FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AJ/HMK/2018/006**
Property	**:**	**70 Highview Road, West Ealing, W13 0HW**
Applicant	**:**	**1. Caterina Reffo** **2. Tomasz Wilk** **3. Eleanor Hart** **4. Aoife Murphy** **5. Balazs Meszaros** **6.Krisztina Meszaros** **7. Jennifer Meghan Hale** **8. Simran Rai**
Representative	**:**	**In person**
Respondent	**:**	**Big Egg Properties Limited**
Representative	**:**	**Ayesha Omar, counsel**
Type of application	**:**	**Application for a Rent Repayment Order – section 40 of the Housing and Planning Act 2016**
Tribunal member(s)	**:**	**Ruth Wayte (Tribunal Judge)** **M.Cairns (Professional Member)**
Date and venue of hearing	**:**	**18 May 2018 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**31 May 2018**

DECISION

Decisions of the tribunal

(1) Big Egg Properties Limited is substituted for Sam Najafi as the Respondent to this application.

(2) The tribunal makes a rent repayment order of £1,694.07. This sum is to be paid to the Applicants in the following amounts: Ms Reffo £305.61; Mr Wilk £213.96; Ms Hart £198.04; Ms Murphy £293.07; Balazs and Kritsztina Meszaros £354.57; Ms Hale £ 272.24 and Ms Rai £56.58.

(3) The tribunal also orders the Respondent to reimburse Ms Reffo in respect of the application and hearing fees of £300.

The application

1. The Applicants seek a rent repayment order (RRO) under section 40 of the Housing and Planning Act 2016 ("the 2016 Act"). They were all occupiers of the property and rely on the Respondent having committed an offence under section 72 (1) of the Housing Act 2004, namely being the landlord of a house in multiple occupation (HMO) without the necessary licence.

2. Directions were issued on 26 February 2018, amended on 27 March 2018 to allow additional time to the Respondent and the hearing took place on 18 May 2018. At the hearing Ms Murphy and Ms Reffo acted as spokespersons for all the Applicants and the Respondent was represented by counsel, Ayesha Omar. The Respondent produced a skeleton argument, sections of the 2016 Act and two case reports, together with some additional bank statements and other documents. No objection was made to the additional evidence but the start of the hearing was delayed to allow for additional reading time.

3. The application was made against Sam Najafi as the Respondent. In submissions dated 6 April 2018 the Respondent's representatives stated that the landlord was in fact Big Egg Properties Limited, as shown on the tenancy agreements. Although Mr Najafi was the sole director and in effect the agent on behalf of the landlord, under the 2016 Act an RRO can only be made against the landlord. In the circumstances the tribunal was invited to substitute the company as the Respondent in place of Mr Najafi. This application was dealt with as a preliminary issue. There was no dispute as to the identity of the landlord and in the circumstances the tribunal ordered that the substitution should be made as requested pursuant to Rule 10 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

The law

4. Sections 40-41 and 43-44 of the 2016 Act contain the provisions in respect of RROs. In summary, section 40 provides that the tribunal may make an RRO in favour of a tenant where a landlord has committed a relevant offence – in this instance the offence set out in section 72(1) of the Housing Act 2004, the control or management of an unlicensed HMO. Section 41 stipulates that an application by a tenant is limited to circumstances where the offence relates to housing that, at the time of the offence, was let to the tenant and was committed in the period of 12 months ending with the day on which the application was made. There was no dispute between the parties that these criteria were met.

5. Section 43 states that the tribunal may make an RRO if satisfied, beyond reasonable doubt, that a landlord has committed the offence. Section 44 states that any RRO must relate to rent paid by the tenant in respect of a period not exceeding 12 months, during which the landlord was committing the offence. Any RRO must not exceed the rent paid in that period and in determining the amount the tribunal must, in particular, take into account:

    - the conduct of the landlord and the tenant;
    - the financial circumstances of the landlord and
    - whether the landlord has at any time been convicted of an offence to which that part of the 2016 Act applies.

6. During the hearing, the Respondent also relied on the cases of *Parker v Waller* [2012] UKUT 301 (LC) and *Fallon v Wilson* [2014] UKUT 0300. Copies were made available to the Applicants.

Background

7. Mr Najafi's statement dated 6 April 2018 set out the background to the application. In short, he started the Respondent company around two years ago, with the purpose of renting property from owners, bringing it up to the standard required for multiple occupiers and then letting rooms out on an individual basis. He produced his tenancy agreement for the property which commenced on 8 March 2017. He made enquiries of Ealing council as to their requirements for HMOs but he failed to apply for a licence due to a lack of funds. He admitted that as at 21 April 2017 the property fell within the borough's mandatory and discretionary licensing scheme as four or more occupiers had moved in. In fact, the property had seven rooms let by December 2017 when Ealing came to inspect. They reiterated that a licence was required and

he made the application by the end of that week, on the 21 December 2017.

8. The applications for an RRO were dated 19 January 2018.

The issues: has the offence been committed (section 43)?

9. The Respondent conceded that an offence had been committed from 21 April 2017 to 21 December 2017, being the dates when the property was first occupied as an HMO and the date the licence was applied for. Although the Applicants initially sought to argue that as no licence had yet been granted the offence was still being committed, Ms Omar pointed to section 72(4) of the Housing Act 2004 which provides a defence where an application for a licence has been made and is still effective. In the circumstances the tribunal is satisfied, beyond reasonable doubt, that an offence has been committed from 21 April to 21 December 2017, triggering the ability to make an RRO.

Amount of any RRO (section 44)

10. As stated above, section 44 of the 2016 Act provides that the amount of the RRO must not exceed the rent paid in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. Given the finding above, it was common ground that the total rent paid from 21 April to 21 December 2017 was £32,586, which gives the upper limit of any RRO. However, in determining the amount section 44 states that the tribunal must, in particular, take into account: the conduct of the landlord and the tenant; the financial circumstances of the landlord and any relevant conviction. It was accepted that there had not been a conviction in this case.

11. Although the decisions of *Parker* and *Fallon* were in relation to applications under the Housing Act 2004, the Respondent submitted and the tribunal accepted they were relevant to the consideration under the 2016 Act, in terms of guidance as to how to approach the issues of conduct and financial circumstances.

12. On conduct, the President of the Upper Tribunal in *Parker* stated at paragraph 39: "*I do not think that conduct on the part of the landlord that is unrelated to the offence under section 72(1) that underlies the RRO could entitle the tribunal to increase the amount of the RRO above the level that would otherwise be justified. To do so would be to punish the landlord for matters that form no part of the offence*". The Applicants had complained about short notice for works to the property, problems with the shower and heating and the removal of a clothes drier. The Respondent stated that his cleaning staff had felt concerned about the tenants' attitude, to the extent that one had asked not to return to the property. The tribunal considered that the issue with the cleaner probably revolved around the Applicants' wish to establish the true cost of the service, which might have concerned the

cleaner but was of no relevance in terms of determination of the amount of any RRO. Similarly, poor conduct in relation to carrying out the landlord's duties has little relevance to the RRO, apart from conduct in respect of the offence itself.

13. On that point, Mr Najafi's evidence was that he knew about the licence but did not have the funds to make the application in April 2017. When the council visited the property in December 2017 he was able to borrow money from his family and made the application within a week. He was an inexperienced landlord, he had undertaken a course in property management but had little hands-on experience. He had learned his lesson and apologised to the tenants and the tribunal for his omission.

14. Although *Parker* is authority for the proposition that a professional landlord should expect to be treated more harshly than the non – professional and a deliberate flouting of the requirement to licence would merit a larger RRO than an omission, the tribunal does not consider that the landlord's conduct in this case is such as to merit a harsh penalty. In truth, Mr Najafi was inexperienced and rather foolish not to apply for a licence earlier, as he now concedes. His conduct in the hearing and in terms of offering a settlement to the Applicants, albeit in the skeleton argument produced on the day of the hearing, is also to his credit.

15. That leaves the financial circumstances of the landlord. Company accounts were produced for the year ending 31 March 2017 which indicated a profit of £42. The accounts for the year ending 31 March 2018 had not been finalised but the Respondent produced a letter from Sheikh & Co, company accountants, dated 17 May 2018 which stated that the company "*had been experiencing great financial difficulties due to tough competition prevailing in the residential letting market*". The tribunal gave this letter little weight as no witness statement had been provided and Mr Sheikh had not made himself available to be cross-examined by the Applicants. No company bank accounts had been produced with details of any balance. In the circumstances it is difficult to assess the financial circumstances of the landlord other than to say that, on a balance of probabilities, the tribunal accepts the company is unlikely to have amassed great wealth during the last financial year.

16. Ms Omah suggested that the tribunal should adopt a "profit calculation" as used in *Fallon*, deducting expenses from the rental income to produce a profit which could be applied to each tenant in accordance with the rent paid during the relevant period. A schedule of outgoings had been produced in an earlier bundle, which produced a daily expense per tenant of £17.69. The Applicants objected to some of these items for lack of evidence, in particular the cleaning expenses and the electricity and gas. They also objected to deduction of the maintenance costs on the basis that these were the landlord's

responsibility under the lease and therefore the landlord should not have the benefit of them in terms of a reduction in any RRO payable.

17. The Respondent relied on the evidence of Mr Najafi in respect of the cleaning expenses and electricity and gas. It was accepted that the cleaner attended the property 3 times a month and there was a signed letter indicating that the rate was £40 a session, although the Applicants had queried whether it was genuine. The Respondent produced bank statements showing various receipts in or around this figure, stating that there were variations for excess travel or the purchase of cleaning supplies. On balance, the tribunal is satisfied that the cleaning costs have been established by the Respondent. The issue with electricity and gas is that Mr Najafi could not obtain the statements from the original supplier Eon. Given the amounts evidenced during the year from the current supplied N Power, the tribunal is also satisfied that the amount claimed by the respondent is sufficiently evidenced. There was no dispute that electricity and gas was provided during the whole period, albeit there were problems with some of the radiators.

18. As to the maintenance costs, Ms Omah relied on *Fallon* as authority that such expenditure should be taken into account, pointing out that it would be relevant to the calculation of profit during the relevant period, namely £6,776.29. The tribunal was invited to calculate the RRO as a percentage of those profits, following *Parker*. That case involved a conviction and poor conduct on the part of the landlord. The Upper Tribunal set the RRO at 75% of the net profit having taken all the relevant circumstances into account. Ms Omah submitted that given there were no real concerns as to conduct in this case, 25% was appropriate and invited the tribunal to make an order in that amount, being £1,694.07.

19. The Applicants did not feel that was sufficient. They suspected that the Respondent would still not have applied for a licence had the council not inspected, a submission that had some force.

20. The tribunal considers that this is case where an RRO ought to be made, reflecting the landlord's failure to apply for a licence. On the Respondent's own evidence, this was a deliberate failure, rather than an omission due to lack of knowledge. The rent paid for the relevant period is substantial, namely £32,586. That said, there is evidence that the company's financial situation is modest and nothing in terms of conduct that might increase the award. The tribunal further accepts that the net profit made during the relevant period is £6,776.29. There is no conviction to take into account. In all the circumstances of the case, the tribunal considers that the RRO should be 25% of the profit made during the relevant period, divided between the Applicants to reflect the proportion of rent paid by them.

21. At the end of the hearing the Applicants also applied for a reimbursement of their application and hearing fees. The Respondent

pointed out that they had refused mediation and therefore the hearing may not have been necessary. However, the Respondent's offer was only made at the hearing and in all the circumstances, the Applicants having been successful, it is just and equitable that they should recover their outlay in terms of fees. The tribunal therefore also orders the Respondent to reimburse the application and hearing fees paid by the Applicant (Ms Reffo) of £300.

Name: Ruth Wayte **Date:** 31 May 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).