FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	BIR/00FY/HMK/2020/0041
Property	:	202 Russell Road, Nottingham NG7 6GW
Applicant	:	Ms Kinga Urszula Nowak
Representative	:	Appearing in person
Respondent	:	Mr Jagir Singh
Representative	:	Mr Chris Daniel, a lay representative of "Possession Friend"
Type of Application	:	Application for a rent repayment order pursuant to ss.40 to 44 of the Housing and Planning Act 2016 ("2016 Act")
Tribunal members	:	Dr Anthony Verduyn Mr P Wilson BSc (Hons) LLB MRICS MCIEH CEnvH
Date and mode of Hearing	:	26th October 2020 Video Hearing on Cloud Video Platform

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DECISION

The Tribunal determines that it shall exercise its discretion to make a rent repayment order in terms that the Respondent shall pay to the Applicant the sum of £5,500 within 35 days of the date of this decision.

REASONS

Introduction

1. The Tribunal is asked to make a Rent Repayment Order pursuant to an application under Section 41 of the Housing and Planning Act 2016 ("the 2016 Act").

Relevant law

2. The relevant statutory provisions are set out in Appendix 1 to this decision.

The Application

3. The application was dated 5th June 2020 and was received by the Tribunal on 8th June 2020. It alleges an offence under Section 95(1) of the Housing Act 2004 on the part of the Respondent, i.e. he was a person having control of or managing a house which is required to be licensed under the selective licensing provisions of Part 3 of the Housing Act 2004, but was not so licensed.

4. The Applicant claims an order on the basis she was (and, indeed, at the time of the hearing remained) the tenant of the Property (which is a house comprising three bedrooms, a bathroom and two living rooms) by virtue of written agreements dated 1st June 2016 at a stated rent of £550 pcm for a year (but held over and in fact paid at £500 pcm) and 1st August 2019 at a stated rent of £580 pcm. She asserts that the local authority introduced a selective licencing regime from 1st August 2018. The Respondent told her he had a licence and this was a justification for the increased rent in August 2019, but on 10th September 2019 Mrs Shiona Elizabeth White, a council officer, attended the Property and informed her it was unlicenced. The Property was allegedly noted not to be up to standard, in particular lacking any fire detection system, and a further inspection was required. A formal inspection by Mr Mark Robert Thomas, another Council officer, took place a few weeks later and deficiencies were identified (detailed below). Documents from the local authority state that the Property was unlicensed until 17th September 2019, a licence application being received on 18th September 2019.

5. Mr Thomas' report, dated 16th October 2019, was made pursuant to the Housing Health and Safety Rating System (England) Regulations 2005. The following works were legally required (and not just recommendations or observations): the installation of handrails to staircases down to the cellar, from ground floor to first floor, and from first floor to second floor; extensive fire safety works, requiring additional sockets and electrical testing, door replacements and frame repairs, removal of polystyrene tiles and provision of a fire escape (egress) window to first floor; thermal improvements to combat excess cold and mould, especially to roofs; security and electrical works; and, resolution of damp to the chimney breast in the rear downstairs lounge. These issues were in addition to the absence of a fire detection system and the apparent absence of any gas safety certificates. The Property was plainly unsafe in a number of ways and posed a cumulative risk, especially were the electrical failings to give rise to a fire, which could be

undetected and difficult to escape, save by using staircases which lacked handrails.

The Issues

6. On 11th June 2020 directions were given in this matter by Tribunal

Judge Barlow. The Tribunal identified the following issues to be

determined:

(1) Whether the Tribunal is satisfied beyond reasonable doubt that the landlord has committed the alleged offence under Section 95(1) of the Housing Act 2004 in respect of control or management of an unlicensed house.

(2) Did the offence relate to housing that, at the time of the offence, was let to the tenant?

(3) Was an offence committed by the landlord in the period of 12 months ending with the date the application was made?

(4) What is the applicable 12-month period?

(5) What is the maximum amount that can be ordered under section 44(3) of the Act?

(6) What account must be taken of:

(a) The conduct of the landlord?

(b) The financial circumstances of the landlord?

(c) Whether the landlord has at any time being convicted of a relevant offence?

(d) The conduct of the tenant?

(e) Any other factors?

The Application

7. The directions of 11th June 2020 also provided for the sequential exchange of bundles comprising statements and documents to be relied upon by each party.

8. The Applicant provided her bundle to the Tribunal on 28th June 2020 and the Respondent by post (for want of an email address) on 2nd July 2020. The bundle was modelled closely on her application. She did enlarge somewhat on the inspection of Mr Thomas and the defects then detected in the state of the Property. The Applicant states that she had repeatedly complained at the lack of a handrail to the stairs. Further, she asserts her younger brother, Mr Ksawier Nowak (now 16 years old), fell down the stairs and broke his leg at the start of October 2019. The injury is the subject of other proceedings and liability is not determined by this Tribunal.

9. The Applicant states that the Respondent preferred to be paid rent in cash and the Applicant did not obtain receipts. She asserts that she paid the rent and that, after the Council officer had first visited, the Respondent started text messaging when rent was paid.

10. The Applicant exhibited the tenancy agreements dated 15th May 2016 (starting 1st June 2016) and 1st August 2019. There was also correspondence from the Council regarding licencing including: notice of the impending visit of Mrs White dated 5th September 2019; Notice of Inspection under statutory powers and rights issued by Mrs White and dated 10th September 2019; email confirmation from Mrs White that the Property was unlicenced prior to receipt of application on 18th September 2019, when licence was required from 1st August 2018; correspondence from the Council regarding hazards at the Property, including under letter dated 10th December 2019 a copy of a letter and report sent by Mr Thomas to the Respondent (detailed above); and, screen shots of text messages regarding rent payment made in cash in October, November, December 2019, and monthly to June 2020.

11. In the meantime by email of 22nd July 2020, the Respondent, via his representative Mr Daniel, had invited the Tribunal to strike out the application for want of evidence of periodic payment of rent during the period of the alleged offence; noting the text messages then received were dated after there was a licence. The Tribunal declined to strike out the application at that juncture and, shortly thereafter on 27th July 2020, received from the Applicant further screenshots of text messages (taken from an old phone, the Applicant stated, that was only accessible after the end of lockdown). These texts were supportive of rental payments having been made and specifically related to payment of £500 on 10th March 2019, £490 at the start of June 2019 and £510 at the start of July 2019.

12. The time for the Respondent's representation was extended at his request, and these were filed and served on 7th August 2020. They comprised a statement from the Respondent and submissions from Mr Daniel.

13. The Respondent confirmed that he bought the Property in 1985 and lived there until he moved to his present home, 6 Wensleydale Close, Melbourne Park, Nottingham, in 1988. Thereafter he rented out the Property for "residual income and financial security", with a buy-to-let interest only mortgage upon it at £226.65. He confirmed the rental agreements disclosed by the Applicant. In respect of the agreement dated 15th May 2016, he confirmed that £550 pcm was a market rent, but that he agreed to accept £500 pcm from the Applicant as his preferred tenant, and further reduced rent at her request for an initial period of 3 months to £450 pcm. He details works he carried out at the Property during those months, including installing a new kitchen and boiler. He detailed other works as well, including responsive repairs.

14. The Respondent confirmed the second agreement of August 2019 in the higher rental figure of £580 pcm. At around the time of the new agreement, the Respondent states he had "recently" become aware of the need for a licence and, when asked by the Applicant, he responded he was applying for one. Following Mrs White's intervention, he called Mrs White to explain that he had intended to make such an application since the start of August. The Respondent explained that he had suffered health issues in this period, with a hernia operation and infections. He was not technologically very able, and this impaired his ability to keep up with increasingly complex requirements for renting the Property. This was also why he preferred rent to be paid in cash. His daughter now helped him, but she had herself been

the victim of domestic violence precluding assistance before the making of the application on 18th September 2019.

15. A Civil Penalty Notice was issued in respect of the failure to obtain a licence for the Property in the sum of £3,715.28. The Respondent says he is struggling to pay this sum. He ceased work in the food services industry in 2018 due to ill-health and is reliant on his rental income (which is subject to the payment of the mortgage in the sum of £226.65 pcm). He details other outgoings on the Property including £13 pcm on the Licence Fee, £6.60 for the Gas Certificate and £14.20 pcm on insurance. He detailed living expenses of £1,194 pcm, and income of £1,369.55 (comprising his wife's earnings of £1,100 pcm and the net rental income), leaving a disposable sum of £225.55 pcm. He provided a tax return to 5th April 2019 showing the declared profit from the Property at £5,298, thereby to demonstrate that the receipt of rent in cash was not tax evasion. He runs a car, but it was bought in 2001, and his home is mortgage free. He anticipates having to sell the Property at the end of the mortgage term.

16. In the matter of the works required by the Council, the Respondent denies complaint from the Applicant at the absence of a handrail to the stairs and denies use of the temporary handrail installed urgently after Council intervention. The Respondent met Mr Thomas at the Property on 17th December 2019 to discuss the works required, and he spent £4,300 on the works identified; none of which, he says, had been the source of complaint by the Applicant.

17. The written submissions of Mr Daniel for the Respondent accompanied the Respondent's statement. These acknowledged the licensing regime applied to the Property from 1st August 2018, but the licence was not applied for until 18th September 2019. The calculation of rent for the year ending 17th September 2019 is provided at £6,118.09 (rather than £6,139.21 calculated by the Applicant and the £6,639.22 calculated by the Judge at Directions). This took account of the monthly rent being £500 to 31st July 2019 and £580 thereafter. The submissions then challenge compliance by the Applicant with the direction for evidence of payment of the rent during the period of the alleged defence (the point taken in the strike out application). It is pointed out that the evidence at the time of the submission of the application post-dated the relevant period. The screenshots presented later in July 2020 show an acknowledgment in March 2019 of the receipt of £500 by the Respondent, but April and May merely detail arrangements for the collection of rent. June acknowledges receipt of a payment £10 short and July of the balance with July's rent. The receipt of rent of £580 in September is acknowledged by text, but only part of this month is applicable. The upshot is that relevant texts evidence only £1,828.66. Mr Daniel asserts the need to prove rental payment to the criminal standard. The submissions then point to rent concessions already made by the Respondent (i.e. the various sums of £450 pcm and £500 pcm taken when the agreement stipulated £550 pcm), his health and financial issues.

18. The Applicant replied to the Respondent's Statement of Case, both on evidential matters and submissions. The Applicant states that at inspection of the Property in May 2016, prior to entering into a tenancy, she commented about its condition, including the absence of handrails to stairs

(a matter she also states she discussed with the Respondent's wife when she inspected during the tenancy). The temporary handrails initially installed after the Council intervention were also unsatisfactory, as they were too low and difficult to grip. The cooker was to be replaced at the inception of the first tenancy and other works were agreed (including the replacement of kitchen cabinet fronts and work surface). Some flooring work was carried out. The statement then goes on to detail disputes of fact relating to the condition of the Property over the years. These do not advance matters significantly in respect of this case. The gist of them is that periodic problems arose, some were resolved, others resolved but recurred (like kitchen flooding) and some went unresolved (like a leaky shower). The Applicant says she was also agitated by the failure to carry out annual gas inspection checks to the boiler. In relation to the licence, the Applicant is adamant that licence costs were used to justify the higher rent of £580, before the licence had even been the subject of an application. She asserts that she asked the Respondent several times about the licence, having been informed of its introduction as a student. She was surprised when she was told it was unlicensed by Mrs White. Had she known of the Respondent's difficulties with new technology, she would have assisted with the application herself (as she and her family had assisted with some other matters around the Property). The Applicant agreed with the Respondent that they had a good relationship, and she asserts that this was supported by her regular payment of the rent. The Respondent had stated that he had made rent concessions, accepted late rent and less rent (although he never suggested that there were arrears outstanding from the period in question). The Respondent stated that payment date varied according to her availability, since the Respondent wanted the money in cash, and once she had miscalculated and paid £10 too little, which she then made up the next month. Rent concessions related to a period of work on the Property (the first three months of her tenancy) and then the Tenancy agreement stating the rate agreed if she were on benefits, when she was not, and so paid the agreed cash rate of £500 pcm (until the rate was revised to £580).

19. In response to Mr Daniel's submissions for the Respondent, the Applicant added the rent liability for the period of the rent repayment claim was agreed at £6,118.09 (the Applicant confirmed that she accepting Mr Daniel's calculation at the hearing, also). She asserted her regular payment of rent, save in August 2019 when she paid £80 only because the Respondent was to retain the deposit of £500 that she had paid previously. There was no deposit under the new tenancy agreement, and the Applicant speculates about whether this was by reason of the requirements for the sums to be held under a deposit scheme and that the Respondent would struggle to administer this. She observed that had there been arrears, it would have been mentioned in the text messages making arrangement for payments

The Hearing

20. This was a remote hearing, notwithstanding that the Applicant had requested a paper determination. A face to face hearing was not held, because it was not practicable on account of the Coronavirus pandemic and all issues could be determined in a remote hearing. On 11th June 2020, the Tribunal gave directions that any remote hearing, if requested, would be by

video conferencing and would be held private. This is what ultimately took place.

21. At the hearing, the Applicant represented herself and Mr Daniel represented the Respondent. Mr Daniel described himself as a private sector housing consultant of 10 years' standing. The Respondent also addressed the Tribunal personally.

22. The Applicant set out her case before the Tribunal, reflecting what had been set out in her Statement of Case, Reply and appended documents. In particulars she confirmed her rent payments, with payments made regularly early or mid-month, when there was no agreed payment date as such.

23. Mr Daniel set out the Respondent's case on the basis of ten propositions, with brief interventions from the Respondent personally: (1) They referred to negotiations regarding rent repayment, and notwithstanding the Tribunal pointing out that these may have been without prejudice, stated that the Applicant wanted an award in full; (2) Mr Daniel took issue with the proof of payment of rent by the Applicant. He asserted that proof of payment by means of the texts described was insufficient, and pointed to the case of 33 Home Farm Close (CAM/00MC/HMF/2020/0006) at paragraph 41 where the Tribunal rejected a payment asserted as "cash in hand" because it was uncorroborated. When pressed on this point by the Tribunal and, in particular, asked whether the Respondent was saying he had not been paid at all or whether he was taking a technical legal point on proof of payment, he objected to answering but then accepted that this was a legal evidential issue, rather than an issue of fact. The deposit was also contested in respect of it not being paid in one go, but in instalments and these only noted to the sum of £150 by the Respondent. In closing the Respondent further stated that there had been an issue over payment of the deposit but he had preferred to "forget it" when the dispute arose. Mr Daniel stated that the deposit scheme was irrelevant to these Rent Repayment proceedings; (3) £550 pcm was asserted to be the market rent and £500 pcm was asserted to be negotiated after the event of signing the tenancy agreement and upon moving in. The market rent is to be inferred from the £550 pcm being payable if Housing Benefit were claimed; (4) The financial circumstances of the Respondent, who had a mortgage on the Property of £54,480 with repayments of £238 pcm; (5) The Respondent was aware of the selective licensing scheme only in early 2019 according to Mr Daniel, although the Respondent then explained that he knew of it when it was introduced but his personal circumstances and capacity prevented him from actioning licensing sooner. He was not technically minded and overwhelmed at the time. Mr Daniel contended that this is not a reasonable excuse defence, but it is a matter of mitigation. It was pointed out that the Applicant had initially stated that she asked the Respondent about a licence, impliedly only once, whereas in her reply she stated she asked the Respondent a few times. When the Respondent spoke on this matter, he accepted that he had been asked by the Applicant in December 2018 and June 2019, so a couple of times, and had said he was progressing it; (6) Regard should be had to improvements to the Property by the Respondent, referring to works to the kitchen, roof, gutters, wasps' nest removal and the like; (7) In similar vein, all reported issues were addressed from the outset (for example, cooker replacement).

Complaint at the handrail was denied, though, as was the inadequacy of the handrail that was temporarily installed. The Respondent added that, had he been asked, he would have readily corrected the problem at very little cost; (8) rent was paid on differing dates, contrast prompt payment for works as required by the Council; (9) The Applicant was in breach of her tenancy agreement by sharing occupation of the Property and others, therefore, paying the rent not her, which may include friends and family. On this point the Tribunal intervened, since this had not featured in the Statements of Case or arguments prior to the hearing and the Tribunal considered to raise such an issue at this juncture was unfair on the Applicant, who could have addressed occupation and contribution to rent had she been forewarned; (10) Damp in the Property was the result of the user by the Applicant, with the front room used as a store and clothes drying area with furniture pressed against the wall. When aired there was no damp.

24. The Respondent personally touched upon matters already addressed in his statement and set out above. When asked about the Gas Safety Certificate, he said the boiler was checked before the Applicant moved in. He produced two certificates and agreed to send these to the Tribunal after the hearing. He was asked about Fire Detection, and accepted that there had been no alarms, but stated a former tenant had removed them. In respect of payments he wanted cash because he had never done on-line banking and his daughter had lost money out of her bank account.

25. Notwithstanding the Tribunal not wishing to hear evidence on the newly alleged breach of the tenancy agreement by sharing occupation, the Applicant nevertheless insisted that she had never sublet. Her brother and others had visited from Poland and friends had made social visits and stayed overnight. The permanent residents were the Applicant and her younger brother. Her father had assisted her with rent also, and shared some costs with her.

26. The Applicant also addressed some of the points raised by Mr Daniel. Notwithstanding that the Tribunal had indicated that it did not wish to take evidence on negotiation, the Applicant described some of the circumstances of the discussion. In respect of proof of rent, she relied on the messages and, circumstantially, the willingness of the Respondent to give her a new tenancy agreement. She observed that there was no evidence to suggest she had not paid. She equally insisted that, had the deposit not been paid, then there would have been evidence for this. She also set out the works required when she moved into the Property, because of its state, and the rent reduction for the first three months due to delays in these works. Essentially, she paid the rent she agreed with the Respondent and it was his job to manage the Property properly. There was no current gas safety certificate when the Council inspected and no handrails to stairs. Similarly, the Respondent was unlicensed when he should have made application or paid an agent to do it for him. The electricity was also not checked, there were no fire doors or detectors and no escape window. Unless he inspected when she was out, the Respondent did not check up on the Property. He relocated a radiator and replaced one that leaked. He did work to the gutters. He was not a bad landlord, but he could have done more and should have been attentive to safety, and special reference was made to the lack of

handrail and inadequate temporary installation after Council intervention. The damp issue was not to the front room, but penetrating the chimney breast (which the Respondent states was resolved by installation of an airbrick). She sought to be a good tenant, including by doing redecorating.

27. In closing Mr Daniel was keen to emphasise that the Respondent was not a rogue landlord (referring the Tribunal to passages out of 72 Stuart Crescent, Winchester CHI/24UP/HMF/2020/0011 & 0016), nor a professional landlord, but he was dependent on the rent he received. In the circumstances, the Respondent objected to a year of rent free occupation being sought by the Applicant pursuant to a Rent Repayment Order.

28. In closing the Applicant repeated that the Respondent was not a bad landlord, but she had her rights. She asserted that he was a professional landlord, with corresponding obligations, and the application was appropriate.

Post Hearing Submissions

29. The Respondent was invited to send to the Tribunal the Gas Safety Certificates he had produced remotely at the hearing. He did so as attachments to an email from Mr Daniel on 30th October 2020. They were both issued by the same gas engineer, and are for the periods from 13th September 2019 and 15th September 2020; that is to say starting with the time a licence was sought for the premises. Mr Daniel wrote : "I submit copies of the two Gas certificates the respondent still has in his possession." It seems Mr Daniel was intending to hint at others having existed, but there was no documentary evidence for any earlier certificate and the evidence of the Respondent was that the new boiler and cooker would have been tested at inception of the tenancy in 2016, when they were installed, but without identifying any certificates thereafter.

30. Notwithstanding that the Tribunal had indicated clearly that the provision of the certificates was not to be taken as an opportunity for further submissions, Mr Daniel saw fit to address two issues. He repeated his reliance on paragraph 41 of the 33 Home Farm Close case referred to above (CAM/ooMC/HMF/2020/006) and asserted that that the burden of proof of rent paid is that solely upon the Applicant, and indeed, the Tribunal's own application form makes that clear, yet the case was allowed to be brought prior to such evidence being submitted. From this he contends that, upon the commencement of the Tribunal hearing, the amount of rent that the applicant can prove should have been established from her own evidence. Mr Daniel took exception to the Tribunal having sought to clarify from the Respondent whether he denied receipt of rent (i.e. was running a positive case that rent had not been received), or a passive case requiring proof by the Applicant, or a similar passive case that in law the Applicant had to prove payment of rent herself. Mr Daniel considered that the Tribunal raising this question was as much an "Ambush" by the Tribunal, as the Tribunal considered him raising the question at the hearing for the first time of who had contributed money to the rent as paid by the Applicant. He asserted that the Tribunal had wrongly put the respondent in the incriminating position of providing evidence against himself. Finally, Mr Daniel asserted

that "the nature of evidence against the respondent is to a criminal standard that has to be produced by the applicant".

31. Mr Daniel's email was copied to Ms Nowak who replied on 5th November 2020 pointing out that the Tribunal had said that, save for the Gas Certificates, no further evidence or argument would be entertained. She understood from the Council that there were no earlier Gas Certificates than those now submitted. She repeated that she did not sublet the Property, but she had had visitors.

32. The Tribunal considers that Ms Nowak is correct on the receipt of further submissions by the Tribunal, and that there was no basis for additional commentary from Mr Daniel. In the circumstances, however, what was submitted by Mr Daniel would have made no difference for the reasons set out below.

33. Turning to the issues identified in the directions:

Whether the Tribunal is satisfied beyond reasonable doubt that

the landlord has committed the alleged offence under Section 95(1) of the Housing Act 2004 in respect of control or management of an unlicensed house?

34. There was no issue on this point. The documentation disclosed from the Council is compelling. As to the circumstances. The Respondent accepted that there was selective licensing in the local housing authority area where the Property was located. He did not dispute that he had failed to apply for a licence and his case was, in part, to seek to mitigate his breach by explaining his personal circumstances and pointing to the civil penalty for breach that had been imposed by Nottingham City Council. Mr Daniel on the Respondent's behalf rightly explained that the Respondent was not advancing some reasonable excuse defence. It follows that the Tribunal can be sure than an offence was committed. It is plainly beyond reasonable doubt that an offence under section 95(1) was committed: the Respondent had control of and was managing the Property, which was a house which required to be licenced from 1st August 2018 and was not so licensed.

Did the offence relate to housing that, at the time of the offence,

was let to the tenant?

35. Again this was not in dispute, the Property was let to the Applicant pursuant to consecutive tenancy agreements as set out above.

Was an offence committed by the landlord in the period of 12

months ending with the date the application was made?

36. The Application was received by the Tribunal on 8th June 2020, when the period of the offence ended on 17th September 2019 (the day preceding the submission of the licence application by the Respondent). The short answer is accordingly yes.

37. Mr Daniel has suggested that there was not sufficient evidence to support the application until the texts from the relevant period were submitted, shortly after the rejection of his strike out application. This is plainly wrong. The Applicant is required to prove her case at the hearing, not at the issue

of the Application. The Application asserted the rent paid under the agreements (including, correctly £500 pcm under the first agreement, rather than the £550 recorded on its face). The Applicant's Statement of Case, received by the Tribunal on 28th June 2020 and posted to the Respondent to be received on or before 3rd July 2020, also detailed rent paid with a calculation appended for the period 18th September 2018 to 17th September 2019 (albeit in a sum slightly exceeding the amount calculated by Mr Daniel and agreed by the Applicant prior to and at the hearing). Texts corroborating some payment of rent, and arrangements for payment of rent, were received from the Applicant in July 2020.

38. An Application is plainly sufficiently made if the Applicant within it asserts facts capable of making out the claim. She does not have to prove those facts at that stage, but at the hearing of the Application (which may, of course, be more than 12 months after the period of the offence). In any event, the point which does not seem to be appreciated by Mr Daniel and the Respondent is that the word of the Applicant is evidence in support of the payment of rent. That evidence has to be assessed at the hearing, and tested against any evidence or contentions to the contrary, but matters can be proven on the basis of oral evidence, and indeed often are in Courts and Tribunals, with or without corroboration.

39. It follows that an offence was committed in the period of 12 months before the Application made by the Applicant. The Application was also rightly entertained by the Tribunal, as there was no basis for dismissing it out of hand where the Applicant had asserted facts and matters necessary to make out her claim. The refusal to entertain the application to strike out the claim after submission of the Applicant's Statement of Case was not challenged by the Respondent, and rightly so.

What is the applicable 12-month period?

40. Under Section 44(2) of the 2016 Act the period is a period, not exceeding 12 months, during which the Respondent was committing the offence. By reason of the offence lasting over 12 months in this case, the maximum period is 12 months expiring on 17th September 2019. This period was correctly adopted by the parties and the basis upon which a sum was agreed.

What is the maximum amount that can be ordered under section 44(3) of the 2016 Act?

41. It was established at the start of the hearing that the rent liability for the period was agreed at £6,118.09.

42. It is at this point that Mr Daniel's arguments about rent arise. The contentions he advances need to be considered carefully. They amount to the following: a Rent Repayment Order can only be made in respect of rent actually paid; such payment must have been made by the tenant Applicant; the burden of proof of payment is upon the tenant Applicant (i.e. there is no burden at all on the landlord Respondent, let alone a burden to disprove payment by the tenant Applicant); and the standard of proof is the criminal standard (i.e. beyond reasonable doubt). Taking these points in turn:

43. It is correct that a Rent Repayment Order can only be made in respect of rent actually paid, since this is the effect of Section 44(3) of the 2016 Act

which refers expressly to repayment (therefore assuming payment in the first place) and sets the maximum level of the Rent Repayment Order to reflect this. It may be that the Tribunal in calculating that sum may expressly identify sums that have not been paid and, therefore, cannot be repaid, and this could have some impact on what may lawfully be due between the parties after the conclusion of the rent repayment proceedings, but that need not concern this Tribunal at this stage.

44. It is correct in one sense that such payment of rent must have been by the tenant Applicant, because the 2016 Act makes careful distinction of Universal Credit, which must be deducted from the rent paid when assessing the maximum amount that a landlord can be compelled to repay to the tenant. The local housing authority may seek to recover the Universal Credit from the landlord under Sections 43 and 45 of the 2016 Act. The treatment of Universal Credit in this context is instructive, though, because its specific deduction from rent paid for the purposes of calculation, would not be necessary if it were not in fact rent paid by the tenant (hence if Section 44(3)(b) were not there, then the tenant could reclaim from the landlord sums which had been paid under Universal Credit as part of the rent). In this context, therefore, it is plainly immaterial how the tenant obtained the sums the tenant paid in rent, unless it was through Universal Credit. Contributions (if any) from family or friends, or borrowing to make payment, or even sums contributed to the rent by lodgers or subtenants would make no difference. The liability to pay rent was always that of the tenant, and the repayment is made to the tenant accordingly and as a matter of law.

45. It follows that it makes no difference that at the Tribunal and in Mr Daniel's subsequent email, he queries the source of rent payment by Ms Nowak. The source of the money is immaterial to the liability, so long as the rent is in fact paid. The submissions which were disallowed, because they were only raised at the Tribunal and precluded Ms Nowak from adducing evidence as to the source of her funds, were irrelevant to the decision to be made by the Tribunal.

46. It is correct that the burden of proof of payment of rent is upon the tenant Applicant.

47. It is incorrect that the standard of proof is the criminal standard (i.e. beyond reasonable doubt). The only thing that the Applicant has to prove to the criminal standard is the offence committed by the landlord. This is expressly required under Section 43(1) of the 2016 Act, and no other relevant part of the 2016 Act carries such a heavy burden. Any such increased burden would need to be set out in terms in the 2016 Act and the provisions of Section 44 are not so identified. The reason for the Section 43(1) being exceptional is that Rent Repayment Orders should be no easier to obtain where a prosecution has not taken place, as they are to obtain when one has. Once the threshold of proof of an offence has been passed, though, there is no reason why the 2016 Act should require such a standard of proof in respect of the rent paid.

48. It is this misunderstanding of the law on the part of Mr Daniel which no doubt underlay Mr Daniel's complaint that the Tribunal clarifying whether

the Respondent was positively denying receipt of rent or not admitting it could be characterised as "self-incrimination". There was, of course, nothing criminal about the Respondent receiving rent due under the tenancy agreements; the question for the Tribunal is whether that rent should be repaid following proof to the Criminal Standard of his failure to obtain a licence in respect of the Property from the local authority.

49. The Tribunal at the start of the hearing was faced with a situation in which the Applicant asserted she had made the contractual payments of rent in the relevant period. The parties were agreed that rent was paid by way of cash payment from the Applicant to the Respondent. The Applicant said that she had made payment and that the texts proved some of those payments, and the exchanges demonstrated that the Respondent was not then claiming not to have been paid (save for a £10 short fall one month, made up the next). The Applicant could not prove every payment by text. At the outset of the Tribunal hearing, there was nothing from the Respondent to positively challenge what the Applicant was saying, and the Tribunal could quite properly simply accept the word of the Applicant as her evidence and conclusive as unchallenged. Simply saying nothing on the part of the Respondent was accordingly hopeless as a defence to liability in respect of rent paid: with the Applicant credibly saying she had paid cash as required under the tenancy agreement and providing texts corroborating some of those payments (and none suggesting any non-payment), the Tribunal would have no basis to reject that evidence. She was asked to prove it, and she did by her word with some corroborating documents consistent with the undisputed mode of payment.

50. In fact, the Applicant would also have been within her rights to point to the positive evidence of payment submitted in advance by the Respondent. In order to demonstrate that the receipt of rent in cash was not tax evasion, the Respondent submitted his tax return for the year ending April 2019, and therefore dealing with the period September 2018 to April 2019. He asserted he had only one rental property and the return shows "profit from UK land and property" as £5,298. This is entirely consistent with rent for that year having been paid in the sum of £6,000 (12 months at the agreed rate of £500 pcm), with some costs deducted to arrive at profit (relief for finance costs is treated elsewhere in the document). Again, in cases where a party is merely put to proof, then material before the Tribunal that is instructive can be considered.

51. The Tribunal went further to determine whether the Respondent was merely not admitting receipt and relying on a legal argument, misconceived as it was, that the Tribunal had to limit itself to the corroborated evidence of the Applicant only. The Tribunal was entitled to make such inquiry as part of its role in determining matters justly between the parties. The admission by the Respondent that he was merely taking a technical legal argument on the source of evidence, in these circumstances, made no difference to the determination of the Tribunal. No Tribunal, properly assessing the evidence, would reject the Applicant's case on the evidence before it, even without questioning the Respondent.

52. As to paragraph 41 of the 33 Home Farm Close case referred to above (CAM/ooMC/HMF/2020/006), this does not establish any matter of

principle. The Tribunal in that case had to assess whether there was receipt of a contested payment of £250 "cash in hand" and rejected it for want of corroborating bank statement or other evidence. There was simply no reason to reject the rent as paid in this case, as cash in hand was the agreed mode of payment and the circumstantial evidence does nothing to contradict the clear assertion of payment by the Applicant.

53. Although the Applicant could not provide corroboration of every payment by a text, she observed with considerable force that the Respondent offered her, and she accepted, a new tenancy during the period in question. If she had not been paying, she asked rhetorically, was it likely that the Respondent would have kept her as a tenant and extended the term of her letting? It may also be borne in mind that it was the Respondent who had insisted upon the rent being paid in cash (presumably without issuing receipts) which of itself reduces the scope for payments being evidenced. It appears inconceivable to the Tribunal that the Respondent would have renewed the tenancy had there been arrears of rent; not least as he was at pains to ensure that a shortfall of £10 one month arising from an oversight was made good the following month.

54. The circumstances and the available evidence all point to rent having been paid as stated by the Applicant. Ultimately, she said she paid, and the Tribunal believes her. There is simply nothing to support a contrary view. If we were required to make such a finding beyond reasonable doubt, then we would do, since no reason for doubt arises.

55. The only exception to the foregoing is a point that arose for the first time at the hearing. The Applicant had said in her reply that she paid the first rent sum of £580, by paying £80 and agreeing with the Respondent that her former deposit of £500 would now be his. Under the new tenancy agreement, there was no deposit, and the circumstances suggested that the deposit under the original agreement had not been properly protected as the law required, so it rather suited everyone to credit the deposit against the rent. The Respondent at the hearing suggested that he may not have received the full deposit, because he had receipted only £150 on the back of the tenancy agreement (although this leaf was never disclosed as a document to the Tribunal). He agreed to treat the full sum as paid to avoid argument. The Applicant was adamant that she had paid in full and the Respondent kept a note of payments if not on the tenancy agreement, but in any event, it was not her responsibility to record matters. The Tribunal finds on this point that it is more probable than not that the payment was made as the Applicant alleges. Had the Respondent truly thought he had not received the full amount, it would have been a point raised earlier in his statement of case. Indeed, it was implausible that he would have written off £350 so casually, if he believed that the Applicant was dishonestly or even mistakenly asserting payment when it had not been made and he could somehow evidence non-payment. Both sides accepted that there was a good continuing relationship of landlord and tenant at this time, and it would have been unlikely that such would be the case, if the Respondent seriously entertained the belief he had not received this sum. As indicated above, he was at pains to ensure payment of an inadvertent underpayment of £10 on one month's rent.

What account must be taken of the matters in s.44(4) or any other factors?

56. In Vadamalayan v Stewart [2020] UK UT 0183 (LC), Judge Elizabeth Cooke of the Upper Tribunal emphasised that there is no requirement that a Rent Repayment Order in favour of a tenant should be determined on the basis of reasonableness. Rather, she held that the obvious starting point is the rent payable for up to 12 months as defined by the 2016 Act. Further, she held that a restriction to the landlord's profits in relation to the tenancy was impossible to justify in the current state of the law and there was no reason why a landlord's costs in meeting his obligations under the lease should be set off. The only deduction which could be legitimately made, apart from the statutory ones, is a deduction for utilities paid for by a landlord (and there were none in the case before this Tribunal). She also reasoned that the civil penalty imposed on an errant landlord is also be disregarded: "it is difficult to see a reason for deducting either a fine or a financial penalty, given Parliament's obvious intention that the landlord should be liable both: (1) to pay a fine or civil penalty; and (2) to make a repayment of rent." Consequently, the only bases for deductions from the full amount were the factors in section 44(4) of the 2016 Act, namely (a) the conduct of the landlord and tenant, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence.

57. In Chan v Bilkhu [2020] UKUT 289 (LC), Judge Elizabeth Cooke of the Upper Tribunal had cause to revisit factors to be taken into account and did observe that the statutory provisions do not limit the matters that the Tribunal may take into consideration, but its attention is directed in particular to the matters listed in section 43(4) of the 2016 Act.

58. The Tribunal will consider the first two particular statutory factors first (the third and final factor is whether the landlord has at any time been convicted of an offence to which this Chapter applies, and is inapplicable), before considering residual matters.

The conduct of the landlord and the tenant

59. Addressing first the landlord, it is notable and to the Respondent's credit, that he is not portrayed to be a rogue by the Applicant. She accepts that they had a good relationship in the period in question and before that, characterised by a degree of give and take: the Respondent carried out works to the Property during the first three months of the tenancy at the request of the Applicant, and waived some of the rent for the time this took. The Respondent also engaged in responsive repairs (not always very successfully). Repairs and a prompt response to Council demands in 2019 are obligations upon a landlord, deserving of no special credit though. Such works necessarily are likely to include some improvements or betterment, but this is not especially to the Respondent's credit, but an incident of being a landlord complying with his legal obligations.

60. The Tribunal, however, considers that the Respondent's conduct as landlord fell well short of an acceptable level in important areas. The state of the Property was such that it was demonstrably unsafe in key respects.

61. Gas safety was substantially disregarded by the Respondent until he addressed the matter to facilitate his (late) licence application. The annual gas safety check is a basic requirement for the safe letting of a property and the evidence is that this was not done, nor was any carbon monoxide detector or alarm fitted, even though these are inexpensive.

62. Fire safety was also woeful. A detection system was not in place, and the one previously removed by a former tenant, was not restored. The seriousness of this neglect was compounded by the fact that the property has three storeys with an attic room, absence of any alternative escape route from the first floor, and the stairs being rendered unsafe by want of handrails. A falling injury is the subject of another claim, but whether it is proven or not is not material for this Tribunal, an obvious safety feature was omitted. The Respondent disputes that the applicant raised this as a concern. Since the Applicant had in her care her younger brother, concern at the absence of a handrail would be an obvious matter to raise, and on the balance of probabilities the Tribunal accepts that complaint was made.

63. The thermal condition of the Property was inadequate, and insulation was required to be installed.

64. In summary, it appears that the Respondent was willing to make repairs when called upon, but not to maintain the Property at the standards required by law. Significant hazards were present as a result. There is no mitigation in these circumstances. It is no assistance to the Respondent to contend that he could have been worse as a landlord.

65. It follows that the legal burdens upon the Respondent were not discharged by him, and this was entirely characteristic of his behaviour: on the balance of probability, he did not secure the deposit of the Applicant when he received it; he did not comply with gas safety regulations or the basic requirements of fire safety; and, in these circumstances, it is unsurprising that he neglected to seek the required licence for the Property. It is simply inadequate to assert a lack of expertise with technology, ill-health or family circumstances, as an excuse for failing to seek a licence for a period exceeding one year. The Tribunal accepts the Applicant's evidence, as the Respondent did to a limited extent, that the licence was raised with him by her during this period. The Tribunal accepts the Applicant's evidence that she was unaware that the Property was unlicensed until informed of this by the Council. The Respondent, the Tribunal finds, had not been candid with her about his failure to make application.

66. By contrast there is nothing in the conduct of the Applicant warranting a reduction in the sum payable under the Order. The text messages show a reasonably accommodating arrangement between Respondent and Applicant for the payment of rent in cash, as the Respondent had desired. There is no evidence that the Applicant was anything but a reasonably diligent tenant. Indeed, given the matters raised on inspection, it would appear fair to characterise her attitude as indulgent of the Respondent. She only made a limited number of complaints about repairs requiring to be

carried out, and she could have pursued matters further and more extensively. The manner of her use of the front downstairs room in particular, was unexceptional.

67. The Respondent did observe that both tenancy agreement contained a provision: "Not to assign sub-let or part with the possession of the premises, and not allow any other person to reside in the premises or to take any lodger". He suggested at the hearing that this was breached, but the Tribunal decided it was unfair to allow this point to be taken only at that time, denying the Applicant the chance of calling evidence to address such allegation. The allegation seemed to be limited to allowing others to reside at the Property, but to some extent that was agreed between the parties anyway, as the Applicant's brother was always to be a resident. If read literally, the provision would appear to be highly unfair in any event: for a three bedroom property to be limited to the occupation of one person would be remarkably limiting and one would expect it to reduce the rental value of the Property substantially.

The financial circumstances of the landlord

68. Much of the material adduced by the Respondent on his financial affairs is immaterial in the light of the decision of Vadamalayan v Stewart. The test is not one of profit made, but of rent received.

69. It is asserted that the respondent is not a professional landlord, but at the same time set out that the rent is his only source of income. Dependence on rental income is a characteristic of a professional landlord, and the real objection here is that he is only a landlord of a single property. Even so, if he wished to protect his income from that Property, it was incumbent upon the Respondent to comply with the law as it relates, not only to licensing, but to hazards in the Property and the like.

70. The Respondent had a civil penalty imposed upon him of £3,715.28, which he says he is struggling to pay on his limited income; again this may be said to be immaterial in the light of the decision of Vadamalayan v Stewart.

71. This Tribunal does have some regard to the limited resources of the Respondent, but it is important to put these in context. The Respondent's evidence is that his income is limited, and that he expects he will have to sell the Property in due course. His capital position is, accordingly, much stronger. Not only does he own his own home mortgage free, where he has lived for many years since moving from the Property, but he will also in due course be releasing the equity in the Property. Cash issues will accordingly be resolved and should not give rise to any significant discount.

The Residual Discretion

72. Turning to the residual discretion as identified in Chan v Bilkhu, some points made on behalf of the Respondent can be shortly disposed of:

73. Rent concessions by the Respondent are irrelevant. The effect of a rent concession is to reduce the total amount payable in any event, and this should not be double counted. In any event, there was no cogent evidence to suggest that rents of £500 pcm, rising to £580 pcm, were not market rents.

74. There is no reason to deny full repayment simply because the Applicant will then have lived rent free in the Property for a year. That is the very consequence identified by the 2016 Act: in a very important sense, the Respondent was not entitled to let the Property at all without a licence and the rent was the result of his unlawful conduct and an improper windfall to him (were he allowed to retain it), rather than a windfall to the Applicant, which parliament has allowed her to assert in any event.

75. Unsuccessful negotiations prior to the hearing ought not to have been referred to at all, and there is certainly no basis for criticising the Applicant for not having entered into an agreement or compromise with the Respondent.

76. The Tribunal, however, takes into account the ill-health of the respondent, his difficult personal circumstances, and his lack of technological awareness and considers that this may have impinged modestly on the delay in seeking a licence at the introduction of the regime. The Respondent could have employed an agent to rent the Property, or even enlisted the assistance of the Applicant (although that would probably have flagged the absence of a gas safety certificate). Only a modest allowance is appropriate accordingly.

Conclusion

77. Taking matters as a whole, including the evidence and submissions made on behalf of the Respondent by Mr Daniel, the Tribunal determines that it shall exercise its discretion to make a Rent Repayment Order in terms that the Respondent shall pay to the Applicant the sum of £5,500. That sum shall be payable within 35 days of the date of this decision to take account of the seasonal holiday in December.

Tribunal Judge Dr Anthony Verduyn

Dated 23rd December 2020

RIGHTS OF APPEAL

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 which 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

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.