FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AN/HMG/2020/0011**
Property	**:**	**Ground Floor Flat at 50 Weltje Road, Fulham, London, W6 9LT**
Applicants	**:**	**(1) Alice Van Der Velden** **(2) Aran Soler Rexach** **(3) Luis Wilkinsin** **(4) Lauren Williamson** **(5) Michael Lloyd**
Representatives	**:**	**Mr Robert Harris of Flat Justice**
Respondent	**:**	**Malinin Munasinghe**
Representative	**:**	**Mr Tacagni, Chartered Environmental Health Practitioner**
Type of application	**:**	**Application under sections 40, 41, 43 & 44 of the Housing & Planning Act 2016 in respect of a Rent Repayment Order**
Tribunal members	**:**	**Tribunal Judge I Mohabir** **Ms S Coughlin MCIEH**
Date of hearing	**:**	**10 July 2020**
Date of decision	**:**	**29 July 2020**

DECISION

Introduction

1. This is an application made by the Applicants under section 41 of the Housing and Planning Act 2016 ("the Act") for a rent repayment order against the Respondent in respect of Ground Floor Flat, 50 Weltje Road, Fulham, London, W6 9LT ("the property").

2. The factual background to the application is largely a matter of common ground and was helpfully summarised by the Applicants in the following way.

3. Under the terms of a tenancy agreement commencing on 1 February 2019 and ending on 31 January 2020 ("the Tenancy Agreement") and varied by a Deed of Assignment dated 20 January 2019 ("the Deed of Assignment"), four of the Applicants were granted an Assured Shorthold tenancy of the property. The original tenants were Mr Luis Wilkinson, Ms Aran Soler Rexach, Ms Sanne Sorensen and Mr Martin McSwigan. Under the Deed of Assignment, Ms Alice Van Der Velden and Mr Michael Lloyd replaced Ms Sorensen and Mr McSwigan before the occupancy commenced. Part of the way through the tenancy Ms Rexach moved out and Ms Lauren Williamson replaced her as the tenant.

4. The Respondent was registered as the joint long leaseholder of the Property and was named as the landlord under the Tenancy Agreement.

5. The Property is in a converted house (with two separate flats above) in the London Borough of Hammersmith and Fulham and consists of three bedrooms with a shared bathroom, kitchen, and lounge. It was classified an HMO under the Act and was unlicensed during the entire term of the tenancy.

6. The rent of £2,150 per calendar month, divided as follows: Room 1 (shared by Ms van der Velden and Mr Lloyd) paid £850pm; Room 2 (initially occupied by Ms Soler Rexach) paid £700pm; and Room 3 (occupied by Mr Wilkinson) paid £600pm.

7. Ms Soler Rexach paid 5 months' rent to the Respondent and Ms Williamson then paid the remaining 7 months' rent, with the latter reimbursing the former for the rent paid for the second half of June 2019. The Applicants paid their rent in full throughout the AST and it is admitted by the Respondent that they paid a total of £25,766.25, which is the total sum claimed by the Applicants in this application.

8. On 26 February 2020, the Applicants made this application for a rent repayment order.

Relevant Law

Making of rent repayment order

9. 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

10. 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

11. The hearing in this case took place on 10 July 2020 remotely using the Cloud Video Platform. The Applicants were represented by Mr Harris from Flat Justice. The Respondent was represented by Mr Tacagni who is a Chartered Environmental Health Practitioner.

12. The issues before the Tribunal were whether an offence had been committed by the Respondent under section 40 of the Act and whether it was appropriate to make a rent repayment order. If so, the amount of any such order in respect of each of the Applicants.

13. The London Borough of Hammersmith and Fulham designated the entire borough as subject to additional licensing for 5 years from 5 June 2017. Section 254 of the Housing Act 2004 ("the 2004 Act") defines the relevant HMOs as rented properties that are occupied by 3 or more persons comprising 2 or more households. All such HMOs are required to be licensed under s. 61(1) of the 2004 Act.

14. The unchallenged evidence was that the Property was subject to the additional licensing scheme, that it was a rented property situated within the borough of the London Borough of Hammersmith and Fulham, that it was variously occupied by five people, namely the Applicants as their main residence who lived as three separate households who paid rents and who shared facilities. However, no such licence was in place during the term of the tenancy and no such licence was applied for by the Respondent until 11 April 2020

15. The Tribunal was, therefore, satisfied beyond reasonable doubt that the Respondents' had committed an offence under section 72(1) of the Housing Act 2004 (as amended), namely, that they had been in control or management of an unlicensed HMO. On balance, the Tribunal was prepared to accept that the Respondent was not a "rogue" landlord and her ignorance of the need to obtain an HMO licence was unintentional. Nevertheless, this does not provide a defence to liability under the Act.

16. It follows that the Tribunal was also satisfied that it was appropriate to make a rent repayment order under section 43 of the Act in respect of each of the Applicants for the 12-month period commencing on 1 February 2019. Any award could not exceed the total rent of £25,766.25 received by the Respondent for this period of time.

17. As to the amount of the order to be made under section 44(4), the Tribunal was assisted by the recent Upper Tribunal judgement in the case of ***Vadamalayan v Stewart & Ors*** [2020] UKUT 0183 (LC) where HHJ Cooke gave a detailed analysis of how an assessment under section 44(4) should be made.

18. The Learned Judge stated this:

> "9. In *Parker v Waller* [2012] UKUT 301 (LC) the President (George Bartlett QC) had to consider the provisions of sections 73 and 74 of the 2004 Act, which gave the FTT jurisdiction to make rent repayment orders; but they have been repealed so far as England is concerned and now apply only in Wales.
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> 10. Section 74(5) of the 2004 Act provided that a rent repayment order in favour of an occupier had to be "such amount as the tribunal considers reasonable in the circumstances". Where the order was made in favour of the local authority, by contrast, section 74(2) provided that the tribunal "may not require the payment of any amount which the tribunal is satisfied, by reason of exceptional circumstances, it would be unreasonable for that person to be required to pay." The President said at paragraph 24 that the contrast between those two provisions was "marked". With regard to orders made in favour of an occupier, therefore, he said at paragraph 26(iii):
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>> "There is no presumption that the RRO should be for the total amount received by the landlord during the relevant period unless there are good reasons why it should not be. The RPT must take an overall view of the circumstances in determining what amount would be reasonable."
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> 11. But the statutory wording on which that paragraph is based is absent from the 2016 Act. There is no requirement that a payment in favour of the tenant should be reasonable. The only difference between section 44, which is about orders made in favour of tenants, and section 45, which is about orders made in favour of local housing authorities, is that in the latter section there is reference to universal credit rather than to rent. Paragraph 26(iii) of *Parker v Waller* is not relevant to the provisions of the 2016 Act; nor is the decision in *Fallon v Wilson* [2014] UKUT 0300 (LC) insofar as it followed that paragraph.
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> 12. That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent.

13. …

14. It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament's intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord's profits was – as the President acknowledged at his paragraph 26 – not the only purpose of a rent repayment order even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied.

15. That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord has spent on the property during the relevant period. That expenditure will have repaired or enhanced the landlord's own property, and will have enabled him to charge a rent for it. Much of the expenditure will have been incurred in meeting the landlord's obligations under the lease. The tenants will typically be entitled to have the structure of the property kept in repair and to have the property kept free of damp and pests. Often the tenancy will include a fridge, a cooker and so on. There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order".

19. HHJ Cooke concluded by stating:

"19. The only basis for deduction is section 44 itself and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence".

20. In other words, there is no longer any requirement for the Tribunal award to be reasonable. Applying the same reasoning in ***Vadamalayan***, the starting point for any determination is the rent paid by the Applicants during the term of the tenancy. In this instance that is £25,766.25. The fact that the Respondent only made a small profit from the letting is irrelevant and no deduction should be made from the award for the Respondent's overheads incurred during the term of the tenancy, for example, any mortgage payments. This is not a case where the Respondent paid the utility costs as part of the overall rent and is, therefore, entitled to these deductions.

21. Turning to the criteria in section 44(4) of the Act, the Tribunal was satisfied that there was no particular conduct on the part of the Respondent that would attract a deduction from the initial figure of £25,766.25. Respondent's assertion that she had carried out repairs from time to time is not conduct

that would mitigate the award under section 44(4)(a) of the Act. The Respondent was doing no more than complying with her repairing obligations under the tenancy agreement.

22. In addition, the Tribunal had regard to the fact that although the Respondent had a small portfolio of properties, she had nevertheless been a professional landlord for 15 years. She has two other properties, which are both mandatory HMO's and is, therefore, familiar with the mandatory licensing system. She has deliberately focussed her property portfolio on room-by-room lettings and she said in evidence that her main concern was "filling the rooms" with tenants. The Respondent made the decision to dispense with the use of a managing agent and manages the properties including the lettings herself. She has, however, failed to familiarise herself with different licensing regimes in different boroughs.

23. As to the Respondent's financial circumstances, it became clear that the financial disclosure made by her was incomplete. This was conceded by her representative, Mr Tacagni. For example, in cross-examination, the Respondent stated that she had 3 Nat West bank accounts, but no disclosure had been made in respect of these. She was not prepared to disclose the value of the properties held in her portfolio nor the income received from them. In the absence of this evidence, the Tribunal was not able to make any finding about the Respondent's true financial circumstances under section 44(4)(b) of the Act and, therefore, no deduction could be made in relation to this matter.

24. There was no evidence that the Respondent had been convicted of any offence under the Act and is consistent with the view expressed earlier by the Tribunal that this was an unintentional offence on her part. The Tribunal was, therefore, satisfied that this should be reflected in a reduction in the award of 20% to reflect this and the high degree of culpability on the part of the Respondent.

25. Having regard to the above matters, the Tribunal concluded that a global award of £20,613 should be made in favour of the Applicants to be apportioned in accordance with their rental liability.

Tribunal Judge I Mohabir

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).