FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AP/HMF/2021/0175**
HMCTS code	**:**	**P: CVPREMOTE**
Property	**:**	**116 Warham Road, Haringey, London, N4 1AU**
Applicant	**:**	**Benjamin Joseph Allen**
Representative	**:**	**Ms Clara Sheratt, Justice for Tenants**
Respondents	**:**	**Gary Jack Clark (1)** **Roxburgh Properties Ltd (2)**
Representative	**:**	**Did not attend and was not represented**
Tribunal members	**:**	**Tribunal Judge I Mohabir** **Mr S Wheeler MCIEH CEnvH**
Date of hearing	**:**	**26 January 2022**
Date of decision	**:**	**26 January 2022**

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: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Introduction

1. Unless stated otherwise, the page references in this decision are to the pages in the Applicant's hearing bundle.

2. This is an application made by the Applicant under section 41 of the Housing and Planning Act 2016 ("the Act") for a rent repayment order against the Respondent in respect of 116 Warham Road, Haringey, London, N4 1AU ("the property").

3. The property is described as a 2-storey 5-bedroom terraced house with a shared kitchen and bathrooms. The property was occupied by at least 5 people during the relevant period of 12 August 2019 and 5 August 2020 (as accepted by Ms Sheratt). The Second Respondent had granted a joint assured shorthold tenancy agreement to the Applicant and the other 4 tenants (page 49) who are not parties to this application. The apportioned rent paid by the Applicant was £350 per month. It was a standard HMO arrangement, there were communal cooking and toilet and washing facilities.

4. The Applicant occupied Room 2 in the property from 1 October 2018 to 14 January 2021.

5. The First Respondent is the registered proprietor of the property. He is a Director of the Second Respondent. However, at all material times, the rent was paid by the Applicant (and the other tenants) to the Second Respondent.

6. It is the Applicant's case that an HMO license for the Property was in place until 11 August 2019 where it expired, and the Respondent's application for another mandatory HMO license was not made until 6 August 2020.

7. Subsequently, the Applicant made this application for a rent repayment order for the period 12 August 2019 and 5 August 2020 during which the property was let as an unlicensed HMO.

Relevant Law
Requirement for a Licence

8. The Housing Act 2004 introduced the mandatory licensing of HMOs whilst The Licensing of Houses in Multiple Occupation Order 2006(3)(2) details the criteria under which HMOs must be licensed. These criteria were later adjusted and renewed by the Licensing of Houses in Multiple Occupation Order 2018, which came into force on 1 October 2018.

9. In addition, a property must meet the requirement to be licensed under the additional licensing scheme where a local authority operates such a scheme. The Tri-

bunal was satisfied that the property was situated within an additional licensing area as designated by the London Borough of Haringey, which came into force on 27 May 2019.

10. The Housing Act 2004 Part 2 s.72(1) provides:
(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.

Section 263 of the Act defines a person having control or managing as:
(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 an other person as agent or trustee, that other person.

3. The Housing Act 2004 Part 2 s. 61(1) provides:
(1) Every HMO to which this Part applies must be licensed under this Part unless—
(a) a temporary exemption notice is in force in relation to it under section 62, or
(b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

4. Section 55 of the Housing Act 2004 provides:
55 - Licensing of HMOs to which this Part applies
(1) This Part provides for HMOs to be licensed by local housing authorities where—
(a) they are HMOs to which this Part applies (see subsection (2)), and
(b) they are required to be licensed under this Part (see section 61(1)).

(2) This Part applies to the following HMOs in the case of each local housing

authority—
(a) any HMO in the authority's district which falls within any prescribed description of HMO, and
(b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation.

Making of rent repayment order

11. Section 40(1) of the 2016 Act confers the power on the First-tier Tribunal to make a rent repayment order in relation to specific offences which are listed in a table at section 40(3) of the Act. Relevant to these proceedings are offences described at row 2 (eviction and harassment of occupiers) and 5 (control or management of unlicensed HMO) of the table.

12. Section 43 of the Housing and Planning Act 2016 ("the Act ") provides:

> "(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 has 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 in accordance 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).

Amount of order: tenants

13. Section 44 of the Act provides:

> (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 the table.
>
> | ***If the order is made on the ground that the landlord has committed*** |
> | --- |
> | an offence mentioned in row 1 or 2 of the table in section 40(3) |
> | an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3) |

the amount must relate to the rent paid by the tenant in respect of	
	the period of 12 months ending with the date of the offence
	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."

Hearing

14. The remote video hearing in this case took place on 26 January 2022. The Applicant was represented by Ms Sheratt from Justice for Tenants. The Respondent did not appear and were not represented. It should be noted that the Respondents have not complied with the Tribunal's directions nor have they engaged with it at all in these proceedings or the Applicant's representative.

15. At the commencement of the hearing, Ms Sheratt explained to the Tribunal the various unsuccessful attempts made on behalf of the Applicant to put the Respondents on notice about this application and their failure to file and serve any evidence. She accepted that the correct figure for the total rent paid by the Applicant for the period in respect of which the property was unlicensed is £4,109.67.

16. Ms Sheratt also conceded that, as a matter of law, the First Respondent could not properly be a Respondent to this application for three reasons. Firstly, he was not the named landlord on the tenancy agreement and there was no evidence upon which the Tribunal could properly make a finding that the agreement was a sham. In other words, there was no basis for going behind the tenancy agreement. The fact that he was the registered proprietor of the property was of no relevance because he was not a party to the tenancy agreement. Secondly, she accepted that the rent had been paid to the Second Respondent at all material

times. Thirdly, there was also no basis for 'piercing' the corporate veil to make the First Respondent personally liable as a director of the company.

17. Therefore, the application only proceeded against the Second Respondent.

18. The Applicant's witness statement was put to him and he confirmed that the contents still remained correct (page 235). When asked by the Tribunal about the fire safety issues mentioned in paragraphs 8 and 9 in his statement, he said that he had been told by another tenant by the name of "Jim" that he and the other tenants had agreed with the landlord not to install fire doors, a wired smoke alarm, fire extinguishers or replacing the fire blanket because they did not want the premises to "look like an institution".

19. The Tribunal then heard closing submissions from Ms Sheratt who primarily contended for an award of 100% of the rent paid by the Applicant. In the alternative, she contended for an award of between 80-90%.

20. The only unchallenged evidence before the Tribunal was that of the Applicant's. Based on that evidence, the Tribunal made the following findings of fact beyond reasonable doubt:

    (a) that the property was an HMO and was in the additional licensing area as designated by the London Borough of Haringey , therefore, required to be licensed under section under sections 61(1) and 55 respectively in the Act.

    (b) that the property was not licensed from 12 August 2019 to 5 August 2020 and, therefore, the Tribunal was satisfied that the Second Respondent had committed an offence under section 72(1) of the Act.

21. The Tribunal then turned to assess the quantum of the rent repayment order that should be made against the Second Respondent.

22. Guidance was given by the Upper Tribunal in ***Vadamalayan v Stewart*** [2020] UKUT 0183 (LC) as to how the assessment of the quantum of a rent assessment order should be approached. It was held in that case the starting point is that any order should be for the whole amount of the rent for the relevant period, which can then be reduced if one or more of the criteria in section 43(4) of the Act or other relevant considerations require such a deduction to be made. The exercise of the Tribunal's discretion is not limited to those matter set in section 43(4).

23. This decision was followed by the Upper Tribunal decision in the case of ***Williams v Parmar*** *[2021] UKUT 244 (LC)* where the Upper Tribunal held that when considering the amount of a rent repayment order the Tribunal is not

restricted to the maximum amount of rent and is not limited to factors listed at section 44(4) of the Act.

24. The Upper Tribunal held that "*there is no presumption in favour of the maximum amount of rent paid during the period*". It was noted that when calculating the amount of a rent repayment order the calculation must relate to the maximum in some way. Although, the amount of the rent repayment order can be "*a proportion of the rent paid, or the rent paid less certain sums, or a combination of both*". Therefore, there is no presumption that the amount paid during the relevant period is the amount of the order subject to the factors referred to in section 44(4) of the Act.

25. The Upper Tribunal further went on to highlight that the Tribunal is not limited to those factors referred to in section 44(4) and that circumstances and seriousness of the offending landlord compromise part of the "*conduct of the landlord*" and ought to be considered. The Upper Tribunal considered that the Tribunal had taken a very narrow approach of section 44(4)(a) by stating "*meritorious conduct of the landlord may justify a deduction from the starting point*". It concluded that the Tribunal may in appropriate cases order a lower than maximum amount if the landlord's conduct was relatively low in the "*scale of seriousness, by reason of mitigating circumstances or otherwise*".

26. The Upper Tribunal went on to lower the amount of the rent repayment orders made by the Tribunal by applying a reduction of 20% and 10% on the basis that whilst the landlord did not have any relevant previous convictions, she was also a professional landlord who had failed to explain why a licence had not been applied for and the condition of the property had serious deficiencies.

27. The Upper Tribunal also confirmed that in cases where the landlord is a professional landlord, and the premises has serious deficiencies more substantial reductions would be inappropriate even if the landlord did not have any previous convictions.

28. This decision highlights that there is no presumption that rent repayment orders will be for maximum rent, and that while the full rent was in some sense still the "starting point" that did not mean that the maximum rent was the default. The amount of the rent repayment order needs to be considered in conjunction with section 44(4) factors and the Tribunal is not limited to the factors mentioned within section 44(4). This means that even if a landlord is guilty of an offence, if their offence is not a particularly serious one, they will expect to be ordered to repay less than the full rent paid during the relevant period.

29. The facts of this case are analogous to ***Williams*** is so far as it concerns a professional landlord who failed to obtain an HMO licence (for approximately a 12 month period of time here). The reason for not doing so is unknown. It seems that the Second Respondent held an HMO licence for the property until 11 August 2019 and reapplied for another one on 6 August 2020.

30. The financial circumstances of the Second Respondent are equally unknown. As the Tribunal understands it, the Second Respondent has not been convicted of

any offence. Therefore, the only section 44(4) consideration by the Tribunal was the conduct of the parties.

31. There was no suggestion that the Applicant had rent arrears or had breached any terms or conditions of the tenancy agreement. The only criticism made of the Second Respondent by the Applicant is the failure to install the fire safety measures set out at paragraph 18 above. The Tribunal considered this to be a material omission by the Second Respondent. The purported "agreement" with the tenants not to do so is irrelevant and cannot replace the statutory duty to install these fire safety measures, especially given the high level of occupancy in an HMO such as this one and the increased risk of a fire.

32. Accordingly, the Tribunal made a rent repayment order in favour of the Applicant in the total sum of say £3,700, which represents approximately 90% of the rent paid by him. The total amount of the rent repayment order is payable by the Second Respondent within 14 days of this decision being issued to the parties.

33. In addition, the Second Respondent is ordered to reimburse the Applicant the fees of £300 paid to the Tribunal to have the application issued and heard. This sum is also to be paid by the Second Respondent within 14 days of this decision being issued to the parties.

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).