Case Reference	**:**	**LON/00BG/HMF/2023/0118**
Property	**:**	**First Floor Flat, 93-95 Commercial Road, London E1 1RD**
Applicants	**:**	**(1) Ms A Batchelor** **(2) Mr J Pope** **(3) Mr M Viana**
Representative	**:**	**In person**
Respondent	**:**	**MPL Estates Ltd**
Representative	**:**	**Did not appear**
Type of Application	**:**	**Application by Tenant for a Rent Repayment Order**
Tribunal Members	**:**	**Judge S Brilliant** **Mr A Fonka FCIEH CEnvH MSc**
Date and Venue of Hearing	**:**	**30 October 2023** **10 Alfred Place, London WC1E 7LR**
Date of Written Reasons	**:**	**30 October 2023**

DECISION

Determination

1. The Tribunal is satisfied beyond all reasonable doubt that, during the period commencing on 14 May 2022 and ending on 13 May 2023, First Floor Flat, 39-95 Commercial Road, London E1 1RD ("the Flat") fell within a selective licensing scheme and therefore required a selective licence.

2. The amount we order to be paid back to the Applicants by the Respondent is as follow:

(a) Ms Batchelor: £6,100;

(b) Mr Pope £6,100;

(c) Mr Viana £6,100.

The Respondent must also refund the application and hearing fees.

The licensing schemes

3. At the material time, the London Borough of Tower Hamlets had in place a selective licensing scheme. Although there was no direct evidence about this in the 54 page bundle provided by the Applicants, we were assured by Ms Batchelor that there was documentary evidence which had only been provided after the bundle had been prepared. It is also clear from the email at page 33 that the Applicants were corresponding with Tower Hamlets on the basis that they were entitled to make a rent repayment order.

4. This selective licensing scheme operates where a flat is privately rented. A licence is required: s.85(1) Housing Act 2004. Failure to obtain a licence is an offence: 95(1) Housing Act 2004. Such a failure can be penalised by a rent repayment order: s.43(3) Housing and Planning Act 2016 ("the 2016 Act").

The proceedings

5. These proceedings concern an application for a rent repayment order made on 8 June 2022 pursuant to ss.40, 41, 43 and 44 of the 2016 Act.

6. Directions for the hearing were given on 29 June and 15 August 2023.

7. At the hearing the Applicants represented themselves. The Respondent had failed to engage with these proceedings in their entirety and did not appear at the hearing.

The oral evidence

8. The Applicants had made a joint written statement. Each gave oral evidence and confirmed that the facts set out in the statement were true. The Respondent did not adduce any evidence. We sought clarification of their evidence from the Applicants where we felt it necessary, and are satisfied that they are all entirely truthful witnesses.

The Respondent

9. The Respondent is a property company. According to Companies House, the activity of the Respondent is buying and selling real estate. In this case it was actually letting out property. The managing agent is a connected company, Wisteria Management Ltd ("Wisteria").

The amount of rent

10. The relevant tenancy was for the period 14 July 2022 – 13 July 2023. The claim for repayment is for the year 14 May 2022 – 13 May 2023. The tenancy was a joint one and the rent was £1,650 per month or £19,800 per annum. The bundle provided evidence that this rent had been paid for the first 10 months of the year, but we were told and accept that all twelve months' rent was paid.

The utilities

11. The terms of the Applicants' tenancy were clear in that the landlord was responsible for gas, water and electricity charges. The Applicants confirmed that this was the case. They were asked to give the Tribunal estimates of these utilities and for gas and electricity, they provided an annual figure of about £2,414 and £2,430 respectively. These were from an online website and from experience for a standard 3 bed flat. As the Respondent had not participated in the hearing, no evidence was provided by it in respect of the actual costs of those utilities. Following the approach in Acheampong the Tribunal therefore set out to make an informed estimate.

12. In reaching its conclusions the Tribunal bore in mind the following facts which it found based on the evidence before it including from the Energy Performance Certificate (EPC) for the Flat which is publicly available. The property is a first floor flat over commercial premises comprising of three bedrooms, living space, kitchen and a bathroom. It is on the first floor of the upper two floors of a brick-built building. The EPC for the premises issued in 2021 estimates that an average household would need to spend £630 per year on heating, hot water and lighting in this property. It shows the energy rating for the premises at band 'D' and the relevant considerations are that the walls are of solid brick, as built and with no insulation (assumed). It says that it benefits from having double glazed windows, is heated by main gas from a gas central heating that also provides hot water. The Applicants' oral evidence, which the Tribunal accepted, was that each bedroom had a

radiator and there was no additional heating. There were also 2 toilets and a single shower.

13. There was quite a difference between the estimates provided by the Applicants and those provided by the EPC. Taking the limited evidence as a whole and doing its best, having regard to its own expertise, the Tribunal made the following informed estimate as to the likely cost of the. It concluded that the likely costs of gas and electricity at the prices current at the time would amount to roughly £90 per month for the whole flat. This would equate to £30 per month per occupant with three occupants present.

14. The Tribunal therefore concluded that the amount of £90 per month should be deducted from the total rent paid to take account of gas and electricity utilities. This amounts to an annual rate of £90 x 12 = £1,080.

15. The Applicants estimated the water charges to be on average £40 and £29. The Tribunal decides on the average of £35 per month. This amounts to an annual rate of £35 x 12 = £420.

16. The Tribunal therefore agrees the annual cost for the utilities to be £1,080 + £420 = £1,500. Therefore the rent for our purposes is reduced to £18,300.

The Applicants' complaints

17. The Applicants had a number of complaints about the condition of the Flat and the behaviour of the Respondent and Wisteria through its employee Adam.

18. The complaints fall under the following categories, of which the ones relating to fire precautions are the most serious:

- no smoke alarms;
- fire alarms on ceiling not working;
- fire box not working;
- no fire safety doors on the bedrooms;
- no locks to bedroom doors;
- no fire seals;
- no kitchen door;
- front door lock broken;
- radiators and curtain rails required refixing to the walls;
- gas leak required the gas being turned off for 24 hours;
- exposed wires on the boilers;
- non regulation windows, kitchen window did not work and one window opened too far;
- mould;
- no carbon dioxide alarm;
- no emergency lighting working.

19. When complaints were made to the Respondent, Wisteria failed to deal with the complaints adequately or at all. In particular, nothing was done about the fire alarms, tradesman would turn up announced, electricity was cut off on one occasion, the Applicants felt they were being harassed and an attempt was made unlawfully to terminate the tenancy. In fact, the Applicants are still living at the Flat

The statutory framework

20. s.40 of the 2016 Act states:

> (*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 … under the tenancy.14*1. Among the relevant offences is not having a selective licence when required.

21. s.43 of the 2016 Act provides that the Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt that the offence has been committed, and that where the application is made by a tenant the amount is to be determined in accordance with s.44.

22. s.44 provides:

> (*1) Where the First-tier Tribunal decides to make a rent repayment order under s.43 in favour of a tenant, the amount is to be determined in accordance with this section.*
>
> *(2) The amount must relate to [our emphasis] rent paid during the period mentioned in the table:* [The table provides for the offence in these proceedings to be *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 … .*
>
> *(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.

The case law

23. There is no requirement that a payment in favour of the tenant should be reasonable: Vadamalayan v Stewart [2020] UKUT 183 (LC) [11].

24. It is not possible to find in the 2016 Act any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied. That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything spent on the property during the relevant period. There is no reason why the landlord's costs in meeting his obligations under the lease (such as repairs) or by way of mortgage repayments should be set off against the cost of meeting his obligations to comply with the rent repayment order: Vadamalayan [14-15].

25. The context 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 s.44(4) obliges the Tribunal to take into account, and which Parliament clearly intended should play an important role (Ficcara v James [2021] UKUT 38 (LC) [50] .

26. An important decision is that of Fancourt J in Williams v Parmar [2021] UKUT 0244 (LC). This deserves to be quoted at length:

> *23. The offence of having control of or managing an unlicensed HMO is not an offence described in s. 46(3)(a) and accordingly there was no requirement in this case for the FTT to make a maximum repayment order. That section did not apply. The amount of the order to be made was governed solely by s.44 of the 2016 Act. Nevertheless, the terms of s.46 show that, in cases to which that section does not apply, there can be no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44 or s.45. The terms of s.44(3) and (4) similarly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must "relate to" the total rent paid in respect of that period.*
>
> *24. It therefore cannot be the case that the words "relate to rent paid during the period …" in s. 44(2) mean "equate to rent paid during the period …". It is clear from s. 44 itself and from s. 46 that in some cases the amount of the RRO will be less than the total amount of rent paid during the relevant period. S. 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and s. 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in*

a particular case, may be taken into account and affect the amount of the order.

25. However, the amount of the RRO must always "relate to" the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary "starting point" for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).

26. In this regard, I agree with the observations of the Deputy President of the Lands Tribunal, Judge Martin Rodger QC, in Ficcara v James. [2021] UKUT 0038 (LC), in which he explained the effect of the Tribunal's earlier decision in Vadamalayan v Stewart [2020] UKUT 0183 (LC). Vadamalayan is authority for the proposition that an RRO is not to be limited to the amount of the landlord's profit obtained by the unlawful activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in s. 44(4).

27. At [40] the learned judge repeated that there was no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s.44(4), although the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

28. At [41] the learned judge said that the circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord" [in s.44(4)(a)], so the Tribunal 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 is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. As we shall see, mitigating circumstances are relevant in these proceedings

29. The learned judge continued:

50. I reject the argument of Mr Colbey that the right approach is for a tribunal simply to consider what amount is reasonable in any given case. A tribunal should address specifically what proportion of the maximum amount of rent paid in the relevant period, or reduction from that amount, or a combination of both, is appropriate in all the circumstances, bearing in mind the purpose of the legislative provisions. A tribunal must have particular regard to the conduct of both parties (which includes the

seriousness of the offence committed), the financial circumstances of the landlord and whether the landlord has at any time been convicted of a relevant offence. The tribunal should also take into account any other factors that appear to be relevant.

51. It seems to me to be implicit in the structure of Chapter 4 of Part 2 of the 2016 Act, and in sections 44 and 46 in particular, that if a landlord has not previously been convicted of a relevant offence, and if their conduct, though serious, is less serious than many other offences of that type, or if the conduct of the tenant is reprehensible in some way, the amount of the RRO may appropriately be less than the maximum amount for an order. Whether that 1 is so and the amount of any reduction will depend on the particular facts of each case. On the other hand, the factors identified in para 3.2 of the guidance for local housing authorities are the reasons why the broader regime of RROs was introduced in the 2016 Act and will generally justify an order for repayment of at least a substantial part of the rent. This is what Judge Cooke meant when she said in Vadamalayan that the provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act, which included expressly a criterion of reasonableness. If Parliament had intended reasonableness to be the criterion under Chapter 4 of Part 2 of the 2016 Act it would have said so.

30. More recently, in Acheampong v Roman [2022] UKUT 239 (LC) it was said that the following approach will ensure consistency with the authorities:

(a) Ascertain the whole of the rent for the relevant period.

(b) Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.

(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 whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step; need to stop shifting blame

(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).

31. The judge added that step (c) above is part of what is required under section 44(4)(a). It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in

committing the offence?

Applying the law to the facts

32. Turning to s.44(4):

(i) The conduct of the Applicants is not open to criticism. The conduct of the Respondent is open to serious criticism, as set out above.

(ii) Having seen the Companies House information, we are satisfied that it is a professional property manager and landlord.

(iii) The Respondent has not at any time been convicted of a relevant offence.

33. Taking into account all of the above matters, in our judgment, the rent repayment order should require 80% of the rent to be repaid. So each Applicant must be repaid £6,100.

Conclusion

34. The Respondent must accordingly refund to the respective Applicants the sums set out in paragraph 33 above. In addition, it must refund the application and hearing fees, which total £400.

Name: Simon Brilliant Date: 30 October 2023

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. 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.