FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/HMG/2020/0009**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**27 Baylis Road, London SE1 7AY**
Applicant	**:**	**Mr Sam Giles**
Representative	**:**	**In person**
Respondent	**:**	**European Ergonomics Co. BV**
Representative	**:**	**Mr Alan Saunders**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge P Korn** **Judge R Percival** **Mr M Cairns MCIEH**
Date of Hearing	**:**	**28th June 2021**
Date of Decision	**:**	**15th July 2021**

DECISION

Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in electronic bundles, the contents of which we have noted. The decision made is set out below under the heading "Decision of the tribunal".

Decision of the tribunal

The tribunal orders the Respondent to repay to the Applicant by way of rent repayment the sum of £3,639.85.

Introduction

1. The Applicant has 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 a house in multiple occupation ("**HMO**") which was required under Part 2 of the Housing Act 2004 ("**the 2004 Act**") to be licensed at a time when it was let to the Applicant but was not so licensed, and that it was therefore committing an offence under section 72(1) of the 2004 Act.

3. The Applicant's claim is for repayment of rent paid during the period from 1st April 2019 to 7th January 2020. At the hearing it was agreed between the parties, after some initial disagreement and confusion, that the total rent paid in respect of this period and therefore the maximum possible rent repayment award was £7,279.70.

4. The parties' written submissions contain many detailed complaints about the other party. These complaints have been considered, but this determination only records those considered to be the most salient, plausible or worthy of comment.

Applicant's case

5. In written submissions the Applicant states that the Respondent knowingly rented out the Property to five tenants and that, for financial gain, the Respondent decided not to obtain an HMO licence for the Property.

6. The Property was visited by Ms C Bennet, an environmental officer for the Council, and she also visited the two houses on either side which were in the same ownership. She concluded that all three properties were being rented out without the correct licences in place and required

substantial updates in safety systems. Mr Saunders was advised that the Respondent was in breach of the law, and as a result of the Applicant's decision to take legal action the Respondent subsequently decided to apply for the necessary licences. The Applicant has provided a copy of a letter from Ms Bennet summarising the results of her inspection.

7. At the hearing the Applicant said that the Respondent had to spend a lot of money on the Property to make it fit to be licensed.

8. Also at the hearing, the Applicant noted that Mr Saunders had originally claimed to have taken the initiative by approaching the Council to enquire about obtaining a licence, but this was not true. The Applicant also complained about the Respondent having sought personal information about him.

9. The Applicant did not have a written tenancy agreement and paid his rent to the other tenants, but at the hearing he said that he was a tenant of the Respondent and not a subtenant. In response to a request for clarification by the tribunal, he said that other tenants were paying their rent to a single tenant as well and then that tenant was accounting for the whole of the rent to the Respondent.

10. The Respondent took no responsibility for the Property, resulting in a court hearing to resolve issues regarding deposits that should have been managed by the Respondent.

11. The Applicant said at the hearing that the other tenants had not joined in this application because they were happy with the living arrangements and were worried about the consequences for them in getting involved with a rent repayment application against their landlord. Also at the hearing, the Applicant took the tribunal through his evidence of having paid rent and explained what he had agreed with the tenant who replaced him – Mr Notsuke – regarding payments to be made by Mr Notsuke to him.

12. The Applicant's bedroom did not have washing facilities (either shower or bath) and therefore he had to ask permission to access the en-suite facilities belonging to the other tenants when possible, often in the early hours of the morning due to the nature of his work at the time.

Respondent's case

13. In written submissions the Respondent states that the Applicant's room was intended by the Respondent to be used as an additional living room, not as a bedroom. It was the other tenants who had decided to use it as a fifth bedroom. The room itself is the best room in the house and occupies the entire top floor and has two balconies. As regards the

Applicant's complaint about the room not having washing facilities, the Applicant knew this when he took the room.

14. The Respondent 'acquiesced' in the letting out of the room in question to the Applicant but states that it did not benefit financially from this as it still received the same amount of rent.

15. The Respondent takes issue with the Applicant's initial calculations as to the amount of rent paid by him, and the Respondent claims that the Applicant has included amounts reimbursed to him by Mr Notsuke and that this is a serious attempt to defraud the Respondent.

16. The Respondent asserts in written submissions that the Applicant was a subtenant, not a direct tenant of the Respondent, and that the Applicant paid cash. The Respondent also challenges the implication that there was a problem with the return of the Applicant's deposit.

17. The Respondent accepts that it was in control of, and managing, an unlicensed HMO but states in written submissions that it relied on Hamptons International to advise it of any additional actions that were needed as a result of new legislation but that Hamptons failed to alert the Respondent to the need for an HMO licence until 17th January 2020.

18. During a meeting with Ms Bennet of the Council, Mr Saunders was told by her that the Property was of a very high standard. The Respondent has also provided a detailed chronology as to what it believes happened as regards the dealings with the Council and applying for the HMO licence, although this chronology was revised following receipt of written submissions from the Applicant.

19. The Respondent states that on learning that the Property needed an HMO licence it could have "chosen to enforce the lease terms to revert to four tenants" but instead chose to incur costs of between £30,000 and £35,000 to comply with the Council's requirements for the Property and the two neighbouring properties.

20. In relation to the Applicant's complaint that the Respondent sought personal information about him, the Respondent states that it was in possession of that information not because of any request but because the Applicant had volunteered the information.

21. The Respondent comments on the handover from Mr Notsuke and states that Mr Notsuke had contacted Mr Saunders because he was extremely concerned that there was no written tenancy agreement or security for the deposit that the Applicant had asked him to pay. The Respondent goes on to state that the Applicant forged a deed of assignment of the tenancy agreement entered into by the other tenants

and purported to guarantee Mr Notsuke's deposit in his desperation to persuade Mr Notsuke to replace him as the fifth tenant. At the hearing Mr Saunders reiterated that in his view the deed of assignment was not a genuine document, and also that it included a provision for a deposit to be payable by Mr Notsuke to the Applicant. The Applicant was not a party to the original tenancy agreement, and the deed of assignment was created to delude Mr Notsuke into believing that he was getting some security.

22. At the hearing Mr Saunders accepted that he had got the chronology wrong and that Ms Bennet from the Council had contacted him (rather than the other way round). However, he maintained that he had received information about licensing from the Respondent's agents at around the same time as he was contacted by Ms Bennet and was determined to put things right as soon as possible.

23. Mr Saunders said that previously he knew nothing about HMO legislation despite the fact that the Respondent owns a number of residential and commercial properties. He and the Respondent invest in property as an investment business and they rely on Hamptons International for information.

24. On being asked specifically by the tribunal about this point, Mr Saunders said that he was not claiming that the Respondent had a reasonable excuse for failing to have a licence as a complete defence under section 72(5) of the 2004 Act to the offence contained in section 72(1).

Follow-up comments at hearing

25. The Applicant accepted that it looked as though he had forged the deed of assignment. The Respondent said that the purpose of the deed of assignment was to persuade Mr Notsuke to pay £1,800 to the Applicant and that Mr Notsuke had contacted him because he was worried about the authenticity of the document.

Relevant statutory provisions

26. 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) … .

Tribunal's analysis

27. The Applicant has provided evidence that the Property required a Part 2 licence throughout the period in respect of which he claims a rent repayment and that it was not licensed. The Respondent has accepted this point.

28. The Respondent also accepts that it had control of and/or was managing the Property throughout the relevant period. There is a factual dispute between the parties as to whether the Respondent was the Applicant's direct landlord, although the Respondent does not try to suggest that anything turns on this point for the purposes of determining whether the tribunal has jurisdiction to make a rent repayment order against the Respondent.

29. In any event, the Respondent seems to accept, and it does appear to be the case, that the Respondent was at the very least the Applicant's superior landlord if not his direct landlord. On this point, the decision of the Upper Tribunal in *Rakusen v Jepsen (2020) UKUT 0298 (LC)* is authority for the proposition that a rent repayment order can be made against a superior landlord on an application by a subtenant, the superior landlord being "a landlord" for the purposes of section 43(1) of the 2016 Act.

30. We therefore accept that the Respondent was "a landlord" throughout the relevant period for the purposes of section 43(1) of the 2016 Act.

The defence of "reasonable excuse"

31. 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. The Respondent has accepted that it cannot successfully run this defence, and on the basis of the evidence before us we do not consider that the Respondent had a reasonable excuse for the purposes of section 72(5). Mere ignorance of the law (if the Respondent was indeed ignorant) is insufficient for these purposes.

The offence

32. 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.

33. 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 part of the Property was let to the Applicant 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.

Amount of rent to be ordered to be repaid

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

35. 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 universal credit paid in respect of rent under the tenancy during that period.

36. In this case, the claim does relate to a period not exceeding 12 months during which the landlord was committing the offence. It is common ground that no universal credit had been paid in respect of the rent.

37. As regards the amount of rent paid, the Applicant's evidence of rental payments was challenged by the Respondent in written submissions. However, at the hearing – after the Applicant first accepted that he had overstated the amount of rent paid in his application – the Respondent accepted and both parties then agreed that the Applicant had paid a total of £7,279.70 in rent in respect of the relevant period. The tribunal has no reason to find otherwise, as the parties are in agreement on this point, and therefore the maximum amount of rent repayment that can be ordered is £7,279.70.

38. Under sub-section 44(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 the relevant part of the 2016 Act applies.

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

40. 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.

41. 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.

42. 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. He also noted that section 46(1) of the 2016 Act specifies particular circumstances in which the FTT must award 100% and must disregard the factors in section 44(4) in the absence of exceptional circumstances, and he expressed the view that a full assessment of the FTT's discretion ought to take section 46(1) into account. 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.

43. 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).

44. Therefore, adopting the approach of the Upper Tribunal in the above cases and starting with 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

45. The Applicant's conduct has been poor. He has tried to give the impression that the Property was in poor condition but he has not brought any credible evidence in support of this point. He has also made much of the fact that his room did not have washing facilities, but this would have been apparent to him when he took the room, and it would seem that the room has other compensating features. In addition, it appears that he forged a deed of assignment in connection with his dealings with Mr Notsuke. Whilst it was unclear at the hearing whether he was expressly accepting that the document was forged, at the very least his evidence on this issue was very unconvincing. This would suggest that he was trying to mislead Mr Notsuke or a third party for the purposes of financial gain, although we do not go so far as to make a definite factual finding that the Applicant committed a forgery for the purposes of financial gain. Finally, the Applicant has overstated

the amount of rent paid by him, and again it is possible that he has done this deliberately.

46. However, the Respondent's conduct has also not been particularly good. Not only has the Respondent committed the criminal offence of controlling and/or managing an unlicensed HMO but it has done so despite having a property portfolio and running a property investment business including a number of residential properties. Mr Saunders claimed that he was relying on advice from Hamptons International, but that is an insufficient excuse even for someone who is letting out a single property and has no knowledge of property law. It is more serious for someone who is running a property investment business.

47. Furthermore, Mr Saunders has tried to give the impression that the licensing of multi-let properties is a very recent piece of legislation which his agents had just discovered, but this is scarcely credible. Legislation requiring the licensing of multi-let residential properties has been in place for very many years, and it is hard to believe that the legislation has only just come to the attention of the Respondent and/or of Hamptons International.

48. The Respondent has tried to excuse itself to some extent by arguing that it merely acquiesced in the Applicant becoming a tenant (or subtenant), but this is to play down the seriousness of the resulting criminal offence and also raises the question as to why it allowed the Applicant to occupy without the protection of a written tenancy agreement, as the Respondent does not seem to be arguing that it believed there to be a written subtenancy in place.

49. In addition, Mr Saunders initially claimed that he and/or Hamptons International had taken the initiative by contacting the Council regarding the need for a licence, but he later conceded that the Council had made the first contact. He suggested at the hearing that it was a natural point on which to be confused, although we did not find this suggestion very persuasive.

50. Finally, in our view both parties have somewhat exaggerated the failings of the other in order – presumably – to blacken the other's character, and that does not reflect well on either of them.

Financial circumstances of the landlord

51. We have not been provided with any specific information on the Respondent's financial circumstances. However, the Respondent has a property portfolio, and no suggestion has been made that the Respondent would have any difficulties paying even the maximum amount.

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

52. The Respondent has not been convicted of a relevant offence, and nor is it alleged that it has been convicted of any other offence.

Other factors

53. 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. One factor identified by the Upper Tribunal in *Vadamalayan v Stewart* as being something to take into account in all but the most serious cases is the inclusion within the rent of the cost of utility services, but there is no evidence in the present case that the rental payments include any charges for utilities.

54. On the facts of this case, we do not consider that there are any other specific factors which should be taken into account in determining the amount of rent to order to be repaid. Therefore, all that remains is to determine the amount that should be paid based on the above factors.

Amount to be repaid

55. The first point to emphasise is that a criminal offence has been committed. There has been much publicity about licensing of HMOs, and no mitigating factors are before us which adequately explain the failure to obtain a licence. Mr Saunders on behalf of the Respondent claims ignorance of the law, but this is highly surprising for someone who is running a property investment business and is not to his credit.

56. We also note that the legislation is in part intended to assist local authorities in locating and monitoring HMOs. Multi-occupied property has historically contained the most unsatisfactory and hazardous living accommodation, with particular concerns about inadequate fire safety provision. Against this background, the failure to apply for a licence is potentially extremely serious. We are also aware of the 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 HMOs without first obtaining a licence.

57. Secondly, the Respondent's conduct has not been particularly good for the reasons already summarised. Thirdly, even if it could be argued that the Applicant 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 then this will significantly undermine the deterrence value of the legislation. Fourthly, the Respondent's financial circumstances would appear to be relatively good.

58. On the other hand, the Applicant's conduct has been poor, again for the reasons summarised above. Whilst rent repayments are not primarily intended to reflect the worthiness of tenants to receive them, nevertheless the legislation requires poor conduct on the part of the tenant to be taken into account when assessing the amount. Tenant's conduct is one of very few factors expressly required to be taken into account. In addition, whilst there have been failings on the Respondent's part, nevertheless the Property seems to have been in relatively good condition and there is no evidence of the Respondent having behaved badly towards the Applicant. In addition, the Respondent has not at any time been convicted of a relevant offence, and if it is the case that the Applicant was a subtenant then arguably the Respondent's level of culpability is slightly less as he did not have a direct contractual relationship with the Applicant.

59. Therefore, in our view there is reasonable scope for deductions from the *Vadamalayan* starting point of 100% of the amount of rent claimed. Taking all the circumstances together, including the conduct of the Applicant and the lack of evidence of the Property being in poor condition, we consider that a 50% deduction would be appropriate in this case. Accordingly, we order the Respondent to repay to the Applicant 50% of the total sum claimed, which equals the sum of £3,639.85.

Cost applications

60. No cost applications were made.

Name: Judge P Korn **Date:** 15th July 2021

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.