FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/HMG/2021/0012**
Property	**:**	**Room 2, 234 Gipsy Road, London SE27 9RB**
Applicant	**:**	**Nadia Mokadem & Nur Mokadem**
Representative	**:**	**Justice for Tenants**
Respondents	**:**	**Jahanara Begum Ali**
Representative	**:**	**Mr Michael Kopta**
Type of application	**:**	**Application by tenants for a rent repayment order under Chapter 4, Housing and Planning Act 2016**
Tribunal	**:**	**Judge Hansen & Antony Parkinson MRICS**
Date of hearing	**:**	**30 November 2021 & 12 May 2022**

DECISION

DECISION

(1) For the avoidance of doubt, the Tribunal records that the case has been reinstated.

(2) The Tribunal makes a rent repayment order in favour of the Applicants in the sum of £1,430.19 pursuant to section 43(1) of the Housing and Planning Act 2016.

(3) The Tribunal refuses the Applicant's application for the Respondent to reimburse the Applicants in the sum of £300 pursuant to paragraph 13(2) of the 2013 Tribunal Procedure Rules.

REASONS

1. This is an application for a Rent Repayment Order ("RRO") in the (revised) sum of £5,720.75 pursuant to Chapter 4 of the Housing and Planning Act 2016. The application is dated 25 March 2021 and is made in respect of the 12-month period from 23 October 2019 to 22 October 2020. The Applicants were the tenants of Room 2, 234 Gipsy Road, London SE27 pursuant to a tenancy which commenced on 1 November 2018. The monthly rent was £750.00. The application names Jahanara Begum Ali and Michael Kopta as the Respondents. Mrs Ali is the landlord. She is the registered freehold proprietor of the Property (LN144769). Mr Kopta is and was her agent. Given that the offence alleged to have been committed is one under s.72(1) of the Housing Act 2004, we are satisfied that the proper Respondent to this application is Mrs Ali and Mr Kopta was removed as a Respondent by order of the Tribunal on 15 October 2021. There was a preliminary question as to whether the case had been re-opened following an application by the tenants to withdraw the case which was consented to by the Tribunal on 14 May 2021. On making further inquiries it became apparent that the Applicants had applied to reinstate the case on 10 July 2021 and Judge Flint had directed that it be re-instated on 14 July 2021, albeit no formal order to this effect had been issued. For the avoidance of doubt, we record the fact that the case was re-instated on 14 July 2021.

2. The case was heard over 2 days on 30 November 2021 and 12 May 2022. The reason for going part-heard was a lack of clarity about the pattern of occupation during the relevant period and whether there were 5 occupants of the Property at all material times. We shall return to this issue in due course. The Applicants were represented by Clara Sherratt of Justice for Tenants. Mr Kopta appeared for the landlord. We heard evidence from Nadia Mokadem and Mr Kopta, each of whom were cross-examined.

We also had regard to the extensive documentary evidence in the case and various clips of video evidence. There were a number of conflicts of evidence relating to conduct which we shall return to below. Our overall impression was that Mr Kopta was the more measured and reliable witness and, save where otherwise expressly indicated, where his evidence conflicts with that of Nadia Mokadem, we prefer his evidence.

3. The Applicants was the tenants of Room 2 pursuant to a tenancy agreement dated 1 November 2018. The Property comprises a total of nine rooms with shared bathrooms and a shared kitchen, although the Applicants had their own private bathroom. It was fully refurbished in 2018 immediately prior to the commencement of the Applicants' tenancy. We accept the evidence of Mr Kopta as set out in his undated statement which begins "*In March 2018 Mrs Ali asked me to help with refurbishment of her house and renting it*". In particular we accept his evidence that he and Mrs Ali "*followed the guidance for HMO properties*", in particular in relation to fire safety standards. We therefore accept that the Property was in good condition at the commencement of the tenancy, as is also apparent from the photographic evidence adduced by the Respondents, and that a license would have been granted had one been applied for. On the first day of the hearing Ms Sherratt accepted that she could not point to any positive evidence to contradict Mr Kopta's evidence that the Property was refurbished to HMO standards. However, in closing she drew our attention to a number of points which she relied on to contend otherwise (see paras. 42-52 of an undated document entitled "Response to Respondent's Submission". However, these points were not put to Mr Kopta in cross-examination and we reject the suggestion that the Property was not in a good condition. We find that the Property was in good condition and would have been licensed had a license been applied for. The tenants' statement of case also contained a number of other allegations against the landlord and/or Mr Kopta including an allegation of (attempted) unlawful eviction and disrepair. We reject these allegations. The former allegation was not put to Mr Kopta and we have seen nothing to substantiate this allegation. The latter allegation was explored with Mr Kopta in cross-examination and his evidence was that he attended to a leak in the Applicants' bathroom but was not on notice of any other disrepair. We accept his evidence.

4. In relation to the issue of licensing, it was common ground that the Property was not licensed. Mr Kopta's evidence was that this was a case of inadvertence on the part of

Mrs Ali for which he took primary responsibility as her agent. It was not, he said, a deliberate breach and Mrs Ali had not previously committed or been convicted of any offence in relation to an unlicensed HMO. We accept this evidence. Subject to one issue that emerged in the course of day 1 of the hearing, it was accepted by Mr Kopta that the Property should have been licensed pursuant to s.55(2)(a) of the Housing Act 2004 on the basis that it fell within the prescribed description of HMO specified in Article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018. That issue related to the issued raised by Article 4(b), namely whether the Property was occupied by 5 or more persons. It was common ground that it was so occupied for the whole of the 12-month period the subject of the claim, except for 4 months from April 2020 to July 2020. We are satisfied that based on Mr Kopta's own spreadsheet, there can be no issue about April 2020. In relation to the other 3 months, it depends on what conclusions we draw from the evidence which was that there were 2 rooms (Rooms 1 and 5) where the tenant was still paying rent, "*to hold the room*" (Mr Kopta said), but where they had moved out because of Covid. By analogy with the case law on occupation in relation to statutory tenancies, we are satisfied that the two tenants of Rooms 1 and 5 remained in occupation. They continued to pay the rent. Their intention was to return. We do not accept Mr Kopta's evidence that they stripped their rooms bare. We consider it more likely that they left some of their property and possessions in the rooms. Their temporary absence was readily explicable by the nature of the coronavirus public health emergency. Mr Kopta appeared to expect them to return and his evidence that they were paying rent to hold the room is consistent with that. In the circumstances, we are satisfied that the Property was required to be licensed at all material times to this claim. Even if we are wrong about this, this would not defeat the claim. It would, in our judgment, reduce it by a quarter to reflect the 3 months when the occupancy condition was not satisfied. However, we are satisfied that the occupancy condition *was* satisfied at all material times, that the Property met the standard test under s.254(2) of the 2004 Act and that the Property was therefore of a prescribed description within the meaning of the 2018 Order at all material times.

5. We are therefore satisfied so as to be sure that the Property was required to be licensed as an HMO but was not so licensed and there was no pending license application at any material time. We are further satisfied that the landlord did not have a reasonable excuse for failing to obtain a license. In those circumstances we are satisfied beyond reasonable doubt that the First Respondent, Mrs Ali, committed an

offence under s.72(1) of the Housing Act 2004 as she was a person having control of or managing an HMO which was required to be licensed but was not so licensed.

6. Section 40(1) of the Housing and Planning Act 2016 states that the FTT has power to make an RRO when the landlord has committed an offence to which Chapter 4 relates, which offences are specified in a table in subsection (3). The offences include control or management of an unlicensed HMO under section 72(1) of the Housing Act 2004.

7. Section 43 of the 2016 Act provides:

> *"(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).*
>
> *……..*
>
> *(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)."*

8. Section 44 of the 2016 Act provides:

> *"(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 …….*
>
> *(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."

9. The table referred to in s.44(2) specifies that in the case of an offence of controlling or managing an unlicensed HMO, 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*".

10. Section 46 of the 2016 Act provides:

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2) Condition 1 is that the order –

(a) is made against a landlord who has been convicted of the offence, or

(b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.

(3) Condition 2 is that the order is made –

(a) in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or

(b) in favour of a local housing authority.

(4) ……..

(5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers that it would be unreasonable to require the landlord to pay."

11. The Tribunal is satisfied, beyond reasonable doubt, that the Respondent has committed an offence to which Chapter 4 of the 2016 applies. The Tribunal is therefore satisfied that it has jurisdiction to make a RRO against the Respondent and that the Applicants have the right to apply for a RRO as the offence referred to above relates to housing that was let to the tenants at the time of the offence and was committed in the period of 12 months ending with the day on which the application was made.

12. In considering the correct approach to quantifying the amount of an RRO, the Chamber President, Fancourt J, said this in *Williams v Parmar* [2021] UKUT 244 (LC):

> *23. The offence of having control of or managing an unlicensed HMO is not an offence described in s. 46(3)(a) and accordingly there was no requirement in this case for the FTT to make a maximum repayment order. That section did not apply. The amount of the order to be made was governed solely by s.44 of the 2016 Act. Nevertheless, the terms of s.46 show that, in cases to which that section does not apply, there can be no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44 or s.45. The terms of s.44(3) and (4) similarly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must "relate to" the total rent paid in respect of that period.*
>
> *24. It therefore cannot be the case that the words "relate to rent paid during the period …" in s. 44(2) mean "equate to rent paid during the period…". It is clear from s. 44 itself and from s. 46 that in some cases the amount of the RRO will be less than the total amount of rent paid during the relevant period. S. 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and s. 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.*
>
> *25. However, the amount of the RRO must always "relate to" the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary "starting point" for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).*
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> *26. In this regard, I agree with the observations of the Deputy President of the Lands Tribunal, Judge Martin Rodger QC, in Ficcara v James. [2021] UKUT 0038 (LC), in which he explained the effect of the Tribunal's earlier decision in Vadamalayan v Stewart [2020] UKUT 0183 (LC). Vadamalayan is authority for the proposition that an RRO is not to be limited to the amount of the landlord's profit obtained by the unlawful activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in s. 44(4).*
>
> *…*

40. It seems to me that the FTT took too narrow a view of its powers under s. 44 to fix the amount of the RROs. For reasons already given, there is no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s. 44(4), though the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

41. In my judgment, the FTT also interpreted s. 44(4)(a) too narrowly if it concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord", so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the FTT should take into account the purposes intended to be served by the jurisdiction to make an RRO: see [43] below.

42. The landlord in this appeal faces an initial difficulty that the argument that the FTT erred by misinterpreting the breadth of its discretion is not a ground of appeal for which permission has been sought or granted. Despite that, Mr Colbey advanced his case succinctly and clearly and the tenants, with some assistance from the Tribunal, were able to participate fully in arguing the point, to the extent that, as non-lawyers, they were able to do so. They were fully able to make observations about whether the FTT had gone wrong in awarding them too high a figure. Their skeleton argument also ranged more widely than the narrow question of the interest-only mortgage repayments. I do not consider that they were disadvantaged by the fact that a ground of appeal had not spelt out the argument that the landlord advanced at the hearing. In those circumstances, I consider that it is just to allow the landlord to raise the point without notice and I grant permission for an amended Ground B to include the argument that I have summarised.

43. Mr Colbey argued that the FTT was wrong to regard the amount of rent paid as any kind of starting point and that the orders should have been made on the basis of what amount was reasonable in each case. He relied on guidance to local authorities issued under Chapter 3 of Part 2 of the 2016 Act, entitled "Rent Repayment Orders under the Housing and Planning Act 2016: Guidance for Local Authorities", which came into force on 6 April 2017. Notably, this is guidance as to whether a local housing authority should exercise its power to apply for an RRO, not guidance on the approach to the amount of RROs. Nevertheless, para 3.2 of that guidance identifies the factors that a local authority should take into account in deciding whether to seek an RRO as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. Although those are identified in connection with the question whether a local authority should take proceedings, they are factors that clearly underlie Chapter 4 of Part 2 of the 2016 Act generally.

44. The FTT erred in construing its powers too narrowly, in the respects that I have identified.

13. The offence of having control of or managing an unlicensed HMO is not an offence which obliges the Tribunal to make a maximum repayment order. The amount of the order to be made is governed solely by s.44 of the 2016 Act and we remind ourselves that in cases to which the terms of s.46 do not apply, there is no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44. As Fancourt J observed in *Williams v. Parmar*, the terms of s.44(3) and (4) clearly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must "relate to" the total rent paid in respect of that period.

14. Under s.44(3) the amount which 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 to any person in respect of rent under the tenancy during that period. In the present case the amount of rent in respect of the 12-month period from 23 October 2019 to 22 October 2020 was £9,000. The amount of universal credit paid to the Applicants in respect of this period amounts to £3,279.25 which falls to be deducted from any RRO. This produces the figure claimed of £5,720.75. In determining the amount of the RRO we take into account, in particular, 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 an offence to which Chapter 4 applies.

15. We begin with the conduct of the landlord and the tenants. The landlord did not license the Property in circumstances where she knew that a license was required. There was no good reason for her failure to do so, other than inadvertence on her part and on the part of her agent. In the landlord's defence we note from her statement dated 3 December 2021 that she is a 76 year old woman with failing memory and her evidence is that the need to apply for an HMO license "*slipped through her mind*". That said, we also bear in mind the purpose of the legislative provisions: to punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. In our judgment, this was a serious and persistent offence, over an extended period, albeit less serious than many other offences of this type. However, we are satisfied that the Property was in good condition at the material time and would have been licensed, if an application had been made. We are not

persuaded by any of the other allegations against the landlord and her agent for the reasons already given and for the further reasons set out below.

16. We find that the tenants have been anything but model tenants. We are satisfied that they smoked cannabis on a regular basis within the Property and that the smell of cannabis permeated the Property. We are satisfied that they were abusive and aggressive to Mr Kopta and other tenants within the Property as is clear from the video evidence we saw and the WhatsApp messages: see, for example, the messages at p.23 of the Respondent's bundle. The Applicants complained of abusive behaviour by the other tenants and Mr Kopta but we reject this evidence. We are satisfied that the Applicants were the aggressors and generally made life very difficult for the other tenants and Mr Kopta. Another video shows one of the Applicants coming and leaving the Property without bothering to close the door. They appear to have treated the Property and the other tenants with contempt. Further, it is accepted that the Applicants ceased to pay any rent at all from May 2021 until they vacated the Property. There was a dispute about when they vacated the Property. The Applicants contended that they vacated at the end of November 2021. Mr Kopta submitted that it was February 2022 and sought to adduce further evidence on this topic but we concluded that it was too late to do so. We find that the Applicants vacated at the end of November 2021, owing 7 months arrears of rent, i.e. £5,250. They contended that they had good reason for withholding rent, namely the alleged abusive conduct of Mr Kopta and the other tenants, but we reject their evidence on this and detect no good reason for withholding rent for this period.

17. We consider next the financial circumstances of the landlord. Belatedly, the landlord put in a statement explaining her circumstances. As noted above, she is a 76 year old woman. She says and we are prepared to accept that this is her only property. She goes on to say that rent from the Property is her main source of income and that her rental income has fallen as the Property has not been fully rented out during and since the pandemic. Apart from this source of income, she says she is reliant on her state pension. The difficulty we have with accepting this evidence is the lack of documentary evidence to support what she says. The Tribunal directions were clear (see para 10(f) of Directions dated 5 September 2021) that "*if reliance is placed on the landlord's financial circumstances, appropriate documentary evidence should be provided*". There is no such evidence and we therefore place limited weight on this evidence as to the landlord's financial circumstances.

18. Finally, there is no suggestion that the landlord has previously been convicted of any offence to which Chapter 4 of the 2016 Act applies.

19. The tenancy agreement, as amended, provided that "*all bills are included in the contract*", in other words the landlord was responsible for the utilities. There was no specific evidence in relation to the amount paid by the landlord in respect of utilities. The statute does not require any specific deduction in relation to utilities but we bear this factor in mind as part of the overall circumstances.

20. In all the circumstances, the Tribunal makes a rent repayment order in favour of the Applicants in the sum of £1,430.19, being 25% of the sum of £5,720.75 identified in paragraph 14 above. In arriving at this conclusion we place particular significance on the Applicants' prolonged and (what we regard as) inexcusable non-payment of rent in respect of the period from May to November 2021 inclusive: see *Kowalek v Hassanein Ltd* [2021] UKUT 143 (LC) at [38]-[39] and *Awad v Hooley* [2021] UKUT 55 (LC) at [36].

21. The Applicants also applied for an order under paragraph 13(2) of the 2013 Tribunal Procedure Rules for the reimbursement of the application fee and the hearing fee which together total £300. We have a discretion. Having regard to our conclusions above, we consider it inappropriate to make the order sought.

Name: Judge W Hansen **Date:** 27 May 2022