First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**LON/00AM/HMF/2021/0303**
Property	**:**	**Flat 3 Victoria Chambers, Luke Street, London EC2A 4EE**
Applicants	**:**	**(1) Harvey Filsell (2) Jack Whittaker (3) Zane Verna (also known as Zaniel Verner)**
Represented by		**Clara Sherratt (Justice for Tenants – lay)**
Respondent	**:**	**Michael Ginn**
Application	**:**	**Applications by tenants for Rent Repayment Orders following an alleged offence committed by the Respondent for having control or management of an unlicensed House in Multiple Occupation ("HMO") – Section 43 of the Housing and Planning Act 2016 ("the 2016 Act")**
Date of application	**:**	**13th December 2021**
Tribunal	**:**	**Bruce Edgington (lawyer chair) Appollo Fonka MCIEH CEnvH M.Sc**
Date & place of hearing:		**17th June 2022 as a video hearing from 10 Alfred Place, London WC1E 7LR in view of COVID pandemic restrictions**

DECISION

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1. Tribunal makes Rent Repayment Orders against the Respondent which are payable on or before 4.00 pm on the 15th July 2022 in favour of:

   (a) the 1st Applicant Harvey Filsell in the sum of £1,485.00
   (b) the 2nd Applicant Jack Whittaker in the sum of £1,890.00 and
   (c) the 3rd Applicant Zane Verna in the sum of £1,620.00

2. No order as to costs save that the Respondent shall re-pay to the Applicants the fees of £300.00 paid to the Tribunal in respect of this application by the same date i.e. by 4.00

pm on the 15th July 2022 PROVIDED that a written authority signed by all 3 Applicants is sent to the Respondent in good time stating to whom this sum shall be paid.

Reasons

Introduction

3. Rent Repayments Orders ("RROs") require landlords and/or other people managing and/or in control of properties who have broken certain laws to repay rent paid either by tenants or by local authorities and are intended to act as a deterrent to prevent offending landlords profiting from breaking such laws.

4. The orders were originally made pursuant to the **Housing Act 2004** ("the 2004 Act") but this application is made under the later provisions contained in the 2016 Act. Section 41(1) of the 2016 Act says that "*A tenant…..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*".

5. Section 40 of the 2016 Act sets out the offences and prefaces the definition by saying "*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*". One of those offences described is under section 72(1) of the 2004 Act i.e. "*control or management of unlicensed HMO*" i.e. a House in Multiple Occupation ("HMO"), and this is the offence relied upon by these Applicants.

6. It should be made clear that the property is not an HMO under part 2 of the 2004 Act as it does not have 5 or more occupiers. It is said that it became an HMO when the London Borough of Hackney created an additional licensing scheme which came into force on the 1st October 2018 and reduced the number of occupiers needed to bring it within the definition of an HMO. This is accepted by the Respondent, even though he was not aware of it at the time.

7. The original application was made by the 1st Applicant, Harvey Filsell. The Applicants obtained help from Justice For Tenants who then applied for an order that Jack Whittaker and Zane Verna be added as Applicants. They also applied for Neil Franklin to be removed as a Respondent as he was not an immediate landlord. The Tribunal made a directions order on the 10th February 2022 timetabling the case to this video hearing. It made a subsequent order on the 1st March 2022 adding the Applicants and removing the Respondent as requested.

8. The Applicants' positions with regard to rent paid is that they all claim from the 10th September 2021 when they took occupation of their rooms until 9th December 2021 when they left. The Respondent applied for a licence. The amounts paid for rent in that period were:

   (a) The 1st Applicant, Harry Filsell paid £1,650.00

   (b) The 2nd Applicant, Jack Whittaker paid £2,100.00

   (c) The 3rd Applicant, Zane Verna paid £1,800.00

9. The Respondent does not dispute that these amounts were paid. He simply asks the Tribunal to take account of his conduct and the general circumstances when assessing what, if any, rent should be repaid.

Inspection

10. It was not considered that a physical inspection of the property was necessary and none has been requested.

The Hearing

11. Those attending the hearing were the 3 Applicants and their representative, Clara Sherratt together with the Respondent. His son was also present and made one or two comments on his behalf. The Tribunal chair introduced himself and the other Tribunal member. He then said that he had some questions to raise on the papers filed. He would do that and if the hearing was then to proceed he would probably ask the parties to put their cases. The other Tribunal member would ask any questions he had as and when he needed to.

12. Ms. Sherratt then said that she had not received any evidence or written representations from the Respondent. There was some discussion about this when the Tribunal chair mentioned the recently reported cases – see below – and told her that there was really nothing in the Respondent's case which was going to substantially alter the Tribunal's decision. Proportionality had to be considered. She agreed to press on.

13. Mr. Ginn said that he was not going to say that his financial position is relevant to the Tribunal's decision. He said that he had not been convicted of any relevant offence and Ms. Sherratt did not suggest that there had been any conviction. This just left the conduct of the parties as the only statutory consideration. The parties made their representations and then the Tribunal chair said that he would bring the hearing to a close. Neither side objected to that, and Ms. Sherratt said that in addition to repaying rent, the Respondent should reimburse the Tribunal fees of £300.00.

Discussion

14. The jurisdiction of the Tribunal including the power to order re-payment of rent for the period claimed is not in dispute. It is also not disputed that the Respondent was, at the relevant time, the person having control or management of the property even though he had managing agents to, as it were, deal with the 'leg work'. The Tribunal is therefore satisfied, beyond a reasonable doubt, that an offence was being committed during the period for which rent is being claimed.

15. If, as is said by the Respondent, he knew nothing of the requirement to licence an HMO with only 3 occupiers, then the Tribunal has some sympathy, in a sense, but the law is there to protect occupiers. The basic principle of the English legal system, as has often been said, is that 'ignorance of the law is no excuse'.

16. The matters to be taken into account by the Tribunal according to section 44 of the 2016 Act are that an order in favour of occupiers must not exceed the rent actually paid less any universal credit. Further, the Tribunal must 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" under Chapter 4 of the 2004 Act.

The conduct of the parties

17. The Respondent says that he has rented the flat for the last 34 years. Initially it had office use for his business as an architect. He applied for residential use in 1988 and he says that "*the current managing agent, Boulton and Franklin, have been letting out both mine and my sons' properties for several years*" and there were 2 managing agents before them.

18. There are accusations from the Applicants that there has been rat infestation, only one fire alarm/smoke detector, no fire doors, some electrical problems, broken bathroom tiles with mould and broken furniture. All of these matters are, in effect, agreed by the Respondent save that the rat infestation was actually a mouse infestation. He says that he tried to rectify problems through his managing agent as and when they arose. The infestation required 4 visits, 3 from Tower Pest Control Ltd. and 1 from the agent's maintenance team. The Respondent points out that this is one of a number of flats in this building and the problem seems to rest mainly with the freeholder. He adds that the problem had clearly arisen during the major lockdown due to COVID.

19. The Respondent does say that when matters came to a head, he did agree that the Applicants could leave the property without giving any notice if that was what they wanted to do and their deposits were returned. For the sake of clarity, it was decided in the Upper Tribunal case of **Kowalek v Hassanein Ltd.** [2021] UKUT 143 (LC), that returning a deposit was not returning 'rent' and therefore had no relevance when ordering rent to be repaid.

The financial circumstances of the landlord

20. The Respondent does not specifically plead lack of funds although he does say that he could not afford to pay the fee required for an HMO as the flat had been empty between November 2020 and April 2021. He could afford and paid for the licence in December 2021 and confirmed at the hearing that he was not claiming financial hardship.

21. However, as has been said above, the Respondent clearly acknowledges that he and his son have 'properties' (plural) and he does not suggest that he has general financial problems. The Tribunal therefore takes the view that this particular landlord's financial circumstances should not influence this determination, one way or the other.

Caselaw

22. The Applicants' representative has referred to a number of previously decided cases including **Vadamalayan v Stewart** [2020] UKUT 183 (LC) and **Williams v Parmar & others** [2021] UKUT 244 (LC) and, as they rightly say, the way in which a rent repayment order is calculated has changed. It is generally accepted that claims under the 2004 Act prior to the changes brought about by the 2016 Act were calculated on the basis of a loss of profit. Nowadays, the starting point in any calculation is the totality of the rent paid during the relevant dates.

23. The Tribunal has considered the later cases of **Aytan v Moore and others** and **Wilson v Arrow and others** [2022] UKUT 27 (LC) which were determined together

by Judge Elizabeth Cooke and the President of the Property Chamber, Judge Siobhan McGrath, sitting as an Upper Tribunal judge, and seem to have been intended to give general guidance.

24. The facts in **Aytan** were that the landlords had 9 flats in a building and employed managing agents. The appeal related to one of those flats which had been let to 3 people. The landlords said that they did not know that the local authority had decided to reduce the number of people required to define an HMO from 5 (the 2004 Act) to 3. The tenants had complained about the lift not working properly, cleaning, paintwork and rubbish collection.

25. The First-tier Tribunal ("FTT") decided to order the landlords to repay all of the rent within the relevant period. The Upper Tribunal overturned that decision and started on its own assessment of the amount payable. It said in paragraph 49:-

> "*49. As we have all the relevant information we can substitute the Tribunal's own decision. In doing so we wish to make it clear that it is not appropriate for a tribunal to indulge in a fine-grained examination of every aspect of the parties' conduct, which would be disproportionate, nor in a detailed comparison of one landlord with another, which is unlikely to be accurate. The FTT must weigh the evidence and make a balanced decision. However, that exercise need not be a detailed forensic exercise as long as all relevant circumstances are taken into account and the outcome falls within the reasonable range of responses available to the Tribunal*".

26. The claim was for £31,200.00 and the Upper Tribunal took "*a serious view of the landlords' conduct*" on the basis that they were very experienced investors in the property market and had made a considerable amount of money. There were some complaints but, overall, the condition of the property "*was good*". That Tribunal ordered 85% of the rent paid to be repaid.

27. In **Wilson**, the property was let to 5 individuals who shared facilities. It had been less than 3 storeys high and therefore did not come with the definition of an HMO until 1st October 2018 when a statutory instrument came into force which removed the 3 storey minimum requirement. The property then became an HMO and it needed a licence. The landlord did not know this. The FTT ordered repayment of 100% of the rent paid by the 4 Applicants to be repaid.

28. In setting aside that order and making its own determination, the Upper Tribunal said:-

> "*64. The FTT described Mr. Wilson as a professional landlord, on a small scale, and clearly he is not an investor in multiple properties. He has rented out a house that used to be his home. That carries responsibilities, even if Mr. Wilson does not make his living from rent. He has not provided any evidence about his financial circumstances. Again, there is no suggestion that he had any relevant convictions. The compelling factor in this case is the absence of important fire safety features, in particular fire doors and alarms, which gave rise to a*

dangerous situation for the tenants throughout the time they lived at the property until the problems were finally remedied in November 2020. We regard that as a very serious matter. The respondents in the written representations made following the decision in ***Williams v Parmar*** *argue that if any further deduction is made from the full rent it should be only a modest one, and taking particular account of the dangerous condition of the property we agree. Accordingly we make only a 10% deduction from the rent to be repaid to the tenants*".

Conclusion as to the Amount of any Order

29. In this case we have, with respect to him, a sensible landlord who acknowledges that ignorance of the law is no excuse and he should have applied for a licence earlier that he did. It is now established law that the starting point is to order repayment of the whole amount paid in rent for the relevant period i.e. in this case, when an offence was being committed. The decisions referred to above also make it very clear that the 3 matters to be taken into account as set out in section 44 of the 2016, must be considered before fixing an amount to be repaid.

30. In this case the Respondent seems to be very similar to the landlord in **Wilson**, although in this case, the fire safety features were not missing completely. There was an alarm and smoke detector in the lounge although there were none anywhere else and there were no fire doors. Ms. Sherratt tried to introduce evidence about the layout of the flat but the Tribunal did not consider this to be particularly relevant. The most serious problem is in respect of the rat/mouse infestation. The fact that efforts were made to resolve the situation is noted but despite a number of visits to the property from the managing agents and others, the situation was not speedily resolved and the Tribunal does consider that this is serious.

31. The implied suggestion by the Respondent that deductions should be made to cover managing agents' fees, pest control and a 1 month notice of termination are not relevant.

32. In all the circumstances, and taking the relevant caselaw into account, it is this Tribunal's determination that the deductions should be 10% as this case is more like the **Wilson** case than the **Aytan** one. Although there was a fire alarm and a smoke detector at the property and the Respondent did take some action to resolve the rat/mouse infestation, it was clearly serious because it was a risk to health and the Tribunal considers that a reasonable landlord faced with that problem would have ensured that emergency action was taken to remove it.

33. As these applications have been largely successful, the Tribunal does not see that it is reasonable for the Applicants to have to meet the cost of the Tribunal fees of £300.00 and the Respondent should pay these.

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Judge Edgington
20th June 2022

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to London.RAP@justice.gov.uk 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.