



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case reference** : **LON/00BE/HMF/2020/0005**

**HMCTS code  
(paper, video,  
audio)** : **V: CVPREMOTE**

**Property** : **25b Southampton Way, Southwark,  
London SE5 7SW**

**Applicants** : **(1) Emma Saunders; (2) Seanab Egeh;  
(3) Mia Cooper**

**Representative** : **Mr Alasdair Mcclenahan from Justice  
for Tenants**

**Respondents** : **(1) Bevan Badenhorst; (2) Genoveva  
Genova**

**Representative** : **Mr Desmond Taylor from Landlords  
Defence Ltd t/a Landlord Licensing and  
Defence**

**Type of application** : **Application for a Rent Repayment Order  
under s.41 of the Housing and Planning  
Act 2016**

**Tribunal  
member(s)** : **Judge N Rushton QC;  
Mr M Cairns MCIEH**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of hearing** : **28 April 2021**

**Date of decision** : **10 May 2021**

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**DECISION**

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**Covid-19 pandemic: description of hearing**

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be

determined in a remote hearing. The documents that the Tribunal were referred to were in five bundles submitted by the parties, the contents of which have been noted (Applicants' main bundle 134 pages; Respondents' main bundle 122 pages; Applicants' supplementary bundle 97 pages; Respondents' supplementary bundle 26 pages; Applicants' further submissions 32 pages).

### **Decisions of the tribunal**

- (1) The tribunal makes a rent repayment order against Mr Bevan Badenhorst in favour of each of Ms Emma Saunders, Ms Seanab Egeh and Ms Mia Cooper in in the sum of £6,361.64 each, or a total of £19,084.92.
- (2) It is recorded that the application against Ms Genoveva Genova is withdrawn by consent. She is accordingly removed as a Respondent.
- (3) The tribunal makes an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that Mr Badenhorst shall reimburse the application fee of £100 and the hearing fee of £200 paid by the Applicants within 28 days of the date this Decision is received by the parties.
- (4) The tribunal makes the further determinations as set out under the various headings in this Decision.

### **The application**

1. The 3 Applicants issued an application on 16 December 2019 for rent repayment orders under s.41(1) of the Housing and Planning Act 2016 ("**the 2016 Act**") against both of the original Respondents.
2. Directions were issued by Judge Dutton on 24 January 2020 which have been essentially complied with by the parties.
3. The parties participated in a mediation on 23 July 2020, but did not reach any settlement.
4. Extracts from relevant legislation are set out in an Appendix to this Decision.

### **The hearing**

5. The hearing took place remotely using the CVP platform. There were occasional technical issues which delayed the hearing for short periods, but the tribunal did not consider these had an impact on the effectiveness of the hearing and no participant suggested that they did.

6. The Applicants were represented by Mr Alasdair Mcclenahan from Justice for Tenants and the Respondents by Mr Desmond Taylor from Landlord Defence.
7. All 3 Applicants attended the hearing, although only Ms Egeh and Ms Cooper had submitted signed witness statements. The tribunal heard live evidence from both of them, and considers that their evidence (combined with the documents) amply covered the situation of all 3 Applicants. The tribunal also heard live evidence from Mr Badenhorst.
8. Mr Badenhorst and Ms Genova are husband and wife. Ms Genova attended briefly, but after the application against her was withdrawn at the start of the hearing, she left and took no further part in it.
9. Mr Douglas Marshall, the recently appointed Judicial Appointments and Conduct Ombudsman, also attended the virtual hearing as an observer.
10. All 3 witnesses were cross-examined and also answered questions from the tribunal. The tribunal finally had the benefit of oral submissions on both the law and evidence from Mr Mcclenahan and Mr Taylor, all of which it has considered carefully in reaching this determination.
11. The tribunal considered all 3 witnesses were honest and were doing their best to assist the tribunal in giving their evidence. With certain limited exceptions (dealt with below where material) it became apparent that most of the facts were not in dispute.
12. However, the tribunal does wish to express its concern as to the very large amount of paperwork which was generated for what was a factually straightforward case, and the extent to which issues were raised (on both sides, but especially by the Respondents) which were not ultimately pursued. It does also though wish to express its appreciation to both sides and their representatives for the way the issues were substantially narrowed at the beginning of the hearing.

### **The property**

13. The application relates to 25b Southampton Way, Southwark, London SE5 7SW ("**the Property**"). The Property is a 3 double bedroom ground floor flat with a garden, which backs onto Burgess Park. The long leasehold interest was at all material times registered in the sole name of Mr Badenhorst.
14. The Applicants each occupied one double bedroom, with use of the common parts (including a kitchen, bathroom and garden), under separate assured shorthold tenancies. The periods of their occupation were as follows:

Ms Saunders: 17 February 2018 to 17 October 2019;  
Ms Egeh: 1 October 2017 to 28 August 2019;  
Ms Cooper: 4 September 2018 to 17 October 2019.

15. During the period from August 2008 until August 2017 the Property was occupied by Mr Badenhorst, Ms Genova, their two children and Ms Genova's mother as their family home. In August 2017 the family moved to 15 Beckenham Road, West Wickham, Kent BR4 0QR.
16. From 1 January 2016, the whole of Southwark, where the Property was situated, was an additional licensing area for privately rented Houses in Multiple Occupation ("HMOs") under s.56 of the Housing Act 2004 ("the 2004 Act"). This extended in particular to self-contained flats with shared facilities occupied as a main residence by at least 3 tenants who were not part of the same household. It is undisputed that this extended to the Property for the period it was occupied by 3 tenants.
17. On 14 August 2019 Mr Badenhorst applied to Southwark Council for a Temporary Exemption Notice ("TEN") under s.62 of the 2004 Act, which was granted on 16 August 2019 for a 3 month period. It was granted because Mr Badenhorst was in the process of selling the Property. The circumstances in which he became aware that the Property should have been licensed are dealt with below.
18. The Property was sold by Mr Badenhorst in November 2019 for £620,000.
19. The Property was described by Ms Egeh in her evidence as "*a lovely place to live*", and this is apparent from the various marketing and other photographs of the Property which were in the bundles.
20. There was though a problem with rats, probably originating from the park. There was a dispute between the parties as to the extent of this problem: the Applicants' case was that they were both in the garden and under the floors/ in the ceiling; Mr Badenhorst's was that they were under the garden decking and in the garden. There was no suggestion that they were seen in the living space in the flat. The tribunal heard extensive evidence from all the witnesses about the rat problem, and about the efforts taken by Mr Badenhorst to address it.

### **Matters not in issue**

21. Mr Taylor made it clear at the start of the hearing that Mr Badenhorst admitted the single offence alleged, under s.72(1) of the 2004 Act, of having control or managing an HMO which was required to be licensed under that Act, but which was not so licensed.

22. The parties agree, and the tribunal is satisfied beyond reasonable doubt, that that offence was committed over the period from 4 September 2018 to 14 August 2019 (a period of 344 days). Ms Cooper moved in on 4 September 2018, so there were three tenants living in the Property at all material times from that date. The end date of 14 August 2019 is the date Mr Badenhorst applied for a TEN.
23. Mr Taylor also asked and Mr Mcclenahan agreed on behalf of the Applicants at the start of the hearing, that their application be withdrawn against Ms Genova. She was not a registered proprietor of the Property. The tribunal accordingly ordered that she be removed as a Respondent.
24. It followed that it was accepted by Mr Badenhorst at the hearing (although it had previously been disputed) that the Property was occupied by all of the Applicants as their main residence.
25. On behalf of Mr Badenhorst, Mr Taylor did not dispute that pursuant to its powers under s.43 of the 2016 Act, the tribunal should make a rent repayment order (“**RRO**”). He submitted that the issue was as to quantum.

### **The tribunal’s determination**

26. The tribunal agrees that this is a case in which it should exercise its discretion under s.43 of the 2016 Act to make an RRO against Mr Badenhorst in favour of each of the Applicants, the offence being admitted and there being no proper basis on which it could refuse to do so. There is no material difference in the position of each of the three Applicants.
27. Section 44 of the 2016 Act provides that where the tribunal decides to make an RRO against a landlord in favour of a tenant, the amount is to be determined in accordance with that section. Sub-paragraph 44(2) provides that in a case concerning an offence under s.72(1) of the 2004 Act, the amount must relate to rent paid during a period, not exceeding 12 months, during which the landlord was committing the offence. It is agreed that the relevant period here is 344 days for each Applicant.
28. The undisputed evidence was that each Applicant paid rent of £750 per month plus £60 in respect of bills, most of which appear to have remained in Mr Badenhorst’s name. Mr Badenhorst said, and it was not disputed, that the actual cost of the bills exceeded £60 per month. The parties agreed, and the tribunal accepts, that the amount of rent paid by the tenants for the purposes of sub-paragraph 44(2) was therefore £750 p.m. for each tenant.

29. No universal credit was paid to any tenant which needs to be deducted pursuant to s.44(3)(b).
30. Accordingly, the maximum RRO which could be ordered in favour of each Applicant is  $750 \times 12 \times 344/365$  or £8,482.19.
31. Sub-section 44(4) provides that in determining the amount of the RRO, 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 Chapter of the 2016 Act applied.
32. Mr Badenhorst has not been convicted of any such offence, so (c) does not apply. Nor has the local authority imposed any financial penalty on him under s.249A of the 2004 Act. In his evidence Mr Badenhorst said that when he contacted the Enforcement Officer at Southwark Council in August 2019 to find out what he needed to do to resolve his lack of a licence, he was advised to and applied for a TEN, but no enforcement action was taken against him.
33. In *Vadamalayan v. Stewart* [2020] UKUT 183 (LC); [2020] HLR 38, the Upper Tribunal (Judge Cooke) said previous practice under the old 2004 Act provisions should not be applied under the 2016 Act, saying:

*"[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 12 months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent."*

And at [19]:

*"The only basis for deduction is s.44 itself. and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence."*

34. Subsequently, in *Ficcara v. James* [2021] UKUT 38 (LC) the Deputy Chamber President of the Upper Tribunal, Martin Rodger QC, in considering *Vadamalayan* said at [50] that:

*"The concept of a "starting point" is familiar in criminal sentencing practice, but since the rent paid is also the maximum which may be*

*ordered the difficulty with treating it as a starting point is that it may leave little room for the matters which section 44(4) obliges the FTT to take into account, and which Parliament clearly intended should play an important role. A full assessment of the FTT's discretion as to the amount to be repaid ought also to take account of section 46(1)."*

(S.46, ss. (1) and (5) provide essentially that where the landlord has been convicted of a relevant offence, the tribunal must order the maximum unless this would be unreasonable by reason of exceptional circumstances.)

35. The Deputy Chamber President further observed at [51] that:

*"It has not been necessary or possible in this appeal to consider whether, in the absence of aggravating or mitigating factors, the direction in section 44(2) that the amount to be repaid must "relate" to the rent paid during the relevant period should be understood as meaning that the amount must "equate" to that rent. That issue must await a future appeal. Meanwhile Vadamalayan should not be treated as the last word on the exercise of discretion which section 44 clearly requires; neither party was represented in that case and the Tribunal's main focus was on clearing away the redundant notion that the landlord's profit represented a ceiling on the amount of the repayment."*

36. Thereafter in *Awad v. Hooley* [2021] UKUT 0055 (LC) Judge Cooke herself said at [40] that she agreed with this analysis in *Ficcara*. She said that whether or not the maximum is described as a starting point, it cannot function in exactly the same way as a starting point in criminal sentencing because it can only go down; however badly a landlord has behaved, it cannot go up. She also said that it would be unusual for there to be absolutely nothing for the FTT to take into account under s.44(4) and emphasised how the cases were examples of exercise of discretion by the FTT.

37. In his submissions Mr Mcclenahan argued that *Vadamalayan* was still precedent and the later cases had not said it was wrong. He said that the purpose of RROs was to be very punitive and hard-edged, that the maximum was still the starting point and that in *Vadamalayan*, Judge Cooke had said at [56] that if she had been starting from a clean sheet, she would not have deducted anything. He suggested this should give this tribunal a clear indication that the maximum RRO should be awarded in the present case. He said that it was always possible to think of worse possible behaviour of a landlord, but this should not deter the tribunal from making the maximum award.

38. Mr Taylor submitted that Mr Mcclenahan's interpretation of *Ficcara* was wrong, and Mr Mcclenahan was refusing to accept that following *Ficcara*, *Vadamalayan* could no longer be his song-sheet (for Justice

for Tenants). He emphasised a number of points about Mr Badenhorst's conduct as a landlord (which will be considered below) which he said should result in the tribunal making an award which was less than the maximum. The thrust of his submissions was that this was very much a case at the lower end of any scale.

39. The tribunal considers that the Upper Tribunal in *Ficcara* and *Awad* has disapproved any suggestion that it should approach the exercise of its discretion under s.44 by awarding the maximum amount unless there is a good reason to make a reduction. Rather it considers those decisions emphasise that (where there is no conviction), the amount of the RRO is a discretionary decision of the tribunal, which, while calculated by reference to the rent paid and subject to the stated maximum, should take into account in particular to the conduct of the landlord and tenant and the financial circumstances of the landlord. This is in deliberate contrast to the approach to be taken in the (more serious) cases where there is a conviction.
40. In the present case, the tribunal has reached the following conclusions on the specific matters it is to take into account under s.44(4).
41. The financial circumstances of the landlord are not a material factor.
42. Mr Badenhorst is a professional who works in project technology, designing or organising software processes. He said in cross examination that he earns £70,000 p.a.. Ms Genova is an architect, but she has also suffered from ill health and the tribunal heard no evidence as to her income. Mr Badenhorst did not choose to put his tax returns in evidence. Mr Mcclenahan emphasised this, but the tribunal considers it most likely that his income is such that Mr Badenhorst did not consider they would assist his case.
43. Their current family home was purchased in August 2017 for £760,000, with a mortgage. He was able to do this without having to sell the Property. The Property was sold on 20 November 2019 and the proceeds of £611,412 mainly used to discharge the mortgage on their home, which has been mortgage-free since then. Mr Badenhorst explained that since he had had a serious health scare some years ago, he has wanted to be debt-free.
44. In terms of assets and income, Mr Badenhorst is and was therefore comfortably off. He was not dependent on the rent from the Property as income.
45. There is no dispute that the Property is the only property that Mr Badenhorst has ever privately let. His evidence was that when the family originally moved in August 2017, he thought he would sell it quite quickly. However, he said in the event, the market was precarious



post-Brexit and he did not put it on the market until June 2018. He said he therefore decided to let the Property out and thought he could do it without using a letting agent. His evidence was that he let the three bedrooms individually rather than letting the whole flat to a family because he might have needed to sell the Property at short notice, which would have inconvenienced a family with children in schools.

46. The Applicants relied on Zoopla quotes for a letting of the Property as a family home, which were in the bracket £1,700 - £2,100. Mr Mcclenahan submitted that Mr Badenhorst's motives for letting the rooms separately were financial, because more rent could be earned that way. The tribunal does not however consider this is a material issue, given its conclusion that Mr Badenhorst's financial circumstances are not a relevant factor.
47. In the event, the asking price for the Property was reduced more than once, and Mr Badenhorst did not find a buyer until July 2019.
48. The events which followed, starting with him trying to give (inadequate) notice to his tenants, are relied on by the Applicants as an important element of poor conduct by him, for the purposes of s.44. There is no dispute as to what took place, although there is a dispute as to how this should be weighed by the tribunal as conduct.
49. When preparing ASTs for the tenants, Mr Badenhorst used a template he found online. However he wrongly amended the statutory minimum two-month notice period in the template to one month. The tribunal finds he did this in ignorance of the correct requirements. (He also incorrectly set the initial period in two of the ASTs at less than 6 months.)
50. On 30 July 2019 he sent each of the tenants an email purporting to give them one month's notice, expiring at the end of August.
51. Both Ms Saunders and Ms Egeh responded very quickly that their understanding was that he was required to give them two months' notice. However Mr Badenhorst persisted in relying on the reference in the AST to one month, causing them anxiety and concern, and with the consequence that the Applicants sought advice from Shelter and then from Southwark Council as to their position.
52. This resulted first in Mr Badenhorst becoming aware that he would need to rectify a number of statutory failures in relation to the tenancies. On 8 August 2019 he hand-delivered letters to each of the Applicants which (a) confirmed he had been wrong in his understanding of the notice requirement, which he now accepted should be 2 months; (b) enclosed a cheque for the return of their deposits of £750 each; (c) enclosed certain documents (which he must

have realised he was obliged to provide but had not), including a gas certificate and “how to rent” guide; and (d) purported to serve a 2 month s.21 notice to terminate their tenancies.

53. At about the same time or shortly afterwards, it came to both the Applicants’ and Mr Badenhorst’s attention that the Property was an HMO which should have been licensed, because it was located within an additional licensing area. Among other things, this lack of a licence prevented Mr Badenhorst from serving any valid s.21 notice. Mr Badenhorst took advice from an officer at Southwark’s Private Sector Housing Enforcement and Licensing. Since he was in the process of selling the Property, he was advised to apply for a TEN. As noted above, he did so on 14 August 2019 and the TEN was granted for 3 months on 16 August 2019.
54. This permitted Mr Badenhorst to serve a valid s.21 notice on the Applicants, which he did on 17 August 2019. This notice expired on 17 October 2019, which was the date of departure of Ms Saunders and Ms Cooper, Ms Egeh having left on 28 August 2019.
55. It is perfectly obvious to the tribunal that in a number of respects Mr Badenhorst did not understand his statutory obligations as a private landlord, let alone as a landlord of an HMO. Clearly he should have found out about all these obligations and/or used a letting agent.
56. The tribunal also considers that once he found out about those breaches and failures, he sought to rectify them promptly. This was no doubt motivated as much by self-interest (so he could serve a s.21 notice and sell the Property) as responsibility towards the tenants, but nevertheless he did so.
57. Mr Badenhorst’s breaches of his obligations as a landlord (which go beyond the offence of not having a licence to operate the Property as an HMO) are relevant as poor conduct for the purposes of s.44. The most important of these was his ignorance of proper notice requirements, which led him to cause unnecessary anxiety to the Applicants by giving insufficient notice and then wrongly maintaining his position. Another significant failure was that the Applicant’s deposits were not held in a proper tenancy deposit scheme he was obliged to do. However they were in fact returned in full before the end of the tenancies, on 8 August 2019.
58. It is correct, as Mr Mcclenahan submitted, that HMO licensing was introduced (and has been extended through additional licensing) with the aim of improving the quality and safety of private rented accommodation occupied by multiple households. The tribunal notes the legislation is intended to assist local authorities to locate and monitor HMOs and also improve the standard and management of this sector. Multi-occupied property has historically contained the most

unsatisfactory and hazardous living accommodation with particular concerns about inadequate fire safety provision and poor management. Against this background the failure to license is potentially extremely serious - hence the significant associated penalties and forfeit of rents sanctioned by the legislation. In addition, good landlords who license promptly may otherwise feel that those failing to license would gain unfair benefit by dodging licensing costs and associated improvement expenditure if licensing were not heavily incentivised. There are therefore sound public policy reasons for the provisions.

59. However, in the present case, there is no evidence that the Property was unsafe or of poor quality (subject only to the issue of the rats). This is not to understate the importance of licensing or other statutory requirements; however the tribunal considers it is relevant that the lack of a licence did not adversely affect the Applicants through the quality of their accommodation.
60. There is no dispute that there was a continuing problem with rats at the Property. Ms Egeh's evidence was that she and Ms Saunders decided to clear what appeared to be old building materials and children's toys in the garden in the spring of 2018 and that this disturbed nests of rats, apparently under the decking in the garden. They informed Mr Badenhorst, who arranged inspections from Southwark Council and Thames Water (as it was believed rats were in the pipes). There was an inspection report from Southwark dated 22 May 2018, including baiting of traps, and a further report from a reinspection on 5 June 2018. There were also details in the bundles of notifications to the tenants of inspections from Thames Water for 11 May 2018 and 4 September 2018. Mr Badenhorst then attended the Property on a number of occasions after that, to check bait hidden in various sites and check for signs of rats. He also blocked pipes from the Property with grilles, as instructed by Southwark.
61. In her evidence Ms Egeh said they could frequently hear scrabbling which sounded like rats under the floorboards or behind the chimney breast. She also said that Mr Badenhorst had removed a dead rat from behind the boiler in a cupboard in the Property, and wrapped it in blue plastic. However, under cross examination she confirmed that she had not actually seen him remove a rat. Ms Cooper was only able to speak to the situation after September 2018. She said there was often a bad smell in the Property which she believed was from dead rats. She also confirmed that she heard scrabbling noises. There were still shots of a rat in the decking within the bundle.
62. Mr Badenhorst said in his evidence that he did not ever remove a dead rat from within the house, although he did remove them from the garden. He said that he attended regularly to remove and replace old bait, and that what the tenants had seen him remove with blue gloves and plastic within the flat was old bait and not a dead rat. The tribunal

accepts the evidence of Mr Badenhorst on this point. It considers that Ms Egeh made an assumption that he had removed a dead rat from behind the boiler, because he also removed dead rats which he then wrapped in plastic from the garden, but that this assumption was incorrect. He said that when Southwark Council and Thames Water attended, they advised him the problem was outside and not within the Property. Their work was therefore concentrated outside, but he said it seemed they were not able to solve it. He said that he did not see evidence of rats inside the house when he checked his bait.

63. Mr Mcclenahan criticised Mr Badenhorst for not having engaged more professionals to deal with the rat problem. Mr Taylor submitted that Mr Badenhorst had done all that might reasonably have been expected of a good landlord in attempting to deal with the rats, but that the rat problem was wider, originating in the park.
64. The tribunal's conclusion is that Mr Badenhorst did engage specialists who visited at least 4 times to deal with the rats (and does not consider it significant whether these were local council employees or private contractors), rats which originated outside the flat itself and were a wider problem most probably originating from the park. It considers that while Mr Badenhorst's own efforts were amateurish and it might have been better to have engaged professionals further than he did, nevertheless he did make a real effort to ensure there was not a problem within the flat itself. It does not consider that Mr Badenhorst could reasonably have been expected to have addressed the wider problem of rats coming into the garden from the park.
65. More generally the tribunal also considers there is ample evidence that on a human level, Mr Badenhorst tried to behave as a good landlord towards the Applicants, and that, at least until the final couple of months, he and the Applicants had a good relationship, with sensible "give and take". A good example concerns visits to the Property. The evidence was that initially he and Ms Genova made visits on quite short notice (a few hours, or occasionally less than an hour), but when the tenants asked for 24 hours' notice of any visits, they complied. He and Ms Genova were reasonably responsive when the tenants had problems, such as with a worktop or with the heating. They gifted furniture to the tenants when they moved out.
66. An issue did arise concerning arrangements for viewings with the second estate agent, Portico, in May 2019. The tenants objected to the agent requesting viewings at less than 24 hours' notice. The agent complained to Mr Badenhorst that the tenants were being difficult about viewings. Mr Badenhorst texted Ms Saunders saying that they were trying to sell the Property; it would be great if the tenants could accommodate requests to view, but that if this was too much of an inconvenience they might have to sell it unoccupied. He proposed a meeting to discuss any concerns they might have that he was unaware

of. Ms Egeh responded that she did not know what Portico had said that had given such a poor impression that he would consider eviction, but it was not true and they had not been obstructive. She agreed to a meeting.

67. Ms Egeh was unhappy that he had accepted the agent's side of the story without asking for hers. However, both Mr Badenhorst and Ms Egeh confirmed that after they discussed the problem at a meeting at the Property, he accepted they had not been obstructive, and that they needed to have 24 hours' notice of any viewings. Both gave the impression that the meeting was amicable.
68. The tribunal considers this incident primarily illustrates that at the time, the parties had a reasonable relationship that permitted them to resolve potential difficulties like this in a sensible way.
69. Unfortunately, it considers that with the issue of proceedings, and the perceived need to establish "poor" conduct on the part of the other party under s.44, both sides have since taken offence and sought to rely in the proceedings on various actions during the tenancy which had not caused significant problems at the time.
70. The tribunal does not consider that there has been poor conduct by the tenants which falls to be taken into account under s.44. In response to a question from the tribunal, Mr Badenhorst said they had been good tenants. They paid the rent and bills on time. The Property was kept in reasonably good condition. An issue was raised as to whether they correctly used the bins, and whether they left non-recyclables in the recycling bin upon leaving. However, the evidence overall indicated that misuse of the bins was probably the fault of the occupiers of the Air bnb in the upstairs flat. The tribunal considers the issue of the non-recyclables to be *de minimis* in this context. Sensibly, Mr Badenhorst also did not pursue the allegation that the tenants had kept a cat in breach of the terms of their lease. Overall, the tribunal considers that the Applicants' conduct as tenants was as good as might reasonably have been expected.
71. Mr Taylor sought to argue that the tenants had been guilty of poor conduct in exaggerating problems during their tenancy, suggesting they were motivated by maximising any RRO. Mr Mcclenahan also relied on the fact Mr Badenhorst had raised allegations against the tenants which he had ultimately dropped. While the tribunal considers it regrettable that the dispute became unnecessarily wide-ranging, and the parties' positions entrenched, it does not consider that this was conduct which was so significant that it should be weighed in the balance under s.44.
72. Accordingly, in conclusion the tribunal considers that (a) the landlord's financial circumstances are not relevant; (b) there is no relevant poor conduct by the tenants; (c) there is some relevant conduct by Mr

Badenhorst which was poor for the purposes of s.44 and also some which was good; (d) while his poor conduct did have an impact on the tenants, this was not major or long-lasting, and he sought to reverse or correct this; and (d) it is relevant that the tribunal is considering only one offence, failure to licence, that it was unintentional and rectified quickly.

73. The tribunal also bears in mind however the punitive purpose of this jurisdiction as outlined above, and the importance of the aim of enforcing a licensing regime which is intended to raise the standards of privately rented HMOs.
74. Weighing all these matters in the balance, the tribunal has concluded that the appropriate award in each case would be an RRO which is 75% of the maximum which could have been awarded by reference to the rent for the 344 day period. It therefore awards an RRO in the sum of £6,361.64 to each of the three Applicants.
75. In view of its findings as set out above, and the fact the Applicants could not actually have obtained relief without pursuing this application, the tribunal further makes an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that Mr Badenhorst shall within 28 days reimburse the application fee of £100 and the hearing fee of £200 paid by the Applicants.

**Name:** Judge Nicola Rushton QC      **Date:** 10 May 2021

### **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**

#### **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). 12

(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).

## **Housing and Planning Act 2016, Chapter 4**

#### **41 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. 13

(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) The amount must relate to the rent paid during the period mentioned in the table.

<b><i>If the order is made on the ground that the landlord has committed</i></b>	<b><i>the amount must relate to rent paid by the tenant in respect of</i></b>
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.

#### **46 Amount of order following conviction**

(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) For the purposes of subsection (2)(b) there is “*no prospect of appeal*”, in relation to a penalty, when the period for appealing the penalty has expired and any appeal has been finally determined or withdrawn.

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