**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2021] UKUT 0244 (LC)**
**UTLC Case Numbers: LC-2020-000088**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

**HOUSING – RENT REPAYMENT ORDER – Housing and Planning Act 2016 ss.40-46 – offence of managing unlicensed house in multiple occupation – amount of rent repayment orders – identification of relevant period specified in s.44(2) – approach to exercise of discretion on amount of RRO relating to the rent paid during the relevant period**

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

**BETWEEN:**

**AMANDA WILLIAMS**

**Appellant**

**-and-**

**KISHAN PARMAR AND OTHERS**

**Respondents**

**Re: 28 Afghan Road,**
**London,**
**SW11 2QD**

**The Chamber President, The Hon. Mr Justice Fancourt**

**Hearing date: 28 July 2021**
**Rolls Building, Fetter Lane, London EC4A 1NL**

Mr Richard Colbey (instructed directly) for the appellant
Mr Kishan Parmar, Ms Phaedra Susans and Ms Alison Ostry in person and for the other respondents

The following cases are referred to in this decision:

*Ficcara v James* [2021] UKUT 0038 (LC)

*Vadamalayan v Stewart* [2020] UKUT 0183 (LC)

## Introduction

1. The appellant ("the landlord") appeals against the decision of the First-tier Tribunal (Property Chamber) ("the FTT") dated 20 October 2020 ("the Decision"), with permission granted by Judge Elizabeth Cooke in the Upper Tribunal. By the Decision, the FTT made six rent repayment orders under Chapter 4 of Part 2 of the Housing and Planning Act 2016 against the landlord in favour of the respondents ("the tenants"). I shall refer to a rent repayment order in this decision as an RRO.

2. The grounds of appeal for which permission was granted are:

    a. the correct rental period was not applied by the FTT in calculating the amount of the RROs, and so the amount should be reduced (Ground A);

    b. the amounts of the interest-only mortgage monthly payments paid by the landlord should have been deducted from the amount of the RROs, since an RRO should only reflect the profit made by the landlord from the commission of the relevant offence (Ground B);

    c. the FTT had insufficient regard to the landlord's financial circumstances and state of health in determining the amount of the RRO (Ground C).

3. As will be seen, the focus of Ground B substantially changed during the course of the argument; and Mr Richard Colbey, who appeared on behalf of the landlord, conceded that it was not possible to say that the FTT did not have regard to the right matters in taking into account the landlord's financial circumstances, as the statutory provisions require. In effect, therefore, only Ground A and a changed Ground B were pursued before me.

4. Three of the tenants represented themselves at the hearing, though Mr Parmar acted to a large extent as spokesman for all the tenants, with their agreement.

5. The jurisdiction under the 2016 Act to make an RRO against the landlord arose because the landlord let six individual bedrooms in 28 Afghan Road, London SW11 2QD ("the Property") to the respondents individually, on assured shorthold tenancies for 6 months running from various dates in September 2019, without having a licence for a house in multiple occupation, contrary to s. 72(1) of the Housing Act 2004. That is a relevant offence for the purposes of Chapter 4 of Part 2 of the 2016 Act, which gives power to the FTT in such circumstances to make an RRO on the application of a tenant or the local housing authority.

6. The landlord did not dispute the offence or the jurisdiction to make an RRO before the FTT and she does not do so before this Tribunal. That is because she accepts that, at a time during the period of 12 months ending with the date of the tenants' applications (27 January 2020), the Property was an unlicensed HMO that she controlled. The only challenge is to the amount of the RROs made by the FTT in the case of each of the six tenants, which were as follows:

a. Kishan Parmar - £5,394
b. Phaedra Susans - £4,460
c. Emma Haldane - £4,832
d. Alison Ostry - £4,945
e. Shruti Sinha - £4,832
f. Jordan Spashett - £4,668

7. The different amounts of the RROs reflect differences in the amount of the 4-weekly rent payable for different sized bedrooms and the slightly different commencement dates of the tenancies.

8. On account of the poor condition of the Property, the tenants all vacated at the end of March 2020 but, for whatever reason, they limited their claims to an RRO to the period starting on the date on which each respective tenancy began and ending on 10 March 2020.

9. The FTT determined the applications of the tenants on paper, pursuant to the Coronavirus practice directions then in effect in the FTT. The Decision records that a paper determination was decided, subject to the views of the parties, in a case management direction made by the FTT when the appellant failed to comply with directions that had previously been made. It also records that a determination on the papers was made with the agreement of the tenants and was not objected to by the landlord.

10. In consequence, the FTT had to make its decision based on the written submissions and evidence that the parties had filed. These were numerous documents and witness statements submitted by the tenants; a response and witness statement of the landlord; and a further reply from Mr Parmar to the landlord's response.

11. In her response, the landlord accepted that the Property was not licensed as an HMO and still was not licensed; she explained that this was due to an oversight on her part and that she had obtained licences for all her other properties (the landlord has a modest property portfolio of rental properties); and she said that the Property was rented out for the first time in September/October and that she did not apply for an HMO licence until February. The landlord did not in her response or witness statement take issue with the period for which the RRO was being claimed by the tenants: her focus was rather on putting forward extenuating circumstances, as she saw them, and identifying her substantial monthly outlay for mortgage payments, gas, electricity, water, TV licence, council tax and wifi for the Property. The tenants replied on the exact amounts of these payments.

12. On the face of the parties' cases and evidence, therefore, the issue for the FTT was not the period in respect of which the RROs should be made but what deductions should be made from the amount of the rent paid during the period from September 2019 to 10 March 2020 to quantify the amount of each RRO. Neither the parties nor the FTT adverted to the possibility that a valid application for an HMO licence made by the landlord in February 2020, if made as she asserted, would provide her with an argument that the period for which

the RROs were made should terminate at that time, rather than on 10 March 2020. It is this point that gives rise to Ground A on the appeal.

13. The relevant statutory provisions for the purpose of determining the Grounds of Appeal are the following.

14. Section 72 of the Housing Act 2004:

> "(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.
>
> ……..
>
> (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 ….."

For these purposes, an application is effective if it has not been withdrawn and the licensing authority has not yet decided whether to serve a temporary exemption notice or (as the case may be) grant a licence. S. 72 further provides that an application remains effective if the time for appealing the authority's refusal of a licence or notification has not expired or if an appeal against such refusal has been brought and has not been withdrawn or determined.

15. Under s. 73 of the 2004 Act, a house in multiple occupation is not "unlicensed" if either a notification has been given under section 62 or an application has been duly made under s.63 and the application is still effective.

16. S. 63 of the 2004 Act provides that an application must be made to the local housing authority in accordance with such requirements as the authority may specify and be accompanied by such fee as the authority may have fixed.

17. So, under the 2004 Act, an offence of having control of or managing an unlicensed HMO is not committed at a time when the person having control or managing the HMO has made to the local housing authority an application for a licence that complies with the requirements and pays the fee that the authority has specified and the application has not yet been decided by the authority. But that does not mean that the offence was not committed at an earlier time.

18. Section 40(1) of the Housing and Planning Act 2016 states that the FTT has power to make an RRO when the landlord has committed an offence to which Chapter 4 relates, which offences are specified in a table in subsection (3). The offences include: use of violence to secure entry to residential premises; unlawful eviction of a residential occupier; failure to

comply with a prohibition order or banning order; and control or management of an unlicensed HMO.

19. Section 43 of the 2016 Act provides:

> "(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).
>
> ……..
>
> (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);
> (b) section 45 (where the application is made by a local housing authority);
> (c) section 46 (in certain cases where the landlord has been convicted etc)."

20. Section 44 of the 2016 Act provides:

> "(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 …….
>
> (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."

21. The table referred to in s.44(2) specifies that in the case of an offence of controlling or managing an unlicensed HMO, 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".

22. Section 46 of the 2016 Act provides:

> (1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that

the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2) Condition 1 is that the order –

(a) is made against a landlord who has been convicted of the offence, or
(b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.

(3) Condition 2 is that the order is made –

(a) in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or
(b) in favour of a local housing authority.

(4) ……..

(5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers that it would be unreasonable to require the landlord to pay."

23. The offence of having control of or managing an unlicensed HMO is not an offence described in s. 46(3)(a) and accordingly there was no requirement in this case for the FTT to make a maximum repayment order. That section did not apply. The amount of the order to be made was governed solely by s.44 of the 2016 Act. Nevertheless, the terms of s.46 show that, in cases to which that section does not apply, there can be no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44 or s.45. The terms of s.44(3) and (4) similarly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must "relate to" the total rent paid in respect of that period.

24. It therefore cannot be the case that the words "relate to rent paid during the period …" in s. 44(2) mean "equate to rent paid during the period …". It is clear from s. 44 itself and from s. 46 that in some cases the amount of the RRO will be less than the total amount of rent paid during the relevant period. S. 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and s. 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.

25. However, the amount of the RRO must always "relate to" the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary "starting point" for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or

the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).

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

27. Turning to Ground A of the landlord's appeal, Mr Colbey submitted that the FTT should itself have raised the question of whether it was proved beyond reasonable doubt that an offence was being committed at any time after 1 February 2020, on the basis of the landlord's statement that she did not apply for an HMO licence for the Property until February 2020. He submitted that since the landlord's evidence was the only evidence and was unspecific about when in February 2020 the application was made, the FTT should have found that an application was made for an HMO licence for the Property and might have been made as early as 1 February 2020, so that it was not proved beyond reasonable doubt that an offence was committed at any time after 31 January 2020. The FTT therefore should have quantified the amount of the RROs by reference in each case to a period ending on that date, not 10 March 2020. He submitted that the amounts of the RROs should be varied by this Tribunal on that account.

28. I do not agree with Mr Colbey's approach for the following reasons.

29. First, there was and is no reasonable doubt that, in the period of 12 months ending with the application of the tenants to the FTT, the landlord committed an offence under s. 72(1) of the 2004 Act. Although the landlord has not been convicted, she accepted that an offence was committed. The FTT therefore had jurisdiction to make RROs in each of the cases before it.

30. Second, the only matter for decision was the appropriate quantum of the orders in each case. In that regard, there was no issue raised in terms by the landlord about the length of the period proposed by the tenants as the correct period under s. 44(2) of the 2016 Act. The reference by the landlord to when the application for a licence had been made was part of her explanation of inadvertent delay (as she claimed) in not applying for a licence before the start of the tenancies of rooms in the Property and was advanced in mitigation of the offence and in the hope that the amount of the RROs might be reduced in consequence. The landlord is therefore seeking on appeal to raise for the first time the argument that the relevant periods in each case should end on 31 January 2020.

31. Third, although the FTT must be satisfied beyond reasonable doubt that an offence to which Chapter 4 of Part 2 of the 2016 Act applies has been committed, thereby establishing

jurisdiction to make an RRO, it is not required to be satisfied to the criminal standard on the identity of the period specified in s. 44(2). Identifying that period is an aspect of quantifying the amount of the RRO, even though the period is defined in relation to certain offences as being the period during which the landlord was committing the offence.

32. Fourth, even if in a criminal trial the legal burden would lie on the prosecution to disprove beyond reasonable doubt the defence to liability established by s. 72(4) of the 2004 Act, there would be an initial evidential burden on the defendant to raise the possible defence.

33. The landlord therefore faces the difficulty on this appeal that she is seeking to raise a new argument that was not raised before the FTT. If the point had been raised in the landlord's response to the application and the relevant period for quantifying the RROs had been challenged, the tenants would have been given the opportunity to address it in evidence.

34. The February 2020 application for an HMO licence was not produced by the landlord in evidence. It was clear from the submissions made by Mr Parmar on the hearing of the appeal that the tenants would have had a good deal to say about whether a valid application for a licence had been made by the landlord in February 2020. In those circumstances, the landlord should not be permitted to rely on her new argument on appeal if the tenants might reasonably have been able to adduce evidence to meet the point, had it been raised before the FTT. The tenants cannot be criticised for not seeking to meet the point in further evidence on the appeal because the appeal is in the nature of a review and is not a rehearing.

35. In my judgment, had the point been taken there was a realistic prospect of the tenants establishing that a valid application containing the required particulars and accompanied by the right fee had not been made, or at least that it was made later than 1 February 2020. That being so, the landlord cannot in fairness be allowed to rely on this point on this appeal.

36. As noted above, Ground B of the appeal was originally limited to an argument that the FTT was wrong not to take into account the fact that much of the rent paid by the tenants during the relevant period was used to pay instalments of an interest-only mortgage of the Property. That argument was bound to fail in view of the decision of this Tribunal in *Vadamalayan*. Judge Cooke recognised that and only gave permission to appeal on Ground B in case this appeal went further than this Tribunal. Unless it does, *Vadamalayan* establishes that the right approach to quantifying an RRO is not by reference to the profit made by the landlord from the unlawful activity.

37. Instead of that ground, Mr Colbey sought to argue that the FTT had erred in its approach to quantifying the amount of the RROs by rejecting as irrelevant all factors other than those specified in s. 44(4). The FTT purported to follow *Vadamalayan* and stated that the starting point is the rent paid by each of the tenants during the period of their tenancies up to 10 March 2020. It then deducted payments for utilities, apportioned between each of the tenants, to reach an "adjusted starting point". (The appropriateness of those adjustments was not raised as a ground of appeal by either side, although Mr Parmar suggested that the FTT had got the arithmetic wrong, and I therefore say nothing about those deductions.) It then stated:

> "19. Turning to the criteria set out in section 44 of the 2016 Act it is not suggested that the applicant [*sic*] has at any time been convicted of an offence to which that part of the 2016 Act applies. Consequently I can only take into account the conduct of the parties and the financial circumstances of the respondent.
>
> 20. The decision in *Vadamalayan v Stewart* effectively deprives me of any discretion to increase the orders to take into account the respondent's conduct in letting the property with the serious deficiencies identified in the Preliminary Improvement Notice. The respondent regrets her oversight in failing to obtain a licence. That regret however is made with hindsight and does not amount to meritorious conduct that might justify a deduction from the starting point."

38. The FTT then went on to reject an argument by the landlord that the tenants had in certain respects behaved badly and declined to reduce the amount of the orders on that account. It considered in detail the landlord's financial circumstances, rejecting any reduction for those matters. It accordingly made RROs in the amount of the adjusted starting point for each tenant.

39. I am not clear what the FTT meant in [20] when it said that the decision in *Vadamalayan* deprived it of discretion to increase the amount of the orders. The 2016 Act does not permit orders to be made in amounts greater than the amount of rent paid by a tenant during the relevant period. The FTT then appeared to look for meritorious conduct on the part of the landlord that might justify reducing the adjusting starting point.

40. It seems to me that the FTT took too narrow a view of its powers under s. 44 to fix the amount of the RROs. For reasons already given, there is no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s. 44(4), though the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

41. In my judgment, the FTT also interpreted s. 44(4)(a) too narrowly if it concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord", so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the FTT should take into account the purposes intended to be served by the jurisdiction to make an RRO: see [43] below.

42. The landlord in this appeal faces an initial difficulty that the argument that the FTT erred by misinterpreting the breadth of its discretion is not a ground of appeal for which permission has been sought or granted. Despite that, Mr Colbey advanced his case succinctly and clearly and the tenants, with some assistance from the Tribunal, were able to participate fully in arguing the point, to the extent that, as non-lawyers, they were able to do so. They were fully able to make observations about whether the FTT had gone wrong in awarding them too high a figure. Their skeleton argument also ranged more widely than the narrow question of the interest-only mortgage repayments. I do not consider that they were disadvantaged

by the fact that a ground of appeal had not spelt out the argument that the landlord advanced at the hearing. In those circumstances, I consider that it is just to allow the landlord to raise the point without notice and I grant permission for an amended Ground B to include the argument that I have summarised.

43. Mr Colbey argued that the FTT was wrong to regard the amount of rent paid as any kind of starting point and that the orders should have been made on the basis of what amount was reasonable in each case. He relied on guidance to local authorities issued under Chapter 3 of Part 2 of the 2016 Act, entitled "Rent Repayment Orders under the Housing and Planning Act 2016: Guidance for Local Authorities", which came into force on 6 April 2017. Notably, this is guidance as to whether a local housing authority should exercise its power to apply for an RRO, not guidance on the approach to the amount of RROs. Nevertheless, para 3.2 of that guidance identifies the factors that a local authority should take into account in deciding whether to seek an RRO as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. Although those are identified in connection with the question whether a local authority should take proceedings, they are factors that clearly underlie Chapter 4 of Part 2 of the 2016 Act generally.

44. The FTT erred in construing its powers too narrowly, in the respects that I have identified. In those circumstances, this Tribunal should, if it fairly can, re-conduct the exercise of determining the amount in which the orders should be made. Both the landlord and the tenants were keen that this case was resolved at this stage, without the need for a further hearing. I consider that I am in a position to make a fair adjudication of the amount of the RROs and will do so. The amount that I determine must "relate to" the amount of rent paid by the tenants during the relevant period, which is the period from the start of each individual tenancy until 10 March 2020. It should also respect the deduction made on account of services enjoyed by the tenant, against which there was no appeal.

45. The FTT helpfully set out in the Decision the total rent paid by each of the tenants during the relevant period (up to 10 March 2020) and the adjusted maximum amount of the orders against each individual tenant, following deduction of the apportioned amounts relating to the services. I set out below the total amount of rent paid by each tenant and the amount of the undisputed deductions made by the FTT in their cases:

a. Kishan Parmar - £6,240 - deduction £846
b. Phaedra Susans - £5,160 - deduction £700
c. Emma Haldane - £5,590 - deduction £758
d. Alison Ostry - £5,720 - deduction £775
e. Shruti Sinha - £5,590 - deduction £758
f. Jordan Spashett - £5,400 - deduction £732

46. The landlord had not obtained an HMO licence by the time that she made her witness statement on 29 April 2020. By then, as explained by Mr Parmar at the hearing, the application that the landlord had made had been rejected because one of the bedrooms was undersized. This was the room occupied by Ms Susans. The tenants had brought the condition of the Property to the attention of the local housing authority principally because

of problems with the absence of functioning central heating, though there were also other defects. These had previously been raised with the landlord, but nothing had been done. As a result of an inspection by an environmental health officer on 6 January 2020, a preliminary improvement notice was served by the Council on the landlord on 3 February 2020, requiring works to be completed by 28 May 2020. The environmental health officer had pointed out the lack of an HMO licence and the fact that a bedroom did not meet the minimum size requirements.

47. The notice served by the Council identified 8 deficiencies, including two category 1 deficiencies relating to fire safety and excessive cold.

48. It is apparent that the Property could not have obtained an HMO licence at the time of the tenancies, not just that the landlord had not applied for one. It was therefore not just a matter of oversight but a question of the need to do further works to make the Property fit to be granted a licence. In her evidence, the landlord stated that she is a professional landlord and has other investment properties, which are licensed. She accepts that the cost of investing in the Property was substantial and that £50,000 of further investment was required, for which she did not at the time have the funds. However, the landlord was not aware of the deficiency in the small bedroom until after the visit of the environmental health officer. There are also personal extenuating circumstances relied on, concerning the ill-health of the landlord at the time and serious ill-health of her regular builder. However, this does not fully explain her inability to do works that would make the Property fit to be licensed, nor does it explain why urgent works were not done to remedy the heating deficiency. The initial "oversight" in applying for an HMO licence is not further explained.

49. As far as the conduct of the tenants is concerned, the FTT found that there was no proper complaint to be made by the landlord and there was no challenge by the landlord on appeal to that finding. Nor, as I have said, was there any appeal pursued on the basis that the FTT had failed to consider adequately the financial circumstances of the landlord. That being so, I accept the conclusions that the FTT reached about the conduct of the tenants and the financial circumstances of the landlord.

50. I reject the argument of Mr Colbey that the right approach is for a tribunal simply to consider what amount is reasonable in any given case. A tribunal should address specifically what proportion of the maximum amount of rent paid in the relevant period, or reduction from that amount, or a combination of both, is appropriate in all the circumstances, bearing in mind the purpose of the legislative provisions. A tribunal must have particular regard to the conduct of both parties (which includes the seriousness of the offence committed), the financial circumstances of the landlord and whether the landlord has at any time been convicted of a relevant offence. The tribunal should also take into account any other factors that appear to be relevant.

51. It seems to me to be implicit in the structure of Chapter 4 of Part 2 of the 2016 Act, and in sections 44 and 46 in particular, that if a landlord has not previously been convicted of a relevant offence, and if their conduct, though serious, is less serious than many other offences of that type, or if the conduct of the tenant is reprehensible in some way, the amount of the RRO may appropriately be less than the maximum amount for an order. Whether that

is so and the amount of any reduction will depend on the particular facts of each case. On the other hand, the factors identified in para 3.2 of the guidance for local housing authorities are the reasons why the broader regime of RROs was introduced in the 2016 Act and will generally justify an order for repayment of at least a substantial part of the rent. This is what Judge Cooke meant when she said in *Vadamalayan* that the provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act, which included expressly a criterion of reasonableness. If Parliament had intended reasonableness to be the criterion under Chapter 4 of Part 2 of the 2016 Act it would have said so.

52. In this case, the landlord is, on the evidence, a first offender, with no relevant convictions. That is obviously in her favour. She was, however, a professional landlord who must be taken to have known the requirements for licensing an HMO. The failure to apply for a licence is unexplained in evidence, save that the landlord said that she overlooked it. There is nothing in her financial circumstances or her conduct to justify reducing the amount of the RROs. The landlord only applied for a licence after an environmental health officer had visited and itemised deficiencies of the Property and the absence of a licence. The Property would not have obtained a licence without further substantial works, had the landlord applied for one, and her February 2020 application was in due course refused because the works had not been done. The inference to be drawn is that the landlord wanted to be able to derive rental income from the Property before she was in a position to do the further works that were necessary to enable her to obtain an HMO licence. There were serious deficiencies in the condition of the Property, which affected the comfort of all the tenants, and the undersized bedroom affected Ms Susans particularly.

53. The factors identified above, which illustrate the kind of evaluative exercise that the tribunal needs to conduct when making an RRO in a case where the maximum amount provisions do not apply, indicate that this was a reasonably serious offence of its kind, though not the most serious case that could be imagined.

54. It is notable that for an offence of this type the maximum amount stipulation in s. 46 of the 2016 Act does not apply where an RRO is applied for by a tenant, even if the landlord has been convicted of the offence. That is an indication that Parliament regarded offences of control or management of an unlicensed HMO and control or management of an unlicensed house, contrary to sections 72(1) and 95(1) of the 2004 Act, as being capable of being less serious than other offences to which Chapter 4 of Part 2 of the 2016 Act relates. In any such cases, however, the tribunal retains a discretion to order repayment in the maximum amount, if justified.

55. In the circumstances of this case, it is not necessary or appropriate to mark the offending of the landlord with an RRO in the maximum adjusted amounts (after taking into account the undisputed reductions for the cost of the extensive services that were provided to the tenants). However, only a modest further reduction of 20% is appropriate, given the factors identified in [52] above, and a smaller reduction of 10% in the case of Ms Susans who was particularly affected by the condition of the Property. Where the unlicensed house has serious deficiencies and the landlord is a professional landlord, more substantial reductions would be inappropriate, even for a first-time offender.

56. I accordingly determine that the amounts to be comprised in the RROs are as follows:

a. Kishan Parmar - £4,315
b. Phaedra Susans - £4,014
c. Emma Haldane - £3,866
d. Alison Ostry - £3,956
e. Shruti Sinha - £3,866
f. Jordan Spashett - £3,734

57. The appeal of the landlord is allowed to that extent.

Mr Justice Fancourt

The President

6 October, 2021