



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

Case reference : **LON/00BJ/HMF/2020/0068**

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

Property : **43 Whitlock Drive, Southfields,
London SW19 6SJ**

Applicants : **(1) Jay El Hajj
(2) Marion Colin
(3) Joanna Kanowik
(4) Vilde Helene Fjelltun**

Representative : **Flat Justice Community Interest Co
(Mr Alex Ivory)**

Respondent : **Simon Peter Thompson**

Representative : **In Person**

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 SHAW
Ms J MANN MCIEH**

Venue : **VIDEO HEARING**

Date of decision : **8th MARCH 2021**

DECISION

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: CVPEREMOTE . A face-to-face hearing was not held because of the Covid-19 Pandemic, and all parties were agreeable to a remote hearing. It was practicable to resolve all issues with a remote hearing. The documents referred to by the Tribunal are in digital bundles, submitted by the parties respectively., and supplemented by some further documents produced shortly before the hearing. All of the documents produced have been carefully considered by the tribunal.

Introduction

1. This case involves an application by the Applicant tenants listed above, for a Rent Repayment Order in respect of the Property at 43 Whitlock Drive, Southfields, London SW19 6SJ ('the Property'). Mr Simon Peter Thompson is the freehold owner of the Property and is the Respondent to the application. The application is made because it is contended that the Respondent committed the offence of having control of a house in multiple occupation which was, and is, required to be licensed, but was not so licensed, contrary to section 72(1) of the Housing Act 2004.

2. The Applicants seek an order for the following periods, in the following sums:

Jay El Hajj:	1 st March 2019-29 th February 2020	£8,380.71
Marion Colin:	1 st March 2019-29 th February 2020	£6,500
Joanna Kanownik:	1 st December 2018-11 th May 2019	£2,415
Vilde Helene Fjelltun:	11 th January-17 th July 2020	£1,729.95

In the event, the sum sought at the hearing on behalf of Mr El Hajj was adjusted to £8295, producing a total order applied for in the sum of £18,939.95. The Tribunal was told that the Respondent has previously had a penalty of £12,500 imposed upon him by the LB Wandsworth in respect of these matters.

3. Directions were given by the Tribunal on 6th November 2020, and a hearing of the matter took place by video link on 1st February 2021. The Applicants attended in person, and were represented by Mr Alex Ivory

of Flat Justice Community Interest Company, a not-for-profit organisation assisting tenants in these circumstances. The Respondent, appeared, again by video link, from New Zealand, from where he originates, and to which he returned to reside some years ago. He was unrepresented.

4. It is proposed to review the parties' respective positions on liability and quantum separately, to refer briefly to the relevant law, and then to give the Tribunal's findings.

The Parties' Cases on Liability

5. Mr Ivory on behalf of the Applicants, drew the Tribunal's attention to section 43(1) of the Housing Act 2016, which empowers the Tribunal to make an order, provided a landlord has committed one of the offences listed in section 40(3) of the Act. These include an offence under section 72(1) of the Housing Act 2004, which provides:

"A person commits an offence if he is a person having control of or managing an HMO which is required to be licenced under this Part (see section 61(1)) but is not so licenced."

6. By virtue of section 263 of the 2004 Housing Act, it is provided that:

(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.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

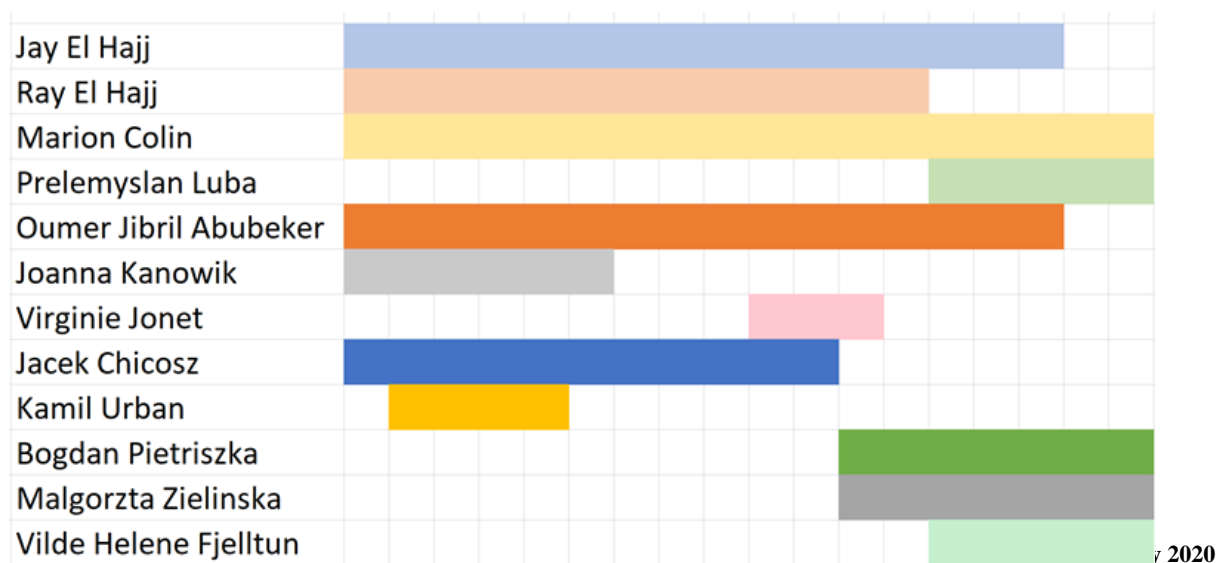
7. It will be observed that the 2004 Act refers to liability being fixed on the person with management or control (as there defined) whereas the 2016 Act imposes liability on a landlord. Although there may be cases where this will require careful examination, this is not one of them, because there was no real dispute from the Respondent that in either event, he was the person properly liable at law. He was indeed the person who received the rack rent for the periods concerned and he was also the freehold proprietor and landlord; indeed, although it is a feature of this case that no written agreements were properly executed, the Tribunal has been shown copies of several unsigned agreements relating to various of the Applicants, in respect of which the Respondent was unfailingly named as the landlord. His case was not that he was not either the landlord or the person receiving the rack rent, but that he had been badly let down by the person he had appointed to manage the Property for him (a Mr Jacek Chicosz).

8. The Property comprises a five-bedroom terrace house, with an annexe or outhouse in the garden. The annexe has no kitchen or bathroom facilities of its own, and these are shared with the other occupiers of the main house. In his written statement to the Tribunal, dated 23rd

January 2021, the Respondent explains that he has owned the Property since 2002, and that until November 2019, he entrusted the management, care and maintenance of the Property to Mr Chicosz. In oral evidence, he told the Tribunal that he (the Respondent) in hindsight had trusted Mr Chicosz too much, and that he had been stupid to so. He freely accepted that he had been “*very, very disengaged*” and that in truth he “*had no idea what Jacek was up to.*”

9. The Applicants produced a table, illustrating their contentions as to the occupancy of the Property from 1st December 2018-31st May 2020. Their case was that, under the mandatory licensing scheme, a property is licensable if it is occupied by five or more persons living in two or more separate households. During the period December 2018 to May 2020, the Property was at all times occupied by five or more persons. This consisted of occupiers of the house and the annexe. The annexe was occupied throughout the relevant period, first by Mr Chicosz and then by Mr. Pietriszka and Ms. Zielinska. The annexe was clearly not a self-contained flat, as it shared a kitchen, bathrooms, and other communal facilities with the house. The occupiers of the annexe must therefore be counted in assessing the occupancy level of the Property. The table is reproduced below:

Figure 1



10. The Tribunal is in no doubt, and finds beyond reasonable doubt, that the Property was, for the relevant period occupied by 5 or more persons who were living in separate households, thus rendering the Property an HMO. The Respondent did not accept the above Table in all its detail. He disputed that Mr El-Hajj’s brother was residing at the Property and counted as a separate occupier. The Tribunal rejects this. It prefers the evidence of Mr El-Hajj who confirmed as much in oral and written evidence, and who produced a signed witness statement from his brother. The Respondent also rejected that Mr Chicosz himself was living in the Property, arguing that he had been out of London for a full 2 years, doing a building job in Kent, and staying only occasionally at the house. This was refuted by all the Applicants, and the Respondent produced neither oral nor written evidence from Mr Chicosz. The Tribunal also gives weight to the separate investigation carried out by the LB of Wandsworth, culminating in the conclusion (see e-mail of Mark Ross dated 3rd April 2020) that not less than 5 separate households occupied during the relevant period.

11. The Respondent relied solely on his evidence of rent receipts in his bank account (statements not produced) to support his understanding, and information provided from the absent Mr Chicosz, who had refused to give evidence when requested. In fact, though the details of some of the occupiers were not admitted (he had not known of the couple occupying the annexe, who were friends of Mr Chicosz), at paragraph 3 of his written statement, and in oral evidence, the Respondent candidly admitted liability, and that the occupancy of the Property was such that a licence was needed for the relevant period. Even without such admission, the Tribunal was satisfied on the Applicants' evidence that liability was made out, and finds accordingly.

Quantum

12. The Applicants, through Mr Ivory, urged the Tribunal to adopt the two stage test counselled by HH Judge Cooke in *Vadamalyan v Stewart [2020] UKUT 183 (LC)*, that is to say, ascertainment of the full rent paid in the 12 month period of commission of the offence, followed by consideration of whether this sum should be varied by any of the discretionary factors in section 44(4) of the 2016 Act. The Tribunal proceeds accordingly.

13. The full sum is £18,939.95, calculated as set out at paragraph 2 above. There was some dispute from the Respondent concerning a deduction of £500 representing the balance of alleged arrears of rent of £1000 of Ms Colin. However, the Tribunal is satisfied that, though Ms Colin did not admit such arrears, the parties reached a resolution in the way explained by Ms Colin, by her paying £500, and the Respondent accepting as the balance her original deposit and her waiving some sums owed for cleaning supplies. The Respondent could produce no documentary evidence in support, and the Tribunal prefers Ms Colin's evidence that compromise was reached.

14. The Respondent also argued, that Mr El Hajj owed a sum of £2,620, a figure disputed by Mr El Hajj, and again unsupported in the documents by the Respondent. Mr El Hajj did however agree to pay a sum of £1200, which he says was accepted in settlement by the Respondent, and referred to an e-mail dated 27th January 2020 from Mr Thompson on page 31 of the Applicants’ bundle. The e-mail explains the discounted settlement of rent owing to be £1200, and further explains that this is to take into account bathroom renovation, extra residents sleeping in the shed, and expenses incurred for the house (mop etc). Having heard from Mr El Hajj, and the Respondent having been unable to make out his assertion of arrears, we are not satisfied that any deduction is to be made in respect of this assertion by the Respondent.

15. The second stage requires a consideration of whether this “*starting point*” (as put in the aforesaid case) is to be modified in any way by the considerations in section 44(4), which provides:

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.

16. It is argued on behalf of the Applicants, that no discount should be given largely because of the prolonged period during which the Property was unlicensed, and other failures on the part of Mr Chicosz (set out at paragraph 30 of the Skeleton Argument) for which the Respondent must take responsibility.

17. The Respondent argued that Mr Jay El Hajj caused trouble, withheld keys and refused to leave. The Tribunal was not persuaded by the evidence that the Mr Hajj’s conduct had been unsatisfactory. The

“trouble” complained of by the Respondent appeared to be the making of a complaint to the council, and co-operating with its investigation. The Tribunal heard that Mr Hajj had offered to pay rent for the period after 7 March, but that the Respondent refused to accept it, and *“wanted him out of my house, he was stirring up grief and causing problems”*

18. The Tribunal has carefully considered these arguments but nonetheless is of the view that this is a case for the exercise of its discretion under the above provision for the following reasons:

- the Respondent is not a professional landlord and this is his only property
- having seen and heard the Respondent give evidence, we are satisfied that he was naïve and misled by his manager, rather than deliberately manipulative of the Applicants. To use his own expression, we accept that he acted *“stupidly”* rather than malevolently
- the HMO management and licencing requirements were not being complied with by the Respondent's manager, who seems to have been uninformed on most matters of housing regulation, but the Property itself seems to have been in generally good repair. Such complaints as the Applicants had about the quality of their accommodation related more to overcrowding of the shared facilities and some disruptive bathroom renovations, rather than the quality of their individual rooms
- he has no previous convictions for an offence of this kind
- we are satisfied that his financial circumstances are parlous

19. In this last respect, the Tribunal heard evidence from the Respondent that his retail business is in dire straits. He has, or had, 13 employees, whom he cannot pay from the business income, because there is virtually no income, as a result of the plunge in the economy, brought on by the pandemic. He told the Tribunal that the business had a

previous annual income of \$43,088-45. However, in the last financial year, it had netted \$135 and this year promised to be no better. He said that he had had to take on a loan of \$50,000 upon which he his wife and children were living, and that the family was receiving government benefits (for which the Tribunal saw documentary evidence (se Respondent's bundle, page 39, bank statement Freedom Account \$553.00 per fortnight) He added that he was acutely embarrassed, that he had been in business for 17 years, but had never expected matters to come to this pass. The documentary evidence produced was imperfect, but the Tribunal found the Respondent's oral evidence persuasive. We do not consider that he was either being dishonest or exaggerating, and we accept that he, his family and his employees, are under intense financial pressure.

- 20.** There was evidence as to the utilities paid by the Respondent during the relevant period, which fall to be deducted from the full rental period. They are in the order of £1275.28 as calculated in the Schedule to this Decision below. Deducting these from the overall figure at Stage 1 of £18,939.95, produces £17,664.67. Applying its discretion in respect of the matters listed above under section 44(4), the Tribunal considers this sum should be varied by a discount of 40%, producing a net Rent Repayment Order in the sum of £10,598,80.

Costs

- 21.** Application was made on behalf of the Applicants for the Respondent to reimburse them their Application and Hearing fees, in the sums of £100 and £200 respectively – to which it seems to the Tribunal that they are entitled, and the application is granted.

Conclusion

- 22.** For the reasons set out above, a Rent Repayment Order in the sum of £10,598,802 is made, together with repayment to the

Applicants of their fees, in the sum of £300, making a total sum of £10,898.80 payable by the Respondent.

JUDGE SHAW

8th March 2021

SCHEDULE IN RESPECT OF UTILITIES

Bank statement evidence from the Respondent January 2019 to Sept 2019 only.

- 1. Power and Gas- Jan 2019 to May 2019 £164 pcm. June 2019 to Sept 2019 £104 pcm.**
- 2. Water- April 2019 £70.70 May to Sept 2019 £ 70.66 pcm**
- 3. Internet- January to March 2019 £38.99 pcm. April to Sept 2019 £40.99 pcm.**

Average monthly occupancy levels in brackets taken from Applicants' table at paragraph 9 above, all Applicants would have benefited from power, water and internet use.

- 1. December 2018 (6) 164 power+ 70.70 water (internet from 2019 only) = $234.70/6 = 33.53$ per resident.**
- 2. January 2019 (7) 164 power+ 70.70 water+ 38.99 int. = $273.69/7=39.09$ per resident.**
- 3. February 2019 (7) as Jan above 39.09 per resident.**
- 4. March 2019 (7) as Jan 39.09 per resident.**
- 5. April 2019 (7) power 164 + water 70.70 + int 40.99 = $275.69/7 = 39.39$ per resident.**
- 6. May 2019 (7-5) power 164 + water 70.66 + int 40.99 = $275.65/6 = 45.94$ per resident.**
- 7. June 2019 (5) power 104 +water 70.66 + int 40.99 = $215.65/5 = 43.13$ per resident**
- 8. July 2019 (5) power 104 + water 70.66 + int 40.99 = $215.65/5 = 43.13$ per resident**
- 9. August 2019 (5) power 104 + water 70.66 + int 40.99 = $215.65/5 = 43.13$ per resident.**

- 10. September 2019 (5-6) $215.65/5 = 43.13$ per resident
- 11. October 2019 (6) $215.65/6 = 35.94$ per resident
- 12. November 2019 (7) $215.65/7 = 30.81$ per resident
- 13. December 2019 (5-4) $215.65/5 = 43.13$ per resident
- 14. January 2020 (5-7) $215.65/6 = 35.94$ per resident
- 15. February 2020 (7) $215.65/7 = 30.81$ per resident
- 16. March 2020 (7-5) $215.65/6 = 35.94$ per resident
- 17. April 2020 (5) $215.65/5 = 43.13$ per resident
- 18. May 2020 (5) $215.65/5 = 43.13$ per resident.

Average monthly share of utilities per resident per month is $707.48/18 = 39.30$.

Mr El Hajj claims 1 March 2019 to 29 February 2020. Estimated utilities share $39.09 + 39.39 + 45.94 + 43.13 + 43.13 + 43.13 + 43.13 + 35.94 + 30.81 + 43.13 + 35.94 + 30.81 = 473.57$.

Ms Colin claims 1 March 2019 to 29 February 2020. Estimated utilities share (same period as Mr El Hajj) 473.57.

Ms Kanownik claims 1 Dec 2018 to 11 May 2019. Estimated utilities share $33.53 + 39.09 + 39.09 + 39.09 + 39.39 + (45.94/31 = 1.48$ per day @ 11 days 16.30) = 206.49.

Ms Fjellton claims 11 Jan 2020 to 21 March 2020. (10 weeks and 1 day) and 22 April 2020 to 21 May 2020 (30 days). Estimated utilities share;

Jan 2020 21/31 of 35.94 = 24.34

Feb 2020 = 30.81

March 2020 21/31 of 35.94 = 24.35

April 2020 9/30 of 43.13 = 12.93

May 2020 21/31 of 43.13 = 29.22

Total $24.34 + 30.81 + 24.35 + 12.93 + 29.22 = 121.65$.

Giving a total deduction for utilities for the 4 applicants of $473.57 + 473.57 + 206.49 + 121.65 = 1275.28$.

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).