



Case Reference : **NS/LON/00BG/HMF/2021/0186**

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

Property : **4 Weddell House, Duckett Street, London E1 4LT**

(1) **Mr George Marigold**

(2) **Ms Kathryn Bryant**

Applicants : (3) **Ms Saskia Hughes**

(4) **Ms Martha Richards**

(5) **Mr Charlie Williams**

Representative : **Ms C Sherratt (Justice for Tenants)**

Respondent : **Mr Robert Wells**

Representative : **Mr S Reid of counsel**

Type of Application : **Application by Tenants for a Rent Repayment Order**

Tribunal Members : **Judge S Brilliant**

Mr P Roberts Dip Arch RIBA

Date and Venue of Hearing : **10 March 2022**

10 Alfred Place, London WC1E 7LR

Date of Written : **16 March 2022**

Reasons

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was by video V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same. The parties each provided electronic bundles.

DECISION

Determination

1. The Tribunal is satisfied beyond all reasonable doubt that, during the year commencing on 22 November 2019 and ending 21 November 2020, 4 Weddell House, Duckett Street, London E1 4LT (“the House”) was a House in Multiple Occupation (“HMO”). The Respondent succeeds in proving his statutory defence under s.72(5) Housing Act 2004 (“the 2004 Act”) that he has a reasonable excuse for having control of or managing the House which is required to be licensed, but is not so licensed.

2. If we had not found that there was a statutory defence, the amount we would have ordered to be paid back to the Applicants by the Respondent is £24,143.42, together with the refund of the application fee.

The proceedings

3. These proceedings concern applications for rent repayment orders pursuant to ss.40, 41, 43 and 44 Housing and Planning Act 2016 (“the 2016 Act”).

4. Directions for the hearing were given on 14 October 2021. The Respondent was ordered to provide a full statement of reasons for opposing the application, including any defence to the alleged offence, by 10 December 2021. The Applicants were given permission to send a brief reply to the issues raised in the Respondent’s statement by 14 January 2022.

5. The hearing took place remotely on 10 March 2022. Ms Sherratt appeared for the Applicants and Mr Reid appeared for the Respondent.

6. At the hearing, each of the Applicants and the Respondent gave oral evidence.

The Leases

7. The first lease of the House is dated 23 November 2018 (“the First Lease”). It was a single lease of the whole of the House and was made between (1) the Respondent on the one hand and (2) Mr Williams, Ms Bryant, Ms Richards, Mr Hughes and Ms Davies on the other. None of the tenants had an individual lease of any one room. The term of the First Lease was 22 November 2018 until 21 November 2019 inclusive. The monthly rent was £3,029 per month which equates to £36,348.00 per annum.

8. In February 2020, Ms Davies left the House and her room was taken over by Mr Marigold. To regularise this a new lease was entered into on 13 February 2020 (“the Second Lease”). Again, it was a single lease of the whole of the House and was made between (1) the Respondent on the one hand and (2) Mr Williams, Ms Bryant, Ms Richards, Mr Hughes and Mr Marigold on the other. Again, none of the tenants had an individual lease of any one room. The term of the Second Lease was again 22 November 2019 until 21 November 2020 inclusive. The monthly rent was again £3,029 per month which equates to £36,348.00 per annum.

9. As a result of the granting of the Second Lease, the First Lease was surrendered by operation of law.

The rent repayment claimed

10. The Applicants claim to be repaid rent for the one year period from 13 November 2019 to 12 November 2020.

11. Ms Davies is not an Applicant (she is time-barred). Accordingly, the rent actually paid by Ms Davies is not to be regarded as rent paid by the Applicants for the purposes of a rent repayment order.

12. In a helpful schedule prepared by Ms Sherratt on this basis, the amount of rent claim to be repayable is £34,490.60. This is common ground between the parties.

The House

13. The House is a 1-storey, 5-bedroom self-contained former local authority flat within a purpose-built block of flats. There is an open plan kitchen lounge and two shower rooms with toilets which are used communally. The House was occupied by at least five people at all points during the relevant period of 13 November 2019 to 12 November 2020. Each Respondent occupied his or her own room on a permanent basis. The Applicants continued to live at the House for a further year after the Second Lease expired, all vacating the House on 22 November 2021.

The HMO licence

14. As stated above, the House is situated in a purpose-built block of flats. Prior to 01 April 2019 this meant that Respondent did not require an HMO licence. Because the House is situated within an additional licensing area as designated by the London Borough of Tower Hamlets, this changed with effect from 01 April 2019. From that date the Respondent did require an HMO licence even though the House is within a purpose-built block of flats.

15. On 31 October 2018, the Respondent applied for a Mandatory HMO licence. This was rejected because the House did not at that time require an HMO licence. The Respondent failed to apply for an Additional HMO licence with effect from 01 April 2019.

The reasonable excuse defence

16. s.72(1) of the 2004 Act provides:

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.

17. s.72(5) of the 2004 Act provides:

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.

18. We were referred to IR Management Services Ltd v Salford City Council [2020] UKUT 81 (LC).

19. This case was concerned with the similarly worded ss.234(3) and (4) of the 2004 Act which impose obligations on the person managing an HMO to make satisfactory arrangements including in respect of the repair, maintenance, cleanliness and good order of the house. The Upper Tribunal held that the burden of proving a reasonable excuse falls on the landlord. It was common ground that the defence need only be established on the balance of probability, and that was held to be clearly correct [26]-[28].

20. As we understand it, it is common ground that the Applicants can show beyond reasonable doubt that the Respondent has committed the offence under s.72(1). Accordingly, the burden is on the Respondent to show that he has a reasonable excuse. He need only persuade us of this on the balance of probabilities.

21. The Respondent's evidence is that on 31 October 2018 he applied to Tower Hamlets for an HMO mandatory licence. As stated above, such a licence was not required at this time because the House is situated within a purpose-built block of flats. The requirement for an HMO in respect of the House only came into force on 01 April 2019.

22. On 15 November 2018, the Respondent received a letter from Tower Hamlets putting the application on hold as certain required documents were missing.

23. At 12:15 PM on 27 November 2018, Mr Tariq Shah at Tower Hamlets emailed the Respondent that he had refunded the payment of £700 made on 31 October 2018. The Respondent's written evidence is that Mr Shah had telephoned him approximately one hour before sending the email to explain that Tower Hamlets would be immediately refunding the application fee, as no licence was needed. He also said the Tower Hamlets would be in touch with the Respondent at a later date to invite him to apply for a different licence. This could not be processed at that time because it had not yet come into effect.

24. The Respondent says he did not hear from Tower Hamlets again, and he only appreciated that he had committed an offence when the rent repayment application was made.

25. If the Applicants wished to challenge this evidence, they should have served witness statements from Mr Shah or anyone else at Tower Hamlets who was in a position to refute this evidence.

26. Instead, on 24th February 2022, Justice for Tenants sent an email to Mr Williams, who is a housing adviser at Tower Hamlets. This was in order to determine whether or not the Respondent had been told that Tower Hamlets would be in touch with him at a later date to invite him to apply for different licence. The email incorrectly said that the Respondent had applied for the HMO licence on 13 October 2018, whilst the correct date was 31 October 2018.

27. The email should have asked Mr Williams open-ended questions so that he could set out Tower Hamlets' account having reviewed the documents and spoken to the relevant individuals. Instead the email said that Justice for Tenants *would be grateful if [Mr Williams] would confirm whether the following understanding is correct*. The email included the following:

Mr Shah has been contacted and confirmed he has no recollection of any phone conversation with Mr Wells where he advised Mr Wells that any contact attempts would be made regarding the need to apply for an HMO licence. As Mr Shah was a Support Officer, my understanding is that he would not have considered doing this as this is outside the remit of the role of Support Officer.

28. Mr Williams's reply was as follows:

Your email below represents a correct interpretation of what transpired

when Mr Wells applied for a Mandatory HMO licence.

29. Based on this conflicting evidence, we have no hesitation in finding that the recollection of the Respondent is correct.

30. If the Respondent's evidence was being challenged, the Applicant should have called Mr Shah to give oral evidence so that he could be cross examined upon it. In his brusque reply Mr Williams does not condescend to reveal what enquiries he had made, and, in particular, to whom he spoke to enable him to say that the contents of the email were a correct interpretation of what transpired.¹

31. There is also a patent mistake in that Mr Williams did not pick up the erroneous date of 13 October 2018, which shows that he may not have taken a great deal of care in answering the email. Mr Williams should also have appreciated from the criticism made of him in the case of D'Costa referred to below (decided on 08 June 2021), that care should be taken in responding to an allegation that Tower Hamlets had promised to notify a landlord when the new licensing regime came into effect so that an application for an HMO had to be made.

32. The Respondent relied upon D'Costa v D'Andrea [2021] UKUT 144 (LC). In that case the landlord gave evidence that Mr Hempstead of Tower Hamlets had told her by email that he would inform her if the house needed an HMO licence and yet Tower Hamlet did not do so, despite having visited the property on several occasions during the relevant period. In that case the landlord said that she had been given this assurance not orally but by email. She had not kept a copy. However, Mr Williams, who was acting for the tenants, did not produce the relevant email correspondence because he did not believe that the local authority employee could possibly have given that assurance.

33. At [39] Judge Cooke said:

It is difficult to understand why a landlord would not have the defence of reasonable excuse to the offence created by s.72(1) of the 2004 Act where he or she has been told by a local authority employee that their property does not need an HMO licence and that they will be told if that situation changes, and I find that Ms D'Costa had that defence.

34. There is nothing in that paragraph to suggest that it was only the cumulative effect of the assurance and subsequent visits to the property by Tower Hamlets (the latter of which did not happen in our case) that gave rise to the defence.

35. In our judgment, the Respondent has proved that on the balance of probabilities he has a reasonable excuse for having control of an HMO which was

¹ Mr Williams himself knew that the landlord might "vigorously" defend the claim for these reasons from his experience in the D'Costa case referred to below: see his email to Mr Marigold dated 26 February 2021 (a year earlier) at page 47 of the Respondent's 50 page exhibit bundle. So it behoved him not just to take the trouble to make all reasonable enquiries but to set out clearly and at length what his enquiries had revealed.

required to be licenced, but was not.

The amount of any rent repayment order

36. If we are wrong on the reasonable excuse, we shall deal shortly with the amount of the rent repayment order we would otherwise have made.

The statutory framework

37. s.40 of the 2016 Act states:

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to (a) repay an amount of rent paid by a tenant ... under the tenancy.

38. Among the relevant offences is having control of or managing an HMO which is required to be licensed and which is not licenced.

39. s. 43 of the 2016 Act provides that the Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt that the offence has been committed, and that where the application is made by a tenant the amount is to be determined in accordance with s.44.

40. s.44 provides:

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

(2) The amount must relate to [our emphasis] rent paid during the period mentioned in the table: [The table provides for the offence in these proceedings to be 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

(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.*

The case law

41. There is no requirement that a payment in favour of the tenant should be reasonable: Vadamalayan v Stewart [2020] UKUT 183 (LC) [11]. That is of some importance in this case.

42. It is not possible to find in the 2016 Act any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied. That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything spent on the property during the relevant period. There is no reason why the landlord's costs in meeting his obligations under the lease (such as repairs) should be set off against the cost of meeting his obligations to comply with the rent repayment order: Vadamalayan [14-15].

43. What a landlord pays by way of mortgage repayments - whether capital or interest - is an investment in the landlord's property and it is difficult to see why the tenant should fund that investment by way of a deduction from the rent repayment order: Vadamalayan [54].

44. The context 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 s.44(4) obliges the Tribunal to take into account, and which Parliament clearly intended should play an important role (Ficcara v James [2021] UKUT 38 (LC) [50]).

45. The most recent authoritative decision is the decision of Fancourt J in Williams v Parmar [2021] UKUT 0244 (LC)². This deserves to be quoted at length:

23. The offence of having control of or managing an unlicensed HMO is not an offence described in s. 46(3)(a) and accordingly there was no requirement in this case for the FTT to make a maximum repayment order. That section did not apply. The amount of the order to be made was governed solely by s.44 of the 2016 Act. Nevertheless, the terms of s.46 show that, in cases to which that section does not apply, there can be no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44 or s.45. The terms of s.44(3) and (4) similarly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must "relate to" the total rent paid in respect of that period.

² The subsequent case of Aytan v Moore [2022] UKUT 27 (LC) applied Williams v Parmar to two cases heard at first instance before that decision was made.

24. *It therefore cannot be the case that the words “relate to rent paid during the period ...” in s. 44(2) mean “equate to rent paid during the period ...”. It is clear from s. 44 itself and from s. 46 that in some cases the amount of the RRO will be less than the total amount of rent paid during the relevant period. S. 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and s. 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.*

25. *However, the amount of the RRO must always “relate to” the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary “starting point” for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).*

26. *In this regard, I agree with the observations of the Deputy President of the Lands Tribunal, Judge Martin Rodger QC, in *Ficcara v James*. [2021] UKUT 0038 (LC), in which he explained the effect of the Tribunal’s earlier decision in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC). *Vadamalayan* is authority for the proposition that an RRO is not to be limited to the amount of the landlord’s profit obtained by the unlawful activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in s. 44(4).*

46. At [36] the learned judge confirmed that the instalments of an interest only mortgage are not to be deducted from the landlord’s profit. At [40] the learned judge repeated that there was no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s.44(4), although the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

47. At [41] the learned judge said that the circumstances and seriousness of the offending conduct of the landlord are comprised in the “conduct of the landlord” [in s.44(4)(a)], so the Tribunal may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise.

48. The learned judge continued:

50. *I reject the argument of Mr Colbey that the right approach is for a tribunal simply to consider what amount is reasonable in any given case. A tribunal should address specifically what proportion of the maximum amount of rent paid in the relevant period, or reduction from that amount, or a combination of both, is appropriate in all the circumstances, bearing in mind the purpose of the legislative provisions. A tribunal must have particular regard to the conduct of both parties (which includes the seriousness of the offence committed), the financial circumstances of the landlord and whether the landlord has at any time been convicted of a relevant offence. The tribunal should also take into account any other factors that appear to be relevant.*

51. *It seems to me to be implicit in the structure of Chapter 4 of Part 2 of the 2016 Act, and in sections 44 and 46 in particular, that if a landlord has not previously been convicted of a relevant offence, and if their conduct, though serious, is less serious than many other offences of that type, or if the conduct of the tenant is reprehensible in some way, the amount of the RRO may appropriately be less than the maximum amount for an order. Whether that is so and the amount of any reduction will depend on the particular facts of each case. On the other hand, the factors identified in para 3.2 of the guidance for local housing authorities are the reasons why the broader regime of RROs was introduced in the 2016 Act and will generally justify an order for repayment of at least a substantial part of the rent. This is what Judge Cooke meant when she said in *Vadamalayan* that the provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act, which included expressly a criterion of reasonableness. If Parliament had intended reasonableness to be the criterion under Chapter 4 of Part 2 of the 2016 Act it would have said so.*

Applying the law to the facts

49. The Respondent is of substantial means (he owns a total of 13 properties he rents out). He has no convictions.

50. The Applicants have all been good tenants, paying their rent on time. They have treated the House well. We do not accept the Respondent's argument that they caused or contributed to the damp complained about. There is no expert evidence that the damp was caused or contributed to by a failure of the Applicants properly to air the House. They reasonably said that they could not leave the windows open during the day, as they were out working or studying.

51. We accept the Applicant's evidence that there was damp in the House, which particularly affected one room. This did continue. Although unpleasant, it was not sufficient for the Applicants to press their complaints, withhold rent or complain to Tower Hamlets. Unusually for a case of this sort, the Applicants stayed on for a further year after the Second Lease expired. It is true that they wished to stay as a group as they were good friends, the House was convenient both for work and study and it is time-consuming and difficult in London to find a new flat. Nevertheless, if the damp had been that serious they would not have stayed on for the further year.

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.