FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/HMF/2021/0059**
HMCTS code	**:**	**Video VHS**
Property	**:**	**9 Setchell Way, London SE1 5XR**
Applicant	**:**	**Mr C Morris, Mr E Middleton, Ms A Smith and Mr M Wilmore**
Representative	**:**	**Mr A Mcclenahan, Justice for Tenants**
Respondent	**:**	**Mr A Macmillan**
Representative	**:**	**In person**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mrs S Coughlin MCIEH**
Date and venue of Hearing	**:**	**Remote** **2 August 2021**
Date of Decision	**:**	**18 November 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video using VHS. A face-to-face hearing was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in electronic bundles, the contents of which we have noted.

Orders

(1) The Tribunal makes rent repayment orders to each of the Applicants in the following sums:

Applicant	Rent repayment order
Mr C Morris	£5,142
Mr E Middleton	£5,330
Ms A Smith	£3,281
Mr M Wilmore	£4,907

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants together the application and hearing fees in respect of this application in the sum of £300.

The application

1. On 25 February 2021, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a Rent Repayment Order under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 9 April 2021.

2. In accordance with the directions, we were provided with an Applicant's bundle of 220 pages (plus a response of 11 pages), and a Respondent's bundle of 155 pages.

Background

3. The property is a two storey, three bedroom semi-detached house. The Respondent holds a long leasehold from Southwark Council.

4. The Respondent had lived in the house initially, before moving China and Hong Kong for professional reasons after 2003. In October 2016, it was let on an assured shorthold tenancy for a fixed term of a year to a relation of the Respondent, called James Dixon, another (a Mr Morley) and Mr Morris. An inventory was made and a check-in process

undertaken at that time, but neither were subsequently repeated. In 2017, Mr Morley moved out, and a new agreement was signed with Mr Dixon and Mr Morris, and Mr Middleton. In 2018, Mr Dixon moved out, and a new agreement was entered into with Mr Morris, Mr Middleton and Mr Willmore. A further agreement was signed in 2019 by the same parties. In March 2020, Mr Middleton left, and a new agreement was signed by Mr Morris, Mr Wilmore and Ms Smith, but not, apparently, by the Respondent. The Respondent did not, however, contest that this was the agreement which regulated the parties relations during this period.

5. The property was managed by a managing agent throughout.

6. From the early 2000s, the Respondent ran a business in China and latterly Hong Kong, where he lived with his Chinese-born wife and their children. From 2016 onwards, family illness impacted both their living arrangements and the Respondent's previously successful business, and from, particularly, 2018, his business brought little money in. These difficulties culminated in a tragic event, the details of which we do not need to detail in deference to the Respondent's privacy.

7. The following table shows the relevant period of occupation of each of the Applicants, and the rent paid referable to that period (that is, the maximum possible rent repayment order for each applicant). Both the periods of occupation and the figures for rent paid are agreed.

Applicant	**Occupation period**	**Total rent**
Mr C Morris	15.09.2019 to 15.09.2020	£8,070
Mr E Middleton	15.03.2019 to 15.03.2020	£8,400
Ms A Smith	15.03.2020 to 04.10.2020	£5,107.73
Mr M Wilmore	15.09.2019 to 15.09.2020	£7,710

8. Some provisions of the 2016 Act referred to in this decision are set out in the appendix. The relevant law may also be consulted here: https://www.legislation.gov.uk/ukpga/2016/22/contents/enacted and here: https://www.legislation.gov.uk/ukpga/2002/15/contents .

The hearing and decisions

The alleged criminal offence

9. The Applicant relies on an allegation that, contrary to section 72(1) of the Housing Act 2004, the Respondent had control or management of an unlicenced house in multiple occupation ("HMO"), an offence specified in section 40(3) of the 2016 Act.

10. The offence particularised was that the property was situated in an area subject to additional licencing, in the London Borough of Southwark,

and that at no time was the Respondent licensed under the relevant scheme, and has not applied for a licence.

11. The Respondent admitted the offence before us. He said that he was sorry that he had not secured a licence, and that the reason was that he was unaware that a licence was necessary.

12. The Applicant has provided correspondence with the local authority which records that the property was not licenced, and that there was (as at 8 December 2020) no outstanding application.

13. The Respondent did not raise the question of whether he had a reasonable excuse for not having a licence, such as to engage the statutory defence in section 72(5) of the Housing Act 2004. However, we considered whether there were any facts which could have afforded him such an excuse, and concluded that there were not. He was clear that the only reason he had not applied for a licence was that he did not know about the requirement to have one. The reason he did not know was that he had not put in a place any system to allow him to keep up to date with the relevant legal requirements. It is true that he blamed his managing agent for not informing him, but for the reasons we give in paragraph [28] below, we do not consider this is capable of amounting to a reasonable excuse.

14. *Decision*: We are satisfied beyond reasonable doubt that the Respondent committed the offence of having control or management of an HMO in respect of the property.

Utilities

15. The agreements from 2016 onwards included clauses specifying that the tenants should pay the utility bills in respect of the house. These were brought to Mr Morley's attention at an early stage, but in the event, the Respondent, not the tenants, paid the energy bills until after July 2020. At that time, the Respondent sought back payment of these bills, but the tenants refused to pay.

16. In *Vadamalayan v Stewart* [2020] UKUT 183 (LC), Judge Cooke made it clear that utilities actually paid for by the Landlord but used by the tenants could appropriately be deducted from a rent repayment order (in contrast to the other costs routinely deducted in respect of pre-2016 Act rent repayment orders). The case for doing so is particularly strong where the tenants were contractually obliged to pay those bills throughout, even if the landlord did not take action to secure those payments. We conclude that payments for utilities should be set against the maximum possible rent repayment order for each applicant in this case.

17. The Respondent has produced evidence of payments made for gas and electricity. We do not have any basis for calculating any other utility costs. From these figures, it is possible to calculate that the per person proportion of the gas bill, per month, is £3.42 and the electricity bill £12.20 up to and including May 2020, and that for June and July 2020, the same corresponding sums are £2.07 and £11.66. Applying these figures gives the reductions set out below.

18. *Decision*: It is appropriate to reduce the rent repayment order by the amount spent by the Respondent on gas and electricity. Accordingly, the following deductions should be made:

    (i) Mr Morris: £160.42

    (ii) Mr Middleton: £199.44

    (iii) Mr Smith: £60.70

    (iv) Ms Wilmore: £160.42

Conduct of the parties, financial circumstances of the Respondent and other considerations

19. By section 44(4) of the 2016 Act, we must in particular (relevantly) take into account the conduct of the parties and the financial circumstances of the landlord.

20. We heard considerable oral evidence. The Applicants had signed a join witness statement, and each gave evidence and were cross-examined by the Respondent. The Respondent provided substantial written evidence in his statement of case, and we heard oral evidence from Mr Dixon on his behalf. The Respondent gave oral evidence and was extensively cross-examined by Mr Mcclenahan for the Applicants. We also heard full submissions on both fact and law from Mr Mcclenahan and from the Respondent.

21. In the circumstances of this case, we do not think it necessary to give an exhaustive account of the factual evidence witness by witness.

22. The overall effect of the evidence was that the tenants were (as we find) broadly happy, and the relationship with the manager and the Respondent a reasonably good one, until the Respondent sought to start the process of repossessing the property in the autumn of 2020. It is true that the Applicants, at least to a degree, sought to emphasise such dissatisfactions as there had been. There were, in particular, problems with a leak in the bathroom at one stage, which it took some time to rectify. However, in the event (after about five months), the Respondent effectively installed a new bathroom, rather than merely repaired the leak. There was some attempt in their oral evidence to minimise favourable comments by the Applicants (for instance, on departure) before this time, which we are inclined to see as, at best, coloured by the subsequently soured relations. Mr Morris left the house

in late 2020, and, given his intention to sell the house, the Respondent was not prepared to allow another tenant to replace him. The result was a higher rent burden for the remaining tenants, which they sought to negotiate down, but unsuccessfully, which again impacted negatively on their relationship, and they left shortly thereafter.

23. On departure, further acrimony entered the relationship. The Respondent objected to the state in which the tenants left the property, and sought to retain their deposits. There were attempts to come to an agreement, but these failed and in the event the TDS (the scheme in which the deposits were lodged) dispute process was instigated. The result was that the disputes process found for the tenants, and all of their deposits were returned.

24. In his written submissions, the Respondent was highly critical of the Applicants principally because he thought that their application for the rent repayment orders was disreputable. We told the Respondent at the hearing that we did not consider that the "conduct of the … tenant" to which we are required by section 44(4)(a) to have regard could include their conduct in seeking a rent repayment order, and we so find as a matter of law.

25. His other main complaint as to their conduct related to the dispute as to the state in which the house was left. He produced photographs which, we consider, show that this criticism was well made. They show the bathroom and kitchen fittings, the floor coverings and other parts of the house to have been left in a very dirty condition.

26. It is true that the TDS dispute scheme found in favour of the Applicants. The adjudication was not, however produced to us, and we do not know upon what basis it was reached. We note that there had not been a proper inventory since 2016, which related to a previous tenancy involving different tenants, which may well have weighed with the TDS adjudicator. In any event, the TDS dispute process was dealing with a different question to that before us, and we are not bound by it, it not being a judicial process. We regard the state in which the property was left as some indication of poor conduct on behalf of the tenants, although we do not place a great deal of stress on it.

27. We turn to the conduct of the Respondent. Mr Mcclenahan made a number of criticisms of his conduct as a landlord. Some of these we regard as trivial – for instance, some minor delay in protecting the initial deposits. Mr Mcclenahan, wisely, did not attempt to portray the Respondent as rapacious, as indifferent to the welfare of the tenants or as providing substandard accommodation while pursuing a deliberate low-cost business model. He – again quite rightly – said that the Respondent was far from the worst sort of landlord.

28. We are satisfied that the Respondent was genuinely ignorant of the requirement to licence the property, and that he would have done so had he been conscious of it. He was not, we find, deliberately seeking to avoid improving the quality of the property or its safety by seeking to evading licencing. However, the important charge made by Mr Mcclenahan that does land is that he had no proper process for ensuring that he was up to date with legal requirements. The Respondent was angry with his managing agent for not informing him. We have not seen the contract with the managing agent, but we know that such contracts usually include a provision that landlords should not rely on managing agents for legal advice, and we take the view that, whether aware of such a provision or not, the Respondent should have appreciated that he should make proper arrangements to keep himself up to date on changes to legal requirements.

29. It is true that the Respondent is not a professional landlord. However, being a landlord at all carries responsibilities, perhaps the first of which is to ensure that one is complying with the legal requirements on landlords.

30. We adverted above to the difficult, and indeed tragic, circumstances in which the Respondent and his family have found themselves, and we extend our sympathy to him, as did the Applicants, through their representative, in their response to his statement.

31. On the one hand, however, the Respondent's failure to provide himself with a proper means of ensuring he was complying with legal requirements pre-dates those matters, and in any event they cannot excuse him from the charge.

32. On the other hand, however, to the (limited) extent that a rent repayment order has a punitive element, they do provide personal mitigation.

33. Finally, the Respondent explained that his circumstances were (comparatively) straightened as a result of the problems with his business, and his savings had been depleted by medical expenses. However, his primary focus was on this as the reason why it was necessary for him to sell the house. That had now been accomplished, and we did not understand him to be arguing that his current financial circumstances were such as to significantly influence our consideration.

34. In exercising our discretion under section 44 as to the amount of the order, we take all these factors into account. We conclude that, having taken away the sums indicated above in respect of utilities, the order should be for 65% of that which remains. We see no reason to distinguish between the Applicants in respect of the amount of the order.

35. In coming to this conclusion, we rejected Mr Mcclenahan's argument that the effect of *Vadamalayan v Stewart* [2020] UKUT 183 (LC), [2020] H.L.R. 38 (and *Chan v Bilkhu* [2020] UKUT 289 (LC)) is that we should adopt the full rent paid (or that minus landlord's expenditure on utilities) as a "starting point" for the order, and be slow to reduce the order from that sum. We did so on the strength of the explanation of *Vadamalayan* in *Ficcara v James* [2021] UKUT 38 (LC), [2021] H.L.R. 30 by the Deputy President, and also endorsed in *Awad v Hooley* [2021] UKUT 0055 (LC) by Judge Cooke, the judge in *Vadamalayan*. Since we came to this decision following the hearing, the report of *Williams v Parmar and Others* [2021] UKUT 244 (LC) has come available, which clearly endorses this approach.

36. *Decision*: The appropriate rent repayment order is 65% the maximum, minus the sums for utilities set out above in respect of each of the Applicants.

The application for the application and hearing fee

37. The Applicants make an application for us to order reimbursement of the application and hearing fee by the Respondent.

38. The application for the rent repayment order was clearly properly made. The Respondent conceded that he had committed the criminal offence and we have made substantial rent repayment orders. In such circumstances, we consider there is a presumption that a reimbursement order be made under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2). We see nothing to rebut that presumption in the facts of this case.

39. *Decision*: We make an order that the Respondent reimburse the Applicants the application fee and the hearing fee.

Rights of appeal

40. 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 London regional office.

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

42. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

43. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 18 November 2021

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.

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and 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, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(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 to 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

	Act	*section*	*general description of offence*
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

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.

(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.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a rent repayment order

(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 had been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

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 rent paid during the period mentioned in this 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 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,

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.