FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AZ/HMF/2020/0056**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Basement Flat 114 Asylum Road SE15 2LW**
Applicant	**:**	**(1) JULIA FISH** **(2) CAROLINE MARTIN** **(3) CHARLOTTE SIMPSON**
Representative	**:**	**JUSTICE FOR TENANTS (Mr A McClenahan)**
Respondent	**:**	**(1) Ms NADINA MUSTAFA** **(2) Ms SIENNA MUSTAFA** **(3) Mr TEKIN MUSTAFA**
Representative	**:**	**In Person**
Type of application	**:**	**Application by Tenants for a Rent Repayment Order, pursuant to the Housing and Planning Act 2016**
Tribunal members	**:**	**JUDGE SHAW** **Mr. M CAIRNS MCIEH** **Mrs L CRANE MCIEH**
Venue	**:**	**Remote Video Hearing**
Date of decision	**:**	**19th January 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented by the parties. The form of remote hearing was V: CVPEREMOTE . A face-to-face hearing was not held because of the Covid-19Pandemic, the Applicant resides in Canada, and all parties were agreeable to a remote hearing. It was practicable to resolve all issues with a remote hearing. The documents referred to by the Tribunal are in 2 bundles, submitted by the parties respectively, which were supplemented by further documents during the hearing. The contents of all documents have been carefully considered by the tribunal.

Introduction

1. This case involves an application by the three above-named former tenants ('the Applicants") of the Basement Flat, 114 Asylum Road SE15 2LW ('the Property") for a Rent Repayment Order ("RRO") in the sum of £21,573.03. The application is made under the provisions of the Housing and Planning Act 2016 ('the Act') against the three above named registered freehold proprietors and landlords of the house of which the Property forms part.

2. The Applicants were each granted a tenancy of the Property on 31st December 2018 to run for a term of 12 months until 30th December 2019. The (unrelated) Applicants each had their own room in the Property, and had shared use of kitchen, bathroom and WC facilities. It is not in dispute that the lettings required an HMO licence, and that no such licence had been applied for or obtained by the Respondents – thereby committing and offence. The local authority elected not to prosecute the offence, but the Applicants are entitled to apply for an RRO in respect of the period during which the licence should have been in operation. In this case, the full term of the Tenancy expired on 31st December 2019, but when the Respondents discovered the necessity for a license (as to which, see below) they were advised by the local authority (London Borough of Southwark) to apply for a Temporary Exemption, which they did on 14th October 2019, and which was granted on 16th October 2019. Again, it is not in dispute that the period of recoverability under the RRO expires as at 16th October 2019, and that the sum in question is £21,573.03.

3. The Application was received by the Tribunal on 5th February 2020, just as the pandemic was breaking. Directions were given later in the year on 16th September 2020, and a hearing of this matter took place before the Tribunal by video link on 11th January 2021. The Applicants appeared in person, and represented by Mr. A McClenehan, of an organization caller Justice for Tenants, which Mr McClenehan informed the Tribunal, is a not for profit organization which assists tenants in these circumstances. The Respondents are siblings. Ms Nadina and Ms Sienna Mustafa attended the hearing and represented themselves, and their brother Tekin, who did not appear. He is a joint proprietor of the Property and a named landlord on the Tenancy Agreements, but so far as could be ascertained, played no active part in the letting of the property – though there is no dispute that was equally obliged to have the necessary licence.

4. Notwithstanding the usual provision in the Directions for the preparation of witness statements, neither side prepared any to put before the Tribunal. However, both sides prepared useful Statements of Case and accompanying documents, which were read by the Tribunal and referred to during the hearing. The Tribunal heard, and was assisted by, evidence from each party attending, and submissions from Mr McClenehan and the two attending Respondents.

5. It is proposed briefly to refer to the relevant and agreed law, and then to summarise the case put forward by both sides. No disrespect is intended to either side if each and every piece of evidence is not referred to in this summary. Suffice it to say that all the evidence has been carefully considered and weighed by the Tribunal, in coming to its conclusions, which will appear in this Decision after these summaries.

The Law

6. As indicated above, there was no dispute in this case that the Property required an HMO licence, that none had been obtained at the relevant time, and that the Applicants were entitled to an RRO against the Respondents. By virtue of section 44(4) of the Act, it is provided that:

"(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".

Mr Mc Clenehan drew the attention of the Tribunal to the decision of the Upper Tribunal (Judge Elizabeth Cooke) last year, binding upon this Tribunal, in the case of ***Vandamalayan v Stewart and others [2020] UKUT 183 (LC).*** In that case, Judge Cooke observed that the provisions of the 2016 Act are more *"hard edged"* than those of its 2004 precursor. She held that *"There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors…..The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances".*

Earlier in her judgment at paragraphs 9-16, she distinguished the earlier decision of the Tribunal in *Parker v Waller*, made under the earlier legislation, and in which the Tribunal had focused on the landlord's profits, rather than the full repayment of rent – allowing various overheads paid by the landlord as deductions. She disapproved of such an approach under the wording of the 2016 Act, stating that *"There is no requirement that a payment in favour of the tenant should be*

reasonable.....That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period...."

7. Mr McClenehan also referred to the subsequent decision of Judge Cooke in the Upper Tribunal in ***Chan v Bilkhu [2020] UKUT 289 (LC)*** in which she reiterated the principles earlier stated, and ordered a return of three quarters of the rent paid, on the basis that the property had not qualified as an HMO for this period of the tenancy.

The Applicants' Case

8. As mentioned, the Applicant's prepared a full and helpful Statement of Case, coupled with a further Statement of case in Response to that of the Respondents. This was supplemented by various reports and research papers submitted by Mr McClehahan on the importance of complying with licencing provisions, and the serious consequences for tenants when rogue landlords flout the protective legislation. More particularly in respect of the individual circumstances of this case, the Tribunal was directed to extensive e-mail and text correspondence between the Applicants and the Respondents (especially the second-named Respondent, Sienna) concerning allegations of damp and mould in this basement flat, during approximately the July/August period 2019. The Tribunal was shown photographs of mould deposits on some clothes and a mattress. There were also exchanges about an extractor fan which though working at the start of the tenancy, ceased working. A temporary extractor was supplied but the fixed extractor was not replaced until approximately August/September. There was an explanation for this given by the Respondents which will be mentioned below.

9. In addition there were concerns that a bed frame or leg had collapsed, and that a blocked drain was aggravating the damp situation.

10. It was argued on behalf of the Applicants, that though it was possible to order part only of the relevant rental to be returned, based on considerations of conduct, - there was no conduct on the part of the Respondents which supported such a measure. Indeed, Mr McClenehan argued that the Respondents had a high degree of culpability. The damp and other issues were not dealt with timeously, and the Respondents were experienced landlords who should have been well appraised of their licencing obligations. He pointed to the Respondents' own evidence that the property had been rented for over 15 years, and submitted that the Respondents had prevaricated on repairs and failed to obtain the licence all as part of a pattern of economizing on expenditure and maximizing profit. He pressed the Tribunal to order the full sum of rent to be returned. Applying Judge Cooke's above guidance, the Tribunal should start from a position of full repayment, and, in this case, stop at that point too.

The Respondents' Case

11. Both Respondents who addressed the Tribunal contended that the picture being painted of them was unfair and inaccurate. They argued that insofar as mould or mildew had developed on some of the Applicants' clothing, it had come about because they would repeatedly leave out wet or freshly washed clothes in this basement flat, but not ventilate the Property by allowing fresh air to enter through the windows periodically. The blocked drain had been the result of tenant misuse, and the extractor fan had worked well at the start of the tenancy. They resisted the suggestion that they were "experienced landlords" – (which will be (examined below), and took the Tribunal through the relevant correspondence, to show that they had in fact acted responsibly when the various issues were brought to their attention during the summer of 2019. They vehemently rejected the aspersion that their prime motivator was the saving of money, and made the point that it would have been absurd for them to ignore what

might have been a structurally important allegation of damp – together with the possible health and safety consequences for their tenants.

Analysis and Determination of the Tribunal

12. The Tribunal takes as its starting point, the guidance given by the Upper Tribunal, as referred to above, that the whole of the rent (in this case £21,573.03) should be returned to the Respondents. In taking this position it is mindful of the fact that the Act has a penal element, and is not primarily designed to achieve a "reasonable" result. As was put by HH Judge Cooke, the Act is "hard-edged."

13. In the experience of the Tribunal, multi occupied property has often historically contained unsatisfactory and hazardous living accommodation, with particular concerns about inadequate fire safety provision in such properties. We are also aware of the argument, as contained in some of the research material produced to the Tribunal, that good landlords who licence promptly, may feel they are being unfairly treated, in the event that failure to licence is not met with serious consequences. There are then sound public policy reasons for the provisions.

14. On the other hand, the statute does give some scope (albeit reduced from that of the earlier Act) for taking into account the 3 factors mentioned in section 44(4).

15. At the outset of the hearing, the Tribunal asked both sides whether the central issue was whether there was "conduct" which was relevant in fixing the amount to be determined. Both sides confirmed that this was the case. As it transpired, both sides endeavoured to introduce arguments as to financial circumstances to be taken into account by the Tribunal. The Tribunal declines to do so. There was no proper

evidence to support either side's contentions in this regard. The inference from the Respondents was that the Applicants were well-placed financially, and were out to exploit this legislation. In contrast, on behalf of the Applicants, it was argued that the Respondents were from a property owning family with some other properties, seeking to maximise returns from these Applicants. The hard evidence either was scant. There were no tax returns, pay-slips, full bank account disclosure or any of the other material often considered in the context of such allegations. The Tribunal did not consider that there was adequate evidence to make a finding either way on the material before it, and no such finding is made.

16. In addition, and for the avoidance of doubt, the Tribunal did not find made out, the suggestions of poor conduct or motivation, made by the Respondents against the Applicants. By the end of the tenancy the Applicants had paid for all rent and outgoings, and there was no evidence of any willful or culpable damage by them of the Property. The allegations of relevant poor conduct on the part of the Applicants, are rejected by the Tribunal, and form no part of the rationale for this Decision.

17. That leaves the 2 other considerations of previous convictions and "conduct". It is accepted by the Applicants that this is a "first offence" by these Respondents.

18. The more weighty consideration is the conduct of the Respondents, and here it seems to the Tribunal, there is something to be said for the Respondents. The Tribunal will tabulate the factors it takes into account:

    (a) The allegation that the Respondents are *"experienced landlords"* who in effect *"should have known better",* is rejected. The first named Respondent is 38 year-old single mother, with a demanding job in the Civil Service. She is not a professional landlord, and was

thrown into assisting her sister, the second-named Respondent, in trying to deal with this property, in tragic circumstances referred to below. The house of which the Property is part, was formerly their family home. Indeed, the second Respondent had lived at the Property and had returned to do so at the time of the hearing. The family had a small portfolio of property which their late father had managed, until his suicide in September 2016. In the aftermath of that trauma, the two Respondents tried both to cope with their grief and the devastation for the family, and manage this Property. Their brother had tried to manage a restaurant business, but Brexit and Covid had all but destroyed that business, which had had to be supported by government grants or loans. The second Respondent was a 20 year old university student when her father died. She is now a 25 year old student of Fine Art, battling to master the intricacies of Landlord and Tenant legislation. She has joined a recognized Landlords' training organization, and she impressed the Tribunal with her sincerity and desire to regularise the letting of other parts of the building.

(b) Neither Respondent gave the impression to the Tribunal that they had ignored the matters brought to their attention by the Applicants. On the contrary, there is lengthy correspondence between, much of it courteous on both sides, evidencing genuine attempts to deal with the issues raised. The assertion that they were in effect overly frugal and mindful only of profit, is simply not borne out on the evidence before the Tribunal – which includes invoices from local tradesmen inspecting and carrying out works of repair at the Property.

(c) The delay in fixing the specific issues is explicable on the evidence. Each of the Applicants were working, and, for some time, away during the summer months. It was not an easy logistic task to have all persons available at the same time for the various necessary attendances. Once this became possible, the air vents were cleared,

the drain unblocked, the extractor fan replaced – and it was the accepted evidence that the problems had been effectively dealt with by September. They were not ignored.

(d) The evidence on both sides was unsatisfactory as to the mould accumulation. The Applicants confirmed that there was no evidence of black or other mould on the walls of the Property, and that the incidence of mould was mainly in one room. Neither side produced a proper damp report from a qualified expert in the field. The Tribunal had insufficient evidence to conclude that either side was primarily at fault, but in so far as it was alleged that the evidence of the mould on clothes for a restricted period and within a restricted part of the property was negative conduct on the part of the Respondents, militating against any Repayment Order other than a full order – the Tribunal does not make such finding.

(e) The conduct of the Respondents needs to be set in the context of the family trauma that occurred in September 2016. It was then that the Respondent's father (who had been responsible for the acquisition and management of the family property) hanged himself, following what transpired to be a false allegation in respect of a child's paternity (the Tribunal was shown documentary evidence in this regard). The Tribunal was told by the Respondents, and the Tribunal accepts, that his wife and children have since been in PTSD therapy, and have struggled to keep their lives together in the aftermath of this tragedy. Of course ignorance of the law cannot be a defence to this offence, but the Tribunal considers that the conduct of the Respondents ought properly be set into the context of what has happened to the family.

(f) Finally, both of the Respondents were contrite and fully candid before the Tribunal. They wholly supported the importance of the legislation, and the need to bring rogue landlords to heal. They

however contended, and the Tribunal accepts on the evidence, they are not in that category of offender.

Conclusion

19. For the reasons indicated above, there must be a Rent Repayment Order in this case, but the Tribunal is satisfied that there is "conduct" within the meaning of section 44(4) on the evidence before it, to be taken into account in fixing the amount of the order. The Tribunal also takes into account that there have been no other offences by the Respondents. The Tribunal considers that the matters raised above merit a discount of approximately one third of the full order. The Order made by the Tribunal is that a Rent Repayment Order in the sum of £14,250 should be made (amounting to £4750 by each Respondent). The Order should be paid within 6 weeks of the date of this order, that is, by **3rd March 2021,** unless any further order is applied for. In addition the Applicants have applied for repayment of the Application and Hearing Fees (£100 and £200 respectively), which the Tribunal considers they are entitled to, and these fees should be added to the Order.

JUDGE SHAW **19th JANUARY 2020**

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).