FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AX/HMF/2022/0121**
Property	:	**67 Orme Road, Kingston Upon Thames, Surrey KT1 3SD**
Applicants	:	**Joe Savage, Shruti Shrungarpure, Anisha Makwane, Olivia Schelde and Noah Aldous**
Representative	:	**Joe Savage (one of the Applicants)**
Respondent	:	**We Let Rooms Limited**
Representative	:	**Not represented and not present at hearing**
Type of Application	:	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	:	**Judge P Korn** **Mr S Wheeler MCIEH CEnvH**
Date of Hearing	:	**9 February 2023**
Date of Decision	:	**6 March 2023**

DECISION

Description of hearing

This was a face-to-face hearing.

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Decisions of the tribunal

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

- Joe Savage - £6,560.00
- Shruti Shrungarpure - £5,600.00
- Anisha Makwana - £4,827.20
- Olivia Schelde - £7,520.00
- Noah Aldous - £4,560.00.

(2) The tribunal also orders the Respondent to reimburse to the Applicants jointly the application fee of £100.00 and the hearing fee of £200.00 paid by them.

(3) The above sums must be paid by the Respondent to the Applicants within 21 days after the date of this determination.

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. The basis for the application is that the Respondent was controlling and/or managing a house in multiple occupation (an "**HMO**") which was required under the Housing Act 2004 ("**the 2004 Act**") to be licensed at a time when it was let to the Applicants but was not so licensed. Based on the information before the tribunal, the claim is that the Respondent was committing an offence under section 72(1) of the 2004 Act.

3. The Applicants' respective claims are for repayment of rent paid during the following periods in the following amounts:-

   - Joe Savage - from 4 May 2021 to 1 May 2022 at £700 per month for 12 months = £8,400.
   - Shruti Shrungarpure - from 29 December 2020 to 1 December 2021 at £600 per month for 12 months = £7,200.

- Anisha Makwana - from 30 June 2021 to 28 April 2022 at £580 per month for 10 months and £412 for part of month at the end = £6,212.

- Olivia Schelde - from 29 May 2021 to 1 May 2022 at £800 per month for 12 months = £9,600.

- Noah Aldous - from 29 July 2021 to 2 May 2022 at £650 per month for 9 months = £5,850.

Applicants' case

4. The Applicants state that the Property was let to the five of them and was an HMO. In the hearing bundle there is a copy letter dated 25 February 2022 from the local housing authority to Shruti Shrungarpure stating that the Property did not at that date have an HMO licence and that no application for an HMO licence had been received in respect of the Property. At the hearing Mr Savage said that the local housing authority had inspected the Property prior to sending the letter and had confirmed that an HMO licence was needed.

5. The hearing bundle contains proof of payment of rent by each Applicant in respect of the relevant periods. It also contains copies of the Applicants' tenancy agreements and copies of relevant title documents. Mr Savage said that the rent included utilities.

6. At the hearing Mr Savage said that the Respondent did not have a reasonable excuse for its failure to obtain a licence. It had several properties and therefore knew or should have known the licensing rules.

7. The Applicants also submit that the Respondent's conduct was poor during the relevant periods. It was slow to respond to issues that were raised and then did not respond effectively. There was a leak from the roof and also a leak in the bathroom on the top floor, and this caused water to drip below and caused the bathroom floor to sink. Instead of fixing problems the Respondent would deal with them superficially, for example by painting over problem areas, and would only take issues seriously at the last moment, for example when a problem became dangerous. This, said Mr Savage, is what happened with the electric system.

8. In addition, the cooker was very old, and it took the Respondent a long time to replace it. Two radiators had never worked, and the Applicants had complained about this. The Applicants were also informed by the local housing authority that some of the doors did not meet fire safety standards, and there was no fire separation between the bedrooms and the kitchen.

9. By contrast, Mr Savage said that the Applicants' own conduct had been good. The atmosphere was harmonious, nothing was broken or damaged, they did not make a noise late at night, and they paid the rent.

Respondent's case

10. The Respondent did not make any written submissions and was neither present nor represented at the hearing.

Relevant statutory provisions

11. 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) ... .

Section 263

(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.

Tribunal's analysis

12. The Applicants' uncontested evidence is that the Property was not licensed at any point during the period of the claim. However, as there were not five people in occupation during the whole of the period of the claim it is conceivable that an HMO licence was not required for the whole of that period. But the Respondent has not sought to argue this point, and it is consistent with information publicly available on the local housing authority's website that – based on the dates of occupation of the various Applicants – there were still at all times a sufficient number of occupiers that a licence would have been needed for the whole time. In the case of *Williams v Parmar (2021) UKUT 0244 (LC)*, the Upper Tribunal determined (at paragraph 31) that, whilst the criminal offence itself needed to be proved beyond reasonable doubt, once this was established the tribunal only needed to be satisfied on the balance of probabilities as to the length of the period of commission of the offence. On the basis of the uncontested evidence, we are satisfied beyond reasonable doubt that a licence was required and was not obtained for at least part of the period of claim, and we are satisfied on the balance of probabilities that a licence was required and was not obtained for the remainder of the period of claim.

13. We are also satisfied on the basis of the evidence before us that the Respondent was the landlord for the purposes of the 2016 Act and that it was a "person having control" of the Property and/or a "person

managing" the Property, in each case within the meaning of section 263 of the 2004 Act.

The defence of "reasonable excuse"

14. 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 2 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.

15. In this case, the Respondent has not argued that it had a reasonable excuse, and we see no reason to conclude that it did on the evidence before us.

The offence

16. 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.

17. 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.

Process for ascertaining the amount of rent to be ordered to be repaid

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

19. 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 housing benefit or universal credit paid in respect of rent under the tenancy during that period.

20. In this case, the Applicants' claim relates to a period not exceeding 12 months. There is no evidence that any part of the rent was covered by the payment of housing benefit and the Respondent does not dispute that the rental amounts claimed were in fact paid by the Applicants. Whilst some of the periods of claim appear to be slightly shorter than stated – for example Shruti Shrungarpure's period of claim seems to be nearer to 11 months than the 12 months for which she is claiming – the evidence before us is that the rental amounts specified in the application were the amounts paid to the Respondent. The Respondent has not disputed this or argued that any part of the rent was later refunded.

21. We are satisfied that the Applicants were in occupation for the whole of the period to which their respective rent repayment applications relate and that the Property required a licence for the whole of that period. Therefore, the maximum sums that can be awarded by way of rent repayment are the sums listed in paragraph 3 above, these being the amounts paid by each Applicant by way of rent in respect of the period of claim.

22. Under sub-section 44(4), in determining the amount of any rent repayment order 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.

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

24. 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.

25. 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.

26. 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. 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.

27. 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).

28. In *Williams v Parmar & Ors [2021] UKUT 244 (LC)*, Mr Justice Fancourt stated that the FTT had in that case taken too narrow a view of its powers under section 44 to fix the amount of the rent repayment order. There is no presumption in favour of the maximum amount of rent paid during the relevant period, and the factors that may be taken into account are not limited to those mentioned in section 44(4), although the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

29. Mr Justice Fancourt went on to state in *Williams* that the FTT should not have concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord", and so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment if what a landlord did or failed to do in committing the offence was relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise.

30. In *Hallett v Parker and others [2022] UKUT 165 (LC)*, the Upper Tribunal did not accept a submission that the fact that the local authority has decided not to prosecute the landlord should be treated as

a "credit factor" which should significantly reduce the amount to be repaid.

31. In its decision in *Acheampong v Roman and others [2022] UKUT 239 (LC)*, the Upper Tribunal recommended a four-stage approach to determining the amount to be repaid, which is paraphrased below:-

(a) ascertain the whole of the rent for the relevant period;
(b) subtract any element of that sum that represents payment by the landlord for utilities that only benefited the tenant;
(c) consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made and compared to other examples of the same type of offence; and
(d) consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

32. Adopting the *Acheampong* approach, the whole of the rent in this case means the whole of the rent paid by the Applicants out of their own resources, which is the whole of the rent in this case as no part of the rent was funded by housing benefit.

33. In this case, there is evidence of the Respondent having paid utilities and so it is appropriate for an amount to be subtracted to reflect the cost of utilities. We do not have detailed evidence of the amount spent by the Respondent on utilities, but the decision in *Acheampong* is authority for the proposition that as an expert tribunal we can and should make an assessment as to the likely cost of utilities. We estimate that over a whole year the cost of utilities for a property of this nature with this level of usage would be in the region of £1,000. This needs to be divided equally between the Applicants, i.e. £200 per year per Applicant and then needs to be reduced for those whose period of claim is less than a year. This means that for Anisha Makwana the figure should be reduced to £178 (£200 x 10.7 ÷ 12, based on the evidence before us) and for Noah Aldous it should be reduced to £150 (£200 x 75%). This reduces the starting point to the following sums:-

- Joe Savage - £8,200
- Shruti Shrungarpure - £7,000
- Anisha Makwana - £6,034
- Olivia Schelde - £9,400
- Noah Aldous - £5,700.

34. As regards the seriousness of the offence, whilst it could be argued based on the maximum criminal penalty available that there are offences covered by section 40(3) of the 2016 Act which can give rise to a greater criminal sanction, a failure to license is still a serious offence. Failure to license leads – or can lead – to significant health and safety risks for often vulnerable tenants, and sanctions for failure to license have an important deterrent effect on future offending as well as encouraging law-abiding landlords to continue to take the licensing system seriously and to inspire general public confidence in the licensing system. In addition, there has been much publicity about licensing of privately rented property, and there is an argument that good landlords who apply for and obtain a licence promptly may feel that those who fail to obtain a licence gain an unfair benefit thereby and therefore need to be heavily incentivised not to let out licensable properties without first obtaining a licence. Furthermore, even if it could be argued that the Applicants 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, this will significantly undermine the deterrence value of the legislation.

35. As for the seriousness of this offence compared to others of the same type, in our view it was reasonably serious but far from being the worst of its type. There is some patchy evidence of issues relating to fire doors, which is a significant issue by itself, but there is no other evidence of serious safety issues. The Property was not overall in bad condition, but there is credible evidence of problems with the cooker and with certain radiators, as well as leaks and some electrical issues.

36. Taking the above factors together, we consider that the starting point for this offence should be 70% of the maximum amount of rent payable.

37. As regards 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

38. There is no evidence before us of the Applicants' conduct having been anything other than good.

39. As regards the Respondent's conduct, there is the failure to obtain a licence over a considerable period of time, and no mitigating circumstances that have been brought to our attention. There is also no

evidence that the Respondent takes licensing issues seriously. The Respondent manages and lets out several properties professionally and should be held to a higher standard than someone who simply lets out a single property but otherwise is not involved in the property world. The Respondent has also completely failed to engage with these proceedings, and there is evidence that it was very unresponsive to the Applicants' legitimate concerns about the Property at various points. There are also the issues referred to in paragraph 35 above, although these should not be taken into account at this stage of the analysis in a way which would lead to double-counting.

Financial circumstances of the landlord

40. There is no evidence before us regarding the Respondent's financial circumstances.

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

41. The Respondent has not been convicted of a relevant offence.

Other factors

42. It is clear from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal "must, in particular, take into account" the specified factors. We are not persuaded that there are any other specific factors which should be taken into account in determining the amount of rent to be ordered to be repaid.

Amount to be repaid

43. The four-stage approach recommended in *Acheampong* has already been set out above. The amount arrived at by going through the first two of those stages is set out at paragraph 33 above. As for the third stage, namely the seriousness of the offence, this reduces the amount to 70% of that sum, subject to the section 44(4) factors.

44. There is nothing to deduct for the Applicants' conduct as there is no evidence before us that the Applicants' conduct was anything other than good. The Respondent's conduct has not been good for the reasons set out in paragraph 39 above. In our view, this justifies increasing the repayment award from 70% to 80% of the maximum amount payable.

45. The Respondent has not at any time been convicted of a relevant offence, but it is clear from the Upper Tribunal decision in *Hallett v*

Parker that this by itself should not be treated as a credit factor. We have no evidence regarding the Respondent's financial circumstances.

46. Therefore, taking all of the factors together, we consider that the rent repayment order should be for 80% of the maximum amount of rent payable. This gives the following final figures:-

- Joe Savage - £6,560.00
- Shruti Shrungarpure - £5,600.00
- Anisha Makwana - £4,827.20
- Olivia Schelde - £7,520.00
- Noah Aldous - £4,560.00.

Cost applications

47. The Applicants have applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for an order that the Respondent reimburse the application fee of £100.00 and the hearing fee of £200.00.

48. As the Applicants have been successful in their claim, albeit that there has been a deduction from the maximum payable, we are satisfied that it is appropriate in the circumstances to order the Respondent to reimburse these fees.

Name: Judge P Korn **Date:** 6 March 2023

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.