

## Rent Repayment Orders – What’s the Big Deal?

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### Introduction

A landlord may face liability under a Rent Repayment Order (“**RRO**”) as a consequence of failing to license a property which is required to be licensed as a house in multiple occupation (“HMO”) or where the local housing authority (“**LHA**”) has implemented a selective licensing regime. If landlords fail to secure the required license, they may be liable to repay rent received during the unlicensed period, up to a maximum of 12 months.

RRO’s are not a new sanction, they were introduced by section 73 and 82 of the Housing Act 2004. However, the Housing and Planning Act 2016 breathed new life into the sanction; in England the jurisdiction under which RRO’s are made is now conferred by the HPA 2016. Under the HA 2004, the Tribunal only had jurisdiction to make a RRO where the landlord had been *convicted* of an offence under section 72 or 95 HA 2004. The Tribunal’s jurisdiction has been broadened by the HPA 2016 in that it can now make a RRO where the landlord is found to have *committed* the offence (see section 40(1) HPA 2016).

As a result, we are seeing more and more tenants making applications to the Tribunal in the hope of a favourable order. By section 49 of the HPA 2016, LHA’s may help a tenant to apply for a RRO and may do so by conducting proceedings or by giving the tenant advice. An application for a RRO can be made by a LHA or the tenant themselves.

In practice, Councils are sending tenants notifications informing them that their landlord has failed to apply for the relevant license and encouraging them to make a RRO application. This is especially helpful to LHA’s if they are ultimately entitled to a rebate of Housing Benefit.

### So how does it all work?

A landlord commits an offence if he is a person having control of or managing a house which is required to be licensed but is not licensed.

Essentially there are two questions:

1. Is the Tribunal satisfied beyond reasonable doubt that the landlord has committed an offence?
2. If it is, what is the amount of rent to be repaid?

The Tribunal must be satisfied to the criminal standard that an offence has been *committed* before it considers making a RRO. Most housing and property lawyers are used to dealing with the normal civil standard of proof (balance of probabilities) and it is important to remember the higher threshold when preparing for the hearing. For

those defending a RRO, it is important to remind the Tribunal of this higher standard before they retire as they, like us, are not used to the criminal standard.

## What are the common defences?

In respect of HMO's, section 72 HA 2004 contains a number of defences which absolve the landlord from liability. That provision is mirrored for selective licensing requirements in section 95 HA 2004.

The following are potential defences:

1. An exemption to obtain a license existed and was still effective at the time of the offence.
2. An application for a license has been duly made and was still effective at the time of the offence.
3. The landlord had a reasonable excuse for failing to apply for a license.
4. The landlord had a reasonable excuse for permitted the tenant to occupy the house (HMO only).

What amounts to a reasonable excuse is not defined under the HA 2004.

If any of these defences do not apply, the Tribunal will consider the amount of rent to be repaid.

## Application by Tenants

An application can be made by a tenant if the offence was committed in the period of 12 months ending with the day on which the application is made. If the Tribunal is satisfied that the landlord has committed the offence, the Tribunal must then consider the amount of rent that it will order to be repaid. Section 44 HPA 2016 sets out a number of considerations keeping in mind that the amount must relate to rent paid by the tenant in respect of a maximum of 12 months.

The Tribunal must 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 the offence.

For both sides of the case, it is these questions that must be specifically addressed in the statement of case. In our experience, if a landlord admits to the offence and explains why it occurred, the Tribunal seems to take a more lenient approach as opposed to a landlord who has denied liability from the outset. Careful advice and drafting are key in these cases.

## Applications by LHA's

An application can be made by a LHA if the offence relates to housing in the authority's area and the LHA has given the landlord notice of intended proceedings under section 42 HPA 2016. Once liability has been established, the Tribunal must then consider quantum. Section 45 HPA 2016 outlines the factors that the Tribunal must consider. Again, the amount must relate to Universal Credit paid by the tenant in respect of a maximum of 12 months. The factors are as above but without the need to consider the tenant's conduct.

### *Assistance with an application by tenants*

LHA's appear to prefer to assist tenants with their applications rather than making the application themselves. This assistance is usually a key part of the tenant's case as it is likely to be difficult for a tenant to prove that an offence has been committed – such as evidence that no application has been made for a property licence.

We have reviewed a number of LHA's websites, and most have detailed guidance available online to assist tenants with understanding how to make an application to the Tribunal. The HPA 2016 encourages LHA's to assist tenants with an application for a RRO. This usually includes providing advice to tenants on their rights but can extend to conducting proceedings on the tenant's behalf.

### **How much can be claimed?**

As already discussed, the amount of rent that tenants can reclaim is capped at 12 months but cannot exceed the amount of rent paid by the tenant.

It is important to remember that the Tribunal is not obliged to award the full amount of rent, and in our experience will only do so in exceptional and very specific circumstances. The award is subjective and is wholly dependent on the facts before the Tribunal. However, the following are taken from our own experience:

AA v BB – a investor landlord ("LL") rented out the property but had retired to live abroad. The LL produced evidence to show that he had informed the LHA of his correspondence address. For 10 years the LHA had used this correspondence address to send their service charge demands. When the licensing scheme was introduced guidance was sent to the property and no notification was sent to the LL's correspondence address. The tenants did not forward the post to the LL. The LL accepted that ignorance was not an excuse and admitted liability; he produced detailed financial evidence to show he relied on his rental income for his retirement. The Tribunal awarded 3 months of rent to the tenants.

CC v DD – an investor landlord ("LL") rented out 5 rooms in the property and failed to obtain a licence. The application was made by a single tenant ("A"). The tenants of each room did not know each other, and the LL sought to defend the application on the basis that he rented the other rooms for storage purposes rather than accommodation. The LL's case was that the A mistakenly thought there were 4 other people occupying the property. A produced extensive evidence of text message conversations with the other tenants which

demonstrated they occupied the property on a permanent basis. The Tribunal found the LL liable and awarded 8 months rent to A. The Tribunal specifically noted that the LL's evidence was 'unconvincing.'

## 5 Points to Remember

1. An application for an RRO can be made where the landlord has not been *convicted* of an offence but is found to have *committed* an offence.
2. The Tribunal must determine the application to the criminal standard of proof.
3. Any amount ordered to be repaid to a tenant or the LHA is recoverable as a debt.
4. If the landlord has been *convicted* of an offence, the Tribunal will order the maximum amount it has the power to order (see section 46 2016 Act).
5. If the LHA becomes aware that a landlord has been convicted of an offence, it has a duty to consider applying for a RRO (see section 48 2016 Act).

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