FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AP/HMF/2020/0223**
HMCTS code (paper, video, audio)		**V: CVPREMOTE**
Property	**:**	**81 Downhills Park Road London N 17**
Applicant	**:**	**Micheil Page(1)** **Nathalie Botcherby (2)** **Rut Einarsdotttr (3)** **Hannah Dalby (4)** **Zelda McCormic (5)**
Representative	**:**	**Justice for Tenants: Alistair Mcclenahan**
Respondent	**:**	**David Ahearne**
Representative	**:**	**Wilson Barca: Richard Barca Solicitor**
Type of application	**:**	**Application for a rent repayment order by tenant Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016**
Tribunal member(s)	**:**	**Judge H. Carr** **Mr Trevor Sennett**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**25th June 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which was not objected 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 tribunal were provided with an electronic bundle prepared by the applicants comprising 196 pages, and a response of 62 pages together with an electronic bundle prepared by the respondent comprising 34 pages. Further documents were submitted by both parties together with skeleton arguments prior to the hearing and submissions subsequent to the hearing. The determination below takes all the documentation and oral evidence into account:

Decisions of the tribunal

(1) The tribunal determines to make a Rent Repayment Order in the sum of £ 26,207.93

(2) The tribunal determines that the respondent reimburse the applicants for their application and hearing fees, totalling £300.

(3) The tribunal makes the determinations as set out under the various headings in this decision.

The application

1. The applicant tenants seek a determination pursuant to section 41 of the Housing and Planning Act 2016 (the Act) for a rent repayment order (RRO).

2. The applicants seek a RRO in the sum of £29,119.92. The period for which the RRO is sought is from 22nd September 2019 to 21st September 2020. This is a period of 12 months. The applicants made their application on 20th October 2020.

3. The applicants allege that the respondent landlord has committed the offence of control or management of an unlicensed HMO under s,72(1) of the Housing Act 2004.

The hearing

4. The applicants, other than Ms Dalby, attended the hearing together with their representative Mr Alistair Mcclenahan from Justice for Tenants. The respondent landlord, Mr Ahearne attended the hearing and was represented by Mr Richard Barca Solicitor. Attending on the

respondent's behalf was Mr. Edward Dill, Manager of H.A.M Estates Ltd.

5. Following representations from the parties the tribunal removed HAM estates from the proceedings.

6. There was some discussion about the applicants seeking to admit additional documents. The documents were designed to rebut some of the contentions in the respondent's skeleton argument. This skeleton contained new arguments rather than providing a summary of arguments already made. The tribunal determined to allow the new documents but reserved the right to not rely on their contents if they turned out to be prejudicial because of the lack of notice provided to the respondent.

The background

7. The property is a five bedroom terrace house occupied by the applicants.

8. Two of the applicants were tenants of the respondent from 22nd September 2017 and all five for the period 22nd September 2019 to 21st September 2020. The initial rental agreement was an assured shorthold tenancy dated 21st September 2017. It was for a period of 12 months and was renewed in 2018 and 2019. The tenants organised new tenants, deposits were recycled and there was no supervision of handovers.

9. The applicants paid rent of £2,426.66 per calendar month.

10. The respondent was the freehold owner of the property from the mid 1990s until when it was sold to Knockboy Investments Limited in December 2020.The directors of Knockboy Investments Ltd are members of the respondent's family.

11. The respondent employed a management agent HAM Estates Ltd to introduce tenants to the property and manage the deposits. Maintenance was carried out by HAM Estates not as part of the management arrangement but as a separate arrangement.

12. Mr Aherne is a director of HAM Estates Ltd.

The issues

13. The issues that the tribunal must determine are;

(i) Is the tribunal satisfied beyond reasonable doubt that the landlord has committed the alleged offence?

(ii) Does the landlord have a defence of a reasonable excuse?

(iii) What amount of RRO, if any, should the tribunal order?

(a) What is the maximum amount that can be ordered under s.44(3) of the Act?

(b) What account must be taken of

(1) The conduct of the landlord

(2) The financial circumstances of the landlord:

(3) The conduct of the tenant?

(iv) Should the tribunal refund the applicants' application and hearing fees?

The determination

Is the tribunal satisfied beyond reasonable doubt that the respondent has committed the alleged offence?

14. The applicants provided confirmation from Haringey council that the property has never been licensed and that no application for a licence had been received. That email is dated 14th April 2021 and was sent by Marta Hardy Senior Environmental Health Officer with Haringey Council.

15. The respondent conceded that the property required licensing and it was not licenced.

16. He mounted three challenges to the alleged offence:

(i) The application was statute barred because the hearing was more than 6 months after the commission of the offence.

(ii) The applicants had not proved that they occupied the property as their only or principal home, or that they had occupied it as such for the full period of the claim

(iii) That the applicants had failed to demonstrate that they were not in receipt of the housing element of universal credit.

17. The respondent's first challenge is novel. He argues that as at the date of the hearing on the 7th May 2021, there could not have been a successful prosecution for any offence under the Housing and Planning Act 2016 there therefore cannot be a successful application for a Rent Repayment Order.

18. He points out that offences under the Act are summary only and therefore, pursuant to s 127 Magistrates Court Act 1980 no prosecution of the respondent could now take place, as all of the dates of occupation were more than 6 months prior to the date of the hearing.

19. Therefore, the respondent submits that there should be no RRO at all as there cannot now be any successful prosecuting of the Respondent.

20. In the alternative, the date to be considered is the date of the application for the Rent Repayment Order (being the 20th October 2020), and the cut-off point should be taken as 6 months prior to that date i.e. 19th April 2020, and the RRO should only as a maximum be awarded for the period of 6 months for which a prosecution was possible at the date of the application being filed.

21. The applicants pointed to the words of s.41 of the Housing and Planning Act 2016 which provides that 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.

22. As the offence was committed in the period of 12 months ending with the day on which the application is made there is no bar to the making of the RRO.

23. In relation to the occupation of the property as only or main residence, the respondent suggested that the applicants had not occupied the property as their own or main home for all or some parts of the relevant period. He refers to correspondence with the applicants which indicated that they had left the property during the pandemic.

24. The applicants gave evidence on the matter. The applicants note that the correspondence that the respondent is relying on is an email sent by Ms Einarsdottir asking for a reduction of rent as a result of losing income during the pandemic. No rent reduction was provided.

25. The applicants gave evidence explaining that any absence from the property was for short periods of time only, for holidays or family reasons. The pandemic delayed return to the property because of restrictions on international travel. Mr Page told the tribunal that he had occupied the property for three years. He returned to his family for a few weeks, during the period of the claim, because his father was terminally ill. The applicants gave evidence that during periods away their belongings remained in the property and correspondence was still sent to the property. Rent was paid during the whole period.

26. The applicants also provided evidence that they paid Council Tax on the property.

27. In relation to the third challenge the applicants stated that none of them were in receipt of universal credit and indeed because of their status those of the applicants who were students were not eligible.

The decision of the tribunal

28. The tribunal determines that the respondent has committed the alleged offence.

The reasons for the decision of the tribunal

29. The tribunal relies on the evidence from the applicants, the information from the local authority and the concessions of the respondent. In particular it finds that whilst the applicants had periods of absence from the property it did not cease to be their main or principal home. It also accepts that none of the applicants were in receipt of the housing element of universal credit.

30. It accepts the argument of the applicants in relation to the statute barring of the prosecution. It considers that the timetable provided in the Housing and Planning Act is determinative of the availability of the RRO. In this case the application was made within 12 months of the offence being committed.

Does the respondent have a reasonable excuse defence?

31. The respondent provided the following reasons for his failure to licence the property. He is 78 years old and suffers from serious health issues. He told the tribunal that he intended to apply to licence the property, but he was unable to do so due to the Coronavirus pandemic. He received medical advice that said he was extremely vulnerable to the virus and that he should shield.

32. Mr Ahearne elaborated upon these reasons in response to questions from the tribunal. He explained that it was not that he was physically incapable of licensing the house, but his diagnosis and tests for cancer had preoccupied him to such an extent that he was unable to concentrate on the business

33. He also said that Haringey Council had failed to prompt him to licence the property.

34. The applicants argue that the respondent is a professional landlord who has had an extensive portfolio of properties for a very long period. He has had experience of licensing properties and also has the benefit of professional support.

35. The tribunal determined to treat the reasons given as an argument that the respondent has a reasonable excuse defence to the alleged offence under s. 72(5) (a) of the Housing Act 2004.

The decision of the tribunal

36. The tribunal determines that the respondent has failed to establish a defence of reasonable excuse.

The reasons for the decision of the tribunal

37. The tribunal's starting point is that the burden of proof for establishing the defence falls on the respondent who has to establish the defence on the balance of probabilities.

38. In these particular circumstances and whilst the tribunal expresses its sympathies for the health conditions of the respondent, the tribunal does not find that the respondent has made out a reasonable excuse defence. Neither forgetting to licence a property, nor being too distracted to licence a property constitute a reasonable excuse defence to the offence. This is particularly true of a professional landlord who had resources available to him that should have enabled him to delegate the responsibilities of licensing.

Should the tribunal make an award of a RRO? If so, for what amount?

39. No issues were raised about the period for which the applicants are claiming nor the amount of the claim. The tribunal therefore determines that the maximum award for the period of claim is £29,119.92.

40. In determining the amount of the award the tribunal heard evidence about

(i) The conduct of the landlord

(ii) The conduct of the tenants

(iii) The financial circumstances of the landlord.

The conduct of the landlord

41. The respondent argues that he has never been convicted of any HMO offence, any offence relating to the management of residential properties or any other offence

42. The respondent says that the property was maintained and constructed such that it was compliant with the HMO standards and that the Property was managed throughout the tenancy to a high standard. Items of repair were attended to promptly as evidenced by his schedule of repairs.

43. The repairs cost the respondent a total of £2,310 and he asks that this be taken into account together with the cost of building insurance and letting agents fees for the period.

44. The respondent refers to the evidence of Mr Dill, in which he states that "When the tenants were leaving the property I spoke with Mr Page who was very amiable and made no suggestions that he had any issues as a result of his tenancy."

45. He suggests that the applicants have failed to provide any evidence to support their claim that there were "significant problems with the management of the property itself" and the respondent denies that there were any. He notes that the applicants state in their response that the lack of the licence was the main reason for the application.

46. The respondent states that no other management issues were identified in the application itself or subsequently. There were no issues and that any items of repair were attended to promptly as evidenced by his schedule of repairs.

47. The applicants state that, whilst not relying upon defects at the property, there were issues in relation to dampness, window repair and

smoke alarms. They had been told to report any issues to HAM Estates. The tenants had never seen Mr Ahearne until the hearing and no routine visits had been made by the agents except for issuing a gas safety record. Contacts at HAM Estates were with Eddie or Phoebe.

48. They also refer to the account of their leaving of the property which is discussed in tenant conduct below

The conduct of the tenants

49. The applicants state that their conduct was exemplary. The tenants have complied with all of their tenancy terms. They paid all rent required despite falls in income as a result of the pandemic.

50. The landlord asks the tribunal to take the conduct of the tenants into account in determining the amount of the RRO. He says that when the tenants left the property, they told Mr Dill that they had left the property in a good condition.

51. On that basis he agreed to refund the whole of the rent deposit, and did so. However, when the landlord's maintenance team went to the Property it became apparent that this was not the case. They discovered the following defects:

(i) Two of the rooms had curtain poles and curtains removed.

(ii) Additional junk furniture had been brought by the tenants and not removed

(iii) The kitchen including the fridge and oven had been left filthy.

(iv) One glass shower panel in the bathroom broken.

(v) The entire house was strewn with bits and pieces – no hoovering or cleaning had been done.

(vi) The garden was full of rubbish – broken furniture, black bags, and assorted rubbish.

(vii) Normal rubbish bins were overflowing with black bin bags such that they would not be accepted by the council.

(viii) Rubbish removal alone from the property from broken furniture cost approximately £400 odd. There were two full truck loads.

52. The applicants argue they left the property in very good condition having spent a day collectively deep cleaning the property. They sent photographs to demonstrate that the property was clean and tidy. There was no glass shower screen, only a shower curtain, and they referred to the photographs taken on the day of departure from the property which showed the bathroom with no sign of a shower screen and the house left in a clean and ordered manner.

53. The tribunal asked Mr Dill about the state of the property. He told the tribunal that there were no inventories of the contents. Also he had never visited the property before he visited it post the tenants departure. He had no knowledge about whether there had been curtain poles and curtains in the property before and was very unclear about the glass shower panel.

54. He suggested that the problem with the fridge may have been caused by the tenants leaving some food behind. Mr Dill says he did not visit until about a month after the termination of the tenancy. Mr Dill did not take photographs of the problems he suggests there were with the condition of the property and could not explain to the tribunal why he had omitted reference to any problems in his witness statement. He was not involved in the organisation of any rubbish clearance and had not seen any invoices for clearance work.

The financial circumstances of the landlord

55. The respondent argues that he is not able to repay the entire sum as claimed as his financial circumstances have been severely affected by the pandemic. He produced, on the morning of the hearing a bank statement indicating that his balance in his bank account as of 4th May 2021 was £6108.78.

56. The respondent explained to the tribunal that he receives no salary, rents the house he lives in owing some £1m in rent and is obliged to pay out £50,000 a year to his children to pay educational fees for their children.

57. The applicants point out that the information on financial circumstances was only provided on the morning of the hearing. They make the following points: the respondent was a professional landlord

until he decided to retire recently. He started his property portfolio in 1975. He owned the subject property without a mortgage, until he sold it for £450,000 on 29 December 2020. He has himself said he owns somewhere in the region of a dozen properties still under his own name, most now unencumbered, and a number more through HAM Estates, a company that exists to manage it's own properties and the Respondents properties, of which he is a Director and shareholder.

58. No tax records or list of property assets have been provided. To argue that he has very limited resources and should have the penalty reduced because of financial circumstances is unreasonable and distasteful.

Submissions on quantum

59. The respondent asked for a deduction of £2,500 be made for tenants' conduct, apportioned equally to the five tenants and to make a 50% reduction in the award to account for the landlord's financial circumstances.

60. The applicants draw on decisions of the Upper Tribunal to argue that the starting point for an RRO is 100% of the rent paid. They argue that there should be no reduction of the RRO because of the landlord's conduct and none because of his financial circumstances.

The decision of the tribunal

61. The tribunal determines to make a RRO of 90% of the amount claimed ie £ 26,207.93.

The reasons for the decision of the tribunal

62. The reason for the 10% deduction is to reflect that the landlord has committed only one offence under the Act. The reason the deduction is not more is that the tribunal has concerns about the conduct of the landlord. The tribunal notes that the respondent has been a professional landlord since the mid 1970s with an extensive property portfolio. He has experience of licencing other properties and he has the resources to delegate the task of licencing. It is very difficult to understand the conduct of the landlord in failing to licence the property since 2017.

63. In setting the level of penalty the tribunal has taken into account the length of the failure to licence. It has also taken into account the importance of licensing as a tool to ensure the health and safety of tenants occupying Houses in Multiple Occupation and the level of RRO must reflect this. It also notes the importance that landlords who do

licence their properties are not disadvantaged by their compliant behaviour.

64. The landlord suggests that other than a failure to licence he has been a good landlord. The tribunal would make two points in response to this to suggest that there were problems over and beyond the simple failure to licence.

(i) Despite the apparent role of HAM estates, the tenants seem to have taken a major role in managing the property. One of the reasons for the particular regulatory framework for HMOs, including the management regulations, is to ensure that the landlord proactively manages the tenancy and there has been a failure to do this here.

(ii) The tribunal finds the respondent's account of the state that the property was allegedly left in implausible. It deals with this below when considering the conduct of the tenants. However it is concerned that this matter did not feature in the original statement of Mr Dill and was only raised on the morning of the hearing.

65. Whilst the tribunal agrees with the applicants that complying with landlord and tenant law as far as giving correct tenancies and proper security of tenure is not conduct that should be anything other than a standard expectation of a landlord, the tribunal does note that the respondent's behaviour is not in the worst category of landlord behaviour. For that reason it has made a small deduction of 10% for the landlord's conduct. The tribunal does not consider that the maintenance problems reported by the applicants were of such concern that they should affect the quantum of the RRO.

66. The respondent has made allegations about the conduct of the tenants. The tribunal does not accept these allegations. It finds the applicants' account plausible. Mr Dill had nothing on which to rely to demonstrate the credibility of his account. There is no email for instance explaining the problematic state of the property. Moreover the tribunal notes that there were no inspections of the property during the course of the occupation of the applicants and there was no inventory. The tribunal agrees with the applicants that Mr Dill's account is implausible. Therefore the tribunal determines to make no deduction for the conduct of the tenants.

67. The tribunal notes the respondent's claim about his financial circumstances. Whilst the respondent's income may have been affected during the pandemic, the tribunal has not been provided with details of income from his portfolio or from other sources. The expenditure

attributable to the property such as agent's fees, insurance and repairs are part of the routine expenditure that landlord incurs as part of normal business arrangements and as such no account should be taken in determining quantum of an RRO award. However it agrees with the applicants that it is very difficult to believe that he is as without resources as he claims. The applicants were not given sufficient time to consider the statement about financial resources as it was only provided on the day of the hearing. In the circumstances the tribunal is not going to make any deduction from the award for the financial circumstances of the respondent.

68. In the light of the above determinations the tribunal also orders the respondent to reimburse the applicants their application fee and hearing fee.

Name: Judge H Carr **Date:** 25th June 2021

Rights of appeal

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

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

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

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case

number), state the grounds of appeal and state the result the party making the application is seeking.

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