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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AQ/HMF/2021/0046** **CVP Remote**
Property	**:**	**139 Marlborough Hill, Harrow, HA1 UG**
Applicants	**:**	**Chetna Khim**
Representative	**:**	**Justice for Tenants**
Respondents	**:**	**Anita Mary O'Shea**
Representative	**:**	**Chris Daniel**
Type of application	**:**	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal members	**:**	**Judge Professor Robert Abbey** **Antony Parkinson MRICS**
Venue and date of hearing	**:**	**By a video hearing on 20 July 2021**
Date of decision	**:**	**26 July 2021**

DECISION

Decision of the tribunal

(1) The Tribunal finds that a rent repayment order be made in the sum set out below in favour of the applicant, the Tribunal being satisfied beyond reasonable doubt that the respondent has committed an offence pursuant to s.72(1) of the Housing Act 2004, namely that a person commits an offence if he is a person having control of or

managing a house which is required to be licensed under Part two of the 2004 Act but is not so licensed. Under section 99 of the 2004 Act "house" means a building or part of a building consisting of one or more dwellings.

(2) The amount of the rent repayment order is **£4069.33** for the rent paid relating to the period of 13 September 2019 until 20 April 2020.

(3) the tribunal determines that there be an order for the refund of the application fees in the sum of £300 pursuant to Rule 13(2) of the Tribunal Rules.

Reasons for the tribunal's decision

Introduction

1. The applicants made an application for a rent repayment order pursuant to the terms of s.41 of the Housing and Planning Act 2016 in respect of a property known as **139 Marlborough Hill Harrow HA1 1UG**. This property is a three bedroom self-contained flat with shared kitchen and bathroom in the London Borough of Harrow let to multiple occupants (three) on separate tenancy agreements all within the same flat in a larger block of flats.

2. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the tribunal to proceed with this determination and also because of the restrictions and regulations arising out of the Covid-19 pandemic.

3. The hearing of the application took place on Monday 20 July 2021. The applicant appeared with representation as more particularly described above. The respondent also appeared with representation as more particularly described above.

4. Rights of appeal are set out in the annex to this decision and relevant legislation is set out in an appendix to this decision.

5. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice CVP platform with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to are in two bundles of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it a pair of electronic/digital trial bundles of

documents prepared by the applicant and the respondent, in accordance with previous directions.

6. The applicant is the former occupant of one of the rooms in the property. The applicant signed a tenancy agreement in the form of a house share agreement with the respondent/ landlord via her spouse, James McHugh. The respondent is the owner of the property as listed on its registered title.

Background and the law

7. Section 41 of the Housing and Planning Act 2016 allows tenants to apply to the Tribunal for a rent repayment order. It involves an HMO i.e., a house in multiple occupation. The Tribunal must be satisfied beyond reasonable doubt that a person/company has committed an offence described in Part two of the Act and in that regard section 72(1) of the 2004 Act states: -

> *(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 (see section 61(1)) but is not so licensed.*

8. The Housing Act 2004 Part 2 s. 61(1) states:

> *(1)Every HMO to which this Part applies must be licensed under this Part unless— (a) a temporary exemption notice is in force in relation to it under section 62, or (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.*

9. 4. Section 55 of the Housing Act 2004 states:

> 55 - Licensing of HMOs to which this Part applies
>
> *(1) This Part provides for HMOs to be licensed by local housing authorities where— (a)they are HMOs to which this Part applies (see subsection (2)), and (b)they are required to be licensed under this Part (see section 61(1)).*
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> *(2) This Part applies to the following HMOs in the case of each local housing authority— (a)any HMO in the authority's district which falls within any prescribed description of HMO, and (b)if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation*

10. The rented property was situated within an additional licensing area as designated by the London Borough of Harrow the details of which were provided to the Tribunal, (Exhibit N in The Trial Bundle). The additional licensing scheme came into force on 01 March 2016, (as confirmed in Exhibit M of the Trial Bundle). The additional licensing scheme has been implemented to apply to several wards in Harrow Council including the ward of Marlborough where the property is situated (again as confirmed in Exhibit M)

11. The meaning of a "person having control" and "person managing" is provided by s.263 of the Housing Act 2004:

> *"(1)In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.*
>
> *(2)In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.*
>
> *(3)In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—*
>
> *(a)receives (whether directly or through an agent or trustee) rents or other payments from—*
>
> *(i)in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and*
>
> *(ii)in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or*
>
> *(b)would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;*
>
> *and includes, where those rents or other payments are received through another person as agent or trustee, that other person. "*

12. Under section 41 (2) (a) and (b) of the 2016 Act 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. The application to the Tribunal was made on 25 December 2020. From the evidence before it the Tribunal was satisfied

that the alleged offence occurred in the period of 12 months ending with the day on which the application was made to the Tribunal.

13. The amount of the rent repayment order is £4069.33 for the period of 13 September 2019 until 20 April 2020. The applicant also supplied to the Tribunal proof of payment shown in the trial bundle. The Tribunal were satisfied that these payments had indeed be made and indeed the respondent confirmed that the applicant paid her rent promptly and without deduction.

The Offence

14. It was conceded at the outset of the hearing by the respondent that the property should have been licensed as a property in multiple occupation but was not so registered. Indeed, the Tribunal considered the evidence supplied and was satisfied that the property was covered by the additional licensing scheme and that there were three tenants in occupation for the period of the claim and that therefore there was a clear breach of the statutory requirements in regard thereto. Therefore, the property was unlicensed. The property was situated within an additional licensing area as designated by the London Borough of Harrow and consequently, the property was not licensed under the additional Licensing Scheme.

15. There being a "house" as defined by statute, then a person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part two of the Act but is not so licensed. The respondent has therefore committed an offence under section 72 (1) of the Housing Act 2004 (as amended by the Housing and Planning Act 2016) as the respondent was in control of an unlicensed property. The Tribunal relies upon the Upper Tribunal decision in the case of *Goldsbrough and Swart v CA Property Management Ltd and Gardner* [2019] UKUT 311(LC) in making this finding.

16. In the Upper Tribunal Judge Elizabeth Cooke found that where the alleged offence is controlling or managing an unlicensed HMO, a rent repayment order can only be made against a landlord of the property in question. While a managing agent cannot be a landlord, she concluded that the definition of a landlord, for the purposes of the 2016 Act, included both the tenants' immediate landlord and the freehold owners of the property The order does not need to be made against the 'immediate landlord' of the tenants of the property. Rather, it can be made against any person who is "a landlord of the property where the tenant lived" (*Goldsbrough v CA Property Management Ltd* [2019] UKUT 311 (LC) at [32]-[33]).

17. In the light of the above, the Tribunal took time to carefully consider the evidence regarding the absence of a licence but came to the

inescapable conclusion that none had been issued by the Council. Therefore, the Tribunal concluded that this was an unlicensed property in relation to this application. There were no submissions or other evidence of a reasonable excuse for not having applied for a licence. Indeed, the representative for the respondent confirmed that there was no reasonable excuse to be put to the Tribunal in this case. Accordingly, the tribunal had no alternative other than to find that the respondent was guilty of the criminal offence contrary to the Housing Act 2004.

The tribunal's determination

18. The amount of the rent repayment order was extracted from the amount of rent paid by the applicant during the period of occupancy as set out within the trial bundle where the rents actually paid were fully stated in a spreadsheet format. The amount was in dispute between the parties as to whether the final 20 or 19 days should form part of the rental apportionment. The Tribunal considered this point but accepted that factually the period was 20 days and apportioned the rent accordingly. However, the Tribunal calculated this to be £4069.33 a few pence less than the applicant's calculation. This sum represents the maximum sum, (£100%), that might form the amount of rent repayment order.

19. In deciding the amount of the rent repayment order, the Tribunal was mindful of the guidance to be found in the case of *Parker v Waller and others* [2012] UKUT 301 (LC) as to what should the Tribunal consider an appropriate order given the circumstances of the claim. Amongst other factors the tribunal should be mindful of the length of time that an offence was being committed and the culpability of the landlord is relevant; a professional landlord is expected to know better. From the evidence before it provided by the applicants the Tribunal took the view that the respondent was not a professional landlord as it had no evidence to say otherwise. As was stated in paragraph 26 of *Parker: -*

> "*Paragraph (d) requires the RPT to take account of the conduct and financial circumstances of the landlord. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to register will obviously merit a larger RRO than instances of inadvertence – although all HMO landlords ought to know the law. A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.*"

20. Having said that, when considering the amount of a rent repayment order the starting point that the Tribunal is governed by is s.44(4), which states that that the Tribunal must "in particular, take into account" three express matters, namely:

(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.

The Tribunal must therefore consider the conduct of the parties and the financial circumstances of the respondent. Express matter (c) was not considered as no such convictions apply so far as the respondent is concerned. Furthermore financial circumstances were not considered as no evidence in that regard of a convincing nature was to be found in the Trial Bundle.

21. The Tribunal were mindful of the recent Upper Tribunal decision in *Vadamalayan v Stewart and Others* [2020] UKUT 183 (LC). In particular Judge Elizabeth Cooke said: -

> *12. That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent.*
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> *14. It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament's intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord's profits was – as the President acknowledged at his paragraph 26 – not the only purpose of a rent repayment order even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied.*
>
> *53. The provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in Parker v Waller. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances. There may be a case, as I said at paragraph 15 above, for deducting the cost of utilities if the landlord pays for them out of the rent (which was not the case here). But there is no justification for deducting other expenditure. The appellant incurred costs for his own*

> *benefit, in order to get a rental income from the property; most were incurred in performance of the appellant's own obligations as landlord. The respondents as tenants were entitled to the items set out in the appellant's schedule of expenditure (insofar as they do relate to the property; in the circumstances I do not have to resolve disputes of fact for example about item 8). The respondents are entitled to a rent repayment order. There is no reason to deduct what the appellant spent in meeting one obligation from what he has to pay to meet the other.*
>
> *54. The appellant also wants to deduct what he had to pay by way of mortgage payments to the TSB and interest on another loan which has not been shown to relate to the property. The FTT refused to deduct the mortgage payments because the mortgage was taken out in 2016 whereas the property was purchased in 2014, so that the mortgage did not appear to have funded the purchase. The appellant says that the property was bought some years before that and that this was a re-mortgage. He did not produce evidence about that to the FTT and he could have done so. More importantly, what a landlord pays by way of mortgage repayments – whether capital or, as in this case, interest only – is an investment in the landlord's own property and it is difficult to see why the tenant should fund that investment by way of a deduction from a rent repayment order. The other loan has not been shown to relate to the property and I regard it as irrelevant, as did the FTT.*

22. In the light of the above when considering financial circumstances, the Tribunal should not consider profit, mortgage payments or reasonableness. So, the Tribunal did not take account of any of these points when coming to the amount of the rent repayment order.

23. The tribunal could not see any justification for a deduction for any outgoing. The conduct of the respondent did not seem to justify this allowance. The respondent had simply failed to properly licence the property and in the same context had failed to ensure proper fire safety provisions were in place such as fire doors.

24. However, it has been observed that quantum of any award is not related to the profit of the respondent, following *Vadamalayan*. Consequently, the only expense deductions that may be allowed, at the discretion of the Tribunal, are for utilities paid on behalf of the tenants by the landlord. It can be argued that council tax is a fixed cost of the landlord, also payable when the property is empty. It is not "consumed at a rate the tenant chooses" (*Vadamalayan*, §16), as per utilities and should not be an allowable expense. The Tribunal agrees with this assessment of the relevance of this outgoing. Consquently, the Tribunal was unable to take into account these items.

25. The Tribunal then turned to the matter of the conduct of the parties. The landlord should have licenced this property but did not. This is a significant factor in relation to the matter of conduct. It remains the case that this property should have been licenced and regrettably it was not.

26. There was lengthy discussion at the time of the hearing regarding loose door handles. Whilst this must have been annoying it is not the worst example of poor maintenance that the Tribunal has encountered. Indeed, the applicant confirmed that she was happy with the property.

27. It was also said that there was an issue at the property with some element of mould but not in the bedroom occupied by the applicant. The Tribunal accepted that there was some mould in the flat but did not feel it was on significant consequence.

28. What was of significant consequence was the fact that the applicant and one of the other tenants had a significant falling out that prompted complaints to the landlord/respondent and the involvement of the Police. What relevance this had to the question of conduct for this Tribunal to consider seemed to the Tribunal to be unclear. It was noted that this disagreement arose during lockdown and this affected what did and what did not happen thereafter.

29. Having said all of the above the Tribunal accepts that this description of the negative aspects of the conduct of the respondent should be taken into account when considering the amount or level of the rent repayment order necessary in this case. Furthermore, the Tribunal noted that the applicant paid her rent properly and without delay or deduction.

30. Consequently, while the Tribunal started at the 100% level of the rent it thought that there were no reductions that might be appropriate, proportionate or indeed necessary to take account of the factors in the Act. Therefore, the Tribunal decided particularly in the light of the absence of a licence that there should be no reduction from the maximum figures set out above giving a final figure of 100% of the claim. This figure represents the Tribunals overall view of the circumstances that determined the amount of the rent repayment order.

31. Therefore, the Tribunal concluded that a rent repayment order be made in the sum of £4069.33 for the rent paid relating to the period of 13 September 2019 until 20 April 2020. The order arises as a consequence of the Tribunal being satisfied beyond reasonable doubt that the respondent had committed an offence pursuant to s.72 of the Housing Act 2004, namely that a person commits an offence if he is a person/company having control of or managing a house which is

required to be licensed under Part two of the 2004 Act but is not so licensed.

32. Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 No 1169 (L.8) does allow for the refund of Tribunal fees. Rule 13(2) states that "*The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.*"

33. There is no requirement of unreasonableness in this regard. Therefore, in this case the Tribunal considers it appropriate and proportionate in the light of the determinations set out above that the respondents refund the Applicants' Tribunal fee payments of £300. In the circumstances the tribunal determines that there be an order for the refund of the application and hearing fees in the sum of £300 pursuant to Rule 13(2) of the Tribunal Rules.

Name: Judge Professor Robert Abbey Date: 26 July 2021

Annex

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Housing Act 2004

Section 72 Offences in relation to licensing of HMOs

(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 (see section 61(1)) but is not so licensed.

(2) A person commits an offence if—

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3)A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine .

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either—

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are—

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

s41 Housing and Planning Act 2016

Application for rent repayment order

(1)A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2)A tenant may apply for a rent repayment order only if —

(a)the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b)the offence was committed in the period of 12 months ending with the day on which the application is made.

(3)A local housing authority may apply for a rent repayment order only if—

(a)the offence relates to housing in the authority's area, and

(b)the authority has complied with section 42.

(4)In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

44 Amount of order: tenants

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
(2)....
(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.