FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2021/0126**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**14 Trellis Square, London, E3 2DR**
Applicants	**:**	**Giovanni Cosma, Lorenzo Beltrami and Michelangelo Rafael Claude Carliez**
Representative	**:**	**Clara Sherratt of Justice for Tenants**
Respondent	**:**	**Emil Arumaithurai**
Representative	**:**	**In person**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge P Korn** **Mr T Sennett MCIEH**
Date of Hearing	**:**	**7th October 2021**
Date of Decision	**:**	**25th October 2021**

DECISION

Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in electronic bundles, the contents of which we have noted. The decisions made are set out below under the heading "Decisions of the tribunal".

Decisions of the tribunal

(1) The tribunal orders the Respondent to repay to the Applicants by way of rent repayment the sum of £13,387.50.

(2) The tribunal also orders the Respondent to reimburse the application fee of £100.00 and the hearing fee of £200.00 paid by the Applicants.

Introduction

1. The Applicants have applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("**the 2016 Act**").

2. The basis for the application is that the Respondent was controlling a house in multiple occupation ("**HMO**") which was required under Part 2 of the Housing Act 2004 ("**the 2004 Act**") to be licensed at a time when it was let to the Applicant but was not so licensed and that it was therefore committing an offence under section 72(1) of the 2004 Act.

3. The Applicants' claim is for repayment of rent paid during the period from 1st October 2019 to 31st May 2020 in the amount of £19,125.00.

Applicants' case

4. In written submissions the Applicants state that the Respondent had control of or managed an unlicensed HMO throughout the period of claim, the Property being situated within an additional licensing area as designated by the local housing authority on 1st April 2019. No application for a licence was made at any point during the period of claim.

5. The Property is a 3-bedroom self-contained flat within a purpose-built block of flats with a shared kitchen and bathroom. It was occupied by at least 3 people at all points during the relevant period of 1st August 2019 to 31st May 2020. Each tenant occupied their own room on a permanent basis with one tenancy for all tenants. It was a standard HMO arrangement, there being communal cooking, toilet and washing

facilities, with separate unrelated individuals each paying rent and occupying their rooms as their only place to live.

6. Emil Arumaithurai is believed by the Applicants to be an appropriate Respondent as he is listed as the landlord in the tenancy agreement and is the beneficial owner of the Property as shown in the Land Registry title deed. He is, therefore, a "person having control" of the Property within the meaning of section 263 of the 2004 Act as he is the person who received or would receive the rack-rent if the Property was let. The Respondent also received rent from tenants of an HMO and is therefore in addition a "person managing" the Property within the meaning of section 263 of the 2004 Act.

7. The Applicants have provided evidence of the amount of rent paid by way of copy bank statements and banking screenshots. They were not in receipt of universal credit during the relevant period.

8. As regards the parties' conduct, the Applicants state that they themselves behaved well whilst the Respondent made unlawful gains by renting out the Property without the required licence and thereby failed to ensure that the Property adhered to the strict safety requirements of the licensing system.

9. All of the Applicants have given brief witness statements and made themselves available to be cross-examined on them at the hearing.

Respondent's case

10. In written submissions the Respondent states that he rented the Property out through an Estate Agent, Elms Estate, and that at no stage did the Estate Agent ask him for an HMO licence. He only became aware of the need for a licence after the Applicants had vacated and then raised the issue. On becoming aware of the position, he then immediately applied for a licence. He notes that it only became mandatory to have a licence for this number of occupiers on 1st April 2019 and states that he was in the process of purchasing the Property and therefore this might be why the point was overlooked.

11. In further mitigation, the Respondent states that Mr Cosma (one of the Applicants) texted the Respondent on 27th April 2020 to say that he was finding it difficult to pay his share of the rent, and the Respondent assured him that he could pay later when he could afford it.

12. The Respondent also states that he later searched for Mr Cosma and found that he was looking to sublet the Property (in breach of the terms of the tenancy agreement). He also questions the Applicants' motives for seeking a rent repayment order.

13. The Respondent states that the pandemic has made life harder and that as a doctor he has been working long hours and has also had to deal with certain other matters including looking after his elderly parents. Nevertheless, he ensured that the Applicants were comfortable in the Property and whenever they contacted him in relation to repairs he went to the Property to fix the relevant problem.

14. The Respondent has contacted Mr Cosma's previous landlord who has given a bad reference for him, a copy of which is in the hearing bundle. The Respondent states that the Applicants left the Property partly damaged and he therefore deducted £450.00 from the deposit.

15. At the hearing, after some discussion, the Respondent accepted that the Applicants had paid all the rent due for the period of their claim. He also stated that he is personally struggling financially.

Follow-up points

16. Regarding Mr Cosma's difficulties with paying the rent, the Applicants make the point – not disputed by the Respondent – that he offered that the unpaid rent could be deducted from the deposit.

17. The Applicants state that Mr Cosma was not trying to sublet the Property but rather was advertising the availability of a different property in Shoreditch.

18. Regarding the allegation that the Applicants damaged the Property, the Applicants make the point that the Respondent did not provide any check-in or check-out reports or any inventory and there is therefore no way to ascertain whether the damage was caused by them or was already present in the Property. The Applicants deny causing any damage beyond normal wear and tear. Furthermore, in the Applicants' submission the conditions set out in the tenancy agreement that the Respondent needed to repair the pipes under the sink and the cabinet door in the kitchen and that the Respondent would provide an assortment of new furniture indicated that the Property was already in a run-down state.

Witness evidence

19. In relation to the bad reference from a previous landlord, Mr Cosma said that the landlord in question was a very difficult person. On a separate point, Mr Cosma said that the Applicants between them had paid all of the utility bills on top of the rent.

20. Mr Beltrami accepted that the Respondent responded fairly quickly to any concerns raised by the Applicants whilst in occupation, although he

said that not everything was fixed and the heating did not always work properly.

21. Mr Carliez denied that the Applicants had bad motives for making the application for a rent repayment order. They had contacted Justice for Tenants in relation to concerns about receiving back the whole of their deposit and it was only then that Justice for Tenants had advised them about their landlord's legal obligation to obtain a licence for the Property.

22. It was put to Mr Carliez that his witness statement and that of his co-Applicants described the Property as being in decent condition. He denied that there was a contradiction between this statement and the condition shown by the photographs in the Respondent's hearing bundle as he still considered the Property to be in a decent condition for this type of letting.

23. In cross-examination the Respondent said that he owned one other property, that property being his home.

Relevant statutory provisions

24. Housing and Planning Act 2016

Section 40

(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 …

(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.

	Act	***section***	***general description of offence***
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

Section 41

(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.

Section 43

(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 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) …

Section 44

(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.

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
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.

Housing Act 2004

Section 72

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part … but is not so licensed.

(5) In proceedings against a person for an offence under subsection (1) … it is a defence that he had a reasonable excuse … for having control of or managing the house in the circumstances mentioned in subsection (1) … .

Tribunal's analysis

25. The Respondent has accepted that the Property was not licensed at any point during the period of the claim and that it was required to be licensed. He also does not deny that he was the landlord for the purposes of the 2016 Act, nor that he was a "person having control" of the Property and/or a "person managing" the Property, in each case within the meaning of section 263 of the 2004 Act.

26. We are satisfied based on the evidence before us that the Property required a licence under the local housing authority's additional licensing scheme throughout the period of the claim. We are also satisfied on the evidence that the Respondent had control of and/or was managing the Property throughout the relevant period and that the Respondent was "a landlord" during this period for the purposes of section 43(1) of the 2016 Act.

The defence of "reasonable excuse"

27. Under section 72(5) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a house which is licensable under Part 2 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence. The Respondent has not tried to argue strongly that he had a complete defence on this basis, but in any event on the basis of the evidence before us we do not consider that the Respondent had a reasonable excuse for the purposes of section 72(5). Mere ignorance of the law (if the Respondent was indeed ignorant) is insufficient for these purposes.

The offence

28. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. The offence of control or management of an unlicensed HMO under section 72(1) of the 2004 Act is one of the offences listed in that table.

29. Under section 41(2), a tenant may apply for a rent repayment order only if the offence relates to housing that, at the time of the offence, was let to the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made. Having

determined that the Respondent did not have a reasonable excuse for failing to license the Property, we are satisfied beyond reasonable doubt that an offence has been committed under section 72(1), that the Property was let to the Applicants at the time of commission of the offence and that the offence was committed in the period of 12 months ending with the day on which the application was made.

Amount of rent to be ordered to be repaid

30. Based on the above findings, we have the power to make a rent repayment order against the Respondent.

31. The amount of rent to be ordered to be repaid is governed by section 44 of the 2016 Act. Under sub-section 44(2), the amount must relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. Under sub-section 44(3), the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of universal credit paid in respect of rent under the tenancy during that period.

32. In this case, the claim does relate to a period not exceeding 12 months. It is also common ground that no universal credit had been paid in respect of the rent.

33. On the basis of the Applicants' evidence, which is not disputed by the Respondent, we are satisfied that the Applicants were in occupation for the whole of the period to which the rent repayment application relates, that the Property required an HMO licence for the whole of that period and – for the reasons already stated – that the Respondent was committing an offence under section 72(1) of the 2004 Act for the whole of that period. There is also no dispute between the parties as regards the amount of rent paid by the Applicants in respect of this period and no suggestion that there is any separate period in respect of which there exist any rent arrears.

34. Under sub-section 44(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 the relevant part of the 2016 Act applies.

35. The Upper Tribunal decision in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* is one of the leading authorities on how a tribunal should approach the question of the amount that it should order to be repaid under a rent repayment order if satisfied that an order should be made. Importantly, it was decided after the coming into force of the 2016 Act

and takes into account the different approach envisaged by the 2016 Act.

36. In her analysis in *Vadamalayan*, Judge Cooke states that the rent (i.e. the maximum amount of rent recoverable) is the obvious starting point, and she effectively states that having established the starting point one should then work out what sums if any should be deducted. She departs from the approach of the Upper Tribunal in *Parker v Waller (2012) UKUT 301*, in part because of the different approach envisaged by the 2016 Act, *Parker v Waller* having been decided in the context of the 2004 Act. Judge Cooke notes that the 2016 Act contains no requirement that a payment in favour of a tenant should be reasonable. More specifically, she does not consider it appropriate to deduct everything that the landlord has spent on the property during the relevant period, not least because much of that expenditure will have repaired or enhanced the landlord's own property and/or been incurred in meeting the landlord's obligations under the tenancy agreement. There is a possible case for deducting utilities, but otherwise in her view the practice of deducting all of the landlord's costs in calculating the amount of the rent repayment should cease.

37. In Judge Cooke's judgment, the only basis for deduction is section 44 of the 2016 Act itself, and she goes on to state that there will be cases where the landlord's good conduct or financial hardship will justify an order less than the maximum.

38. Since the decision in *Vadamalayan*, there have been other Upper Tribunal decisions in this area, notably those in *Ficcara and others v James* (2021) UKUT 0038 (LC) and *Awad v Hooley (2021) UKUT 0055 (LC)*. In *Ficcara v James*, in making his decision Martin Rodger QC stressed that whilst the maximum amount of rent was indeed the starting point the First-tier Tribunal (FTT) still had discretion to make deductions to reflect the various factors referred to in section 44(4) of the 2016 Act. He also noted that section 46(1) of the 2016 Act specifies particular circumstances in which the FTT must award 100% and must disregard the factors in section 44(4) in the absence of exceptional circumstances, and he expressed the view that a full assessment of the FTT's discretion ought to take section 46(1) into account. In addition, he stated that neither party was represented in *Vadamalayan*, that the Upper Tribunal's focus in that case was on the relevance of the amount of the landlord's profit to the amount of rent repayment and that *Vadamalayan* should not be treated as the last word on the exercise of discretion required by section 44.

39. In *Awad v Hooley*, Judge Cooke agreed with the analysis in *Ficcara v James* and said that it will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4).

40. Therefore, adopting the approach of the Upper Tribunal in the above cases and starting with the specific matters listed in section 44, the tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence. We will take these in turn.

Conduct of the parties

41. The Respondent has suggested that Mr Cosma tried to sublet the Property in breach of the terms of the tenancy agreement. Whilst the wording of Mr Cosma's Facebook message is a little strange, our factual finding having considered the Facebook message and cross-examined Mr Cosma is that the message related to a different property, in part because the property in question is described as being in Shoreditch.

42. In relation to the bad reference for Mr Cosma from a previous landlord, it is not relevant to his conduct in this case and it is difficult to place much weight on that reference without any further context and without being able to cross-examine the previous landlord in question.

43. As regards the condition of the Property, in the absence of any objective documentary evidence of the previous condition of the Property or any independent witness or other evidence, we are not persuaded that the Applicants have caused damage to the Property other than fair wear and tear. Overall, the evidence indicates that the Applicants' conduct has been broadly good.

44. As regards the Respondent's conduct, whilst certain points have been raised at a late stage there is nothing in the Applicants' statement of case to indicate any concerns about the Respondent's conduct other than his failure to obtain a licence. As stated at the hearing, the Applicants' written statement of case must be taken as setting out the Applicants' position and it would be unfairly prejudicial to the Respondent – particularly as he is unrepresented – to allow late comments on conduct to be admissible.

Financial circumstances of the landlord

45. The Respondent has stated that he is struggling financially but neither party has provided any meaningful evidence in relation to the Respondent's financial circumstances.

Whether the landlord has at any time been convicted of a relevant offence

46. The Respondent has not been convicted of a relevant offence.

Other factors

47. It is clear from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal "must, in particular, take into account" the specified factors. One factor identified by the Upper Tribunal in *Vadamalayan v Stewart* as being something to take into account in all but the most serious cases is the inclusion within the rent of the cost of utility services. However, in the present case it is common ground that the Applicants have paid for the utilities themselves on top of the rent and therefore no deduction can be made for utilities.

48. We are not persuaded that there are any other specific factors which should be taken into account in determining the amount of rent to order to be repaid.

Amount to be repaid

49. The first point to emphasise is that a criminal offence has been committed. There has been much publicity about licensing of HMOs, and no mitigating factors are before us which adequately explain the failure to obtain a licence. The Respondent claims ignorance of the law, but this is not a sufficient excuse; it is incumbent on those who let out properties to multiple tenants to acquaint themselves with the relevant legislation, the purpose of which is to guarantee tenants certain minimum standards of safety and comfort.

50. We also note that the legislation is in part intended to assist local authorities in locating and monitoring HMOs. Multi-occupied property has historically contained the most unsatisfactory and hazardous living accommodation, with particular concerns about inadequate fire safety provision. Against this background, the failure to apply for a licence is potentially extremely serious. We are also aware of the argument that good landlords who apply for and obtain a licence promptly may feel that those who fail to obtain a licence gain an unfair benefit thereby and therefore need to be heavily incentivised not to let out licensable HMOs without first obtaining a licence.

51. Secondly, there is no persuasive evidence before us that the Applicants' conduct has been anything other than good. Thirdly, even if it could be argued that the Applicants did not suffer direct loss through the Respondent's failure to obtain a licence, it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If landlords can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show that they have suffered actual loss then this will significantly undermine the deterrence value of the legislation.

52. On the other hand, aside from the very important fact of his failure to obtain a licence, the admissible evidence before us indicates that the Respondent's conduct has generally been of a reasonable standard. He has been a fairly responsive landlord and the Applicants describe the Property as having been in a 'decent' condition. He is also not a professional landlord. In addition, the Respondent has not at any time been convicted of a relevant offence.

53. Therefore, in our view there is some scope for deductions from the *Vadamalayan* starting point of 100% of the amount of rent claimed. Taking all the circumstances together, including the condition of the Property, the Respondent's responsiveness and the lack of any criminal conviction, we consider that a 30% deduction would be appropriate in this case. To deduct any more in these particular circumstances would serve to downplay the gravity of the offence.

54. As the amount claimed is £19,125.00, a 30% deduction would reduce this to £13,387.50. Accordingly, we order the Respondent to repay to the Applicants the total sum of £13,387.50.

Cost applications

55. The Applicants have applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for an order that the Respondent reimburse the application fee of £100.00 and the hearing fee of £200.00.

56. As the Applicants have been successful in their claim, albeit that there has been a deduction from the maximum payable, in the absence of any other relevant factors we are satisfied that it is appropriate in the circumstances to order the Respondent to reimburse these fees.

Name: Judge P Korn **Date:** 25th October 2021

RIGHTS OF APPEAL

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

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.