



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

V: CVPREMOTE

Case Reference : **CAM/26UL/HMF/2020/0013**

Property : **43 Bradshaws
Hatfield
Herts
AL10 9QS.**

Applicants : **James Trodd
Ema da Rocha
Kavan Green
Dominykas Navickas**

Represented by: **James Trodd (in person)**

Respondent : **Victoria Pafiti (in person)**

Type of Application : **Application for a rent repayment
order pursuant to ss.40 to 44 of the
Housing and Planning Act 2016.**

Tribunal Members : **Tribunal Judge Stephen Evans
Mr Gerard Smith MRICS FAAV**

**Date and venue of
Hearing** : **24 March 2021, remote hearing,
by cloud video platform**

Date of Decision : **31 March 2021**

DECISION

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- (1) The Tribunal determines that it shall exercise its discretion to make a rent repayment order, in terms that the Respondent shall pay within 35 days of the date of this decision:**

**£1333.33 to James Trodd;
£760.00 to Ema da Rocha;
£1600.00 to Kavan Green;
£1466.67 to Dominykas Navickas.**

- (2) The Respondent shall pay the Applicants the application fee of £100, together with the fee of £200 for the hearing, also within 35 days of the date of this decision.**

DECISION

Introduction

1. The Tribunal is asked to make a rent repayment order pursuant to section 41 of the Housing and Planning Act 2016.

Relevant law

2. The relevant statutory provisions are set out in Appendix 1 to this decision.

The Application

3. There are 4 separate applications dating between 2nd November 2020 and 24th November 2020. They each allege an offence under s.72(1) of the Housing Act 2004 on the part of the Respondent, i.e. she was a person in control of or managing a HMO which was not licensed and was required to be.
4. The Applicants claim an order on the basis they were each tenants of a room in the property, by virtue of written agreements made in July and August 2019 which granted them exclusive possession for a term at a rent; that the property consists of a 5 bedroom, 2 storey mid terraced house, with a bathroom and kitchen shared by more than 5 occupiers from 2 or more households, such that it was a HMO which required to be licensed, but was not.
5. The Applicants claim the following sums for the following periods:
 - (1) James Trodd: 1/9/19 to 31/1/20, £400 pcm (total £2000)
 - (2) Ema da Rocha: 1/9/19 to 1/12/19, £380 pcm (total £1140);

- (3) Kavan Green: 1/9/19 to 31/1/20, £480 pcm (total £2400);
- (4) Dominykas Navickas: 1/9/19 to 31/1/20, £440 pcm (total £2200).

The Issues

- 6. On 17 December 2020 directions were given in this matter by Regional Judge Wayte. The Judge identified the following issues to be determined:
 - (1) Whether the Tribunal is satisfied beyond reasonable doubt that the landlord has committed the alleged offence.
 - (2) Whether the offence related to housing that, at the time of the offence, was let to the tenant.
 - (3) Was an offence committed by the landlord in the period of 12 months ending with the date the application was made?
 - (4) What is the maximum amount that can be ordered under section 44(3) of the Act?
 - (5) What account must be taken of:
 - (a) The conduct of the landlord?
 - (b) The financial circumstances of the landlord?
 - (c) Whether the landlord has at any time being convicted of an offence?
 - (d) The conduct of the tenant?
 - (e) Any other factors?

The hearing

- 7. This was a remote hearing which was not objected to by the parties. A face-to-face hearing was not held, because it was not practicable on account of the Coronavirus pandemic and all issues could be determined in a remote hearing. On 17th December 2020, the Tribunal gave directions that any remote hearing would be likely to be conducted by telephone or video. The Tribunal confirmed the above direction that the hearing be in private and recorded on Cloud Video Platform. The documents before the Tribunal were contained in an Applicants' bundle and a Respondent's bundle, for which we are grateful.
- 8. Only Mr Trodd appeared for the Applicants. He explained the Applicants agreed that he should represent them all, because it would be better to have "one voice" at the hearing. No objection was taken by the Respondent.

9. The Tribunal reminded the parties that the standard and burden of proof lay on the Applicants to establish an offence beyond reasonable doubt, but any defence of reasonable excuse raised by the Respondent need only be proved on balance of probability.
10. The Tribunal took the opportunity to remind the Respondent that while she could not be prosecuted for any offences for which a financial penalty had been imposed, she could be prosecuted for other matters admitted by her or in respect of which the Tribunal made findings of fact; that she did not have to answer any question or make any statement which might tend to incriminate her, although the Tribunal might draw an adverse inference from her failure to answer.
11. The Respondent confirmed at the outset that she had received some legal advice, as a result of which she had prepared a written witness statement dated 10th February 2021, signed with a statement of truth, upon which she relied at the hearing. She confirmed to the Tribunal that the contents of the statement were true.
12. The Respondent further confirmed that, in accordance with her written statement, she did not seek to contest that the alleged offence had been committed, nor did she dispute that the Applicants had paid the sums alleged.
13. The Respondent indicated that she did not have questions to ask of the Applicants.
14. Mr Trodd asked some questions of the Respondent, in particular as to whether she initially intended to let to 5 persons, which she denied. She also confirmed that she was the landlord of another house, let to 4 persons only.
15. In answer to questions from the Tribunal, the Respondent admitted she received a letter from Welwyn Hatfield Council in August 2019, a questionnaire which she had filled out and returned. She did not keep a copy. She stated she did not know if she paid had full attention to the letter, but thought it was only asking her for the details of the occupants at the time (and there were fewer than 5 persons in occupation at this time).
16. The Respondent emphasised she would not have then openly informed the Council Tax Department of all 5 occupants if she had been trying to hide matters.
17. The Respondent said she could not afford to pay in cash the sums sought by the Applicants, but conceded that she did not have any documents exhibited which might tend to confirm her impecuniosity. She did, after some questioning,

admit that there was sufficient equity in both the rented houses she owned to satisfy even the maximum amount claimed by the Applicants in these proceedings.

Whether the Tribunal is satisfied beyond reasonable doubt that the landlord has committed the alleged offence?

18. This was not in dispute between the parties.
19. The Tribunal is satisfied beyond reasonable doubt that the property between 1st September 2019 and 31st January 2020 satisfied the definition of a house in multiple occupation (HMO) on the standard test, but was not licensed.
20. The Tribunal is also satisfied that the Respondent was at all material times a person having control of the premises, being in receipt of the rack rents for the Applicants' rooms.
21. The Respondent confirmed that she did not advance a defence of reasonable excuse, but in any event the Tribunal does not consider that any of the matters advanced by the Respondent orally or in writing amount to a defence of reasonable excuse for the purposes of section 72(5) of the 2004 Act.

The defence related to housing that, at the time of the offence, was let to the tenant

22. For the reasons already given under the first issue, the Tribunal finds this matter satisfied beyond reasonable doubt.

Was an offence committed by the landlord in the period of 12 months ending with the date the application was made?

23. For all the reasons given under the previous 2 issues, the Tribunal finds beyond reasonable doubt that the Respondent committed an offence under section 72(1) of the Housing Act 2004 between 1st September 2019 and 31st January 2020.
24. An offence was therefore committed on at least 1 day within the period of 12 months preceding the applications made in November 2020.

What is the maximum amount that can be ordered under section 44(3) of the 2016 Act?

25. By section 44 of the 2016 Act, the amount must relate to rent paid by the Applicants in respect of a period not exceeding 12 months during which the landlord was committing the offence: s.44(2).
26. It was an agreed fact that all the payments alleged by the Applicants were made in the sums set out in the Applications.
27. There was no evidence of receipt of universal credit to deduct from any rental payment.
28. Accordingly, the maximum amounts are those set out in paragraph 5 above.

What account must be taken of the matters in s.44(4) or any other factors?

29. The Tribunal does not find any adverse conduct issues which might impact on the level of the award. Neither the Applicants nor the Respondents alleged poor conduct against each other. Indeed, the Applicants said the Respondent had been very welcoming, that most of their issues had been addressed, and that they thought she was a very good landlord.
30. The Respondent's statement, as confirmed by her at the hearing, has been carefully considered by the Tribunal. In this, she emphasises the following:
 - (1) That she has always taken pride in being a caring and responsible landlord;
 - (2) She has never been the subject of legal proceedings before (she did initially appeal against the financial penalty imposed by the Council, but then withdrew it);
 - (3) She is a managing director of a property management company, the revenue of which has dropped by 75% during the coronavirus pandemic;
 - (4) Her father died in May 2019 and this impacted on her health, which has not always been good;
 - (5) The Respondent attempted to carry on work as normal, but found herself forgetting simple but important matters that she usually would have been organised to do;

- (6) Her failure to apply for a HMO licence “was not deliberate but was an oversight which I can put down to the stress and trauma that I was under, not only while my father was unwell, but also after his death”;
 - (7) She had informed the relevant Council Tax department that she had 5 tenants, and was not told she had to pay for a HMO licence;
 - (8) When the Property was visited on 31st January 2020 by a Council officer, the Respondent was told the property needed a licence and that she should make an application, which the Respondent did the very same day;
 - (9) On 20th February 2020 she was served notice of intent to impose a financial penalty; she responded to admit her oversight, and this led to a reduction in penalty from £2500 to £1750, which she has paid the Council in full;
 - (10) She now operates the property under a HMO licence, granted until September 2023;
 - (11) She is deeply remorseful and has accepted her guilt;
 - (12) She is currently under extreme financial pressure.
31. The Respondent confirmed that she was not convicted of an offence by the relevant Council.
32. The Respondent also said she was sorry to be appearing before the Tribunal, that she was very regretful, and that she wished she could go back and change things.
33. The Tribunal is mindful of the following recent caselaw:
34. The case of *Vadamayalan v Stewart* [2020] UKUT 183 (LC) suggests that the “obvious starting point” for a rent repayment order is the maximum rent paid (up to 12 months) in section 44(2).
35. However, there has been an explanation, if not something of a retreat, from *Vadamayalan*: see *Ficcara v James* [2021] UKUT 38 (LC) at para. 49-51 and *Awad v Hooley* [2021] UKUT 005 (LC) at paras 39-40. *Vadamayalan* “should not be treated as the last word on the exercise of the [statutory] discretion”, per Martin Rodger QC at para 51 of *Ficcara*.

36. In other words, “it will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4)”, per Judge Elizabeth Cooke at para. 40 in *Awad*.
37. Moreover, the Tribunal is not limited to the statutory factors (*Ficcara*, para. 31).
38. As to conduct (section 44(4)(a)), the fact that a landlord is not a professional landlord and had no idea they needed a licence is one of the relevant factors: see *Awad v Hooley* [2021] UKUT 005 (LC).
39. On the other hand, the rent repayment order scheme is not meant to be compensatory. It is a punitive regime: *Ficcara v James* [2021] UKUT 38 (LC) at paras. 31 and 39.
40. Considering all the relevant factual circumstances against the backcloth of the law, the Tribunal reaches its conclusions as follows:
41. The Tribunal believes the Respondent’s evidence generally. Notwithstanding that the Respondent is an experienced landlord, the Tribunal does not consider this case to be one of deliberate evasion of a responsibility to licence a HMO, in particular given:
- (a) The Respondent did not seek to hide from the Council the fact she had 5 tenancy agreements at a time when she had no licence;
 - (b) At the time she returned the form in late August 2019 to the Council stating that the property was not licensable, that information was the truth, because Mr Green and Ms Da Rocha did not take up occupation until 1st September 2019.
42. The Tribunal considers the following matters also to weigh in the Respondent’s favour as regards conduct:
- (1) That she has admitted the commission of the offence, and has not sought to evade responsibility at any time;
 - (2) That she is remorseful;
 - (3) That she has been a good landlord to the Applicants;
 - (4) That the Applicants have had the benefit of good standard accommodation;

(5) That the Respondent has received and paid a financial penalty, which was discounted by Welwyn Hatfield BC;

(6) That the property is now licensed until 2023. A similar offence is therefore unlikely to recur.

43. The Tribunal concludes that it should make a rent repayment order, but it should be discounted. We determine that the Respondent should receive a credit of 33% for all relevant matters, to be applied to the obvious starting point of the full rent paid in the relevant period.

Conclusions

44. The Tribunal determines that it shall exercise its discretion to make a rent repayment order, in terms that the Respondent shall pay to the Applicants the following sums within 35 days of the date of this decision:

- (1) To James Trodd: £1333.33;
- (2) To Ema da Rocha: £760.00;
- (3) To Kavan Green: £1600.00;
- (4) To Dominykas Navickas: £1466.67.

45. By virtue of section 47 of the Housing and Planning Act 2016, the above amounts are recoverable as a debt.

46. The Tribunal further determines that the Respondent shall pay the Applicants the fee for the issue of the application in the sum of £100, together with the fee of £200 for the hearing, also within 35 days of the date of this decision.

47. The Tribunal concludes by thanking the parties for their succinct, measured and civil submissions at the hearing.

Judge: _____
S J Evans

Date:
31/3/21

ANNEX – RIGHTS OF APPEAL

1. 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 at the Regional Office which has been dealing with the case.
2. 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.
3. If the application is not made within the 28-day time limit, such application must include a request to 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.
4. 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.

Appendix 1

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

Offences in relation to licensing of HMOs

(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 (see section 61(1)) but is not so licensed.

(2)...

(3)...

(4) 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

- (b) an application for a licence had been duly made in respect of the house under section 63, and that notification or application was still effective (see subsection (8)).
- (5) In proceedings against a person for an offence under subsection (1), (2) or (3) 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 permitting the person to occupy the house, or
 - (c) for failing to comply with the condition, as the case may be.

254 Meaning of “house in multiple occupation

(1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if– (a) it meets the conditions in subsection (2) (“the standard test”); (b) it meets the conditions in subsection (3) (“the self-contained flat test”); (c) it meets the conditions in subsection (4) (“the converted building test”); (d) an HMO declaration is in force in respect of it under section 255; or (e) it is a converted block of flats to which section 257 applies.

(2) A building or a part of a building meets the **standard test** if–

- (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
- (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
- (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
- (d) their occupation of the living accommodation constitutes the only use of that accommodation;
- (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
- (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

(3) A part of a building meets the **self-contained flat test** if–

- (a) it consists of a self-contained flat; and
- (b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat).

(4) A building or a part of a building meets the **converted building test** if–

- (a) it is a converted building;
- (b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);

(c) the living accommodation is occupied by persons who do not form a single household (see section 258);

(d) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(e) their occupation of the living accommodation constitutes the only use of that accommodation; and

(f) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.

(8) In this section— “basic amenities” means— (a) a toilet, (b) personal washing facilities, or (c) cooking facilities;

“converted building” means a building or part of a building consisting of living accommodation in which one or more units of such accommodation have been created since the building or part was constructed;

“enactment” includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30));

“self-contained flat” means a separate set of premises (whether or not on the same floor)— (a) which forms part of a building; (b) either the whole or a material part of which lies above or below some other part of the building; and (c) in which all three basic amenities are available for the exclusive use of its occupants.

S.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.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018

“4. An HMO is of a prescribed description for the purpose of section 55(2)(a) of the [Housing] Act [2004] if it—

(a) is occupied by five or more persons;

(b) is occupied by persons living in two or more separate households;
and

(c) meets—

(i) the standard test under section 254(2) of the Act;

(ii) the self-contained flat test under section 254(3) of the Act but is not a purpose-built flat situated in a block comprising three or more self-contained flats; or

(iii) the converted building test under section 254(4) of the Act.”