



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

**Case Reference** : **LON/00AH/HMF/2020/0016**

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

**Property** : **49 West Street, Croydon, Surrey  
CR0 1DJ**

**Applicants** : **Mr S Gietzen and Mr L Dowding**

**Representative** : **In person**

**Respondents** : **Mr M Cauchi and Mrs J Cauchi**

**Representative** : **In person**

**Type of Application** : **Application for Rent Repayment  
Order under the Housing and  
Planning Act 2016**

**Tribunal Members** : **Judge P Korn  
Mr M Cairns MCIEH**

**Date of Hearing** : **9<sup>th</sup> November 2020**

**Date of Decision** : **4<sup>th</sup> December 2020**

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**DECISION**

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## **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: CVPREMOTE. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in a series of electronic bundles, the contents of which we have noted. The decision made is set out below under the heading “Decision of the tribunal”.

## **Decision of the tribunal**

The tribunal orders the Respondents (jointly and severally) to repay to the Applicants jointly the sum of £2,737.64 by way of rent repayment.

## **Introduction**

1. The Applicants have applied for a rent repayment order against the Respondents under sections 40-44 of the Housing and Planning Act 2016 (“**the 2016 Act**”).
2. On 16<sup>th</sup> February 2019 the Applicants jointly entered into an assured shorthold tenancy agreement with Mr Cauchi. A copy of the tenancy agreement is in the hearing bundle. It is clear from the title documentation in the bundle, and not disputed, that Mr and Mrs Cauchi are the joint freehold owners of the Property and therefore that Mr Cauchi was granting the tenancy to the Applicants on behalf of both Respondents.
3. The basis for the application is that the Respondents were controlling an unlicensed house which was required under Part 3 of the Housing Act 2004 (“**the 2004 Act**”) to be licensed at a time when it was let to the Applicants and were therefore committing an offence under section 95(1) of the 2004 Act.
4. The claim is for repayment of rent paid during the period from 14<sup>th</sup> February 2019 to 23<sup>rd</sup> October 2019 totalling £9,125.48 in aggregate.

## **Applicants’ case**

5. In written submissions the Applicants state that the Property was unlicensed but required a licence during the period from 14<sup>th</sup> February 2019 to 23<sup>rd</sup> October 2019 when they were in occupation. The Respondents were the owners of the Property during that period.
6. The Applicants have also made certain complaints about the Respondents’ conduct. Without prior notice the Respondents charged an additional amount of £22.67 per calendar month for the insurance

of white goods. At various times they arrived at the Property without giving 24 hours' prior notice. There were lengthy delays in relation to property management issues despite reminders. In particular, historical damage from a leaking toilet cistern resulted in mouldy woodwork, leaking ceilings and windows were not addressed. As a result, certain items of furniture had to be disposed of because of damage from damp and a suit hanging in a cupboard was ruined. The damp also affected the Applicants' health. There were also delays in fixing the combi boiler. In addition, when seeking to surrender the tenancy early as a result of their concerns about the Property the Applicants faced long periods of unresponsiveness and the whole process of surrendering the tenancy took four months.

7. As regards the Respondents' point that they did not know that the Property required a licence, at the hearing the Applicants said that they should have known and they referred the tribunal to the evidence in the hearing bundle of the local housing authority's publicity for landlords about the selective licensing scheme.
8. As regards the level of seriousness of the leaks, at the hearing the Applicants said that the leaks were more of a steady drip than anything worse, although on one occasion water was pouring down in a stairwell. The problem with the heating was just in October, but the Respondents did not offer temporary substitute heating.
9. Certain other points were made by the Applicants in written submissions but not pursued at the hearing.

### **Respondents' case**

10. The Respondents accept that they committed an offence by failing to license the Property. They also accept that this was the case for the whole of the period in respect of which the Applicants claim a rent repayment. They also agree with the Applicants' calculations as to the amount of rent paid for that period and accept that it was pure rent and did not include any charges for utilities.
11. The Respondents state that prior to the Applicants taking up occupation they had been dealing with a problematic previous tenant who stopped paying rent in July 2015 and would not allow them access to the Property. She ended up vandalising the Property and had to be evicted. The eviction took place in January 2016, and evidence of the eviction is contained in the hearing bundle. The experience caused the Respondents a great deal of stress, and the effect of this coupled with the fact that they were not professional landlords meant that they missed the fact that the Property needed a licence if rented out from 1<sup>st</sup> October 2015. They do not rent out any other properties.

12. As regards the heating issue, the Respondents responded immediately. Their normal plumber was on holiday and so a different plumber came. It took a while to resolve the problem because the switch had snapped, but the Respondents were in constant contact with the Applicants via WhatsApp. They also offered a temporary heater. Mr Cauchi referred the tribunal to a message from Mr Dowding to Mr Cauchi in which he said *“Good to catch up yesterday. All seems fine with the boiler now.”*
13. Regarding the damp, no water was pouring down. The Respondents’ roofer had a look at the damp and was of the view that the problem was likely to be with the party wall. Mr Cauchi was also of the view that the Applicants should have kept the extractor fan open more frequently because of the build-up of moisture.
14. Mr Cauchi did not accept that he had entered on to the Property without giving proper notice. As regards damage to the Applicants’ goods, this was something that they had not previously mentioned. As a general point, the Respondents considered themselves to have been fair and attentive landlords. They stated that the Property was well-kept and newly decorated with a modern kitchen and bathroom and that it had always met all relevant safety checks. The Applicants included copy photographs in their hearing bundle.
15. In relation to the charge for insuring white goods, the agents were supposed to advise the Applicants of this charge at the start of the tenancy but failed to do so. The issue was resolved at the time and not raised again until now.
16. As regards the early surrender of the tenancy, the Applicants’ email requesting a surrender went to a defunct email address. There was a further delay because the Respondents wanted to get advice from a property agent about the surrender. It took a while to arrange everything because the Respondents first wanted to organise a replacement tenant.
17. In relation to the Respondents’ financial circumstances, Mr Cauchi had been made redundant and at the time of the hearing was working part-time under a contract which was due to come to an end. Mrs Cauchi was working 4 days a week. In written submissions they stated that the maximum rent repayment was not a sum of money that they had or could find.

### **Follow-up points by Applicants**

18. The Applicants denied that they had been offered a temporary heater. In addition, the email address described by Mr Cauchi as defunct was the email address provided to the Applicants at the start of their tenancy.

19. In relation to the Respondents’ financial circumstances, the Respondents had failed to substantiate their claim that the maximum rent repayment was not a sum of money that they had or could find.
20. As regards the point that the Respondents were not property professionals, Mr Cauchi had some knowledge of property matters having previously worked as a branch manager at a firm of estate agents.
21. A few days after the hearing the Applicants expressed frustration regarding an element of non-compliance by the Respondents with the tribunal’s directions. Having considered the concerns expressed by the Applicants the tribunal then allowed them a further 7 days to comment further on any evidence which had been served late by the Respondents. The Applicants’ further comments have been considered and taken into account by the tribunal.

**Relevant statutory provisions**

22. Housing and Planning Act 2016

Section 40

- (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 ...
- (3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

	<b><i>Act</i></b>	<b><i>section</i></b>	<b><i>general description of offence</i></b>
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers

3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

#### Section 41

- (1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
- (2) A tenant may apply for a rent repayment order only if – (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and (b) the offence was committed in the period of 12 months ending with the day on which the application is made.

#### Section 43

- (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 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) ...

#### Section 44

- (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.

<b><i>If the order is made on the ground that the landlord has committed</i></b>	<b><i>the amount must relate to rent paid by the tenant in respect of</i></b>
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	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.

#### Housing Act 2004

##### Section 95

- (1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part ... but is not so licensed.
- (4) In proceedings against a person for an offence under subsection (1) ... it is a defence that he had a reasonable excuse ... for having control of or managing the house in the circumstances mentioned in subsection (1) ... .

### **Tribunal's analysis**

23. The Applicants have provided evidence that the Property required a licence throughout the period in respect of which they claim a rent repayment and that it was not licensed. The Respondents have accepted that this is the case.

#### The defence of "reasonable excuse"

24. Under section 95(4) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a house which is licensable under Part 3 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. As stated by the Upper Tribunal in *I R Management Services Limited v Salford City Council*, the burden of proof is on the person relying on the defence. The tribunal drew this possible defence to the Respondents' attention at the hearing, but the Respondents did not try to argue that they had a complete defence under section 95(4). In any event, in our view mere ignorance of the legal obligation to obtain a licence (if indeed the Respondents were unaware of this obligation) is not sufficient reason to constitute a reasonable excuse for the purposes of section 95(4).

#### The offence

25. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. The offence of control or management of an unlicensed house under section 95(1) of the 2004 Act is one of the offences listed in that table.
26. Under section 41(2), a tenant may apply for a rent repayment order only if the offence relates to housing that, at the time of the offence, was let to the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made. Having determined that the Respondents did not have a reasonable excuse for failing to license the Property, we are satisfied beyond reasonable doubt that an offence has been committed under section 95(1), that the Property was let to the Applicants at the time of commission of the offence and that the offence was committed in the period of 12 months ending with the day on which the application was made.

#### Amount of rent to be ordered to be repaid

27. Based on the above findings, we have the power to make a rent repayment order against the Respondents.



28. The amount of rent to be ordered to be repaid is governed by section 44 of the 2016 Act. Under sub-section 44(2), the amount must relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. Under sub-section 44(3), the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of universal credit paid in respect of rent under the tenancy during that period.
29. In this case, the claim does relate to a period not exceeding 12 months during which the landlord was committing the offence, and there is no evidence of any universal credit having been paid. The Applicants' unchallenged evidence, plus supporting documentation, shows that the rent paid for that period amounts to £9,125.48, and the tribunal has no reason to find otherwise. Therefore, the maximum amount of rent repayment that can be ordered is £9,125.48.
30. Under sub-section 44(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 the relevant part of the 2016 Act applies.
31. The Upper Tribunal decision in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* is a leading authority on how a tribunal should approach the question of the amount that it should order to be repaid under a rent repayment order if satisfied that an order should be made. Importantly, it was decided after the coming into force of the 2016 Act and takes into account the different approach envisaged by the 2016 Act.
32. In her analysis in *Vadamalayan*, Judge Cooke states that the rent (i.e. the maximum amount of rent recoverable) is the obvious starting point, and she effectively states that having established the starting point one should then work out what sums if any should be deducted. She departs from the approach of the Upper Tribunal in *Parker v Waller (2012) UKUT 301*, in part because of the different approach envisaged by the 2016 Act, *Parker v Waller* being decided in the context of the 2004 Act. Judge Cooke notes that the 2016 Act contains no requirement that a payment in favour of a tenant should be reasonable. More specifically, she does not consider it appropriate to deduct everything that the landlord has spent on the property during the relevant period, not least because much of that expenditure will have repaired or enhanced the landlord's own property and/or been incurred in meeting the landlord's obligations under the tenancy agreement. There is a case for deducting utilities, but otherwise in her view the practice of deducting all of the landlord's costs in calculating the amount of the rent repayment should cease.

33. In Judge Cooke's judgment, the only basis for deduction is section 44 of the 2016 Act itself, and she goes on to state that there will certainly be cases where the landlord's good conduct or financial hardship will justify an order less than the maximum.
34. Adopting Judge Cooke's approach and starting with the specific matters listed in section 44, the tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence. We will take these in turn.

### Conduct of the parties

35. Whilst the Respondents are unhappy that the Applicants have applied for a rent repayment order against them, they have not complained about the Applicants' conduct. By contrast, the Applicants have made various complaints about the Respondents' own conduct. In particular, they have referred to various deficiencies at the Property which the Respondents were slow to remedy as well as the Respondents' slow response to their request for a surrender of the tenancy.
36. As regards the various deficiencies referred to by the Applicants, we accept that there were issues but we consider that the Applicants have significantly overstated their case as to how bad a landlord the Respondents were. The Respondents are not property professionals and do not rent out any other properties, and whilst they were certainly not perfect landlords we consider that most of the time they were doing what they reasonably could in the circumstances. The evidence indicates that on the whole the Property was in a good condition and that the Respondents complied with their health and safety obligations and were for the most part reasonably responsive to the Applicants' concerns. We note the Applicants' point that Mr Cauchi has worked as a branch manager at a firm of estate agents but this is very different from being the sort of property professional who owns or lets out several properties or is in charge of a letting agency.
37. As regards the delay in agreeing to a surrender, as the Applicants themselves acknowledged at the hearing the Respondents were under no obligation to agree to a surrender and in our view the Applicants were fortunate that the Respondents were prepared to agree to a surrender at all. It was also perfectly understandable that the Respondents should want to secure a replacement tenant before releasing the Applicants from their tenancy.
38. The other significant aspect of the Respondents' conduct is their conduct in relation to the offence itself. Whilst ignorance of the legislation is insufficient to operate as a complete defence under section 95(4) it is relevant to the level of culpability, and we accept that the Respondents did not know at the time that they were committing an

offence and that the problems with the previous tenant are of some relevance to their lack of focus on the need for a licence. We also accept their unchallenged evidence that they applied for a licence immediately after being made aware that one was required. Furthermore, we note that the Respondents are not professional landlords and that they do not let out any other properties.

#### Financial circumstances of the landlord

39. According to the evidence provided by the Respondents, Mr Cauchi had been made redundant and at the time of the hearing was working part-time under a contract which was due to come to an end. Mrs Cauchi was working 4 days a week. They state that the maximum rent repayment is not a sum of money that they have or would be able to find.
40. We note the Applicants' comments on the limitations of the Respondents' evidence on these issues, particularly as to the lack of hard evidence of inability to pay. Our overall impression, based on the limited information before us, is of financial circumstances which are neither certain nor comfortable, although there is insufficient evidence to conclude that their financial circumstances could properly be described as dire.

#### Whether the landlord has at any time been convicted of a relevant offence

41. The Respondents have not been convicted of a relevant offence, and nor is it alleged that they have been convicted of any other offence.

#### Other factors

42. It is clear from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal "must, in particular, take into account" the specified factors. One factor identified by the Upper Tribunal in both *Parker v Waller* and *Vadamalayan v Stewart* as being something to take into account in all but the most serious cases is the inclusion within the rent of the cost of utility services, but there is no evidence in the present case that the rental payments include any charges for utilities.
43. On the facts of this case we do not consider that there are any other specific factors which should be taken into account in determining the amount of rent to order to be repaid. Therefore, all that remains is to determine the amount that should be paid based on the above factors.

### Amount to be repaid

44. The first point to emphasise is that a criminal offence has been committed. There has been much publicity about licensing of houses and the Respondents have offered no excuse for their failure to obtain a licence other than lack of knowledge of their obligations plus some context for that lack of knowledge.
45. Secondly, whilst the Applicants may not have suffered much if anything by way of direct loss through the failure to obtain a licence, it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If landlords can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show that they have suffered actual loss, then this will significantly undermine the deterrence value of the legislation.
46. In her decision in *Vadamalayan* Judge Cooke states that the total amount of rent paid for the relevant period is the obvious starting point for a rent repayment order, subject to any deductions being appropriate. In this case, we consider the Respondents' conduct to have been broadly good. They were not perfect landlords, but they generally did their best and we do not accept the very negative picture of their conduct painted by the Applicants. In addition, the Respondents are not professional landlords, they were only letting out one property, they were not aware that it needed to be licensed (and have provided some context for this lack of awareness) and they applied for a licence immediately after being made aware that one was required. They have not previously been convicted of any relevant offences. The evidence, slightly thin though it is, suggests that their financial circumstances are modest.
47. In the circumstances we consider that – taking all of the mitigating circumstances together – on the particular facts of this case it is appropriate to make a deduction of 70%. Accordingly, we therefore order the Respondents to repay to the Applicants the sum of £2,737.64, this being 30% of the maximum sum of £9,125.48 that could have been awarded.

### Cost applications

48. There were no cost applications.

**Name:** Judge P Korn

**Date:** 4<sup>th</sup> December 2020

## **RIGHTS OF APPEAL**

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.