



Case Reference : **LON/00BG/HMF/2021/0235**

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

Property : **15 Massingham Street, London E1 4EP**

(1) **Mr A Green**

: (2) **Mr R Timms**

(3) **Mr H Hawkes**

Representative : **Mr M Williams (LB of Tower Hamlets)**

(1) **Mr S Swaby**

Respondent : (2) **Mrs L Swaby**

Representative : **In person**

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

Tribunal Members : **Judge S Brilliant**

Mr C Gowman

Date and Venue of Hearing : **16 March 2022**

10 Alfred Place, London WC1E 7LR

Date of Written Reasons : **21 March 2022**

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 period commencing on 08 November 2019 and ending 03 October 2020¹, 15 Massingham Road, London E14EP (“the House”) was a House in Multiple Occupation (“HMO”). It had required an HMO licence from 01 February 2019.
2. The amount we order to be paid back to the Applicants by the Respondent is £9,104.97, 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 03 December 2021.
5. Originally, the agents who found the Applicants for the Respondent and arranged the Lease, Felicity J Lord (“the Agents”), were joined as parties. There is no claim against them, and proceedings against and were duly struck out. Mr Swaby was joined as he is the joint long lessee of the House. He has been estranged from the Respondent for over 20 years and was not named as a landlord in the Lease. Accordingly, the proceedings against him were struck out at the beginning of this hearing.
6. The hearing took place remotely on 16 March 2022. Mr Williams, who is an Environmental Health and Trading Standards officer employed by Tower Hamlets appeared for the Applicants The Respondent appeared in person. At the hearing each of the Applicants and the Respondent gave oral evidence and were cross-examined.

¹ These are the dates in the application notice.

The Lease

7. The lease of the House is dated 28 October 2019 (“the 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) each of the Respondents on the other. None of the tenants had an individual lease of any one room. The term of the Lease was 04 November 2019 until 03 November 2020 inclusive. The rent was £2,097 per month.

The rent repayment claimed

8. The Applicants claim to be repaid rent for the period from 08 November 2019 to 03 October 2020.

The House

9. The House is a 2-storey, 3-bedroom self-contained flat within a Post-war purpose-built block of flats. The cooking and bathroom/WC facilities are shared communally. The House was occupied by at least three people at all points during the relevant period of 08 November 2019 to 03 October 2020. Each Respondent occupied his room on a permanent basis. The Applicants vacated the House on the termination of the Lease.

The HMO licence

10. 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. This changed with effect from 01 April 2019. From that date the Respondent did require an Additional HMO licence even though the House is within a purpose-built block of flats. This is because the House is situated within an additional licensing area as designated by Tower Hamlets.

11. Tower Hamlets discovered that the House did not have an HMO licence on 05 August 2020, following a doorstep survey. The Respondent did not receive Tower Hamlets’ Notices dated 05 October 2020 and 22 October 2020 because they were sent to the House but not forwarded to her.

12. On 27 September 2021, the Respondent applied for an Additional HMO licence, but then withdrew the application because she did not intend to use the House as an HMO.

The statutory framework

13. 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.*

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

15. 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.

16. 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

17. 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.

18. 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) or by way of mortgage repayments should be set off against the cost of meeting his obligations to comply with the rent repayment order: Vadamalayan [14-15]. In fairness to the Respondent, she did not seek to make any deductions.

19. 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]).

20. 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.

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

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.

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).*

21. 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.

22. 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. As we shall see, mitigating circumstances are relevant in these proceedings

23. 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 1 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

24. The Respondent is not a person of means. The House is the only property she has ever let out. She never set out to be a landlord. She originally lived in the House, but has had to move to Derby to be near to where her daughter lives. We accept that she has had difficulties with her mental health, exacerbated by the stress of these proceedings. That is one reason why she moved to be near her daughter. Another reason is that her daughter herself has health problems of her own, we were told it was due to her heart, so they support each other mutually.

25. We accept the Respondent's evidence that she relied upon the rent she received from the House to fund the rent she now has to pay while living in Derby.

26. The Respondent has no convictions.

27. There is a difference between the parties as to whether the Applicants were bad tenants (as claimed by the Respondent) and as to whether the Respondent was a bad landlord (as claimed by the Applicants).

28. The Applicants made a joint witness statement. The Respondent raised a number of pertinent questions in cross examination. It became apparent when the Applicants answered those questions frankly that they had greatly exaggerated their written evidence:

(a) It is common ground that the Agents had failed to arrange a deep clean prior to the Lease commencing.

(b) As the Applicants were on their way to pick up the keys and move in on 04 November 2019, they received a text from the Agents saying that the house was not yet ready for them. Not surprisingly, the Applicants insisted on moving in on that day.

(c) Because there had not yet been a deep clean, the state of the House was appalling. The Applicants say in their witness statement: *Our first day experience at the property set the precedent for a miserable 12 month occupancy.*

(d) This gives a wholly misleading impression. It was accepted by Mr

Green that by the time he moved in a day or two after the Lease had commenced, the House had been deep cleaned (the Respondent said that this had taken nine hours) and that he told the Respondent that he was pleased with the cleaning.

(e) The witness statement goes on *We went weeks without warm water*. Mr Green added in oral evidence that there was no heat either during the cold month of November.

(f) The Respondent said that this could not have been the case because there was a full immersion boiler and there were electric heaters in the cupboard. On balance, we accept the Applicants that there was a period with no hot water or heating.

(g) However, it had been misleading to describe this period of time as *weeks*. The Applicants admitted that once they had drawn this matter to the attention of the Respondent she had arranged for an engineer to come out and it only took seven days for the problem to be corrected. Indeed, had Mr Timms not been absent at an interview which went on longer than he had anticipated, the repairs would be carried out three days earlier than that.

(h) The Respondent alleges that the Applicants broke the toilet. We accept the Applicants' evidence that a crack appeared during the course of the tenancy. On the evidence before us, we come to the conclusion that this was fair wear and tear.

(i) The obligation of the Applicants in respect of the front and back gardens is contained in clause 10.8 of the Lease: *You agree to look after and maintain the garden (if any) to the same standard as at the start of the Agreement*. The Respondent admitted that the gardens were not well maintained at the start of the Lease. She only got round to dealing with the gardens in June 2020. Accordingly, the Applicants were under no obligation to leave the garden well maintained when they left.

(j) Accordingly, we agree with the Dispute Service that the deposits should not have been retained.

(k) Comparing the photograph at page 49 of the Respondent's bundle with the Checkout Report dated 04 November 2019, we conclude that the Applicants did damage of the wardrobe.

(l) The Respondent's unchallenged evidence was that during the tenancy she redecorated all walls, ceilings and paintwork in the House. Therefore the damage to the walls photographed in the bundle must go beyond fair wear and tear. However, we are not persuaded on the evidence that the Applicants were responsible for the missing door handle in the kitchen, smashing the plug socket or staining the bed mattress. However, it would appear from the 2019 Checkout Report that no bed was then broken, and it is therefore likely that it was broken by the Applicants.

29. In her witness statement the Respondent complained that the Applicants had

been poor tenants as far as the payment of rent was concerned. However, none of this was put to the Applicants when they gave their evidence, so they were unable to give their response to this, and therefore we do not take it into account.

30. We accept that the Respondent was let down by the Agents who had failed to inform her that an HMO licence was needed when she granted the Lease, some seven months after the need for it was brought into force. The Respondent was mortified when she learned that she had failed to comply with the law. There is no evidence that the Respondent broke the law again. We bear all of this very much in mind. In the main, the Respondent was not a bad landlord. Equally, the Applicants were not in the main bad tenants. However, they greatly exaggerated their evidence in their joint witness statement and that is a serious matter and something which we do pay regard to.

31. Doing the best we can, and taking all the above circumstances into account, we order 40% of the rent to be repaid. The application notice seeks repayment for a period of 10 months and 36 days. Therefore, the relevant rent paid was £22,762.42. 40% of this is £9,104.97. The Respondent must also refund the application fee.

Name: Simon Brilliant

Date: 21 March 2022.

ANNEX - RIGHTS OF APPEAL

- i. 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.
- ii. 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.
- iii. 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.
- iv. 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.

