UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 301 (LC)
Case Number: HA/6/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – house in multiple occupation – rent repayment order in favour of occupiers – RPT ordering repayment of 100% of rent during relevant period – whether approach correct – held that it was not – relevant considerations – appeal allowed – Housing Act 2004 ss 73 and 74

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN **JASON AARON PARKER** **Appellant**

and

(1) MR R WALLER **Respondents**
(2) MR C HOBBS
(3) MISS K MCKIMM
(4) MR A ROWLAND
(5) MISS R FRASER
(6) MR R PHILP

Re: 85 Victoria Road North
Southsea
PO5 1PP

Before: The President

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 14 August 2012

The appellant in person
Mr R Waller for himself, Mr C Hobbs, Miss K McKimm and Miss R Fraser. The other two respondents did not appear and were not represented.

The following case is referred to in this decision:
Pepper v Hart [1993] AC 593

DECISION

Introduction

1. Under Part 2 of the Housing Act 2004 (in provisions to which I refer in more detail below) there is a requirement that every house in multiple occupation must be licensed. The appellant is the owner of a house in multiple occupation, and each of the respondents at the material times occupied a room in the house as the tenant or licensee of the appellant. The house was not licensed as an HMO. Under section 73 of the Act an occupier of accommodation in an unlicensed HMO may apply to a residential property tribunal for a rent repayment order, and, if certain conditions are satisfied, the RPT may order the landlord to repay to the applicant such amount of the rent paid in the 12 months immediately preceding the application as may be specified in the order. Under section 74 the amount to be repaid is to be such amount as the tribunal considers reasonable in the circumstances, and in determining what amount would be reasonable the tribunal is required to have regard in particular to certain specified matters.

2. The respondents applied to the RPT for a rent repayment order, and in its decision of 2 May 2011 the RPT made an order in their favour for the repayment of 100% of the rent that each of them had paid in the 12 months preceding the application. The amounts totalled £15,423.63. The appellant appeals, with permission that I granted, raising a number of matters in relation to the lawfulness of the tribunal's order.

The statutory provisions

3. Under section 61 of the Act (as read with section 55) every HMO which falls within any relevant description of HMO must be licensed. Application for a licence is to be made to the local housing authority under section 63, and the authority may grant or refuse a licence (section 64). Before granting a licence the authority must (under section 64) be satisfied about a number of matters, including that the house is suitable for multiple occupation, that the licence holder is a fit and proper person to be the licence holder, that the proposed manager of the house is a fit and proper person for that purpose, and that the proposed management arrangements are otherwise satisfactory. Under section 67 a licence may include such conditions as the local housing authority consider appropriate for regulating the management, use and occupation of the house and its condition and contents. Section 6 1(1) provides that a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed but is not licensed. Under subsection (7) such person is liable on summary conviction to a fine not exceeding £20,000.

4. Sections 73 and 74 make provision about rent repayment orders as follows:

> "73 Other consequences of operating unlicensed HMOs: rent repayment orders
>
> (1) For the purposes of this section an HMO is an 'unlicensed HMO' if –

(a) it is required to be licensed under this Part but is not so licensed, and

(b) neither of the conditions in subsection (2) is satisfied.

(2) The conditions are–

(a) that a notification has been duly given in respect of the HMO under section 62(1) and that notification is still effective (as so defined by section 72(8));

(b) that an application for a licence has been duly made in respect of the HMO under section 63 and that application is still effective (as so defined).

(3) No rule of law relating to the validity or enforceability of contracts in circumstances involving illegality is to affect the validity or enforceability of–

(a) any provision requiring the payment of rent or the making of any other periodical payment in connection with any tenancy or licence of a part of an unlicensed HMO, or

(b) any other provision of such a tenancy or licence.

(4) But amounts paid in respect of rent or other periodical payments payable in connection with such a tenancy or licence may be recovered in accordance with subsection (5) and section 74.

(5) If–

(a) an application in respect of an HMO is made to a residential property tribunal by the local housing authority or an occupier of a part of the HMO, and

(b) the tribunal is satisfied as to the matters mentioned in subsection (6) or (8),

The tribunal may make an order (a 'rent repayment order') requiring the appropriate person to pay to the applicant such amount in respect of the housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 74(2) to (8)).

(6) If the application is made by the local housing authority, the tribunal must be satisfied as to the following matters–

(a) that, at any time within the period of 12 months ending with the date of the notice of intended proceedings required by subsection (7), the appropriate person has committed an offence under section 72(1) in relation to the HMO (whether or not he has been charged or convicted),

(b) that housing benefit has been paid (to any person) in respect of periodical payments payable in connection with the occupation of a

part or parts of the HMO during any period during which it appears to the tribunal that such offence was being committed, and

(c) that the requirements of subsection (7) have been complied with in relation to the application.

(7) Those requirements are as follows–

(a) the authority must have served on the appropriate person a notice (a 'notice of intended proceedings')–

(i) informing him that the authority are proposing to make an application under subsection (5),

(ii) setting out the reasons why they propose to do so,

(iii) stating the amount that they will seek to recover under that subsection and how that amount is calculated, and

(iv) inviting him to make representations to them within a period specified in the notice of not less than 28 days;

(b) that period must have expired; and

(c) the authority must have considered any representations made to them within that period by the appropriate person.

(8) If the application is made by an occupier of a part of the HMO, the tribunal must be satisfied as to the following matters –

(a) that the appropriate person has been convicted of an offence under section 72(1) in relation to the HMO, or has been required by a rent repayment order to make a payment in respect of housing benefit paid in connection with occupation of a part or parts of the HMO.

(b) that the occupier paid, to a person having control of or managing the HMO, periodical payments in respect of occupation of part of the HMO during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO, and

(c) that the application is made within the period of 12 months beginning with –

(i) the date of the conviction or order, or

(ii) if such a conviction was followed by such an order (or vice versa), the date of the later of them.

(9) Where a local housing authority serve a notice of intended proceedings on any person under this section, they must ensure–

(a) that a copy of the notice is received by the department of the authority responsible for administering the housing benefit to which the proceedings would relate; and

(b) that the department is subsequently kept informed of any matters relating to the proceedings that are likely to be of interest to it in connection with the administration of housing benefit.

(10) In this section–

'the appropriate person', in relation to any payment of housing benefit or periodical payment payable in connection with occupation of a part of an HMO, means the person who at the time of the payment was entitled to receive on his own account periodical payments payable in connection with such occupations;

'housing benefit' means housing benefit provided by virtue of a scheme under section 123 of the Social Security Contributions and Benefits Act 1992 (c4);

'occupier', in relation to any periodical payment, means a person who was an occupier at the time of the payment, whether under a tenancy or licence or otherwise (and 'occupation' has a corresponding meaning);

'periodical payments' means periodical payments in respect of which housing benefit may be paid by virtue of regulation 10 of the Housing Benefit (General) Regulations 1987 (SI 1987/1971) or any corresponding provision replacing that regulation.

(11) For the purposes of this section an amount which–

(a) is not actually paid by an occupier but is used by him to discharge the whole or part of his liability in respect of a periodical payment (for example, by offsetting the amount against any such liability), and

(b) is not an amount of housing benefit,

is to be regarded as an amount paid by the occupier in respect of that periodical payment.

74 Further provision about rent repayment orders

(1) This section applies in relation to rent repayment orders made by residential property tribunals under section 73(5).

(2) Where, on an application by the local housing authority, the tribunal is satisfied–

(a) that a person has been convicted of an offence under section 72(1) in relation to the HMO, and

(b) that housing benefit was paid (whether or not to the appropriate person) in respect of periodical payments payable in connection with occupation of a part or parts of the HMO during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO,

the tribunal must make a rent repayment order requiring the appropriate person to pay to the authority an amount equal to the total amount of housing benefit paid as mentioned in paragraph (b).

This is subject to subsections (3), (4) and (8).

(3) If the total of the amounts received by the appropriate person in respect of periodical payments payable as mentioned in paragraph (b) of subsection (2) ('the rent total') is less than the total amount of housing benefit paid as mentioned in that paragraph, the amount required to be paid by virtue of a rent repayment order made in accordance with that subsection is limited to the rent total.

(4) A rent repayment order made in accordance with subsection (2) may not require the payment of any amount which the tribunal is satisfied that, by reason of any exceptional circumstances, it would be unreasonable for that person to be required to pay.

(5) In a case where subsection (2) does not apply, the amount required to be paid by virtue of a rent repayment order under section 73(5) is to be such amount as the tribunal considers reasonable in the circumstances.

This is subject to subsections (6) to (8)

(6) In such a case the tribunal must, in particular, take into account the following matters –

(a) the total amount of relevant payments paid in connection with occupation of the HMO during any period during which it appears to the tribunal that an offence was being committed by the appropriate person in relation to the HMO under section 72(1);

(b) the extent to which that total amount –

(i) consisted of, or derived from, payments of housing benefit, and

(ii) was actually received by the appropriate person;

(c) whether the appropriate person has at any time been convicted of an offence under section 72(1) in relation to the HMO;

(d) the conduct and financial circumstances of the appropriate person; and

(e) where the application is made by an occupier, the conduct of the occupier.

(7) In subsection (6) 'relevant payments' means –

(a) in relation to an application by a local housing authority, payments of housing benefit or periodical payments payable by occupiers;

(b) in relation to an application by an occupier, periodical payments payable by the occupier, less any amount of housing benefit payable in respect of occupation of the part of the HMO occupied by him during the period in question.

(8) A rent repayment order may not require the payment of any amount which–

(a) (where the application is made by a local housing authority) is in respect of any time falling outside the period of 12 months mentioned in section 73(6)(a); or

(b) (where the application is made by an occupier) is in respect of any time falling outside the period of 12 months ending with the date of the occupier's application under section 73(5);

and the period to be taken into account under subsection (6)(a) above is restricted accordingly.

(9) Any amount payable to a local housing authority under a rent repayment order–

(a) does not, when recovered by the authority, constitute an amount of housing benefit recovered by them, and

(b) until recovered by them, is a legal charge on the HMO which is a local land charge.

(10) For the purpose of enforcing that charge the authority have the same powers and remedies under the Law of Property Act 1925 (c 20) and otherwise as if they were mortgagees by deed having powers of sale and lease, and of accepting surrenders of leases and of appointing a receiver.

(11) The power of appointing a receiver is exercisable at any time after the end of the period of one month beginning with the date on which the charge takes effect.

(12) If the authority subsequently grant a licence under this Part or Part 3 in respect of the HMO to the appropriate person or any person acting on his behalf, the conditions contained in the licence may include a condition requiring the licence holder –

(a) to pay to the authority any amount payable to them under the rent repayment order and not so far recovered by them; and

(b) to do so in such instalments as are specified in the licence.

(13) If the authority subsequently make a management order under Chapter 1 of Part 4 in respect of the HMO, the order may contain such provisions as the authority consider appropriate for the recovery of any amount payable to them under the rent repayment order and not so far recovered by them.

(14) Any amount payable to an occupier by virtue of a rent repayment order is recoverable by the occupier as a debt due to him from the appropriate person.

(15) The appropriate national authority may by regulations make such provision as it considers appropriate for supplementing the provisions of this section and section 73, and in particular –

(a) for securing that persons are not unfairly prejudiced by rent repayment orders (whether in cases where there have been over-payments of housing benefit or otherwise);

(b) for requiring or authorising amounts received by local housing authorities by virtue of rent repayment orders to be dealt with in such manner as is specified in the regulations.

(16) Section 73(10) and (11) apply for the purposes of this section as they apply for the purposes of section 73."

The facts

5. The facts are to be derived from the LVT's decision and the statements put in by Mr Parker and by Mr Waller, on behalf of himself and three of the other respondents, and the documents that they produced. Applications were made to the RPT by each of the respondents on 4 February 2011 under section 73 for rent repayment orders in respect of the occupation of their respective rooms at the property known as 85 Victoria Road North, Southsea. There is no dispute that the property was at all material times an HMO for the purposes of the provisions of Part 2 of the Act and that the conditions for making a rent repayment order were satisfied. The applications were determined without a hearing.

6. Mr Parker submitted a statement to the RPT in which he acknowledged that he had failed to licence the property and had failed to attend a magistrates court hearing on 15 November 2010. (A notice of fine and collection order was sent to him from East Hampshire Magistrates' Court on 22 November referring to his conviction on that date for an offence described as "Controller/manager of house in multiple occupation act without licence under s 6(1)". The order was for £786, consisting of a fine of £525, victim support payment of £15 and costs of £246.) Mr Parker acknowledged that he had received written communications from Portsmouth City Council requesting that he make application to license the premises under the council's HMO registration scheme. He said that he had licensed the property under previous registration schemes in 1996 and 2002. Although he had earlier questioned whether the property was licensable under the present scheme, he accepted that it must be licensed, and he had made an application to the council for a licence on 21 January 2011.

7. Mr Parker said that his understanding was that the tenants were entitled to claim back part of the rent that they had paid for the period between the conviction of the offence of failing to licence the property and submission of the application for a licence. Those dates were 15 November 2010 and 21 January 2011. During that period the tenants suffered no loss of services at the property and were under no risk of harm to their person or property. All tenants at the property paid rent an all inclusive basis, which meant, he said, that he paid for council tax, water rates, gas and electricity. He suggested that the cost of these should be excluded from the rents when calculating any amount to be returned to the tenants.

8. Mr Parker's statement to the RPT went on to say that he had been a property professional for 23 years and that he recognised that he had been foolish in allowing the matter to have proceeded to a conviction despite his concern as to the licensability of the property. (Under the council's scheme only properties of three storeys or more are licensable, and Mr Parker had contended that neither the basement, used by the occupiers for storage, nor the rear mezzanine level was a storey for this purpose.) He accepted that he should have replied promptly to the correspondence he had received. Extreme pressure of work and a complicated home life as a single parent caring for two teenagers had taken its toll and he had simply buried his head as far as the matter was concerned. He considered that he had been properly punished by the fine and the order for costs and through the adverse publicity that the matter had had on his otherwise exemplary reputation, his prosecution having been displayed twice in the local paper, to his great humiliation. To punish him further by way of providing the tenants with an unwarranted windfall seemed to him to be beyond what was reasonable in the circumstances.

9. Mr Parker said that he had subsequently handed over all aspects of management of the property to Bernards Estate Agents Ltd, who would be the managing agents and HMO licence holder. There would in consequence be an added cost burden in terms of ongoing management fees. He said that he left it to the RPT to determine what level of rent repayment the tenants should enjoy, taking account of what he had stated. He provided a schedule of the rents and expenses for each tenant for the period 15 November 2010 to 21 January 2011. The schedule showed the costs of gas, electricity, council tax and water to be £589 per month or £3.23 per day for each of the six tenants, and it set out the net rents for the period after allowing for this.

10. On behalf of the tenants Mr Waller provided a statement to the RPT in which he chronicled aspects of unsatisfactory management on Mr Parker's part. They included a period of 90 days in 2008 when the heating and hot water boiler was out of action.

The RPT's decision

11. In its decision the RPT, having set out some of the provisions of sections 73 and 74, identified particular points on which, it said, it had to make specific findings. It went on to consider these as follows:

> "11. Was the HMO licensed? Mr Parker's statement dated 4 March 2011 acknowledges that he failed to licence the property as required by the Act. He does not suggest that at any time for which a repayment may be ordered, it was licensed. We were satisfied therefore that at no material time for our purposes was the HMO licensed.
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> 12. Is Mr Parker the appropriate person? He does not deny that he is. In some of the cases before us there are tenancy agreements which show that he was either the sole or a joint landlord. He does not deny receipt of rent from each of the Applicants. We are satisfied that he is the appropriate person.

13. Has he been convicted of an offence under section 72? He accepts in his statement that he has been convicted of an offence of failing to licence the premises as an HMO, this being the offence under section 72 which is the basis on which a repayment order can be made. We are accordingly satisfied that he has been so convicted."

12. The RPT then went on to consider "14. What periodical payments have been made?" On the material before it, it concluded that each applicant, except Ms McKimm, Mr Rowland and Ms Fraser, had complete 12 month periods up to 4 February 2011 (the date of the applications) during which payments had been made that might be the subject of a rent repayment order, while those three were in each case limited to the period of the tenancy.

13. Finally the RPT addressed the question: "15. What is a reasonable repayment having regard to subsection (6)?" In relation to this it said:

"(a) We have no evidence that any of these rental payments derived wholly or partly from housing benefit; no evidence that Mr Parker did not actually receive the rental payments, whether solely or jointly; we have already found that he was convicted of an offence under section 72; we find nothing in relation to the conduct of any of the Applicants to adversely affect the amount of any repayment.

(b) As regards the conduct and financial circumstances of Mr Parker he says that he has been a property professional for 23 years and has been foolish in allowing the matter to proceed to conviction; he pleads extreme pressure of work and complicated home life and that he has already been punished by the court and by adverse publicity and should not be punished further by the tenants receiving what he calls an 'unwarranted windfall'.

(c) In his statement he refers to the fact, which we accept, that out of rents received he has had to pay utility costs. We do not find that that is a matter of his conduct or financial circumstances. The Act does not differentiate between rent payments which are purely rent and rent payments which may include utility costs.

(d) While we accept that Mr Parker has been punished by the court and has probably received adverse publicity, it is plainly the intention of Parliament that the sanctions for failing to licence an HMO should go further. We found no reason to limit the repayment orders to less than the full amount as calculated in the decision, figures which we found to be reasonable in each case."

14. The RPT accordingly made the repayment orders for 100% of the monthly rent that each tenant had paid as follows:

(i) Mr Waller, Mr Hobbs and Mr Philp from 4 February 2010 to 4 February 2011;

(ii) Ms McKimm for the period 2 July 2010 to 2 February 2011;

(iii) Mr Rowland for the period 10 July 2010 to 4 February 2011;

(iv) Ms Fraser for the period 26 August 2010 to 26 January 2011.

Permission to appeal

15. In granting permission to appeal against the RPT's decision I said :

> "There is a realistic prospect of success on the ground that the RPT's conclusion that there was no reason to limit the repayment orders to less than the full amount of the rents was not a lawful exercise of its discretion. There are clear arguments, firstly, that to approach the exercise of the power by asking whether there were any reasons to limit the repayment orders to less than the full rent was wrong in principle; and, secondly, that the matters that a tribunal may take into account under section 74(5) are not limited to those that are particularised in subsection (6), so that the RPT was wrong to exclude consideration of the landlord's costs."

The appellant's case

16. Mr Parker, as he was entitled to do, advanced a number of contentions in addition to the two matters that I had referred to in granting permission to appeal. Firstly he said that the RPT had been wrong to reject his argument that the repayment period did not commence until the date of his conviction under section 72(1). He said that the period during which the offence of failing to license the property as an HMO occurred was unclear to him. He had previously registered the property as an HMO on 15 April 2002, and at no time had he been informed that the licence had been revoked. There was no terminal date on the licence. The first communication from the council suggesting that a new HMO licence was required was not received until 13 May 2010. His contention was that the property did not become unlicensed until the magistrates had convicted him. He was not aware that he was committing any offence until he received the order to pay the fine.

17. Secondly, Mr Parker said, the RPT had been wrong to award the tenants 100% recovery of the rent that they had paid. There had been no application of the test of reasonableness to take account of his financial circumstances; and the repayments were a windfall for the tenants. There had been no reference in the RPT's decision to any lack of repair of the premises or to any misconduct on his part. The purpose of the power to order repayment was, he said, to ensure that a landlord did not profit from his wrongdoing in failing to license the premises, and he referred to a statement to this effect by the government spokesman in the House of Lords, during the committee stage of the Bill in 2004. Therefore, he said, it was wrong for the RPT to have included in the repayment amount the costs that he had incurred in relation to gas, electricity, council tax and water. While the magistrates had been entitled to impose a fine of up to £20,000, they had in fact fined him £525, and the amount of the repayment order, £15,423.63, did not bear any relation to this. He referred to three decisions of Midland area RPTs, where repayment orders of £5, 30% and 50% respectively had been made. Finally he said that no indication had been given as to any time within which the repayments were to be made.

18. Mr Waller filed a statement to the Tribunal on 28 November 2011, a further letter (undated) to the Registrar and a bundle of documents for the hearing. He said that he lived at 85 Victoria Road North for 23 years. For the final 15 years the property had been owned by Mr Parker. The property had been let as individual rooms with shared kitchen, bathroom and dining room facilities. Due to the extensive disrepair to the property and harassment by the landlord he had been re-housed by the council on 6 June 2011, and the other residents of the property had also moved out. Mr Waller produced a number of documents that, he suggested, showed that Mr Parker's conduct had been far from exemplary. They included copies of three notices served by Portsmouth City Council on Mr Parker as the person responsible for the management of the house. The first was a notice dated 8 October 2004 under section 372 of the Housing Act 1985 to execute works to remedy neglect of management of a house in multiple occupation. It required the carrying out of all works necessary to put the gas fired central heating boiler into proper working order. The second notice was an improvement notice dated 7 May 2010 under section 12 of the 2004 Act identifying 8 category 2 hazards that were said to exist on the premises, including damp and mould growth and other matters, and requiring remedial action to be taken. The third notice was an interim management order made on 21 January 2011 under section 102(2) of the 2004 Act requiring Mr Parker to hand over the management of the premises to the council on 19 February 2011 for a period of one year. Mr Waller said that Mr Parker was the managing director of Bernards Estate Agents, who acted as letting agents and, he believed, managed many properties. He therefore submitted that as a professional managing agent Mr Parker should be fully conversant with the Housing Act and relevant regulations.

19. At the hearing Mr Waller said that he relied on his statement and these documents. He added that about two years ago he had contacted the council's housing standards officer on behalf of himself and the other tenants to complain about outstanding repairs. When the officer visited the property she noticed that the basement contained spare beds and armchairs. Mr Waller said that he had had the use of the basement under his tenancy. In addition one of the floors of the premises was up three steps, so that there were four floors. Mr Parker might have had a licence for two floors, but he did not have a licence for four floors. As managing director of a firm of local letting agents he ought to have known that a new licence was needed. In making the order that it did the RPT had had regard to the disrepair of the property that had been going on for many years.

Discussion

20. Any consideration of the exercise of the RPT's power to make a rent repayment order in favour of an occupier must in my view start from an identification of the purpose for which the power is given. Section 74(5) provides that the amount to be paid to an occupier by virtue of such an order is to be "such amount as the tribunal considers reasonable in the circumstances". Under subsection (6) the tribunal must in particular take account of five specified matters. What amount, taking account of those matters, would be reasonable can only be determined in the light of the purpose underlying the provisions, and this is nowhere stated. Is the purpose to punish the landlord by adding a second financial penalty to the one to which he is liable in respect of the offence under section 72(1)? Is it to deprive him of some or all of the profit that he made from the letting during the 12 months preceding the date of the tenant's application to the RPT

(see section 74(8))? Is it to provide the tenant with a statutory substitute for any common law right he might have to treat the rent as not payable as having been agreed under an illegal contract? Is it to compensate the tenant for having paid rent to occupy premises that were unprotected by an HMO? Clearly, what amount would be "reasonable in the circumstances" might be very different if the purpose was one of these rather than the others.

21. In the absence of any express indication the purpose of the power is to be sought in the provisions themselves. I have set out in full sections 73 and 74. They are lengthy provisions, made more difficult to follow by the fact that they provide, in different terms, for two types of RRO – on the one hand in favour of a housing authority in respect of housing benefit and on the other in favour of an occupier in respect of periodical payments (to which I am referring as rent). The power to make an RRO is contained in section 73(5), which relates both to applications made by a housing authority in respect of housing benefit and to applications made by an occupier in respect of rent. It provides that, if the conditions relating to applications by a housing authority and or to those relating to applications by an occupier (subsections (6) and (8)) are satisfied the tribunal "may make an order". There is then a divergence between the two types of RRO in section 74, which makes further provision for such orders.

22. Claims by housing authorities are dealt with in section 74(2), which provides that, if conditions relating to conviction and the payment of housing benefit are satisfied, the tribunal "must make a rent repayment order…equal to the total amount of housing benefit paid". Subsection (4) then provides that such an RRO "may not require the payment of any amount which the tribunal is satisfied that, by reason of exceptional circumstances, it would be unreasonable for that person to pay".

23. By contrast the amount payable by virtue of an RRO in favour of an occupier is, under section 74(5) to be "such amount as the tribunal considers reasonable in the circumstances". Subsection (6) then requires the tribunal to take into account for this purpose "in particular" the five matters that it sets out. They include the conduct and financial circumstances of the landlord (matter (d)) and the conduct of the occupier (matter (e)). (Puzzlingly (e) is prefaced by the words "where the application is made by an occupier": but under sections 73(5) applications can only be made by a local housing authority or an occupier, and under section 74(5) that subsection and subsection (6) apply in cases where the application is one that is not made by a local housing authority. All the subsection (6) matters, it would appear, thus apply, and apply only, where the application is by an occupier.)

24. The contrast between what the RPT may or must order in respect of the two types of RRO is marked. In the case of an application by a housing authority it is obliged to make an order for the full amount of housing benefit unless by reason of exceptional circumstances this would be unreasonable. In the case of an application by an occupier, on the other hand, the amount to be repaid under the RRO is the amount that is reasonable in the circumstances, and the circumstances include the conduct and means of the landlord and the conduct of the tenant. The underlying purpose of the provisions as they relate to housing authorities is reasonably clear. As a matter of public policy it is

considered unacceptable that a landlord should receive any of the proceeds of housing benefit when he has failed to obtain an HMO licence, so that he is required to repay the full amount that he has received. No such clarity attaches to the provisions as they relate to an occupier. Moreover subsections (3) and (4) of section 73 are to be noted. Subsection (3) disapplies any rule of law that might make the payment of rent or any other provision of a tenancy or licence invalid or unenforceable by reason of illegality; and subsection (4) goes on to provide that amounts paid as rent may be recovered under the RRO provisions. Those provisions could have a purely mechanical purpose – to enable the RRO provisions to operate free from rules of law relating to contracts tainted by illegality – or they could suggest that the purpose of occupier RROs is to produce some "fair" substitute for the effect of those rules, or they may have some other or additional purpose.

25. The purpose of occupier RROs remains obscure after considering the provisions of sections 73 and 74, and in my judgment it is appropriate to seek assistance in resolving the ambiguity in section 74(5) by applying the rule in *Pepper v Hart* [1993] AC 593. It appears that the provisions were inserted by Government amendment on the Third Reading of the Bill in the House of Lords; and HL Hansard 3 Nov 04 vol 666 col 329 records the Government spokesman, Lord Bassam of Brighton, as explaining them as follows:

> "The amendments recognise the widespread concern expressed about the practical application of the provisions, in particular, the absence of clear decision-making procedures and responsibilities, as well as the potential retaliatory action by landlords for occupants withholding rent. We all agreed on Report that those potential problems could be solved by amending existing provisions to produce the effect that rent is payable but that a landlord who receives rent while operating an unlicensed HMO or other rented property could be liable to a penalty equivalent to any rent received during the period of the offence.
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> The residential property tribunal will be given the power to make a rent repayment order, imposing that penalty where it determines that an offence has been committed under Clauses 72(1) or 93(1)… A local housing authority will be entitled to make an application for such an order where it discovers that a landlord or managing agent is committing an offence and where housing benefit has been paid to that landlord during any period when such an offence was being committed. Such applications would not be restricted to cases where prosecution had been brought under Clause 72 or 93, but could also take place where the RPT was satisfied that an offence had been committed.
>
> Tenants would also be permitted to make an application to the RPT for a rent repayment order where an order had already been granted to the local housing authority in respect of the same property, or where the landlord had been convicted of the offence. Such rent will be recoverable as an ordinary civil debt. The sanction proposed will help prevent a landlord from profiting from renting properties illegally, including cases where that would be at the expense of the public purse through housing benefit. It will also provide a civil sanction through the residential property tribunal for cases where potentially slow and resource-intensive action through the courts is impractical or not considered appropriate."

26. It can be concluded from this statement that the occupier RRO provisions have a number of purposes – to enable a penalty in the form of a civil sanction to be imposed in addition to the fine payable for the criminal offence of operating an unlicensed HMO; to help prevent a landlord from profiting from renting properties illegally; and to resolve the problems arising from the withholding of rent by tenants (sc on the basis of illegality). What amount it would be "reasonable in the circumstances" for an RPT to order to be repaid under an RRO must be considered in relation to these purposes. The following points, in my view, should be borne in mind:

(i) Since the RRO provisions are in their nature penal, an RPT must be satisfied on every matter that is determinative of the tenant's entitlement to an order or its amount. It must be satisfied of the matters set out in section 73(8), and it must take into account the particular matters set out in section 74(6) as well as any other matters that may be material.

(ii) Since the landlord is liable to suffer two penalties – a fine and an RRO – it will be necessary to take this into account. An RPT should have regard to the total amount that the landlord would have to pay by way of a fine and under an RRO. There may be a tension between the imposition of a fine and the making of an RRO. The maximum fine is £20,000, and this shows the seriousness with which Parliament regards the offence. In the present case the magistrates imposed a fine of £525, which would suggest that they did not consider this particular offence to be other than minor. The RPT, however, is entitled to take a different view about the seriousness of operating the HMO without a licence.

(iii) There is no presumption that the RRO should be for the total amount received by the landlord during the relevant period unless there are good reasons why it should not be. The RPT must take an overall view of the circumstances in determining what amount would be reasonable.

(iv) Paragraph (a) of section 74(6) requires the RPT to take into account the total amount of rent received during any period during which it appears to it that the offence was being committed. It needs to do that because the RRO can only be made in respect of rent received during that period. It is limited to the period of 12 months ending with the date of the occupier's application (see section 74(8)). But the RPT ought also to have regard to the total length of time during which the offence was being committed, because this bears upon the seriousness of the offence.

(v) The fact that the tenant will have had the benefit of occupying the premises during the relevant period is not, in my judgment a material consideration or, if it is material, one to which any significant weight should be attached. This is because it is of the essence of an occupier's RRO that the rent should be repaid in respect of a period of his occupation. While the tenant might be viewed as the fortunate beneficiary of the sanction that is imposed on the landlord, it is only misconduct on his part (see paragraph(e)) that would in my view justify the reduction of a repayment amount that was otherwise reasonable.

(vi) Payments made as part of the rent for utility services count as part of the periodical payments in respect of which an RRO may be made. But since the

landlord will not himself have benefited from these, it would only be in the most serious case that they should be included in the RRO.

(vii) Paragraph (d) requires the RPT to take account of the conduct and financial circumstances of the landlord. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to register will obviously merit a larger RRO than instances of inadvertence – although all HMO landlords ought to know the law. A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.

27. I turn to consider the RPT's decision in the present case. Under section 73(8)(b) the RPT must be satisfied that the occupier paid rent during a period during which an offence under section 72(1) was being committed. An RRO may only be made in respect of rent paid during that period (see section 73(5)), and it is limited to the 12 months ending with the occupier's application to the RPT (see section 74(8)). It may not be made for any period after an application for an HMO licence under section 63 has been made (see section 73(1) and (2)). Mr Parker contended that an RRO could only be made for the period between the date of his conviction under section 72(1) (15 November 2010) and the date when he applied for a licence (21 January 2011). In respect of three of the tenants the RPT made RROs for rent paid during the period from 4 February 2010 to 4 February 2011; for the other three tenants the periods started later, and they ended respectively on 26 January 2011, 2 February 2011 and 4 February 2011 (see paragraph 14 above).

28. In his statement to the RPT Mr Parker said that he had applied for the necessary HMO licence on 21 January 2011, and although he did not produce a copy of his application there was no challenge on the part of Mr Waller to this assertion. In treating the period as ending on 4 February 2011 (the date of the applications to the RPT) or other dates after 21 January 2011 the RPT was, therefore, in error.

29. Mr Parker is clearly wrong, however, in asserting that the period could only run from the date of his conviction (15 November 2010). The relevant period (under section 73(8)(b)) is that during which the offence of which he was convicted was being committed. The RPT, however, did not make a finding as to when the period commenced. It could not have done so on the basis of the material before it. It simply said (see paragraph 11 above):

> "Mr Parker's statement dated 4 March 2011 acknowledges that he failed to licence the property as required by the Act. He does not suggest that at any time for which a repayment may be ordered, it was licensed. We were satisfied therefore that at no material time for our purposes was the HMO licensed."

The RPT was not entitled, in my judgment, to make such a finding. Mr Parker's contention was that the material time began with his conviction. That was wrong, but, given that that was his contention, the RPT could not properly have drawn any inference from the fact that he did not suggest that the property was licensed at any particular time.

30. In his application for permission to appeal and at the hearing before me, as I have said, Mr Parker said that he had previously registered the property as an HMO on 15 April 2002, and at no time had he been informed that the licence had been revoked. There was no terminal date on the licence. The first communication from the council suggesting that a new HMO licence was required was not received until 13 May 2010. He did not, however, produce the 2002 licence or the communication from the council. Nor did he seek to explain how the HMO provisions operated in Portsmouth before and after the 2004 Act, even though these were matters that, as a landlord of HMO property, and particularly as an estate agent engaged in the letting of such property, he ought to have known about.

31. Mr Parker's second contention was that the RPT had been wrong to award the tenants 100% of what they had paid by way of rent. In doing so, he said, it had failed to apply the test of reasonableness, in particular by failing to take account of his financial circumstances, the fact that the repayments would be a windfall for the tenants, the absence of any finding of misconduct on his part, and the fact that the rent included the cost of gas, electricity, council tax and water. As far as the first of these is concerned no evidence about any limitations in his financial circumstances was produced to the RPT, and there was nothing in this respect for the RPT to take into account. As far as the windfall argument is concerned, I have said above that I do not regard the fact that the tenant will have had the benefit of the accommodation during the relevant period for less than the contractual rent to be a material consideration, or, if it is a material consideration, one to which any significant weight is to be attached.

32. The approach of the RPT was made clear in paragraph 15(d) of its decision. It said that it could find no reason to limit the repayment orders to less than the full amount that could be ordered. It is implicit in this that it treated the Act as providing that an RRO should order the repayment of the maximum amount that could be ordered to be repaid unless there are good reasons to order less than this. That was clearly wrong, in my view, as I have said above. What the RPT was required to do under section 74(5) was to determine an amount that was reasonable in the circumstances. It had to form a judgement, bearing in mind the purpose of the provisions as I have identified them, and having regard to the circumstances, including in particular the matters set out in section 74(6). The power under section 73(5) to make an occupier's RRO in respect of rent is to be contrasted with the duty that is imposed under section 74(2) to make a repayment order in respect of housing benefit that is equal to the full amount of that benefit; and subsection (5) of section 74 is to be contrasted with subsection (4), which provides that a repayment order in respect of housing benefit may not require the payment of any amount which, by reason of exceptional circumstances, it would be unreasonable for the landlord to pay.

33. Paragraph 15(c) of the decision clearly implies that because Mr Parker's payment of utility costs was not a matter of his conduct or his financial circumstances this was not a material consideration. That, in my judgment, was an error. The matters set out in section 74(6) are not the only potential material considerations. Since the power to make an RRO is a penal power, it must be relevant to have regard to the benefit that the landlord has derived from his illegal conduct as well as considerations that go to his culpability and the seriousness of the offence itself.

34. Mr Parker's final contention was that the RPT was wrong not to have given an indication as to any time within which the repayments were to be made. The short answer to this is that the tribunal had no power to order a staged or delayed repayment.

Interim decision

35. In view of my conclusions in paragraphs 28, 30, 32 and 33 the appeal must be allowed. The RPT was in error–

(a) In making repayment orders for periods after 21 January 2011 (the date of Mr Parker's application for a licence);

(b) In finding that the property was not licensed at any material time;

(c) In determining what repayment amount was reasonable in the circumstances on the basis that a repayment of the maximum amount should be made unless there were reasons for not doing so; and

(d) In treating as immaterial the amounts included in respect of utility costs and council tax in the rents paid by the tenants.

36. I have considered in the light of these conclusions whether the case should be remitted to the RPT, but the better course appears to me to be that I should re-take the decision in the light of any further material that the parties may now see fit to put before me in the light of what I have said. Any statements or submissions, together with any documents relied on, must be sent to the Tribunal and copied to the other party within 28 days of the date of this decision. I think it unlikely that a further hearing will be required, but I will consider any request that either party may make about this.

Dated 29 August 2012

George Bartlett QC, President

ADDENDUM

37. The parties sent representations as they were invited to by the previous paragraph. I have considered these together with the material already before me for the purpose of determining the amounts to be included in the RRO in relation to each tenant. I approach the determination bearing in mind the considerations which I set out in paragraph 26. They include the specific requirements contained in section 74(6) – the

fact that Mr Parker was convicted under section 72(1), his conduct and financial circumstances and the conduct of the occupiers.

38. Mr Waller has referred a number of ways in which he asserts that Mr Parker acted badly as a landlord. They include intimidation and harassment and failure to implement vital repairs, in particular failures to mend the central heating boiler, which was out of action for periods in 2004 and 2008, and to carry out various works of repair, which resulted in an improvement notice and an interim management order being served on Mr Parker in May 2010.

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. Mr Parker's offence consisted in the fact that he was a person having control of an HMO which was required to be licensed but was not so licensed. I am not satisfied that the matters of which Mr Waller complains are related to the failure to license the premises. It might on the other hand be open to a landlord to rely on material showing that in all respects other than the failure to license the premises he had been a model landlord. That could constitute mitigation in accordance with the principles that generally apply in sentencing. There is nothing, however, that would suggest to me that the amount of the RRO should be reduced on this ground. It is, therefore, only Mr Parker's conduct in relation to his failure to obtain a licence that requires to be considered. Of obvious relevance to this is the fact that he is an estate agent, actively engaged in the management of domestic property. He was well aware of the need to obtain a licence for any premises that constituted an HMO, and indeed he says that under the previous licensing schemes the premises had been licensed. For a time Mr Parker had contended that under the new scheme the premises were not three-storey premises and so were not licensable. While I accept that he initially advanced the contention believing it to be right, he would have been aware that if he was wrong he was committing an offence in letting unlicensed premises. He showed no urgency, as a professional in his position should have done, in seeking to sort the matter out. He failed to respond promptly to letters from the council. Even though he was sent notice of his conviction and fine on 22 November 2010 it was not until 21 January 2011 that he applied for a licence. He told the RPT that extreme pressure of work and a complicated home life as a single parent caring for two teenage children had taken its toll and he had simply buried his head as far as the matter was concerned. I do not accept that this is any mitigation. He was simply insufficiently concerned to do what he was required by law to do and apply for a licence.

40. Mr Parker asks me to take into account his financial circumstances, but only on the basis that these are not divulged to his tenants. It has been made clear to him that I cannot consider his financial circumstances on this basis. Were I to reduce the amount of the RRO because of these, the tenants would be entitled to know the facts that had led me to do so, not simply so that they understood the reasons for my decision but so that they could consider whether to seek permission to appeal against it. There is therefore nothing before me that I can take into account in this respect. As far as the conduct of the tenants is concerned I see nothing that would cause me to reduce the amount of the RRO to be made.

41. As I noted in paragraph 27 the RRO in the present case could only be made in respect of rent for the period before 21 January 2011, when Mr Parker made application for an HMO licence. The relevant period in the case of each tenant is thus between the date shown in the table below and 21 January 2011, and the amounts paid are those that are set out. The table also shows each of these amounts as a percentage of the total rents over the period.

Tenant	Period start	Rate per month	Rent paid during period	%ge of total rent
Mr Waller	4 Feb 2010	£260	£3,000.33	20.28%
Mr Hobbs	4 Feb 2010	£285	£3,288.82	22.23%
Miss McKimm	2 July 2010	£300	£2,002.19	13.53%
Mr Rowland	10 July 2010	£285	£1,827.12	12.35%
Miss Fraser	26 Aug 2010	£285	£1,386.74	9.37%
Mr Philp	4 Feb 2010	£285	£3,288.82	22.23%
			£14,794.02 (total)	

42. The RPT ordered the repayment of the whole of the rents received. Mr Parker says that the amounts that he had to pay out of these gross rents in respect of his mortgage, insurance, gas, electricity, water, council tax and cleaning should be brought into account. These totalled, according to him, £13,550, of which £5,904 was mortgage costs. I consider that it would not be appropriate to impose upon him an RRO amount that exceeded his profit in the relevant period. Mr Waller says that the cleaning charges are unreasonable as he had to do much of the cleaning himself, but the amount does not seem to me to be such that I should discount it. However, it appears that, although Mr Parker bought the house in 1996, the costs of the mortgage relate to a mortgage that was taken out relatively recently, as he says that he is in negative equity. I am not satisfied, therefore, that the mortgage costs should be brought into the reckoning. If these are deducted from the total costs the resulting figure is £7,646; and if this amount is deducted from the total rents, £14,494, the resulting figure of £7,148 seems to me to be a fair representation of the profit that he derived from the lettings over the relevant period. The fine that he paid plus costs amounted to £786, and taking account of this the amount that he was left with was £6,362.

43. In view of Mr Parker's obvious culpability as a professional engaged in the letting of residential property it would in my judgment be reasonable that the amount that he should have to pay to the tenants under the RRO is 75% of his profit less the amount of the fine plus costs, ie £4,771. Dividing this between the tenants on the basis of the percentages in the above table, the amount to be repaid to each tenant is as follows:

Mr Waller	£967
Mr Hobbs	£1060
Miss McKimm	£645
Mr Rowland	£589
Miss Fraser	£447
Mr Philp	£1060

44. The above amounts must be paid to the tenants. Mr Parker asks that he should be given time to make such payments as he may be ordered to make, but I have no power to direct this.

Dated 26 November 2012

George Bartlett QC, President