FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AL/HMF/2020/0172**
HMCTS	**:**	**V: CVPREMOTE**
Property	**:**	**3a John Penn Street, London, SE13 7QT**
Applicants	**:**	**Sofia Elvira Veliz Valencia Christian Silva Diaz Rocio Martinez Madrid Linyue Kang**
Representative	**:**	**Alasdair Mcclenehan (Justice for Tenants)**
Respondent	**:**	**Adebowale Ogunbajo**
Representative	**:**	**No appearance**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant**
Tribunal Member	**:**	**Judge Robert Latham Ms Fiona Macleod MCIEH**
Date and Venue of Hearing	**:**	**3 March 2021 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**8 March 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Applicants have produced a Bundle of Documents which totals 200 pages and to which page references are made in this decision.

Decision of the Tribunal

1. The Tribunal makes the following rent repayment orders against the Respondent which are to be paid by 26 March 2021:

    (i) £4,499 in favour of Sofia Elvira Veliz Valencia and Christian Silva Diaz;

    (ii) £3,170 in favour of Rocio Martinez Madrid; and

    (iii) £1,700 in favour of Linyue Kang

2. The Tribunal determines that the Respondent shall also pay the Applicants £300 by 26 March 2021 in respect of the reimbursement of the tribunal fees paid by the Applicants.

The Application

1. By an application, dated 27 August 2020, the Applicants seek Rent Repayment Order ("RROs") against the Respondent. On 3 June 1999, the Respondent was registered as the leaseholder of 3a John Penn Street, London, SE13 7QT ("the Flat"). The Land Registry (at p.94) record the Respondent's address as the Flat. This is the address supplied by the Applicants to the Tribunal. On 1 October 2020, the Tribunal sent a copy of the application to the Respondent.

2. On 26 November 2020, the Tribunal gave Directions. On the same day, the Tribunal sent a copy of the Directions to the parties. Pursuant to the Directions, the Applicant has filed a Bundle of Documents. By 22 January 2021, the Respondent was directed to file a Bundle of Documents upon which he relied in opposing the application. The Respondent has not filed a bundle.

3. On 8 February 2021, the Tribunal wrote to the Respondent requiring him to file his Statement of Case by 15 February. On 15 February, the Tribunal sent the Respondent an Order debarring him from taking any further part in the proceedings.

The Hearing

4. Mr Alasdair Mcclenehan appeared for the Applicants. He is a case worker with Justice for Tenants. This is a Not-for-Profit Organisation which acts for tenants and seeks to ensure that they have access to justice. We are grateful for the assistance that he provided. All the Applicants participated in the hearing and gave evidence, albeit that none of them have English as their first language. We accept their evidence without hesitation.

The Law

The Housing and Planning Act 2016 ("the 2016 Act")

5. Section 40 provides (emphasis added):

> "(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, or
>
> (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy."

6. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". These include the offence under section 72(1) of the Housing Act 2004 ("the 2004 Act") of control or management of an unlicenced HMO.

7. Section 41 deals with applications for RROs. The material parts provide:

> "(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.

8. Section 43 provides for the making of RROs (emphasis added):

> "(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)."

9. Section 44 is concerned with the amount payable under a RRO made in favour of tenants. By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which then follows. The table provides for repayment of rent paid by the tenant in respect of a maximum period of 12 months. Section 44(3) provides (emphasis added):

"(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.

10. Section 44(4) provides (emphasis added):

"(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."

11. Section 56 is the definition section. This provides that "tenancy" includes a licence.

The Housing Act 2004 ("the 2004 Act")

12. Part 2 of the 2004 Act relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed. A licence under the 2004 Act may be held by a person who is not the immediate landlord of the occupier of residential premises. Section 64 lays down no ownership condition for the grant of a licence. The local housing authority ("LHA") must be satisfied that an applicant is a fit and proper person to be the licence holder, and that, out of all the persons reasonably available to be the licence holder in respect of the house, they are the most appropriate person.

13. Section 72 specifies a number of offences in relation to the licencing of HMOs. The material parts provide (emphasis added):

"(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.

……..

(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).

14. It is to be noted that this section does not use the word "landlord". Section 263 defines the concepts of a person having "control" and/or "managing" premises. These definitions are wide enough to include a number of different people in

respect of a property. Where there is a chain of landlords, more than one may be liable. It may also extend to a managing agent.

15. Section 263 provides (emphasis added):

> "(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
>
> (2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.
>
> (3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–
>
> > (a) receives (whether directly or through an agent or trustee) rents or other payments from–
> >
> > > (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
> > >
> > > (ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or
> >
> > (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
>
> and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

16. Section 263 was recently considered by Martin Rodger QC, the Deputy President, in *Rakusen v Jepson and Others [2020] UKUT 298* (LC) ("R*akusen*"). The situation is complex given the range of people, apart from the immediate landlord, who may be deemed to be persons "having control" and/or "managing" premises.

17. The Upper Tribunal ("UT") noted that Section 263(1) is divided into two limbs: if a house is let at a rack rent the person having control is the person who receives the rack-rent; if the house is not let at a rack rent (for example because the only letting is at a ground rent) the person having control is the person who would receive the rack-rent if the premises were subject to a letting at a rack rent. The formula used in the definition has a considerable history going back at least to 1847 (as Lord Bridge of Harwich explained in *Pollway Nominees Ltd*

v Croydon LBC [1987] 1 AC 79). The purpose of the definition is to identify the person (or group of persons who collectively have the relevant interest) who may be made subject to a statutory obligation to undertake work or make a contribution to the cost of public works.

18. In *London Corporation v Cusack-Smith* [1955] AC 337, Lord Reid considered a chain of leases and subleases where several were at a rack rent and was of the opinion that more than one person could be in receipt of a rack rent at one time. Where a house is let under a single tenancy at its full value, who then sublets the house either as a whole or as individual rooms to different sub-tenants, again at full value, both the superior landlord and the intermediate landlord will be in receipt of the rack rent of the premises and will satisfy the definition in section 263(1) of a person having control.

19. The status of "person managing" is more restrictive. The key qualification is the receipt of rent from the persons who are in occupation (whether directly or through an agent or trustee). Where a superior landlord lets a house to an intermediate landlord who then sublets to tenants or licensees in occupation, ordinarily only the intermediate landlord receives rent from those tenants or licensees. The superior landlord will receive rent from the intermediate landlord, who is not an agent or trustee for the superior landlord, so the superior landlord will not be a "person managing" for the purpose of section 263(3).

20. In *Rakusen*, the UT noted (at [59]) that the policy of the London Borough of Camden is that licences will not be granted to landlords holding less than a five year term (that being the usual duration of a licence) and that Camden considers the most appropriate person to be a licence holder in such situations to be the superior landlord. Similarly, when deciding on whom to serve an improvement notice, a LHA is likely to consider the practicality of the recipient being able to carry out the necessary remedial works. If the intermediate landlord has no significant repairing obligations and no right to carry out major repairs to the building, the LHA may well consider that the appropriate recipient of an improvement notice is the superior landlord.

21. In *Rakusen*, the Deputy President considered the purpose of the 2016 Act before summarising his conclusion:

> "64. Finally, I bear in mind that the policy of the whole of Part 2 of the 2016 Act is clearly to deter the commission of housing offences and to discourage the activities of "rogue landlords" in the residential sector by the imposition of stringent penalties. Despite its irregular status, an unlicensed HMO may be a perfectly satisfactory place to live, and the main object of the provisions is deterrence rather than compensation. The scope of the additional jurisdictions conferred on the FTT is defined by reference to the commission of specific offences, with the only qualification identified being that the person committing the offence must be a landlord. I can think of no policy reason why the objective of deterring such offences should extend only to immediate landlords and not to superior landlords. If such a limitation had been intended it could have been made clear, as it was in section 73(1), 2004 Act. The facts of

> this case are not unusual and the phenomenon of intermediate landlords taking relatively short leases of houses with few repairing responsibilities with a view to subletting them to occupational tenants is sufficiently commonplace to have acquired the recognised label "rent-to-rent". The effectiveness of rent repayment orders would be considerably reduced if the "rogue landlords" whom the orders are intended to deter could protect themselves against the risk of rent repayment by letting to an intermediate while themselves retaining responsibility for licencing and for the condition of the accommodation.
>
> 65. The conclusion I have reached, therefore, is that the FTT does have jurisdiction to make a rent repayment order against any landlord who has committed an offence to which Chapter 4 applies, including a superior landlord. There is no additional requirement that the landlord be the immediate landlord of the tenant in whose favour the order is sought. That appears to me to be the natural meaning of the statute and is consistent with its legislative purpose. The only jurisdictional filter is that the landlord in question must have committed one of the relevant offences, and before an order may be made the FTT must be satisfied to the criminal standard of proof that that is the case. Although a narrower interpretation is possible it would involve reading the language as prescribing an additional condition which is not clearly stated, and which would detract from the simplicity and effectiveness of the statutory regime."

The Background

22. On 1 October 2017, the London Borough of Greenwich ("Greenwich") introduced an Additional Licencing Scheme (at p.181-190). This extends to all HMOs in the borough.

23. On 3 June 19999, the Respondent was registered at the Land Registry as the leaseholder of the Flat at 3a John Penn Street, SE13 7QT (p.94-5). The Flat is part of a council block in Greenwich. There is a plan at p.200. The flat is on two floors. Originally, there were three bedrooms on the first floor. The ground floor living room has been divided to make two additional bedrooms. All the occupants share a kitchen (on the ground floor) and a toilet and bathroom (on the first floor).

24. At the material times, all the rooms were rented under similar agreements. The agreement for Ms Rocio Martinez Madrid is at p.41-51. It is headed "Booking Summary". The "Host" is specified as "Simple Properties Management Limited" ("Simple Properties). Whilst there is reference to a website, no address is given for the landlord. The "booking details" purport to offer a discounted rate" of "£17.33" per day.

25. We are satisfied that this agreement is a sham, intended to deceive. The substance and reality of the arrangement was for the landlord to grant Ms Madrid a tenancy. She was granted exclusive occupation of Room 5 for a term at a rent (see *Street v Mountford* [1985] AC 818). All the tenants had locks to

their rooms. The term was stated to be 19 January 2019 to 19 September 2019 at a payment of £520 per month. In fact, Ms Madrid occupied the room between 21 January 2019 to 3 September 2019. On 8 January, she had arrived in the UK from Barcelona. She initially worked as a bar tender whilst she studied child care. She is now a nursery teacher. She paid a total of £3,170 in rent (see p.77).

26. Ms Sofia Elvira Veliz Valencia and Mr Christian Silva Diaz occupied Room 4 between 3 March and 3 September 2019. Their agreement is at p.28-39. They paid £780 per month, a total of £4,499 (see p.76). On 11 April 2018, Mr Diaz had arrived in the UK from Madrid. He works as a chef for a Mexican restaurant near London Bridge. On 3 July 2018, he was joined by Ms Valencia. She has worked as a waitress.

27. Ms Linyue Kang occupied Room 1 between 28 May and 3 October 2019. Her agreement is at p.59-75. She paid £422 per month, a total of £1,700 (see p.78). Ms Kang had arrived in the UK from China at the end of 2019. She is studying Fine Art at the Camberwell College of Art.

28. The Applicants have brought their application against the Respondent, rather than Simple Properties. Justice for Tenants have had considerable experience with Simple Properties. Mr Mcclenehan described their "rent to rent" business model. Simple Properties guarantee the leaseholder a fixed rent each month. They are permitted to maximise the rent which they are able to extract by subletting the flat. They select tenants who are vulnerable, often because they do not have English as their first language and who have no understanding of their rights as tenants. Different names and agreements are used to create a smokescreen between the occupants and the leaseholder. The leaseholder's name is never specified on any tenancy agreement. When applications are sought for RROs, Simple Homes do not participate in the proceedings.

29. Mr Mcclenehan framed his application in two ways. Whilst his primary submission is that that Simple Homes was the immediate landlord, the Applicants are entitled to pursue their claim against the Respondent as the head lessor. Alternatively, Simple Homes were managing the Flat on behalf of the Respondent who would be liable as an undisclosed principal. In either situation, the Respondent would have been the most appropriate person to be the licence holder given to the sham agreements utilised by Simple Homes.

Our Determination

30. The Tribunal is satisfied beyond reasonable doubt that the Respondent has committed an offence under section 72(1) of the 2004 Act of control or management of an unlicenced HMO. The Flat is an HMO within "the self-contained flat test" specified by section 254 of the 2004 Act. It is an HMO which required a licence under Greenwich's Additional Licencing Scheme. It is not so licenced. Mr Mcclenehan has carried out a thorough search of Greenwich's Licencing register (at p.96-148).

31. We are further satisfied that the Respondent is a "person having control" of the Flat as he receives the rack-rent of the premises. We are satisfied that he receives a rack rent either directly from Simple Homes (as his tenant) or indirectly through Simple homes (as his managing agent). The busines model seems to be premised on a relationship of landlord/tenant between the leaseholder and Simple Homes, as opposed to principal/managing agent. Were the relationship to be one of principal/agent, the Respondent would also be the "person managing" the Flat in that he was receiving rent from the persons in occupation of the premises "through an agent".

32. The 2016 Act gives the Tribunal a discretion as to whether to make an RRO, and if so, the amount of the order. Section 44 provides that the period of the RRO may not exceed a period of 12 months during which the landlord was committing the offence. The amount must not exceed the rent paid by the tenant during this period, less any award of universal credit. We are satisfied that none of the Applicants were in receipt of any state benefits. They all paid the rent from their earnings.

33. The Applicants seek RROs in the following sums:

(i) £4,499 in favour of Sofia Elvira Veliz Valencia and Christian Silva Diaz for the period 3 March to 3 September 2019;

(ii) £3,170 in favour of Rocio Martinez Madrid for the period 21 January to 3 September 2019; and

(iii) £1,700 in favour of Linyue Kang for the period 28 May to 3 October 2019.

34. Section 44 of the 2016 Act, requires the Tribunal to take the following matters into account:

(i) The conduct of the landlord.

(ii) The conduct of the tenant. There has been no criticism of the conduct of the tenants.

(iii) The financial circumstances of the landlord.

(iv) Whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies, namely the offences specified in section 40. There is no relevant conviction in this case.

35. Having regard to these factors, we have no hesitation in making RROs in the sums sought. We are satisfied that the sham booking agreements were intended as a smokescreen to conceal the Respondent's identity as superior landlord. Any tenant is entitled to know the identity of their landlord. An excessive number of occupants were sharing the limited facilities in the Flat. The 2016 Act is

intended to deter the commission of housing offences and to discourage the activities of such rogue landlords.

36. We are also satisfied that the Respondent should refund to the Applicants the tribunal fees of £300 which they have paid in connection with this application.

Judge Robert Latham
8 March 2021

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28-day time limit, such application must include a request 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.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e., give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.