FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/HMF/2020/0063**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**3 Camberwell Station Road, London SE5 9JJ**
Applicants	**:**	**Lorna McGhee, Aisling Sweeney and Rebecca Ferrier**
Representative	**:**	**Alasdair McClenahan of Justice for Tenants**
Respondent	**:**	**Andrew Mannoukas**
Representative	**:**	**In person**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge P Korn** **Ms S Coughlin MCIEH**
Date of Hearing	**:**	**15th February 2021**
Date of Decision	**:**	**12th March 2021**

DECISION

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 two electronic bundles, the contents of which we have noted. The decision made is set out below under the heading "Decisions of the tribunal".

Decisions of the tribunal

(1) The tribunal orders the Respondent to repay to the Applicants the following sums by way of rent repayment:-

Lorna McGhee	£4,435.27
Aisling Sweeney	£3,890.75
Rebecca Ferrier	£4,405.27.

(2) Pursuant to paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**"), the tribunal orders the Respondent to reimburse to the Applicants the application fee of £100.00 and the hearing fee of £200.00.

Introduction

1. The Applicants have applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("**the 2016 Act**").

2. On 4th January 2019 the Applicants jointly entered into an assured shorthold tenancy agreement with the Respondent. A copy of the tenancy agreement is in the Applicants' hearing bundle.

3. The basis for the application is that the Respondent was controlling an unlicensed house in multiple occupation ("**HMO**") 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 was therefore committing an offence under section 72(1) of the 2004 Act.

4. The Applicants' respective claims are for repayment of rent paid during the period from 5th January 2019 to 30th August 2019 in the following amounts:-

Lorna McGhee	£4,435.27

Aisling Sweeney £3,890.75

Rebecca Ferrier £4,405.27.

Applicants' case

5. In written submissions the Applicants state that the Property is a two-storey self-contained flat with a shared kitchen and bathroom and was occupied by the three of them at all times during the period to which the claim relates, namely 5th January 2019 to 30th August 2019. Each tenant occupied their own room on a permanent basis pursuant to a single tenancy agreement for all tenants. The tenants were separate, unrelated individuals each paying rent.

6. The Property was situated during the relevant period within an additional licensing area as designated by the London Borough of Southwark ("**the Council**"), the additional licensing scheme having come into force on 1st January 2016. After an inspection on 10th July 2019 the Council confirmed that the Property required an HMO licence. Such a licence was not held during the relevant period, the Respondent only applying for a licence on 30th August 2019.

7. The Applicants have provided copy bank statements showing the rental payments made, together with a spreadsheet showing how they have calculated the amount of rent repayment being sought.

8. As regards the conduct of the parties, the Applicants state that they have paid all rent and have followed all appropriate channels to deal with a landlord lacking the necessary HMO licence.

9. By contrast, the Respondent failed to ensure that the Property adhered to the safety conditions imposed by the licensing scheme. During the Applicants' tenancy there was a severe flood from the upstairs flat, which was also let by the Respondent, and this caused the electrics at the Property to cut out. The Respondent responded to this problem slowly and – although he fixed the lights – he did not take appropriate steps to deal with the resulting dampness. This in turn caused the ceiling above one of the bedrooms to bow because of the quantity of water. Furthermore, the dampness caused mould which led to several of the Applicants' belongings being damaged.

10. In response to the continuing problems the Applicants contacted the Council's environmental health team. An environmental health officer then visited the Property and this resulted in a Prohibition Order being served on the Respondent, prohibiting the use of the premises for all living and sleeping purposes whilst the hazards listed in the Prohibition Order, lighting and fire, remained.

11. At the hearing Mr McClenahan said that the Respondent had provided no evidence of poor conduct on the part of the Applicants nor any evidence as to his own financial circumstances.

12. In relation to the photographs in the Applicants' hearing bundle showing aspects of the condition of the Property, including size of windows and escape routes, Ms Sweeney talked the tribunal through these.

Respondent's case

13. The Respondent accepts that he committed an offence by failing to license the Property. At the hearing it was clear that he accepted that this was the case for the whole of the period in respect of which the Applicants claim a rent repayment. He does not dispute the Applicants' calculations as to the amount of rent paid for that period and accepts (or at least does not deny) that the rent was pure rent and did not include any charges for utilities.

14. In written submissions in relation to the water damage issue, the Respondent states that a water pipe was damaged by the tenants who were living in the flat above and who contacted him around 6am that morning. He immediately contacted his builder, who lived nearby, and the issue was resolved within 30 minutes. However, within that time a lot of water had travelled through the floor into the Applicants' flat. His builder went in and assessed the situation and then hired an industrial de-humidifier to remove the moisture. Nevertheless, after two weeks there was still a lot of damp and so the hire was extended by a further week.

15. It seemed to the Respondent that due to the noise of the industrial de-humidifier the Applicants were turning it off for convenience and so it was unable to perform its work. Given this situation, he subsequently bought a domestic de-humidifier, which was much quieter and was allowed to do its work and the situation was soon better. He also decided to reduce the rent for the following month by £900 (£300 per tenant) to take care of any dry-cleaning necessary or any other damage that the Applicants felt had been caused by the water.

16. Regarding the Council's environmental health team, he states that they came and inspected the Property and found no health issues, but the visit instigated the HMO proceedings. However, due to the original 'notice' from the Enforcement Officer being sent to the wrong address (an address he had moved from about 8 years before), he was unaware of their intended visit and the subsequent misreading of the Property's building plans. Had the Enforcement Officer found dangerous or harmful issues, he is sure that the Council itself would have prosecuted him. At the hearing he said that certain things were assumed by the

Council when making the Prohibition Order which he was not given an opportunity to answer.

17. The Respondent adds that once he had satisfied the Enforcement Officer that only minor issues needed attending to, the Applicants were happy to continue their tenancy.

18. Specifically as regards the statement in the Prohibition Order that "All walls throughout the ground floor have been removed by the owner to create open-plan living", the Respondent comments that actually no walls were removed in the conversion, which took place about 12 years earlier. The space, as was, was simply adapted by the architect; the ground floor had been a café with a kitchen separated by a stand-alone counter which was obviously removed in the renovations.

19. As regards the untested smoke detectors, although they were indeed untested they were found on inspection to be fully functional and linked. As regards the lighting, the light was deemed sufficient by the Council's Buildings Regulator who was also happy about the 'not-sealed' lightwell which formed part of the fire exit. The fact that there was no outlook from the bedrooms was because they were in the basement, and the bedrooms were dark because the Applicants dressed the windows with dark curtains to block the light, as shown in one of the photographs in the hearing bundle.

20. The Respondent adds that when he had the building converted he did so with the collaboration of the Council, and for the first 8 or 9 years he let it to the Council through a housing association which had strict rules on how the flats should be presented and kept. At no time during this period were any issues raised about licensing or the fire escape.

21. At the hearing the Respondent said that the Property was converted in about 2006/2007 with planning permission and building regulations consent and generally with the Council's co-operation. The fire escapes were approved by the Council. He accepted that the window in Bedroom 1 was small but maintained that it was fully in compliance with the Council's requirements at the time. He also accepted that that the fire escape route to the garden was not operational, but an alternative solution was found. He further accepted that the means of escape from the basement bedrooms, which required the occupiers to climb through small windows into the front light well, then up a ladder and through a glass panel at street level, was not operational. He said that he did not regularly test the panel as he did not want it to be seen as a way of accessing the Property for security reasons. He said that, after service of the Prohibition Order, he had replaced one of the windows with a door and renewed the glass panel and that the Council was now satisfied. Regarding the lack of light in the basement, he commented that this was not surprising for a basement.

22. In response to a question from the tribunal the Respondent said that in addition to the Property he has a couple of studios and a house that he lets out, although previously he had a bigger portfolio. He said that he was aware of the concept of HMOs but thought that a property had to contain 5 or more people to qualify as an HMO.

Follow-up points

23. Mr McClenahan noted that the Respondent had not produced any correspondence from the Council confirming that the Prohibition Order was a mistake or even overstated.

24. In response, the Respondent said that the Applicants were not disadvantaged by the absence of an HMO licence and he maintained that he was a good landlord. He added that the Council had not raised any health concerns, but Mr McClenahan countered that the Prohibition Order expressly states that the non-existent outlook from the bedroom(s) resulted in an extremely oppressive atmosphere which was likely to result in psychological harm.

Relevant statutory provisions

25. 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.

	Act	***section***	***general description of offence***
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.

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
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 72

(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 … but is not so licensed.

(5) 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

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

27. The Applicants have also provided evidence that the Respondent was "a landlord" for the purposes of section 43(1) of the 2016 Act. They argue that he was a "person having control" of and a "person managing" the Property for the purposes of section 263 of the 2004 Act, that he was named as landlord in the tenancy agreement and was the beneficial owner of the Property as shown in the Land Registry title document. Whilst in fact the Land Registry title document shows the Respondent to own the Property jointly with Barbara Mannoukas this does not prevent him falling within the definition of "a landlord" for these purposes, and we accept on the basis of the Applicants' uncontested evidence on this issue that the Respondent is "a landlord" for the purposes of section 43(1) of the 2016 Act.

The defence of "reasonable excuse"

28. Under section 72(5) 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 Respondent's attention at the hearing, but the Respondent did not try, or at least did not try with any conviction, to argue that he had a complete defence under section 72(5). In any event, in our view mere ignorance of the legal obligation to obtain a licence (if indeed the Respondent was unaware of this obligation) is not sufficient reason to constitute a reasonable excuse for the purposes of section 72(5).

The offence

29. 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 HMO under section 72(1) of the 2004 Act is one of the offences listed in that table.

30. 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 Respondent 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 72(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

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

32. 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.

33. 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 in aggregate to £12,731.29 (split between the Applicants as set out in paragraph 4 above) and the tribunal has no reason to find otherwise. Therefore, the maximum amount of rent repayment that can be ordered is £12,731.29 (split as stated above).

34. 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.

35. The Upper Tribunal decision in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* is the 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.

36. 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* having been 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 possible 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.

37. 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 be cases where the landlord's good conduct or financial hardship will justify an order less than the maximum.

38. 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

39. The Respondent has not complained about the Applicants' conduct, and their unchallenged evidence on this point indicates that their conduct has been good.

40. By contrast, the Applicants have made certain complaints about the Respondent's own conduct. In particular, they have referred to what they characterise as a slow and inadequate response to the problems with flooding. The evidence indicates that the flooding/leaking problems caused issues with the electrics and led to concerns about a bowing ceiling and mould causing damage to many of the Applicants' belongings. The Respondent has sought to give the impression that he dealt with these issues very promptly, but he has not denied that the Applicants suffered the consequences described by them, and it is hard to see – for example – why their belongings would have been damaged

by mould if indeed the problems had been attended to promptly and effectively. We note the Respondent's evidence that he agreed to a partial rental refund by way of compensation, and this is of some relevance, but in our view it is outweighed by the other factors referred to above.

41. In addition, there is the Prohibition Order issue. It seems clear that the problems which led to the Prohibition Order being served would have been identified before the Applicants moved in if the Respondent had first applied for an HMO licence as legally required to. He has tried to argue that the Prohibition Order greatly overstated the problems at the Property or even that the Prohibition Order was based on a misunderstanding of the layout of the Property on the part of the Council, but he has offered no evidence to corroborate this suggestion and we do not find it credible in the absence of any such evidence. He does not appear to accept the importance of the defects to the escape route although he has now carried out the work.

42. Specifically in relation to the size of windows and the adequacy of escape routes, whilst we accept that it is difficult to form a definitive view based on copy photographs, the accommodation looks unattractive in this regard and the Respondent appears at best to have taken a minimalist approach. The Respondent asserts that he obtained all necessary approvals, but first of all he has provided no evidence to corroborate this and secondly any approvals obtained may have been limited to the previous use of the Property and may not be relevant to its use as an HMO.

43. As regards the Respondent's conduct in relation to the offence itself, whilst it is possible that he did not know the law he has not provided any compelling explanation or justification for his apparent ignorance. He has admitted that he was aware of the HMO licensing legislation and that he used to have a significant property portfolio. Given that it is a criminal offence not to obtain a licence where one is required, that he knew about the legislation in principle, that licensing of properties is directly linked to occupiers' safety and that in practice the Council placed a Prohibition Order on the Property after having inspected it, his ignorance of the details of the legislation in this particular case (if indeed he was ignorant) cannot in our view be treated as a mitigating factor. He did apply for the licence 28 days after receiving the notification, which included the Prohibition Order, from the Council, but the letter in fact requested that the application be made within 14 days and also made clear the possibility of a prosecution if he did not comply.

<u>Financial circumstances of the landlord</u>

44. On his own admission, in addition to the Property the Respondent has a couple of studios and a house that he lets out, and previously he had a

bigger portfolio. There is no evidence of any financial difficulties and therefore no reason on the evidence before us to reduce the amount of rent repayment on the basis of the Respondent's financial circumstances.

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

45. The Respondent has not been convicted of a relevant offence, and nor is it alleged that he has been convicted of any other offence.

Other factors

46. 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.

47. 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

48. The first point to emphasise is that a criminal offence has been committed. There has been much publicity about licensing of HMOs and the Respondent has offered no excuse for his failure to obtain a licence other than lack of knowledge of his obligations, and even if it is true that he did not know that the Property qualified as an HMO we consider that he should have known and/or should have made more effort to find out.

49. Secondly, on the facts of this case, the failure to apply for an HMO licence appears to have masked the existence of hazards which were serious enough to warrant the serving of a Prohibition Order by the Council. Thirdly, even if it could be argued that the Applicants did not suffer 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.

50. 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 Applicants' conduct to have been good. As for the Respondent, whilst there is no suggestion that he was a terrible landlord, nevertheless we consider that the problems identified above are serious enough – taken in aggregate – that the Respondent's overall conduct is not such as to justify a deduction. As for the Respondent's financial circumstances, the evidence before us indicates that these are not such as to justify a deduction. As regards the fact that there is no evidence of previous convictions, whilst the existence of previous convictions would clearly be an aggravating factor, there is nothing in the decision in *Vadamalayan* to suggest that the mere absence of previous convictions should be a mitigating factor which by itself should justify a deduction.

51. Therefore, applying *Vadamalayan*, the starting point is 100% of the amount of rent claimed and there are no factors in this case justifying any deductions from that starting point. It follows, therefore, that we should award the full 100%. Accordingly, we order the Respondent to repay to the Applicants the following sums:-

Lorna McGhee	£4,435.27
Aisling Sweeney	£3,890.75
Rebecca Ferrier	£4,405.27.

Cost applications

52. The Applicants have applied under paragraph 13(2) of the Tribunal Rules for an order that the Respondent reimburse their application fee of £100.00 and their hearing fee of £200.00. Paragraph 13(2) of the Tribunal Rules states that *"The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of any fee paid by the other party which has not been remitted by the Lord Chancellor"*.

53. In this case the Applicants have been wholly successful and have conducted these proceedings perfectly properly. In the circumstances it is entirely appropriate to order the Respondent to reimburse these fees, which we hereby do.

Name: Judge P Korn **Date:** 12th March 2021

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.