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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AN/HMF/2020/0051** **FVH Remote**
Property	**:**	**50 Crabtree Lane, London, SW6 6LW**
Applicants	**:**	**1. Evan Fotopoulos** **2. Deniz Ahmet Derici** **3. Elisa Soraya Emch**
Representative	**:**	**Flat Justice Community Interest Company**
Respondent	**:**	**1. Yilin Xiao (1)** **2. Equinox Re Limited (2)**
Representative	**:**	**-**
Type of application	**:**	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal members	**:**	**Judge Professor Robert Abbey** **Mr S Wheeler MCIEH CEnvH; Professional Member**
Venue and date of hearing	**:**	**Video hearing on 08 January 2021**
Date of decision	**:**	**12 January 2021**

DECISION

Decision of the tribunal

(1) The tribunal finds that a rent repayment order be made in the sum of £13,995 in favour of the applicants, the tribunal being satisfied beyond reasonable doubt that the first and second respondents have committed an offence pursuant to s.72(1) of the Housing Act 2004, namely that a

person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part two of the 2004 Act but is not so licensed. Under section 99 of the 2004 Act "house" means a building or part of a building consisting of one or more dwellings. The first respondent must pay£13992 of the rent repayment order and the second respondent must pay £3.

Reasons for the tribunal's decision

Introduction

1. The applicant made an application for a rent repayment order pursuant to the terms of s.41 of the Housing and Planning Act 2016 in respect of a property known as **50 Crabtree Lane, London, SW6 6LW**. This property is a five-bedroom house in the London Borough of Hammersmith and Fulham let to multiple occupants on separate tenancy agreements expressed on the face of the documents to be licences.

2. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the tribunal to proceed with this determination and also because of the restrictions and regulations arising out of the Covid-19 pandemic.

3. The hearing of the application took place on Friday 8 January 2021. All three parties appeared being the applicants, all with representation as more particularly described above. Neither respondent appeared nor were there any representatives present on their behalf. The Tribunal decided to proceed in their absence in accordance with Rule 34 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 S.I. 2013 No. 1169 (L. 8) as the Tribunal was satisfied that the parties had been notified of the hearing or that reasonable steps had been taken to notify the parties of the hearing; and the Tribunal considered that it was in the interests of justice to proceed with the hearing. The Applicants attended with their representative and were ready to proceed with their application.

4. Rights of appeal are set out in the annex to this decision and relevant legislation is set out in an appendix to this decision.

5. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as FVHREMOTE - use for a hearing that is held entirely on the Ministry of Justice Full Video Hearing platform with all participants joining from outside the court. A face to face hearing was not held because it was not possible due to the Covid -19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to are in a bundle of many pages, the contents of which we have

recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions. The bundle was supplemented by some additional documents submitted in the week prior to the hearing.

6. The first respondent is the owner of the property as listed on its registered title. The second respondent company is named as 'licensor' on the licences or tenancy agreements signed by the applicants, and appears to act as agent for the first respondent, managing the property on his behalf as his listed residence is abroad.

Background and the law

7. An HMO (Housing in Multiple Occupation) is when you have a minimum of 3 people in 2 households living together who are sharing amenities. There are a range of different types of accommodation that could be an HMO, depending on how many people are living there and what the living arrangements are. As a general rule, where there are three or more tenants in a property who make up more than one household with shared toilet, bathroom or kitchen facilities, this could be an HMO. A large HMO exists where there are at least 5 tenants forming more than one household sharing the facilitates mentioned above.

8. Section 41 of the Housing and Planning Act 2016 allows tenants to apply to the Tribunal for a rent repayment order. The Tribunal must be satisfied beyond reasonable doubt that a person/company has committed an offence described in Part two of the Act and in that regard section 72 of the 2004 Act states: -

> *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.*

9. Under section 41 (2) (a) and (b) of the 2016 Act 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. The application to the Tribunal was made on 13 March 2020 but not actually received until 7 April 2020. From the evidence before it the Tribunal was satisfied that the alleged offence occurred in the period of 12 months ending with the day on which the application was made to the Tribunal.

10. The total value of the application is £13,995, and that breaks down for Mr. Evangelos Fotopoulos – occupant 06/04/2019 to 05/09/2019 - 5 months' rent @ £910 per month = £4,550; Mr. Deniz Ahmet Derici – occupant 27/6/2019 to 28/09/2019: 2 months' rent @ £1,105 per month + £605 = £2,815; Ms. Elisa Soraya Emch – occupant 18/12/2018 to 23/06/2019 – 6 months' rent @ £1,105 per month = £6,630. The applicants also supplied to the Tribunal proof of payment shown in the trial bundle. The Tribunal were satisfied that these payments had indeed be made.

11. It was noted that the local authority confirmed by email that no licence in respect of the property had been applied for. The Private Sector Licensing Officer wrote "*I can confirm that your landlord will definitely require a Licence… we will be placing him on our enforcement list*". The witness statement of Gianluca Leone, a director of the second respondent confirms that an HMO licence was required for the property, and that there was a failure on the part of the respondents to secure such a licence. At paragraph 4 of his statement, he states that "*Equinox is and was fully aware of the need to obtain licences for Houses in Multiple Occupation and it is not clear to me what happened on this occasion*." This statement clearly amounts to an acceptance on the part of the second respondent (via its director) that an HMO licence should have been sought for the property. Accordingly, there was no issue before the tribunal as to the need for a licence.

12. The property is potentially subject to several licensing schemes but the Tribunal were satisfied that the following applied. First the Mandatory Licensing Scheme. This is the scheme under the Housing Act 2004, defined at s.254 of that Act as applicable to all HMOs in which five occupants from more than one household share amenities. The scheme applies across England. A failure to licence a property as required by this scheme is an offence under s.72(1) of the Housing Act 2004.The property was required to be licensed under this scheme as it housed five occupants from more than one household. Each of the applicants confirms in their sworn witness statements that they shared the Subject Property with four other persons, none of whom were members of the same household. The presence of five persons with five separate households clearly meets the requirements of the Mandatory Licensing Scheme; the property was accordingly required to be licensed under this scheme.

13. Secondly, and in the alternative, the Additional Licensing Scheme was established by the London Borough of Hammersmith & Fulham, as defined by the designation of 13/12/2016 being applicable to all HMOs with three or more occupants from two or more households. The scheme applies across the borough. A failure to license a property as required by this scheme is an offence under s.72(1) of the Housing Act 2004. The property was required to be licensed under this scheme as it housed three or more occupants from more than one household. Each of the applicants confirms in their sworn witness statements that they were resident at the property at least partly contemporaneously with one

another, as well as two other persons. The applicants each confirm they did not share a household with any of the other applicants, nor the other persons in occupation at the same time. The presence of at least three persons with at least three separate households clearly meets the requirements of the Additional Licensing Scheme; the property was accordingly required to be licensed under this scheme.

14. Notwithstanding the two applicable schemes mentioned above, it is also worth noting that there is also a selective licensing scheme established by the London Borough of Hammersmith & Fulham, from 2016 applicable to privately rented properties in certain streets within the borough. The scheme applies to Crabtree Lane, in which the property is located. A failure to licence a property as required by this scheme is an offence under s.95(1) of the Housing Act 2004. In the alternative, the property was required to be licensed under this scheme.

The Offence

15. There being a house as defined by statute, then a person commits an offence if he is a person having control of or managing a house which is required to be licensed under Part two of the Act but is not so licensed. The first respondent and the second respondent have therefore committed an offence under section 72 (1) of the Housing Act 2004 (as amended by the Housing and Planning Act 2016) as the first respondent was in control of an unlicensed property and the second respondent was a person managing an unlicensed property. The Tribunal relies upon the Upper Tribunal decision in the case of *Goldsbrough and Swart v CA Property Management Ltd and Gardner* [2019] UKUT 311(LC) in making this finding.

16. In the Upper Tribunal Judge Elizabeth Cooke found that where the alleged offence is controlling or managing an unlicensed HMO, an RRO can only be made against a landlord of the property in question. While a managing agent cannot be a landlord, she concluded that the definition of a landlord, for the purposes of the 2016 Act, included both the tenants' immediate landlord and the freehold owners of the property, in circumstances where the freehold owners had granted a lease of the property to the tenants' immediate landlord, who then entered into tenancy agreements with the tenants. This is precisely the situation that arose in this case and therefore the case applies thus enabling the Tribunal to make a decision that affects both respondents.

17. To assist I quote some paragraphs of Judge Cooke's decision: -

> *"31. I also agree that a managing agent that does not have a lease of the property cannot be a landlord. If that is what the government guidance, quoted at paragraph 23 above, is intended to say then it is correct. But if it is intended to say that an intermediate lessee, who is the landlord of the applicants but*

the sub-tenant of the freeholders (or indeed of another superior lessee) cannot be subject to an RRO than that would appear to be incorrect and misleading. It would be very helpful for that guidance to be clarified.

32. Where I part company with the FTT is in its restriction of liability to an RRO to "the landlord" of the occupier. That is not what the 2016 Act says. The only conditions that it sets for liability to an RRO are, first, that the person is "a landlord" and second that that person has committed one of the offences. Certainly the person must be a landlord of the property where the tenant lived; section 41(2)(a) requires that the offence relates to housing that, at the time of the offence, was let to the tenant. It does not say that the person must be the immediate landlord of the occupier; if that was what was meant, the statue would have said so.

35. If the only possible respondent were the landlord who held the immediate reversion to the tenant, it would be possible for a freeholder to set up a situation where a rent repayment order could not be made, by first granting a lease of the property to a company that is not in control of, nor managing, the property and is ineligible for an HMO licence, and then having that company grant the residential tenancies…."

18. In the light of the above, the Tribunal took time to carefully consider the evidence regarding the absence of a licence but came to the inescapable conclusion that none had been issued by the Council. Therefore, the Tribunal concluded that this was an unlicensed property in relation to this application. There were no submissions or other evidence of a reasonable excuse for not having applied for a licence. Accordingly, the tribunal had no alternative other than to find that both the respondents were guilty of the criminal offence contrary to the Housing Act 2004.

The tribunal's determination

19. The amount of the rent repayment order was extracted from the amount of rent paid by the applicants during the period of occupancy as set out within the trial bundle where the rent actually paid was stated to be £13995. This represents the maximum sum, (£100%), that might form the amount of a rent repayment order.

20. In deciding the amount of the rent repayment order, the Tribunal was mindful of the guidance to be found in the case of *Parker v Waller and others* [2012] UKUT 301 (LC) as to what should the Tribunal consider an appropriate order given the circumstances of the claim. Amongst other factors the tribunal should be mindful of the length of time that an offence was being committed and the culpability of the landlord is relevant; a professional landlord is expected to know better. From the

evidence before it provided by the applicants the Tribunal took the view that the first respondent was not a professional landlord. As was stated in paragraph 26 of *Parker* "*Paragraph (d) requires the RPT to take account of the conduct and financial circumstances of the landlord. The circumstances in which the offence was committed are always likely to be material. A deliberate flouting of the requirement to register will obviously merit a larger RRO than instances of inadvertence – although all HMO landlords ought to know the law. A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional.*"

21. Having said that, when considering the amount of a rent repayment order the starting point that the Tribunal is governed by is s.44(4), which states that that the Tribunal must "in particular, take into account" three express matters, namely:

> (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 Tribunal must therefore consider the conduct of the parties and the financial circumstances of the respondent. Express matter (c) was not considered as no such convictions apply so far as the two respondents are concerned.

22. The Tribunal were mindful of the recent Upper Tribunal decision in *Vadamalayan v Stewart and Others* [2020] UKUT 183 (LC). In particular Judge Elizabeth Cooke said: -

> *12. That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent.*
>
> *14. It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament's intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord's profits was – as the President acknowledged at his paragraph 26 – not the only purpose of a rent repayment order even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in*

the current statute any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied.

53. The provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in Parker v Waller. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances. There may be a case, as I said at paragraph 15 above, for deducting the cost of utilities if the landlord pays for them out of the rent (which was not the case here). But there is no justification for deducting other expenditure. The appellant incurred costs for his own benefit, in order to get a rental income from the property; most were incurred in performance of the appellant's own obligations as landlord. The respondents as tenants were entitled to the items set out in the appellant's schedule of expenditure (insofar as they do relate to the property; in the circumstances I do not have to resolve disputes of fact for example about item 8). The respondents are entitled to a rent repayment order. There is no reason to deduct what the appellant spent in meeting one obligation from what he has to pay to meet the other.

54. The appellant also wants to deduct what he had to pay by way of mortgage payments to the TSB and interest on another loan which has not been shown to relate to the property. The FTT refused to deduct the mortgage payments because the mortgage was taken out in 2016 whereas the property was purchased in 2014, so that the mortgage did not appear to have funded the purchase. The appellant says that the property was bought some years before that and that this was a re-mortgage. He did not produce evidence about that to the FTT and he could have done so. More importantly, what a landlord pays by way of mortgage repayments – whether capital or, as in this case, interest only – is an investment in the landlord's own property and it is difficult to see why the tenant should fund that investment by way of a deduction from a rent repayment order. The other loan has not been shown to relate to the property and I regard it as irrelevant, as did the FTT.

23. In the light of the above when considering financial circumstances, the Tribunal should not consider profit, mortgage payments or reasonableness. So, the Tribunal did not take account of any of these points when coming to the amount of the rent repayment order. The tribunal could not see any justification for a deduction for any outgoing. The conduct of the respondents did not seem to justify this allowance. The second respondent mentioned in a written submission sent in late to the Tribunal that there was only a minor profit to be made in this regard.

24. However, as the applicants observed "quantum of any award is not related to the profit of the Respondent, following *Vadamalayan*. The only expense deductions that may be allowed, at the discretion of the Tribunal, are for utilities paid on behalf of the tenants by the landlord. We argue that council tax is a fixed cost of the landlord, also payable when the property is empty. It is not "consumed at a rate the tenant chooses" (*Vadamalayan*, §16), as per utilities and should not be an allowable expense." The Tribunal agrees with this assessment of the relevance of this outgoing. Details of other expenses were submitted but in the absence any witness before the Tribunal to give evidence on behalf of the respondents, the Tribunal was unable to take into account these items.

25. The Tribunal then turned to the matter of the conduct of the parties. The landlord should have licenced this property but did not. This is a significant factor even though the director of the second respondent said he was not clear what happened on this occasion in relation to this property. However, it still remains the case that this property should have been licenced and ignorance of the law/facts does not assist the second respondent, it remains liable as does the first respondent.

26. The applicants asserted that: -

> "*The landlord's wider conduct shows a general disregard for HMO licensing regulations, including by failing to display details of the landlord or managing agent's details within the Subject Property and failing to conduct a Fire Risk Assessment. This and other conduct is related to the HMO licensing offence as demonstrating a general disregard for the particular statutory requirements relating to HMOs*."

The Tribunal agrees with this assessment of the conduct of the respondents.

27. Furthermore, there was a distinct lack of engagement with the Tribunal on the part of both respondents. The failure of both respondents to comply with the directions of the Tribunal is aggravating conduct. The first respondent has made no response at any stage in the process, despite repeated valid service of documents upon him. The second respondents have only appointed solicitors at a very late stage, after the deadline directed by the tribunal for submission of the Respondent's bundle and although submissions in writing were made no one appeared at the hearing.

28. Consequently, while the Tribunal started at the 100% level of the rent it thought that there were no reductions that might be appropriate, proportionate or indeed necessary to take account of the factors in the Act. Therefore, the Tribunal decided particularly in the light of the absence of a licence that there should be no reduction from the

maximum figure of £13995 giving a final figure of 100% of the claim. This figure represents the Tribunals overall view of the circumstances that determined the amount of the rent repayment order.

29. One late submission by the second respondent made just before the date for the hearing indicated that the second respondent was experiencing financial difficulties. The Tribunal were informed that steps were being considered to take action because of the potential insolvency of the company. Accompanying the submission was a copy letter from Carter Clark, Insolvency Practitioners who wrote that ""*It is clear at this point that the general body of creditors would be unlikely to receive any return if the Company were placed into liquidation…*". In the light of this at the hearing the representative of the applicants asked that the Order be apportioned so that only one pound was set against the second respondent and the remainder against the first. This was requested because "*This is to reflect the poor prospects of recovering any part of the award from R2 when it has entered into receivership*". The Tribunal took this request into account when making its rent repayment order.

30. Consequently, the Tribunal concluded that a rent repayment order be made in the sum of £13995 the tribunal being satisfied beyond reasonable doubt that the first and second respondents had both committed an offence pursuant to s.72 of the Housing Act 2004, namely that a person commits an offence if he is a person/company having control of or managing a house which is required to be licensed under Part two of the 2004 Act but is not so licensed.

31. The rent repayment monies are to be paid as to £13992 by the first respondent and £3 by the second respondent to the applicants within 28 days of the date of this decision. The sums payable by the first respondent shall be £4549 payable to the first applicant, £2814 to the second applicant and £6629 to the third applicant. The second respondent is to pay £1 each to the three applicants

32. Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 N0 1169 (L.8) does allow for the refund of Tribunal fees. Rule 13(2) states that: -

> "*The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.*"

33. There is no requirement of unreasonableness in this regard. Therefore, in this case the Tribunal considers it appropriate and proportionate in the light of the determinations set out above that the first respondent refund the Applicants' Tribunal fee payments of £300.

34. In the circumstances the tribunal determines that there be an order for the refund of the application fee in the sum of £300 pursuant to Rule 13(2).

Name:	Judge Professor Robert Abbey	Date:	12 January 2021

Annex

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

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) A person commits an offence if—

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3)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 67(5), and

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

(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.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine .

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either—

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are—

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

s41 Housing and Planning Act 2016

Application for rent repayment order

(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.

(3)A local housing authority may apply for a rent repayment order only if—

(a)the offence relates to housing in the authority's area, and

(b)the authority has complied with section 42.

(4)In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

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)....
(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.