said she would repair it during the initial viewing. After an initial period explained by drying out the ceiling and monitoring, she suggested that the onset of the pandemic would have led to delays. She did not, she said, realise that it was such as nuisance as the Applicants' evidence indicated. She regretted not dealing with it earlier.

51. On the evidence, the hole clearly affected the amenity of the bedroom, to the discomfort of the occupant at certain times of the day. It was equally clearly remiss of the Respondent to not have it repaired. The pandemic may provide some reason at least initially, but is certainly not a complete excuse, particularly in the context of the other works being carried out in and around the property during the latter part of the period.

52. To the limited extend that the Applicants had other complaints about condition or repairs, we did not see evidence of anything other than pretty normal occasional faults or disputes (such as who's hair – the previous tenants or the Applicant's' – blocked a shower).

53. The hole was an incident of significant disrepair. However, the condition of repair in the house as a whole was high (we note the evidence of refurbishment in 2016). Insofar as we are assessing the seriousness of disrepair as relevant to the seriousness of this breach of section 72(1), the property is very much at the less serious end of the spectrum of cases coming before the Tribunal, even taking into account the hole.

54. In respect of the landlord-status of the Respondent, the evidence was that she had bought the house as a buy to let property, and had let it, in total, for three years. The tenants before the Applicants were six men. She had let out rooms in the family house, and sometimes the whole house, but as short term accommodation through AirBnB. We do not consider this to be a sufficiently similar form of economic activity to letting out properties on short term tenancies to count as "being a landlord".

55. The Respondent took her letting agents word that, with the tenancy agreement they produced, she did not need an HMO licence (see the next paragraph), although she acknowledged that the agents only provided the normal services of a letting agent, not management services, and were not under any obligation to advise her of her legal obligations. She did not engage the letting agent as managing agents (services they did offer), because she thought herself capable of undertaking the management of the property. "Management", she had thought, meant things like ensuring the boiler was repaired. For one year, she had been a member of one of the landlords' organisations, but she could not remember which one. As a member, she received an email newsletter, but only recalled that it containing anecdotes about tenants. She had no other systematic way of keeping up to date with her legal obligations.

56. The tenancy agreement specified the tenants as being four of the Applicants, the other two being identified as "permitted occupants". The reason for this arrangement was that, on the Respondent's evidence, the letting agents had told her that if such an arrangement

were made, it was possible to let to six "sharers" without requiring an HMO licence. The Respondent said she had believed that this was an accurate representation of the law. She had explained this to the Applicants when they viewed the property. Ms Johnson said that the Respondent had referred to this as a "loophole". The Respondent denied that she had used that word. Although presumably having something to do with the rule in Law of Property Act 1925, section 34(2) (albeit the precise thought process eludes us), it is difficult to see how anyone could possibly make such a mistake, having read even the most basic guide to the HMO regime. It is, therefore, indicative of the failure of the Respondent to take steps to properly understand her responsibilities.

57. We do not think we should read a great deal into whether she used the term "loophole", or indeed thought that that was what she was taking advantage of in using this form of agreement, however. If it had been right (difficult though it is to image), she would have been entitled to have taken advantage of it.

58. We do not think it helps us to come to a binary conclusion as to whether or not the Respondent ticks a box labelled "professional landlord". What matters are the specific facts of the case. She was letting out a house, which she had acquired to engage in the economic activity of providing a home for others for profit, which she sought to manage herself. In doing so, she completely failed to take appropriate steps to inform herself of her legal obligations as a landlord.

59. Initially, it appeared that the Applicants were claiming that there had been a number of breaches of the Management of Houses in Multiple Occupation (England) Regulations 2006 and other regulatory instruments. In the end, we do not think there was anything of significance that we have not covered substantively. We believe the Respondent's evidence that she had secured the necessary gas and electricity safety certificates, but had not provided them to the Applicants.

60. In assessing the extent of an RRO at stage (c) (and at stage (d), noting that most of these cases predate the *Acheampong* guidance), we have taken account of the guidance in the following cases, including particularly where the Upper Tribunal has substituted percentage reductions from the maxima: *Acheampong* itself, *Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8; *Aytan v Moore* [2022] UKUT 27 (LC); *Hallett v Parker* [2022] UKUT 239 (LC); *Hancher v David and Others* [2022] UKUT 277 (LC); and *Dowd v Martins and Others* [2022] UKUT 249 (LC). The range of percentage of the maximum possible RRO awarded range from 25% to 90% (ie at stage (d)).

61. Given our conclusions in respect of the three main factors in this case – fire safety, disrepair and the status of the Respondent as a landlord (the "professional landlord" issue), we conclude that the seriousness of the offence puts it in – but by not means all the way to the end of – the bottom half of the seriousness spectrum. In that respect, we find the (post-*Acheampong*) case of *Dowd v Martins and Others* helpful. In that case, following a similar broad conclusion, the stage (c) assessment made by the Upper Tribunal was 45% (there was no further adjustment at stage (d) in that case). Although the recitation of the facts in that case is limited, the Upper Tribunal did not mention any fire safety issues. In this case, the property did lack thirty-minute self-closing fire doors. This was an important defect in the fire safety provision, albeit in the context of the other, mitigating, features we refer to (the alarms, the relatively lower fire risk in a detached house). In the light of this, we conclude that the stage (c) starting point should be 50%.

62. We turn, therefore, to stage (d), at which we must consider the conduct of the parties, and the financial circumstances of the landlord (section 44(4) of the 2016 Act). We also, in this case, consider the other, non-financial, circumstances of the Respondent.

63. Both parties made allegations about the conduct of the other. The Respondent had decided that she should sell the property, and put in hand a programme of work intended to maximise the sale price. This created nuisance for the Applicants, about which they complained (during a period in which they were mostly working from home). The Respondent agreed to stop internal work, but – according to the Applicants – some continued, and some of the external work was also noisy. The Applicants complained that the Respondent visited without proper notice, on occasions, and rearranged some of their property when showing the property to potential purchasers near the end of the tenancy.

64. The Respondent complained that the Applicants fairly frequently hosted loud parties, which created nuisance to the neighbours (she produced evidence from a neighbour of two such parties). Among other allegations of (minor) damage, they broke a large dining table. The Applicants, admitting the damage to the table, counter-alleged that the Respondent held them to ransom by refusing to provide a reference for new accommodation until they replaced (exactly) the table. The Respondent countered that she was reluctant to provide references, when she had reservations about the conduct of the Applicants, in particular in relation to the parties.

65. All this was in the context of what appeared to be a reasonable relationship between the parties initially, which soured later, after the works started from the Applicants view point, or nearer the end of the tenancy, as the Respondent saw it.

66. We do not think it necessary to provide blow-by-blow details of the contested issues, beyond this overview, to justify our conclusion. That is that, first, neither party's conduct was anything like the worst that the Tribunal sees; but, secondly, that there was clearly some fault on both sides. We do not, in other words, think that the (not very serious) misconduct on either side over-balances that on the other. If conduct was all that we had to consider at stage (d), we would conclude that there was no call to disturb our stage (c) starting point.

67. However, in this case, the closely inter-related financial and personal circumstances of the Respondent make a considerable difference to our final conclusion.

68. The Respondent is by profession an architect. She has only worked on a casual and part time basis since having children. She estimated that she might earn up to a maximum of £15,000 a year in that way. To earn more, she would have to work as an employee of an architectural practice. When able to do so, she would expect to earn about £35,000 a year.

69. She bought the property to make provision for retirement, following the example of her father, who had also been an architect. The plan was to let it until she was in her early 70s, then sell it to provide an on-going pension pot (she was 57 at the time of the hearing). The family home was acquired in 2006. She estimated that it was worth about £1.75 million at the time of the hearing. She increased the mortgage on the family home to acquire the property. Following refurbishment, it was put on the rental marked in January 2017.

70. The backdrop to the period from 2017 was the increasing ill-health and death of first her father and then her mother (in 2019), who also suffered from advanced dementia.

71. Her older son started secondary school in September 2018, and now suffered from significant mental illness, including depression (for which he was receiving medication) and suicidal thoughts. He is being treated by the relevant Child and Adolescent Mental Heath Service. She has two younger sons (aged 10 and 15 at the date of her witness statement in September 2022). The youngest has been diagnosed with a condition called Development Coordination Disorder.

72. Her partner had been diagnosed with what she described as a rare and difficult-to-treat form of type 1 diabetes in 2008. He was taken seriously ill in 2019, and spent most of the year in hospital (including an operation to amputate four toes). He then caught a virus resulting in a collapsed lung and pneumonia, and he suffered a series of heart attacks. Treatment was long, arduous and painful, and culminated in a high-risk quintuple heart bypass operation in October 2020, after which he was discharged from hospital. He was, at the time of the

hearing, still very poorly. He had become acutely depressed, and during 2022 had made several suicide attempts, including at home. In August 2022, he disappeared from home for some time.

73. As to her financial circumstances, she produced figures to show that she had made a loss on renting the property. The mortgage on the family home was £1,000,000 (following drawings to buy the property – see above). She anticipating having to sell the family house in four years when the current fixed-rate mortgage ended.

74. The Respondent sold the property in January 2022. The sale price was £1,545,000. The purchase price had been £985,000. She produced a document purporting to show that taking into account all the costs, the end result was a profit of £11,708. A significant element of the costs was a figure of £275,000 for refurbishment.

75. We are not sure that this calculation is of great assistance to us. When asked, the Respondent said that the cash, representing the proceeds of the sale that she had available at the time of the hearing, was just under £300,000, from which an estimated £70,000 in capital gains tax fell to be deducted. It was this money that the family was now living on (including the £1,600 a month mortgage payments). There was no other income. The Respondent's husband was earning nothing, and had no independent savings. A claim had been made for benefits to assist with his care, but had not been received at the time of the hearing (and would not be back-dated).

76. We asked about the Respondent's expectations in terms of earning herself. She would, she said, definitely have to start work full time when her younger son went to secondary school in September 2023. She expressed concern, however, about whether that would be possible, given the need to look after her partner. It may be that she would only be able to work part time. Her account was one of uncertainty and anxiety about the future. She described her life as being "just fire-fighting all the time".

77. Mr Nielson pointed out that there was limited documentation as to the Respondent's financial circumstances. He was quite right to do so. The directions require such disclosure, and the documents that were provided gave us only a limited insight into the current position of her financial position, and that of the family. Having said that, the documents and her oral evidence were entirely consistent, and we do not doubt her honesty. We note that the very difficulties in relation to her person circumstances upon which she relies will have made preparation for the Tribunal more difficult that would have otherwise been the case.

78. The Respondent's financial position is that she has had to effectively extinguish the provision she was making for her and her husband's old

age to cope with current expenditure. Currently, there is little or no income coming into the household, although some assistance from benefits is anticipated. She may be able to work full time, or more part time, from September 2023, but she may not. Given the care and support required by her partner, it is quite possible that her ability to earn even the sum she mentioned, which is well under the average salary in London, will be compromised.

79. Mr Neilson notes that there is equity in the family house, but in practice, given even the most optimistic outcome in terms of income, the Respondent would not be realistically able to finance any further borrowing against that equity. Her current annual expenditure on mortgage repayments is £19,200, which, as she notes, is currently effectively being paid for out of liquidated equity from the time that she purchased the property. Thus, the equity in the family home would only become relevant if she is to be expected to sell the family home to finance an RRO in the order of the 70% or so order for which Mr Nielson contends.

80. Quite apart from the financial burdens imposed by her partner's condition, including his mental as well as his physical state, the mental health issues faced by her oldest son and the difficulties encountered by her youngest, it is appropriate for us to take into account the personal, social and mental health burdens that these impose on the Respondent.

81. In assessing the effect on the percentage RRO, we have in the front our minds the injunction by the Deputy President in *Hallett v Parker* [2022] UKUT 165 (LC), at paragraph [26] that "Tribunals should … be aware of the risk of injustice if orders are made which are harsher than is necessary to achieve the statutory objectives."

82. *Hallett v Parker* is one of two cases in which the Upper Tribunal either approved or substituted a percentage RRO of 25%. The facts of both are different from those in this case. In the first case chronologically, *Awad v Hooley* [2021] UKUT 55 (LC), there was a very marked contrast between the poor conduct of the tenant, and the positively good conduct of the landlord. In *Hallett*, there were a number of features in common with this case – the less serious nature of the offence, the failure of the landlord to inform him or herself, and that no other property was let. The quality of the property in this case is perhaps higher than the "fairly good" in Hallett, but in Hallett the landlord engaged a managing agent, and might reasonably have expected them to have told them of the licensing requirements. There is, however, no mention of the financial or personal circumstances of the landlord. In our case, the financial and personal circumstances are a substantial part of the decision we have to take.

83. Our conclusin is that, while there are differences between this case and both *Hallett* and *Awad*, it requires the same percentage RRO. To

impose more would be to succumb to the risk of making an order harsher than was necessary to achieve the statutory objectives.

84. At stage (d), we reduce the percentage RRO to 25%.

Reimbursement of Tribunal fees

85. The Applicant applied for the reimbursement of the application and hearing fees paid by the Applicants under Rule 13(2) of the Rules. We have found that the Respondent committed the criminal offence and we have made an RRO, albeit one at the bottom end of the spectrum. We allow the application.

Rights of appeal

86. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

87. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

88. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

89. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

Name: Tribunal Judge Professor Richard Percival **Date:** 21 February 2023

Appendix of Relevant Legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(3) A reference to "an offence to which this Chapter applies" is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

	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

	Act	*section*	*general description of offence*
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if –

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if –

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord had been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

44 Amount of order: tenants

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in this table.

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 in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account –

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord,

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.