FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2020/0216**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**185 Woodseer Street, London E1 5HG**
Applicant	**:**	**Diana Dudaete**
Representative	**:**	**Julian Hunt of Counsel**
Respondent	**:**	**Manus Ubartas**
Representative	**:**	**Not represented and not present**
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	**:**	**19th April 2021**
Date of Decision	**:**	**4th May 2021**

DECISION

Description of hearing

This has been a remote video hearing which has been consented to by the Applicant and not objected to by the Respondent. 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 an electronic bundle, 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

(1) The tribunal orders the Respondent to repay to the Applicant by way of rent repayment the sum of £6,345.00.

(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 Applicant the application fee of £100.00 and the hearing fee of £200.00.

Introduction

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

2. The basis for the application is that the Respondent was controlling a 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 Applicant and was therefore committing an offence under section 95(1) of the 2004 Act.

3. The Applicant's claim is for repayment of rent paid during the period from 28th February 2019 to 16th December 2019 totalling £7,050.00.

Applicant's case

4. In written submissions the Applicant states that the Property was let out to the Respondent by the freeholder and the Respondent then let out individual rooms to occupiers, including to the Applicant. The Applicant was not given a written tenancy agreement at any stage but paid rent for her occupation of the relevant part of the Property.

5. The Property is situated in the Whitechapel Ward of the London Borough of Tower Hamlets. On 1st October 2016, that Ward was designated as a Ward in which properties occupied under a tenancy or licence were required to be licensed under the selective licensing regime. This designation remained in force until a date which was after

the date on which a selective licence was first applied for, namely 16th December 2019. The Applicant has included within the electronic bundle an email from the local housing authority confirming that no licence was applied for before that date.

6. The Applicant submits that the Respondent was a "person managing" the Property for the purposes of section 263(3)(a)(ii) of the 2004 Act as he took rental payments from the Applicant on a month-by-month basis in his capacity as a lessee of the Property himself. He failed to obtain a selective licence for the Property until one was applied for on 16th December 2019 and was therefore committing an offence during the period when a licence was required but had not been applied for.

7. Therefore, in the Applicant's submission, the Respondent was committing an offence under section 95(1) of the 2004 Act unless he had what amounted in law to a reasonable excuse under section 95(4). The Respondent has not put forward any 'reasonable excuse' defence, and the Applicant submits that there was no reasonable excuse.

8. The Applicant further submits that the Respondent was her "landlord" for the purposes of section 43 of the 2016 Act in that he was her immediate landlord taking rent from her on a monthly basis under an oral tenancy between him and the Applicant.

9. The Applicant has provided copy bank statements showing the rental payments made, together with a separate sheet showing how she has calculated the amount of rent repayment being sought.

10. The Applicant has provided copies of exchanges of text messages in Lithuanian, together with a certified translation into English, in which he states that he will deduct rent from the deposit, that if the Applicant is one week late in paying the rent he will have to evict her, and that he knows the property law very well. Another text message from the Respondent, addressed to another tenant Robin Guet, states that the Respondent is running a 'rent-to-rent' business.

11. Via the Companies House website, the Applicant has established that the Respondent is linked to a number of different companies and that his occupation is described as 'real estate professional'. None of his companies nor the Respondent himself is registered with the Property Ombudsman or the Property Redress Scheme.

12. In her witness statement the Applicant states that there were three people including her living permanently at the Property, with another room rented out periodically via Airbnb until the pandemic started. There were also others living in a wooden structure outside. The Property was cleaned irregularly and not very well. At a certain point the electricity and gas started to run out, leading to food going bad and

problems with the shower. The absence of electricity or gas happened on about five occasions. There was also a problem with the lock on the front door, and the Respondent agreed to change the lock but then did not do so. In addition, on separate occasions there was a break-in, and then a broken main door and a broken window on the second floor, but the Respondent did not report these incidents to the police. The Applicant's deposit was not protected by a deposit scheme, and as at the date of her witness statement she had not received it back.

13. The Respondent has taken no part in these proceedings despite having been communicated with by post and by email, including having been sent the tribunal's directions. The Applicant invites the tribunal to draw an adverse inference from the Respondent's lack of engagement with the process. The Applicant also notes that a selective licence was applied for soon after the Applicant complained about the lack of a licence and she invites the tribunal to draw the inference that the Respondent knew that he had no reason not to have a licence.

14. On the question of what deductions, if any, should be made from the maximum amount of rent repayment, the Applicant quotes from the decision of the Upper Tribunal in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* in arguing that the wording of the relevant sections of the 2016 Act is such as to show that Parliament intended rent repayment orders under the 2016 Act to serve as part of a harsh and fiercely deterrent regime and that there is no longer a requirement for a rent repayment award to be tempered by a requirement of reasonableness, in contrast with the old regime under the 2004 Act.

15. The Applicant states that the offence was committed over a considerable period of time and that the offence was aggravated by the lack of a written tenancy agreement, the failure to protect her deposit in a deposit scheme, the lack of fire doors or any lock on the Applicant's door from the end of January 2020, the text messages referred to above, the gas and electricity running out, the broken window, the fact that the Respondent styled himself as a real estate professional, the lack of registration with the Property Ombudsman or the Property Redress Scheme, the fact that the selective licensing scheme had already been in force for 3 years prior to the date on which the licence was applied for, and the Respondent's complete lack of engagement with this application.

16. At the hearing, Mr Hunt acknowledged that there have been other Upper Tribunal decisions since the one in *Vadamalayan*, including *Ficcara and others v James* (2021) UKUT 0038 (LC) and *Awad v Hooley (2021) UKUT 0055 (LC)* and that these decisions continue the analysis which began in *Vadamalayan*. He also said that the Applicant had no information as to the Respondent's financial circumstances, although he acknowledged that the Respondent had claimed in one of his text messages that he was experiencing financial difficulties.

Respondent's case

17. The Respondent has made no written submissions, did not attend and was not represented at the hearing, and has not engaged with the process at all.

Relevant statutory provisions

18. 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 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

19. First of all, based on the evidence presented to us by the Applicant as to service of proceedings and of documents, we are satisfied that the Respondent had notice of these proceedings.

20. The Applicant has provided evidence that the Property required a Part 3 licence throughout the period in respect of which she claims a rent

repayment and that it was not licensed. The Respondent has not disputed this point.

21. The Applicant has also provided evidence that the Respondent was "a landlord" for the purposes of section 43(1) of the 2016 Act. She argues that he was at the very least a "person managing" the Property under section 263(3)(a)(ii) of the 2004 Act, as he took rental payments from the Applicant on a month-by-month basis in his capacity as a lessee of the Property himself. We accept on the basis of the Applicant's uncontested evidence on this issue that the Respondent was "a landlord" during the relevant period for the purposes of section 43(1) of the 2016 Act.

The defence of "reasonable excuse"

22. 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. The burden of proof is on the person relying on the defence. The Respondent has not raised this defence, and nor has he engaged with this process in any way, and on the basis of the evidence before us we have no reason to conclude that the Respondent did have a reasonable excuse for the purposes of section 95(4).

The offence

23. 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.

24. 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 95(1), that the Property was let to the Applicant 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

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

26. 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.

27. In this case, the claim does relate to a period not exceeding 12 months during which the landlord was committing the offence. The Applicant in her evidence stated that no universal credit had been paid in respect of her rent. The Applicant's unchallenged evidence, plus supporting documentation, shows that the rent paid for that period amounts to £7,050.00 and the tribunal has no reason to find otherwise. Therefore, the maximum amount of rent repayment that can be ordered is £7,050.

28. 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.

29. The Upper Tribunal decision in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* is one of the leading authorities 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.

30. 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.

31. 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.

32. Since the decision in *Vadamalayan*, there have been other Upper Tribunal decisions in this area, notably those in *Ficcara and others v James* (2021) UKUT 0038 (LC) and *Awad v Hooley (2021) UKUT 0055 (LC)*. In *Ficcara v James*, in making his decision Martin Rodger QC stressed that whilst the maximum amount of rent was indeed the starting point the First-tier Tribunal (FTT) still had discretion to make deductions to reflect the various factors referred to in section 44(4) of the 2016 Act. He also noted that section 46(1) of the 2016 Act specifies particular circumstances in which the FTT must award 100% and must disregard the factors in section 44(4) in the absence of exceptional circumstances, and he expressed the view that a full assessment of the FTT's discretion ought to take section 46(1) into account. In addition, he stated that neither party was represented in *Vadamalayan*, that the Upper Tribunal's focus in that case was on the relevance of the amount of the landlord's profit to the amount of rent repayment and that *Vadamalayan* should not be treated as the last word on the exercise of discretion required by section 44.

33. In *Awad v Hooley*, Judge Cooke agreed with the analysis in *Ficcara v James* and said that it will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4).

34. Therefore, adopting the approach of the Upper Tribunal in the above cases 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.

<u>Conduct of the parties</u>

35. The Respondent has not complained about the Applicant's conduct and, save for some aggressive language in text messages to express her frustration in her dealings with the Respondent, we have no reason to conclude that the Applicant's conduct has been poor.

36. By contrast, the Respondent's conduct has not been good. He did not give the Applicant the protection of a written tenancy agreement and he

did not protect her deposit. There were problems with a lack of electricity and/or gas on a few separate occasions as well as problems with break-ins or attempted break-ins and damage to doors and windows, and the Applicant's uncontested evidence indicates that the Respondent did not take these issues seriously. The text exchanges between the parties also include a threat on the part of the Respondent to evict the Applicant if she was late by a week in paying her rent in the course of a disagreement about paying her final month's rent. In addition, after the licence application was made the Respondent asked tenants to refuse access to the local housing authority to inspect the Property as he had not yet fitted the specialised smoke detectors required by the local housing authority.

37. As regards the Respondent's conduct in relation to the offence itself, he describes himself as a real estate professional and yet failed to license the Property even though the relevant selective licensing regime came into force nearly 3 years before the Property was finally licensed.

Financial circumstances of the landlord

38. We have been provided with no information on the Respondent's financial circumstances. In one of his text messages the Respondent claimed that he was experiencing financial difficulties, but the Respondent has provided no information to substantiate this claim. Equally, though, there is no basis for us to conclude that the Respondent's financial circumstances are good.

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

39. 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

40. 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 *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.

41. 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

42. The first point to emphasise is that a criminal offence has been committed. There has been much publicity about licensing of houses and no mitigating factors are before us which might explain the failure to obtain a licence.

43. Secondly, the Respondent's conduct has been poor for the reasons summarised above, and he has failed to engage whatsoever with these proceedings. Thirdly, even if it could be argued that the Applicant did not suffer direct loss through the Respondent's 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.

44. In her decision in *Awad v Hooley*, Judge Cooke states that it will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4). In the present case, the Respondent has not at any time been convicted of a relevant offence and we have no basis for concluding that his financial circumstances are good. In addition, whilst the hearing bundle contains a whole section labelled "Abusive texts from Landlord" in our view much of the exchange between the Respondent and the Applicant is unremarkable. Furthermore, we do not accept that it was an aggravating factor to have applied for a licence once it had been pointed out to the Respondent that a licence was required.

45. Therefore, in our view there is some scope for a very modest deduction from the *Vadamalayan* starting point of 100% of the amount of rent claimed. We stress that it must be a modest deduction because the negative factors referred to above are serious, and the Respondent, who appears to style himself as a real estate professional, has not behaved well.

46. Taking all the circumstances together, we consider that a 10% deduction would be appropriate in this case. Accordingly, we order the Respondent to repay to the Applicant 90% of the total sum claimed. 90% of £7,050.00 equals the sum of £6,345.00.

Cost applications

47. The Applicant has applied under paragraph 13(2) of the Tribunal Rules for an order that the Respondent reimburse her application fee of £100.00 and her 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".

48. In this case the Applicant has been almost wholly successful and has conducted these proceedings perfectly properly, whereas the Respondent has not engaged with these proceedings at all. In the circumstances it is entirely appropriate to order the Respondent to reimburse these fees, which we hereby do.

Name: Judge P Korn **Date:** 4th May 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.