



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER (RESIDENTIAL  
PROPERTY)**

**Case Reference** : **CHI/21UD/HMF/2020/0020**

**Property** : **62b Elphinstone Road, Hastings, TN34  
2EB**

**Applicant** : **Andrew Sullivan and Elle Watson**

**Representative** : **N/A**

**Respondent** : **Trio Property Investment Limited  
Deborah Weller**

**Representative** : **N/A**

**Type of Application** : **Application for a Rent Repayment Order  
by tenant (ss40 to 44 Housing and  
Planning Act 2016)**

**Tribunal Members** : **Judge R Cooper  
Mr K Ridgeway  
Ms J Dalal**

**Date and venue of  
Consideration** : **22<sup>nd</sup> October 2020  
Havant Justice Centre (remote hearing  
– CVP)**

**Date of Decision** : **26<sup>th</sup> October 2020**

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**DECISION**

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**The Applicants are entitled to a Rent Repayment Order.**

**The Respondent must pay the sum of £4,946.00 to the Applicants  
within 42 days of the date of this decision.**

**The Respondent must pay the application fee (£100) and the hearing fee (£200) to the Applicants within 42 days.**

### **The Application**

1. On 17<sup>th</sup> July 2020 the Tribunal received an application from the Applicant tenants under s41 Housing and Planning Act 2016 ('the 2016 Act') seeking a Rent Repayment Order ('RRO').
2. The Applicants seek to recover from the Respondent the rent they paid for their occupation of 62b Elphinstone Road, Hastings, TN34 2EB ('the Property') for the period 22<sup>nd</sup> June 2019 to 24<sup>th</sup> January 2020 ('the Relevant Period'). The Applicants also seek reimbursement of the application fee (£100) and hearing fee (£200).
3. The Tribunal issued directions on the 6<sup>th</sup> August 2020, and 16<sup>th</sup>, 21<sup>st</sup> and 24<sup>th</sup> September 2020, which have been complied with by the parties. Both parties have filed their statements of case and evidence, and the Applicants served an additional statement in response. The hearing originally listed on 6<sup>th</sup> October 2020 was adjourned until 22<sup>nd</sup> October due to the Respondent's travel plans.

### **Background to the application**

4. On 10<sup>th</sup> October 2017 Hastings Borough Council ('the Council') exercised powers under s56 Housing Act 2004 and designated four wards as an area for an Additional Licencing Scheme for Houses in Multiple Occupation (HMOs). The additional scheme came into force on 4<sup>th</sup> May 2018 [91]. 62b Elphinstone Road, Hastings, TN34 2EB ('the Property') falls within the designated area [83].
5. Trio Property Investment Ltd ('Trio'), the leasehold owner of the Property, granted Mr Sullivan and Ms Watson a 12-month tenancy, which commenced on the 22<sup>nd</sup> June 2019. The tenancy agreement provides for a rent of £700 due in advance on the 22<sup>nd</sup> day of each month [29]. A deposit of £805 was also payable [51].
6. Deborah Weller is the freehold owner of 62 Elphinstone Road, and is a Director and the sole shareholder of Trio. At the material time she was responsible for day-to-day management of the Company, although she appointed Fox and Sons (Sequence) to identify prospective tenants, carry out checks and deal with the tenancy sign up.
7. On 24<sup>th</sup> January 2020 Mrs Weller applied to the Council for a licence in respect of 62 Elphinstone Road. A licence was issued on 9<sup>th</sup> June 2020 valid until 23<sup>rd</sup> January 2021 [122].
8. The Applicants' application for a Rent Repayment Order was received by the Tribunal on 17<sup>th</sup> July 2020.

## **Issues in the appeal**

9. The Applicants apply for a RRO under s41 of the 2016 Act for the period 22<sup>nd</sup> June 2019 to 24<sup>th</sup> January 2020. In their application they claimed the sum of £4,900 or £5,600 [6].
10. An RRO can only be made where the Tribunal is satisfied that the Respondent had committed one or more of the seven specified offences (set out in s40 of the 2016 Act). In this case, the Applicants assert the Respondent committed an offence under s95(1) Housing Act 2004 ('the 2004 Act') by failing to obtain a licence from Hastings Borough Council as required by the additional HMO licencing scheme.
11. Before making an RRO the Tribunal must be satisfied to the criminal standard (i.e. beyond reasonable doubt) that the specified offence has been committed (s43(1)).
12. If satisfied an offence has been committed, s43(3) requires the Tribunal to consider the amount of the RRO which must be determined. In the case of an application made by a tenant the relevant factors are set out in s44.
13. The amount of the RRO must relate to the rent paid in a period not exceeding 12 months during which time the landlord was committing the offence (s44(2)). It must not exceed the rent paid by the Applicant in respect of that period (less any Universal Credit (or Housing Benefit) paid) (s44(3)). The Tribunal must take into consideration the matters set out in s44(4) namely conduct of the Applicant and Respondent, the financial circumstances of the Respondent and whether she had been convicted or fined for any of the offences listed in s40(3).

## **The Law**

14. The applicable law referred to in this decision is set out in full in the Appendix to this decision.

## **The hearing**

15. Because of the Covid 19 pandemic, this was a remote hearing conducted fully on video by CVP, as directed on 6<sup>th</sup> August 2020.
16. The Applicants and the Second Respondent appeared in person. Neither party was represented.
17. There were two breaks during the hearing, and at the end of the hearing both parties confirmed they were satisfied there had been no technical difficulties with the hearing.

**Decision and reasons** (References in this decision to pages in the bundle appear in [])

*Did the Respondent commit an offence under s95(1) Housing Act 2004?*

18. The Tribunal finds the Property falls within the Council's designated area for the Additional Licencing Scheme [83]. Having considered the totality of the evidence in the round, and in particular the letter from Deborah Watts, of the Council's Housing Licencing team [26], the Tribunal is satisfied beyond reasonable doubt that the Respondent did commit an offence under s95(1) of the 2004 Act by failing to have a licence at all times when the Property was let from 4<sup>th</sup> May 2018 until her application was made on 24<sup>th</sup> January 2020 [27 and 122].
19. Mrs Weller did not deny that a licence was required, and that she did not have one at the relevant time, but simply says she was unaware of the requirement to hold one until receiving the Council's email in November 2019. The Tribunal did not find this a reasonable excuse. She is a professional landlady, who established a company (Trio) *inter alia* to acquire and let out rental property for profit. She had previously held an HMO licence in respect of 62 Elphinstone Road. It appeared to the Tribunal that despite claiming to be professional in her approach to letting property, she had taken no reasonable steps to understand her legal obligations in respect of HMOs. Although she may have had difficult personal circumstances (an injury sustained in September 2018 and the tragic death of her brother in March 2019), the Council's additional licencing requirements came into force on 4<sup>th</sup> May 2018, following designation in October 2017.
20. The Tribunal also found there was no reasonable excuse for the delay in applying for the licence between 21<sup>st</sup> November 2019 (when she says she was first aware of the requirement) and 24<sup>th</sup> January 2020 when she made her application. Mrs Weller explained that the reason for the delay in applying for the licence was because she had an agreement with Mr Ian Doe (who is the leasehold owner of 62c and 62d Elphinstone Road) to share the costs of an HMO licence. She therefore was waiting for payment from him, and had provided the Tribunal with evidence of her communication with Mr Doe. The Tribunal found that Mrs Weller needed to get an HMO licence irrespective of any payments she may or may not have received from Mr Doe.

*Was the offence committed in the 12-month period immediately preceding receipt of the application?*

21. As the Applicant's application was received by the Tribunal on 17<sup>th</sup> July 2020, we found the offence was committed in the 12 month period immediately prior to the application (s41(2)). The Tribunal, therefore, has jurisdiction to make a rent repayment order.

*What is the total amount of the RRO that could be awarded by the Tribunal?*

22. Section 44(2) provides that in relation to an offence under s95(1) the amount of the maximum that can be ordered by the Tribunal is repayment of rent for a period not exceeding 12 months. In this case the offence under s95(1) of Part 3 Housing Act 2004 was committed from 22<sup>nd</sup> June 2019 until 23<sup>rd</sup> January 2020 (inclusive), a period of 7 months and 2 days ('the Relevant Period').
23. The issues the Tribunal had to determine, therefore, were
  - (i) the rent liability under the tenancy agreement,
  - (ii) the rent that was paid in respect of the Relevant Period less any housing benefit or housing cost element of Universal Credit, and
  - (iii) whether the maximum rent repayment that could be ordered should be reduced.

*What was the rent due under the tenancy agreement?*

24. The tenancy agreement entered into between Trio and the Applicants confirms the rent due was £700 per calendar month payable in advance on the 22<sup>nd</sup> of each month [29].

*What rent was paid by the Applicants in respect of the Relevant Period?*

25. Ms Watson's bank statements show payments of £700 to Mrs Weller on or around the 22<sup>nd</sup> of each month from 22<sup>nd</sup> July 2019 to 22<sup>nd</sup> May 2020 (inclusive). They also show that £1,344 was paid to Sequence on 25<sup>th</sup> June 2019. During the hearing the Applicants produced a screen shot showing that a holding deposit of £161 was also paid to Sequence on 3<sup>rd</sup> June 2019. The Tribunal finds that between 22<sup>nd</sup> June 2019 and 22<sup>nd</sup> January 2020 a total of £6,405 was paid by the Applicants to the Respondent and their agent Fox and Sons (Sequence), including the deposit of £805 [29 and 51] and the rent due in full for the months of July 2019 to January 2020 (inclusive). Ms Watson's statements also show that she received a contribution towards the rent from Mr Sullivan. There is no evidence suggesting the Appellants received Housing Benefit or the Housing Cost Element of Universal Credit.
26. The Tribunal finds that the Applicants paid to the Respondent rent amounting to £4,946.00 for the Relevant Period (22<sup>nd</sup> June 2019 to 23<sup>rd</sup> January 2020), a period of 7 months and 2 days.

*Should the maximum rent repayment be ordered or should it be reduced?*

27. The Upper Tribunal in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC) (in particular at paragraphs 14, 15 and 19) made clear that the only

relevant matters for the Tribunal when determining whether anything other than the maximum rent should be repaid under the 2016 Act are (a) the conduct of both parties, (b) the financial resources of the landlord, and (c) whether the landlord had been convicted of any offences listed in s40(3). Upper Tribunal Judge Elizabeth Cooke expressly confirmed that the reasoning in *Parker v Waller* [2012] UKUT 301 (LC) does not apply under the Housing and Planning Act 2016 regime. The Landlord's net profit is therefore not the starting point [15], although at [16] Judge Cooke confirmed that any payment made by the Landlord for utilities (which benefitted tenants) could be deducted.

28. The Tribunal made the following findings as regards the matters to be taken into account under s44(2).

#### *Conduct of the Respondent*

29. The Tribunal is satisfied that Ms Weller is a professional landlord. She established Trio on 18<sup>th</sup> March 2013 [173], which she confirmed was for the purpose of purchasing the two leases at 62 Elphinstone Road (flats A and B). She has since let out both of those properties and at least one other for profit.
30. The Tribunal finds that she failed to take reasonable steps to ascertain her legal obligations as a landlord. Ms Weller complains that the Council did not make her aware of the new licencing scheme [107]. However, it is for landlords themselves to understand and comply with their legal duties before letting their property, if necessary by taking legal advice or employing professional managing agents. The Tribunal is also satisfied that as a matter of public record there is an abundance of information available online about HMO licencing and the obligations of landlords, including from Hastings Borough Council in whose district all three of her rental properties are situated.
31. Nor does the Tribunal find her broken clavicle in September 2018 or the tragic death of her brother in March 2019 to be a reasonable excuse, as the licencing requirements came into force well before both events. The area for the Additional Licencing Scheme was designated in October 2017 [91]. Mrs Weller has previously held an HMO licence for the Property issued by the Council under the 2015 scheme and the Tribunal was therefore satisfied she was aware of HMO licencing requirements and on notice that the Council might again designate licencing areas.
32. The Tribunal also finds Mrs Weller delayed unduly in applying for a licence (having been sent warning letters by the Council on 2<sup>nd</sup> and 29<sup>th</sup> October 2019 [112] and by email on 21<sup>st</sup> November 2019 [110]). Her claim not to have received either warning letter lacked credibility. There was no evidence to suggest she was unable to drive to the company's Registered Office in Tunbridge Wells in October 2019, and Mr Doe's failure to provide his 50% contribution of the application fee until January 2020 was not a reasonable excuse for her failure to apply.

33. The Applicants complain about Mrs Weller's attempts to retain a significant portion of their deposit at the end of tenancy, and of charging an inflated for carpet cleaning. The Tribunal has given this no weight. Matters were resolved by raising a dispute through TDS.

*The Tenant's conduct*

34. Mrs Weller makes allegations regarding the Applicant's conduct. She says they caused damp in one bedroom through drying wet washing and failing to ventilate, and left the property in a poor and dirty state at the end of the tenancy. The Tribunal finds neither made out on the evidence. The checkout inspection clearly indicates that at the property was left in a broadly similar state to its condition at commencement (as shown by the original inventory notes) [132 to 165]. Had the problem with damp been simply one of a lack of ventilation, the Tribunal found repairs would not have cost £1,500 as Mrs Weller claimed. On the evidence heard it appears there were drainage problems at the property at the time the Applicants vacated, and that there had been issues during the tenancy with leaks from the flat above into both the bathroom and kitchen.
35. Mrs Weller also complains that the Applicants failed to notify her in October or November 2019 regarding her failure to obtain a licence, but the Tribunal finds it was not their responsibility to do so.

*The financial circumstances of the Respondent*

36. The Respondent says nothing about her income, save that 62 Elphinstone was purchased as a buy to let property and her loan repayment for Flats A and B were approximately £573 per month at the material time. She confirmed in evidence that in addition to the two flats in Elphinstone Road she rented out another property in Hastings and that her husband ran a building firm and was VAT registered.
37. The Upper Tribunal confirmed in *Vandamalayan v Stewart* (at paragraphs 14 and 15), that the starting point for the Tribunal is not the Landlord's net profit but rather the rent payments made by the tenant. Although the Upper Tribunal confirmed that any payment made by the landlord towards the utilities used by the tenants could be taken into account, under the terms of the Applicants' tenancy agreement in this case the Respondent does not pay anything towards the utilities. As Judge Elizabeth Cooke said in [19] of that judgment '*I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence.*'
38. Whilst Mrs Weller may not be making very substantial profit through her business, the Tribunal found there was no basis on which the RRO should be reduced on account of her financial circumstances.

### *Convictions*

39. The Tribunal accepts that the Respondent has not been convicted of an offence in relation to any of the matters set out in s40(3).
40. There were no other matters considered of relevance by the Tribunal

### Conclusion

41. Having considered in the round the conduct of the parties, the Respondents' financial circumstances and all other matters as set out above, the Tribunal concludes that there is no reason to reduce the maximum rent repayment that could be ordered. Accordingly the rent to be repaid by the Respondent to the Applicants is £4,946.00 for the period 22<sup>nd</sup> June 2019 to 23<sup>rd</sup> January 2020 (both dates included). Having allowed the application, there is no reason why the application and hearing fees sought should not be paid by the Respondent also.

**Judge R Cooper**

**Date 26<sup>th</sup> October 2020**

### **Note: Appeals**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office that has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.



## APPENDIX 1

The following are relevant excerpts from the legislation referred to in this decision

### 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 has 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 by that landlord.

	<i>Act</i>	<i>Section</i>	<i>general description of offence</i>
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
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.

#### **43 Making of 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 has 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 in accordance 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 the table.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
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 paid 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, and
- (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.