FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FY/HMJ/2021/0008**
Property	**:**	**48 Ladbrooke Crescent Nottingham NG6 0GQ**
Applicants	**:**	**Mr Oliver Smith Mrs Rachel Smith**
Representative	**:**	**Ms Clara Sherratt Justice for Tenants**
Respondent	**:**	**Mrs Sarah Rawson**
Representative	**:**	
Type of application	**:**	**Application by a tenant for a Rent Repayment Order under section 41(1) of the Housing and Planning Act 2016**
Tribunal members	**:**	**P Wilson BSc (Hons) LLB MRICS MCIEH CEnvH Judge P Ellis**
Date and place of hearing	**:**	**27 July 2021 CVP Remote Hearing**
Date of decision	**:**	**31 August 2021**

DECISION

Covid-19 pandemic: description of hearing

This determination included a remote video hearing which had been consented to by the parties. The form of remote hearing was Video (V: CVP REMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing/on paper. The documents referred to were contained within the parties' bundles, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal, the Tribunal directed that the hearing be held in private. The Tribunal had directed that the proceedings were to be conducted wholly as video proceedings; it was not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who were not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction was necessary to secure the proper administration of justice.

Decision

1. The Tribunal makes a Rent Repayment Order in the sum of £765 and orders that that sum of £765 be repaid by the Respondent to the Applicants by way of a Rent Repayment Order.

2. The Tribunal makes an order under Rule 13(2) that the Respondent reimburses the Applicants the applicant fee and hearing fee in the sum of £300.

Background

3. This is a decision on an application for a Rent Repayment Order under section 41 of the Housing and Planning Act 2016 ('the 2016 Act').

4. Part 3 of the Housing Act 2004 ('the 2004 Act') provides for local housing authorities to designate all or part of their district as subject to selective licensing. Section 95(1) of the 2004 provides that a person commits an offence if he is a person having control of or managing a house which is required to be licensed but is not so licensed.

5. Section 41(1) of the Housing and Planning Act 2016 ('the 2016 Act') provides that a tenant or former tenant of a property where the landlord has committed an offence under section 95(1) of the 2004 Act may apply for a Rent Repayment Order whether or not the landlord has been convicted.

6. The Respondent granted the Applicant a tenancy of 48 Ladbrooke Crescent, Nottingham NG6 0GQ ('the Property) on 7 September 2019. It was a standard assured shorthold tenancy arranged directly by the parties for a six month term at a rental of £650 per calendar month. It continued as a periodic contract until the applicants vacated the premises on the 30 August 2020. The Applicants maintained that the rental for the final three months had increased to £700 per calendar month but accepted at the hearing that the additional £50 per calendar month was an additional surety paid on a monthly basis reflecting the fact that they had, by agreement, starting keeping a dog at the Property.

7. On 1 August 2018, Nottingham City Council made an order designating the area in which the Property is located as subject to selective licensing under section 80 of the Housing Act 2004 ("the 2004 Act").

8. The Applicants applied for a rent repayment order on 13 March 2020. In their application, they sought an order for repayment of 9 months rent at £650 per month and three months rent at £700 pcm, totalling £7,950.00, the applicable period being 7 September 2019 to 30 August 2020.

9. The Tribunal issued directions on the 26 May 2021 and directed that both parties provide statements of their case and that the case was unlikely to be suitable for determination on the basis of the written statements of case. Accordingly, having regard to prevailing COVID-19 restrictions the matter was listed for an oral hearing by remote video conferencing (CVP platform) with no inspection being held. The oral hearing took place on the 27 July 2021 with the Applicants being represented by Ms Clara Sherratt of Justice for Tenants and the Respondent representing herself.

10. During the hearing, the Respondent gave oral evidence in respect of her financial circumstances which was not supported by documentary evidence. Further Directions were issued on the 29 July 2021 requiring to the Applicants to give a written statement supported by a signed statement of truth that the details of her financial circumstances given in oral evidence were accurate and true. A signed statement to this effect with support statement of truth from the Respondent was received on the 2 August 2021.

Law

11. Section 40 of the Act provides that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent which has been paid by a tenant.

12. Section 41 of the Act provides:

41 Application for rent repayment order

(1) A tenant … 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.

13. Section 43 of the Act provides:

43 Making of rent repayment order

(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.

The relevant offences are detailed in the table in section 40(3) of the Act as follows:

	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

14. Section 44 of the Act provides:

44 Amount of order: tenants

(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.

15. Before a rent repayment order is made, the Tribunal must be satisfied, beyond reasonable doubt, that a designated offence has been committed (see section 43(1) of the 2016 Act). An offence under section 95(1) of the 2004 Act is such a designated offence.

16. The relevant part of section 95 provides:

"Offences in relation to licensing of houses under this Part

(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 (see section 85(1)) but is not so licensed.

(2) A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and

(b) he fails to comply with any condition of the licence.

(3) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1) or 86(1), or

(b) an application for a licence had been duly made in respect of the house under section 87, and that notification or application was still effective (see subsection (7)).

(4) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for failing to comply with the condition, as the case may be.

17. Section 263 of the 2004 Act defines a "person having control" and a "person managing" for the purposes of section 95. It provides:

263 Meaning of "person having control" and "person managing" etc.

(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—

- *(a) receives (whether directly or through an agent or trustee) rents or other payments from—*
  - *(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and*
  - *(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or*
- *(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner*

or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

The Property

18. Because of current COVID-19 restrictions no inspection was carried out. However, from the documentation submitted and access to publicly available online street view information it may be said that the Property is a two storey, three bedroom semi-detached house built probably in the late 1950s/1960s. It has brick elevations under a duo pitch roof with concrete tile covering (first floor rooms under flat dormer roofs with felt covering).

The Evidence/Submissions by Each Party

19. The Applicants' evidence comprised an expanded statement of reasons for the application prepared by Justice for Tenants, statements by the Applicants and 15 exhibits A – P. The Applicants produced a response to the Respondent's submission on the 8 July 2021.

20. The Respondent's evidence comprised a full statement of reasons for opposing the application, six documents including a witness statement by Ms Tracy Walker (a neighbour) and 7 exhibits A - G. The Respondent produced a response on the 12 July 2021 replying to points made in the Applicants.

<u>The Applicants' Evidence</u>

21. As a preliminary point Ms Sherratt stated that the submission made by the Respondent on the 12 July 2021 should not be admitted as there was no provision for this submission in the Directions. The Tribunal pointed out that the submission had been made on the 12 July 2021 giving Justice for Tenants sufficient time to raise any objection prior to the hearing. In any event, had such an objection been made the Tribunal would still have allowed the submission to be admitted as it responded specifically to assertions relating to the formality and credibility of evidence in the Respondent's bundle. The Respondent is a litigant in person.

22. As a second preliminary point, it was agreed by both parties at the outset that the Respondent was the freehold owner of the Property, that it was necessary for the Property to be licensed throughout the duration of the tenancy as a consequence of the Nottingham City Council Selective Licensing designation and, as a matter of fact, that the Respondent had not applied for the necessary licence and no licence had been held for the relevant period. The Tribunal reminded the parties that it was still necessary for the Tribunal to consider whether any circumstances given in evidence would amount to a defence of 'reasonable excuse'.

23. As a third preliminary point, Ms Sherratt referred to the amount of £7,950.00 claimed in the application included the final three monthly payments of £700.00. In their application, the Applicants had contended that these three payments were payments of rent and accordingly capable of being included in the amount claimed. Ms Sherratt acknowledged that the additional £50.00 pcm paid in respect of the last three months of the tenancy was an additional surety paid after the Respondent agreed that the Applicants could keep a dog at the Property and further that the Applicants had asked that the additional surety sought by the Respondent be paid on a monthly basis and not in a lump sum. Accordingly, the amount claimed was £7,800.00.

24. The Applicant's submission evidenced the fact that Mrs Smith was the tenant of the Property from the 7 September 2019 until the 30 August 2020. During this period, bank statements showed that she paid a holding deposit of £200 on the 5 August 2021 and a further £900 on the 9 September 2019. The Applicants contended that this £1,100 comprised the first rental payment of £650 together with the deposit of £450 and that only the rental payment of £650 was being claimed. Regular monthly payments were then made until the 26 July 2020; eight payments of £650 and three payments of £700.

25. The Applicants contended that the initial deposit of £450 had not been protected under one of the approved tenancy deposit schemes as required by Part 6 of the Housing Act 2004. This meant that Applicants were not able to use the arbitration procedure embodied in the tenancy deposit schemes to seek to recover their deposit in full.

26. The submission by the Applicants set out some of the general policy arguments made in favour of selective licensing regimes. The submission cited in particular 'A licence to rent', a joint research project by the Chartered Institute of Environmental Health and Chartered Institute of Housing referring in particular to the finding that "*Selective licensing schemes are successful at improving housing conditions. We found numerous examples of inspections leading to very high numbers of serious hazards and defects being identified and addressed in licensed areas*". The Applicants further submitted that the Respondent had made "unlawful gains by renting a premise without the required licence and failed to ensure that the Property adhered to the strict safety conditions imposed by licensing schemes" and cited the reference in the 2018 report by Julie Rugg 'The Evolving Private Rented Sector' to the private rented sector being '.

27. The submission referred to the conduct of both parties with Justice for Tenants contrasting the conduct of the Applicants who they state paid their rent and followed correct channels when dealing with the landlord and that of the landlord who failed to both license the Property and to protect the deposit of the tenant.

28. Referring to the amount of any award, the case statement cited the decision in *Vadamalayan v Stewart & Ors [2020] UKUT 0183 (LC)* stating the decision meant that the starting point for any award must be the maximum (ie the actual paid during the relevant period). The submission also stated that paragraph 48 of *Vadamalayan* makes it clear that simply not being a professional landlord is not a factor to justify a Tribunal making any deduction from a potential rent repayment order. Furthermore, the submission states that paragraph 53 of the decision makes it clear the provisions in the 2016 Act are 'hard edged'; the paragraph states "The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances". The successful appeal by the tenant in *Chan v Bilku [2020] UKUT 289 (LC)* was also cited as authority for the proposition that an award should be at the maximum amount set by statue. These arguments were emphasised in the closing submission by Ms Sherratt, set out at paragraphs 45 - 49.

29. Both Applicants gave evidence to confirm their statements of truth but only Mr Smith gave evidence in chief. He referred to visits to the property by two separate electricians to quote in respect of the electric installation. He contended that both said work was required and said one referred to the consumer unit as being "not fit for purpose". No work was done.

30. His attention was drawn by the Tribunal to the Electrical Installation Condition Report prepared by Williams and Sons Electric Services dated the 7 March 2020 contained in the Respondent's bundle. This listed 13 items recommended for improvement (Code 3) but no items requiring either immediate action (Code 1) or urgent remedial action (Code 2). There was a reference in the EICR to the consumer unit having a combustible case; however, the requirement for new electrical installations to have consumer units with metal cases was introduced on the 1 January 2016 and does not apply retrospectively. The Tribunal pointed out that the great majority of consumer units in the country have plastic cases and this does not of itself render them 'not fit for purpose' as suggested by Mr Smith. He was also reminded that the COVID-19 pandemic had led to the imposition of severe restrictions in March 2020 in particular with visits to homes and the works in the EICR were Code 3 only. Mr Smith reiterated his comments about the visit by the electrician and contended he had lost sleep worrying about the consumer unit as there had been an electrical fire in a property he had lived in previously. There was no convincing response when he was asked as to why he had not pursued the matter with the Respondent given his stated level of concern. He also referred to a shower head that did not function, the living room windows not opening and the fact that no formal inventory was taken at the start of the tenancy.

<u>The Respondent's Evidence</u>

31. The submission by the Respondent stated that she had been approached by a friend who worked with one of the Applicants to see if she would be

interested in renting out her house as she knew that the Respondent was moving in with her then partner. She didn't approach an agent as she thought it would assist the Applicants not to have pay agent fees. She stated that her aim in renting the house out was not to make a profit but to cover her mortgage and have the house lived rather than left empty. She said that this was the first time she had rented a property out and was unaware of the need to obtain a licence and also for the deposit to be put in an approved tenancy deposit scheme. The statement accepts that this was "total naivety" on her part. She stated she wished to assist a family who had been made homeless from their previous rented property and were living apart.

32. Prior to letting, her statement says that she had the lounge redecorated by the Tenant's father (for which she paid) and also newly carpeted. The statement says that the Applicants asked if they could bring cats to the house; she was reluctant but agreed as she did not wish them to be obliged to get rid of them. She stated again that she wished to assist the family.

33. Her statement acknowledges she took a holding deposit of £200 and states that a deposit of £450 was agreed. The statement further acknowledges that the rent payments were made on time every month. Accordingly, she states that this led her to believe the Applicants did not have any concerns about the Property. She was, however, 'disappointed' to receive complaints from neighbours of the property in the last couple of months of the tenancy regarding noise level, bad language and general anti social, intimidating behaviour of the Applicants. The statement contends that the neighbours did not want her to approach the Applicants as they were afraid of repercussions.

34. During the tenancy, the Applicants approached the Respondent and asked if they could keep a dog at the Property. The statement says the Respondent was unhappy at this prospect but reluctantly agreed subject to a further surety of £350. She states that the Applicants asked if this could be paid at £50 per month and she agreed to this (making the monthly payment £700 per month).

35. The Applicants gave short notice to terminate the tenancy and the Respondent states that she accepted this as her personal circumstances had changed. On vacation of the Property, the statement says that the Respondent found damage mainly to carpets and paintwork. The damage was evidenced in photographs. The Respondent states that it was necessary for her to redecorate complete which she did herself as she could not afford a decorator, clean and replace carpets and make good damage to the lawn

36. In her oral evidence, the Respondent confirmed her statement of truth and reiterated some of the statements in her submission. She also refuted the assertion by Mr Smith that the shower head did not work and said that

it was her understanding that there was one window in the living room which did not open, not two.

37. She called her neighbour, Ms Tracy Walker of 117 Bagnall Rd, to give evidence in respect of the anti social behaviour issues. The rear garden of Ms Walker's property backs onto that of the subject Property. Ms Walker said she had lived in her property for around 30 years and generally enjoyed good relations with neighbours. However, she and her partner experienced difficulties with a family which included three children, two cats and a dog that moved into the Respondent's house. Problems included shouting, foul language, footballs being kicked against the fence and loud music including from what she thought was a PA device. She said that the problems had reached a point where she had put her property on the market but took it off sale when she realised that the family were moving out.

38. On one occasion she said that her partner went round to ask if they could turn the volume down and there was a situation where the man at the property (Mr Smith) thought her partner had come to fight although his wife (Mrs Smith) told him this was not the case. The volume was turned down.

39. In cross examination, Ms Walker was asked when she first met the Respondent and replied about 15 years ago. Asked if she had made a complaint to police, she said not because of doubt as to what they would do although she did discuss making a complaint with her partner. She did not complain to the Council as she didn't wish to cause problems for the Respondent. She acknowledged that matters did improve after her partner had visited the Property and that the noise didn't start until 5.30 pm. She said noise essentially became just acceptable. She did hear the exchange when her partner visited the Property in respect of the noise as the rear gardens of the two properties adjoin. She heard her partner say that he had not come to fight.

40. Given the evidence from Ms Walker, Mr Smith was invited to comment in particular on the incident. He said was sat in the garden and heard someone at the gate – Mr Smith said the man was screaming at him and told him to have respect for people dying. He said his wife was not present. He was just using a single Bluetooth speaker. He said because of the pandemic lockdown many neighbours regularly had two or three people in the garden. He did not remember swearing. He said there had been no other complaints other than one neighbour who had asked him to turn the volume down. He recalled there was a problem with cats fighting.

41. In cross examination, the Respondent said that the first time she had been a landlord was September 2019. She had let the Property because she had been approached by a 'friend of a friend'. She did not use an agent to keep the rent down and she anticipated that that it would not be a long term arrangement. Asked if she had undertaken research into the

rules/requirements relating to being a landlord, she said had not – she had been naïve. During cross examination, it appeared clear that formal inventory procedures had not been used at either the start or conclusion of the tenancy. The Respondent pointed out that the Applicants had vacated the Property late at night. Ms Sherratt put it to the Respondent that there was no proper evidence of the conditions at the start of the tenancy and so there was no basis for retaining part of the deposit. The Respondent was relying on the photographs taken after the tenancy had ended. It was clarified that the amount of the deposit retained was £300.

42. On the issue of repairs, the Respondent said she could not undertake repairs if she was not told about them. Ms Sherratt raised the issue of inspections with her but the Respondent drew attention to the pandemic lockdown.

43. The Respondent was asked by the Tribunal to give details of her financial circumstances if these were to be taken into account; she had not provided these details in her bundle. The Respondent gave oral evidence on her savings, current monthly outgoings and net monthly income from her employment. She confirmed that her employment was her only source of income. She further confirmed that she had to provide monthly financial support to her mother. Ms Sherratt pointed out that there was no documentary evidence to support the oral evidence. The Tribunal indicated that it would consider the issue of further directions in this regard.

Closing Submissions

44. The parties were invited to make closing submissions, with the purpose of such submissions explained for the benefit of the Respondent who is unrepresented. The Respondent declined to do so saying that she could add nothing to the submissions she had made.

45. Ms Sherratt started her closing submission by saying that it appeared clear that the breach had been accepted and that no defence of reasonable excuse had been made; it was a question of ignorance of the law only.

46. Ms Sherratt emphasised the importance of the decision in *Vadamalayan v Stewart* in respect of rent repayment order awards; the principle that landlord expenses are not relevant and the starting point for any rent repayment order should be the full rent paid during the relevant period, not the landlord's profit after deduction of expenses. *Vadamalayan* emphasised that the legislation was 'hard edged'. This methodology in terms of starting point was approved in *Chan v Bilku*. In *Ficcara v James [2021] UKUT 0038 (LC)* The Upper Tribunal confirmed that the First tier Tribunal (Property Chamber) did have discretion but she emphasised that the 2016 Act did not require an award to be reasonable or proportionate; there was a defence of reasonable excuse to provide protection for landlords.

47. Ms Sherratt then cited *Awad v Hooley [2021] UKUT 0055 (LC)* as providing a useful framework for the Tribunal to exercise discretion in respect of reducing the amount of any rent repayment order. She contended that it would need to be very good conduct by the landlord and/or very bad behaviour by the tenant to reduce an award. She said there was no evidence of good conduct by the Respondent; she had accepted the Applicants bringing a dog to the property but had demanded an increase in the deposit. Accordingly, this was not an example of good conduct and did not give a reason to reduce any award. The Applicants had observed the terms of the tenancy in particular paying the rent on time and did not contest that it was a good house to live in.

48. In terms of bad conduct by the Respondent, she had failed to license the Property and also failed to protect the deposit. She failed to carry out property inspections during the tenancy (no proactive approach) and also did not conduct proper inventory/ check in and check out procedures; a proper inventory is a basic requirement. Nonetheless, she still deducted a substantial proportionate of the deposit. Ms Sherratt acknowledged that the Respondent was a first time renter and had apologised; however, she was negligent and failed to undertake any research. She should have obtained information about the responsibilities of a landlord.

49. Having regard to all these factors, Ms Sherratt submitted to the Tribunal that there was no reason for the rent repayment order to be anything less than the maximum amount repayable. She also sought an order from the Tribunal for the Respondent to pay the £300 application and hearing fees.

Discussion

50. At the outset, the Tribunal states that is satisfied beyond reasonable doubt that the Respondent committed an offence within section 40(3) of the 2016 Act and further that it is satisfied that no defence of reasonable excuse has been made out. Accordingly, it is now for the Tribunal to determine what, if any, rent repayment order it is to make.

<u>Does the Tribunal have to make a rent repayment order?</u>

51. Once a Tribunal is satisfied that an offence within section 40(3) has been committed must a rent repayment order follow? Section 40(1) says that the Act confers power to make a rent repayment order. Section 43(1) states "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…". Section 44(1) goes on to say "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." All appear clearly to give a Tribunal discretion – a Tribunal may, or may not, make a rent repayment order, although to the knowledge of the Tribunal there are no decided cases on

this point. Neither section, however, gives any guidance or sets any criteria for the exercise of such discretion assuming it exists.

52. Assuming the Tribunal is correct in its view that it does have a discretion as to whether or not to make a rent repayment order, the Tribunal thought it helpful to bear in mind the purpose and context of the legislation, not least in the light of comments in the recent Court of Appeal decision in *Rakusen v Jepson & Ors [2021] EWCA Civ 1150* when making its decision on this issue.

53. Part 2 of the 2016 Act is headed "Rogue landlords and property agents in England" and section 13(1) says "This Part is about rogue landlords and property agents". Part 2 contains provisions which relate to banning orders and a database of rogue landlords and property agents in addition to rent repayment orders. At paragraph 38 in *Rakusen* the Court of Appeal states "On its face, therefore, the legislation confers tough new powers to address these problems" and at paragraph 39 "It is common ground that Chapter 4 is intended to deter landlords from committing the specified offences". The theme of deterrence is evident in several Upper Tribunal (Lands Chamber) decisions, for example at paragraph 31 of *Ficcara*: "… the purpose of rent repayment orders is primarily to deter landlords from committing housing offences rather than to compensate tenants who have experienced the consequences of those offences

54. The 2016 Act does not define 'rogue landlord'. The Oxford English Dictionary defines 'rogue' as 'a dishonest, unprincipled person'. The then Parliamentary Under-Secretary of State for Communities and Local Government, Baroness Williams of Trafford, responding to a written parliamentary question in 2016 asking for the Government's technical or legal definition of 'rogue landlord' prior to the enactment of the 2016 Act said:

"The term 'rogue landlord' is widely understood in the lettings industry to describe a landlord who knowingly flouts their obligations by renting out unsafe and substandard accommodation to tenants, many of whom may be vulnerable. The Housing and Planning Bill contains a number of measures to help local authorities crack down on rogue landlords and force them to either improve or leave the sector."

55. Having regard to all the evidence in this matter, the Tribunal states that it does not consider the Respondent to be a 'rogue landlord' in the ordinary meaning of the phrase and the sense apparently envisaged by and targeted by the legislation. She became an amateur landlord through a change in her personal circumstances and an approach to let the Property from a mutual friend of her and the Applicants and, given her inexperience, was both very naïve and extremely ill advised in renting out the Property without undertaking basic research into the wider obligations on landlords when renting out residential properties. She failed to license the property (and protect the deposit) through ignorance of the law, not

that that amounts to a reasonable excuse as obviously she should have taken steps to inform herself of the law. Also, whilst no inspection was undertaken because of COVID-19 restrictions, from the evidence available to it the Tribunal does not consider the accommodation to be in poor condition; there were no complaints during the tenancy and indeed the Applicants acknowledged they were happy there.

56. Again assuming the Tribunal is correct in its view that it does have a discretion as to whether or not to make a rent repayment order, given that it does not consider the Respondent to be a rogue landlord in the ordinary meaning of the phrase (which appears to be the target of the provisions), should it exercise that discretion to make no order? Given all the circumstances, the Tribunal considers that it should make a rent repayment order ; the Respondent appeared to put too much faith in what started as relationship that was informal to a degree and failed to inform herself fully of the responsibilities. The purpose of the provisions is to deter landlords from failing to meet their obligations; whilst it appears clear that the Respondent did not knowingly flout the law she nonetheless did not make the enquiries that would reasonably be expected of a new landlord renting out for the first time. It is noted that she arranged for a gas safety check to be undertaken immediately after the start of the tenancy.

57. Licensing is aimed at ensuring that landlords meet the fit and proper person test, that properties meet necessary standards and are properly managed. Had the Respondent applied for a licence, it may well be that she would have been able to obtain the same without undue difficulty but nonetheless her responsibilities in a new role as landlord (including protecting the deposit) would have been made very clear to her. The underlying purpose of the provisions is to deter rogue landlords and it seems to the Tribunal that that purpose is served if rent repayment orders are made when individual landlords breach the statutory provisions in section 40 whether they fall clearly into the category of rogue landlord (within the ordinary meaning of the phrase) or not.

<u>The amount of the rent repayment order</u>

58. Having decided to make a rent repayment order, the Tribunal then has to determine the amount in accordance with section 44 of the Act and having regard to the decisions of the Upper Tribunal (Lands Chamber) in *Vadamalayan* onwards.

59. The first matter to be determined is the maximum amount of rent that the Tribunal could order to be repaid. The relevant period is from the 7 September 2019 to the 30 August 2020, a period of 51 weeks. The rent per calendar month was £650, making the weekly rent £150 and accordingly the rent for the 51 week period is £7,650. In line with *Vadamalayan* no deductions are to be made in respect of landlord costs.

60. There has been some discussion, for example in *Ficcara* at paragraph 51, as to the meaning of the phrase in section 40(2) 'The amount must relate to rent paid during the period mentioned in the table' in particular 'must relate to'. In the absence of 'aggravating or mitigating' factors which a Tribunal could consider when considering the exercise of the discretion outlined in section 40(4), does the phrase mean the amount repayable should be the full rent? In reaching its decision in this case, the Tribunal simply thought it meant that the maximum amount repayable should be determined by reference only to rent paid during the 'period, not exceeding 12 months, during which the landlord was committing the offence' ie the relevant period and not rent paid at any other times. It does not appear, to this Tribunal at least, to give any direction as to the amount the Tribunal should award after consideration of the case, only rent to be included when determining the maximum amount repayable.

61. Section 44(4) stipulates that '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.

Previous convictions

62. Section 44(4)(c) is dealt with first. There was no evidence that the Respondent, a first time landlord, has at any time been convicted of a relevant offence.

Conduct of the landlord and the tenant

63. Ms Sherratt argued that post *Vadamalayan* and subsequent Upper Tribunal (Lands Chamber) cases, a First tier Tribunal (Property Chamber) has only very limited discretion and, further, that there would need to be 'very good' conduct on the part of a landlord and/or 'very bad' conduct on the part of a tenant to reduce an award below the maximum amount payable.

64. The Tribunal does not accept her general contention that post *Vadamalayan* and *Chan* the discretion open to a Tribunal is so severely circumscribed. The decision in *Vadamalayan* was primarily to sweep away the former convention limiting an award to a landlord's profit and was reinforced in *Chan*. In *Ficcara*, at paragraph 50 the Upper Tribunal (Lands Chamber) states:

"The concept of a "starting point" is familiar in criminal sentencing practice, but since the rent paid is also the maximum which may be ordered the difficulty with treating it as a starting point is that it may leave little room for the matters which section 44(4) obliges the FTT to

take into account, and which Parliament clearly intended should play an important role. A full assessment of the FTT's discretion as to the amount to be repaid ought also to take account of section 46(1). Where the landlord has been convicted, other than of a licensing offence, in the absence of exceptional circumstances the amount to be repaid is to be the maximum that the Tribunal has power to order, disregarding subsection (4) of section 44 or section 45."

65. The clear implication of this paragraph is that significant discretion is retained and has an important role, including it would appear as to the starting point. The paragraph notes the differential treatment of licensing offences by section 46(1); there is an obligation to award the full rent repayable with the offences of violence for securing entry, illegal eviction or harassment of occupiers, breach of a banning order and failure to comply with an improvement notice or prohibition order but not where the offence is control or management of an unlicensed house as here. Clearly offences such as violent entry, illegal eviction/harassment are egregious in nature and cause great misery and the implication is that the offence of managing an unlicensed house is viewed in a less serious light and accordingly does not warrant the automatic imposition of a requirement to repay a full years rent. An implication may be drawn that the starting point should not necessarily be the maximum repayable under section 44(2) for failure to license; the Upper Tribunal has acknowledged separately (when it heard *Rakusen* prior to the Court of Appeal hearing and in *Kowalek v Hassanein Limited [2021] UKUT 143 (LC))* that "*unlicensed accommodation may provide a perfectly satisfactory place to live, despite its irregular status, and the main object of rent repayment orders is deterrence rather than compensation."* Viewing a failure to license in a less serious light may particularly be the case with selective licensing as it is not of universal application across England indeed it frequently only applies to limited areas of a local authority district as is the case in Nottingham. It is less likely to spring to mind with a new landlord than say safety issues such as gas safety checks. Having said that, the need to be licensed can be discovered straightaway by an internet search.

66. What sort of conduct may a Tribunal take into account? It has been suggested that some forms of conduct are not relevant, for example rent arrears in *Kowalek* – the argument there was in part that it was not part of the policy underlying rent arrears that they should punish the conduct of tenants; the only relevant policy was to deter the commission of housing offences and discourage rogue landlords. The Upper Tribunal in *Kowalek* pointed out at paragraph 38 that

" Section 44(4)(a) requires the FTT to take into account the conduct of the tenant when determining the amount of an order. No limit is imposed on the type of conduct that may be considered, and no more detailed guidance is given about the significance or weight to be attributed to different types of conduct in the determination. Those questions have

been left to the FTT to resolve. I can think of no reason why relevant conduct should not include the conduct of a tenant in relation to the obligations of the tenancy."

By extension, it would seem reasonable to apply the same principle to landlords.

67. Ms Sherratt argues that the conduct of the Respondent here was bad in that she failed to license the Property, failed to protect the deposit and withheld part of the deposit even though she had not undertaken full inventory procedures at the start and end of the tenancy (especially as part of the deposit was withheld . The Tribunal does not consider the failure to license an additional issue of conduct to take into account; the fact that the proceedings are taking place at all already reflects that failure. The failure to protect the deposit and the failure to carry out inventory procedures are issues the Tribunal does take into account albeit the Tribunal is of the view that the failures were attributable to naivety and ignorance and not motivated by a desire to disadvantage the Applicants or evade responsibility. The issue of deposit protection is not a matter for the Tribunal directly.

68. With the conduct of the tenants, there is the question of the allegations of anti social behaviour and also there was damage to the Property at the end of the tenancy. Clause 2.28 of the tenancy agreement provides that the tenant agrees "Not to do, or permit to be done, in or on the Premises, any act or thing which any become a nuisance or annoyance (this includes any nuisance or annoyance caused by noise) or cause damage or inconvenience to the Landlord or the Tenants or occupiers of any nearby premises." With regard to anti social behaviour, the Tribunal is satisfied, having regard to the submissions and the evidence of Ms Walker the neighbour and Mr Smith, that on the balance of probabilities that some anti social behaviour did occur. Mr Smith himself drew attention to a second complaint by a neighbour not previously referred to in the submissions. Such behaviour would create difficulties for neighbours and for a landlord in their relationships with neighbours.

69. There is also the question of the alleged damage caused to the property found at the end of the tenancy. The Tribunal has accepted that the landlord failed to carry out proper inventory procedures; equally the photographs bearing a date taken by the Respondent after the conclusion of the tenancy do indicate that there was some damage to carpets and decorations. The Tribunal notes that the Respondent did retain £300 of the deposit (which had not been properly protected) and accordingly feels the actions of both parties can be said to cancel each other out in terms of considering this issue for the purposes of section 44(4)(a).

70. The last point to be considered is section 44(4)(b), the financial circumstances of the landlord. The Respondent did make a number of statements in her written submissions as to the difficulties a significant

financial award would make as she supports herself on a single salary working 30 hours per week but did not provide documentary evidence of her circumstances as required by the Directions. At the hearing, she gave clear oral evidence on her financial position, in particular the absence of savings, figures for her outgoings and net income and confirmation that her earnings were her sole source of income. She also pointed out that she had to provide ongoing financial support to a close relative.

71. Ms Sherratt drew attention to the lack of documentary support in respect of her financial position. The Tribunal is conscious that many people will be extremely reluctant to release very personal details relating to their financial position not least as such information could be published in a decision which is a public document available on the internet. She did give clear figures in her oral evidence and accordingly the Tribunal issued further Directions requiring her to confirm that these figures were correct and to support them with a signed statement of truth. She did this on the 2 August 2021.

72. The Respondent indicated that she made good decorations to the Property herself as she could not afford to pay a decorator and could not afford professional representation at this Tribunal. She indicated that it would be necessary for her to pay any rent repayment order made in instalments (although this is obviously not an order the Tribunal can make). The Tribunal notes that she once again lives in the Property herself and to release any equity would require the Property to be sold which, whilst perhaps appropriate with in some cases with portfolio landlords does not appear so with an owner occupier. The Tribunal is satisfied, having regard to the evidence given on her financial and personal circumstances, that making a rent repayment order of substantial value would cause her very significant hardship very probably for a number of years.

73. As set out at paragraphs 51 to 57, the Tribunal did consider whether, once satisfied to the criminal standard that a relevant office had been committed, it had discretion as to whether to make a rent repayment order or not. It further considered, having regard to the particular circumstances in this case, whether to make no award. For the reasons set out at paragraphs 56 and 57, the Tribunal decided it would be appropriate to make a rent repayment order. However, the Tribunal has decided that, looking at matters in the round, the rent repayment order should be very substantially reduced from the maximum payable.

74. The Respondent here is clearly not, in the view of the Tribunal, a 'rogue landlord'. She was naïve and has made a mistake in failing to seek a licence which has and will prove very costly. The Tribunal is certain that, in the unlikely event that she lets a property again, she will not make the same mistake again. It was the Applicants who approached the Respondent about letting the Property (albeit through a mutual friend) and there is evidence the Respondent sought to assist them when they were in difficult circumstances. The evidence here indicates that the

Property was in good condition and that the Applicants were happy with it during the 51 weeks they occupied it. The Tribunal again refers to paragraph 37 of *Kowalek*:

"A tenant in whose favour a rent repayment order is made cannot be regarded as being punished by a reduction in the amount of the order below the maximum permissible. From the point of view of the tenant, any repayment is a windfall. It is of course the case that some tenants in whose favour orders are made have been the victims of serious housing offences (harassment or unlawful eviction) or will have lived in hazardous or unpleasant conditions because of breaches of their landlords' obligations. But that will often not be the case. As the Tribunal said in Rakusen v Jepsen [2020] UKUT 298 (LC) at [64], unlicensed accommodation may provide a perfectly satisfactory place to live, despite its irregular status, and the main object of rent repayment orders is deterrence rather than compensation."

75. The Tribunal here feels that a substantially reduced award will still act as a general deterrent and is consistent with the duty of the Tribunal to give effect to overriding objective in Rule 3 of the First tier Tribunal (Property Chamber) Rules of dealing with cases fairly and justly. Whilst, unlike the 2004 Act, the new legislation may not impose any requirement that any order in favour of a tenant should be reasonable (as per *Vadamalayan* at paragraph 11) equally it does not appear to preclude an award being reasonable and proportionate either.

76. Under the previous regime, guidance on the amount of a rent repayment order could be gleaned from previous cases but *Vadamalayan* made it clear that the 2016 Act was a fresh start and neither the statue nor cases post Vadamalayan do not provide clear guidance on this issue, as acknowledged by the Upper Tribunal in *Awad v Hooley* at paragraph 40. The Tribunal notes that in *Awad* the Upper Tribunal did not disturb an award of 25% of the maximum rent repayable.

77. Having regard to all the circumstances of this case, and in particular the financial circumstances of the Respondent, the Tribunal orders the Respondent to pay the Applicants £765 by way of a rent repayment order. This figure amounts to 10% of the maximum rent repayable but nonetheless will still impose a significant financial burden in the light of the financial circumstances disclosed by the Respondent. The Tribunal further orders that the Respondent reimburse the Applicants in the sum of £300 for the application and hearing fees.

Appeal

78. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days

of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Peter Wilson
Chair
First-tier Tribunal (Property Chamber)