FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BB/HMF/2020/0211**
Property	**:**	**44 Abercrombie Road, London, E20 1FU**
Applicants	**:**	**Rachel Canfield (1)** **Nicole Ducasse (2)** **Josh Worth (3)** **Ryan Donnelly (4)** **Rohail Rafi (5)**
Representative	**:**	**Mr Penny, Flat Justice**
Respondent	**:**	**Ms Nehizena Uyiekpen (1)** **Ms Thrilla Gukuta (2)**
Representative	**:**	**Ms Annette Cafferkey, Counsel**
Type of application	**:**	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	**:**	**Mr Charles Norman FRICS Valuer Chairman** **Mr Trevor Sennett FCIEH**
Venue and Date	**:**	**10 Alfred Place, London WC1E 7LR, 27 September 2021**
Date of decision	**:**	**23 January 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be

determined in a remote hearing. The documents that the Tribunal were referred to are in bundles of approximately 500 pages, the contents of which the Tribunal has noted. The Decision is set out below.

DECISION

(1) The application for a rent repayment order is refused
(2) The application for reimbursement of the applicants' Tribunal fees is refused

REASONS

Background

1. By an application dated 9 October 2020, the applicants applied for a rent repayment order as follows:

2. In respect of an alleged licencing offence under section 72(1) of the Housing Act 2004 and section 40(3) of the Housing and Planning Act 2016:

Rachel Canfield	December 2020-May 2020	£5200
Nicole Ducasse	January – July 2020	£6771
Josh Worth	June – July 2020	£2593
Ryan Donnelly	December 2019-April 2020	£4750
Rohail Rafi	December 2020-July 2020	£6750

The total was therefore £26,064.

In addition, an application was also made in respect of an alleged eviction offence contrary to section 3A of the protection from eviction act 1977. The claim in respect of this was as follows:

Nicole Ducasse	January – July 2020	£6771
Josh Worth	June – July 2020	£2593
Rohail Rafi	December 2020-July 2020	£6750

This total was £16,114.

3. On 28 November 2019, Ms Uyiekpen entered into a tenancy of a recently constructed house in Stratford for a term of two years at a rent of £3200 per month. The landlord and freeholder was Mr Boris Wiessler. His agents were Foxtons.

4. Clause 5.1, 5.3 and 5.4 of the tenancy agreement imposed covenants on the tenant to use the property as a private residence only in the occupation of the tenant and immediate family, not a run a business from

the property and not to use the property for any illegal purpose. Clause 5.23 prohibited the tenant doing anything to create an HMO. Clause 12.1 prohibited the parting of possession or sharing of possession except with the named tenant. Clause 12.2 prohibited the taking in of lodgers, paying guests or any person other than the named tenant and her children under 18.

5. In the tenancy agreements between the landlord and each of the applicants the landlord was stated as "TNG International Properties".

Procedural Matters

6. At the commencement of the hearing, Ms Cafferky submitted that the direction of the Tribunal that Ms Gukuta be joined as a second respondent should be reconsidered. Counsel submitted that the applicants' basis namely that she was "the person managing the property and exercising control over it" did not give the Tribunal jurisdiction, as it was not made on the basis that she was the landlord. Ms Cafferky also submitted that the landlord is the person who holds the reversionary interest, citing *Goldsborough v CA Property Management Limited* [2019] UKUT 311.

7. The Tribunal reserved its position on this submission at the hearing, but invited written submissions on the point, which were provided by both parties. The Tribunal subsequently identified a point of law which neither party had raised namely whether the second respondent was a lessor by estoppel, with reference to para 1.035 of Woodfall. This states inter alia "The first is estoppel by representation, which may apply where the landlord has represented that he has a particular title. In such a case he will be estopped from afterwards denying that he had the title which he asserted he had." The applicants submitted that Ms Gukuta was estopped from denying title as a lessor.

8. Ms Cafferkey submitted that the doctrine did not apply as the validity of the agreement as between the freeholder and Ms Uyiekpen was not in dispute and it was she who granted the subtenancies. The purpose of estoppel was not to provide an additional landlord where there was already one. The estoppel principle could confer additional jurisdiction on the Tribunal, applying *Contour Homes v Rowen* [2008] HLR 9. *Goldsborough* was cited to support a contention that a managing agent that does not have a lease of the property cannot be a landlord.

9. Ms Cafferkey also disagreed with the statement in Woodfall Para 1.035 that "the execution of a lease which operates by estoppel, there is created in the lessor a reversion in fee simple by estoppel" on the grounds that *Cutherbertson v Irving* had been misapplied.

10. Further, estoppel is a vague concept and had no place in a criminal jurisdiction.

11. The Tribunal's decision on this issue is set out below, after consideration of the evidence.

The Applicants' Case

The Licencing Offence

12. The applicants' case may be summarised as follows. The property was occupied as a house of multiple occupation (HMO) with five occupants from more than one household sharing amenities. Such properties are required to be licensed by the local housing authority under the mandatory statutory licensing scheme. The definition of such properties is derived from the standard test under s 254 of the Housing Act 2004, as amended, and under the Prescribed Description Order 2006, which exempts properties with less than five occupants, and also the Prescribed Description Order 2018 which removed the exemption for properties with less than three storeys. Further, failing to licence such a property is an offence under s. 72 (1) of the Housing act 2004. By section 40(3) of the Housing and Planning Act 2016, such an offence gives rise to a potential rent repayment order.

13. From *Vadamalayan v Stewart* [2020] UKUT 183 (LC), the applicants submitted that quantification should proceed in two stages. The starting point was the rent paid during a period not exceeding 12 months during which the landlord was committing the offence. Except where the landlord pays for utilities, the Tribunal should not deduct the landlord expenses to calculate a profit. It is then necessary to consider whether alteration should be made to take into account the conduct of the landlord and tenant, the financial circumstances of the landlord and whether the landlord has been convicted of [a relevant offence]. Therefore the applicant submitted that at the first stage the full amount claimed should be allowed.

14. As to the said second stage, as conduct of the parties was a relevant consideration under the previous Housing act 2004 regime, cases on that regime remain authoritative guidance. In particular *Parker v Waller* [2012] UKUT 0183 (LC) made clear that only conduct which relates to the offence should be considered. The tenant's conduct should be considered only if in some way it prevented the respondent from complying with their obligation to licence the property. There was no such relevant conduct by the applicants.

15. Conversely, the landlord's conduct exhibited the following failures: failure to provide copies of the gas safety certificate as required by The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015, absence of a "how-to rent" guide; the lack of an electrical installation condition report; the absence of an energy performance certificate; the lack of a fire risk assessment; the absence of

a clear display of the landlord or managing agents' details. In addition, the applicants asserted that the respondent had harassed and evicted the tenants.

16. Paragraph 40 of *Parker* states that any landlord's mitigation based on financial circumstances must be public open to challenge by the tenants. The applicant submitted that this should be proved to the criminal standard of proof. Further there are no exceptional circumstances in favour of the respondents.

The Alleged Harassment Offence

17. It is convenient to address this below.

The Applicants' Evidence

18. Mr Perry called Ms Canfield, Mr Worth, Mr Rafi, and Ms Ducasse. Mr Donnelly was not available to attend the hearing but provided a witness statement. Each of their respective witness statements was in substantially similar terms. Each witness confirmed that the property was their main residence, and that the property was shared with up to five other occupants amounting to 5 separate households. Each stated that the property was occupied as per an occupancy table contained in the bundle. Each also referred to a chronology and confirmed that that document was accurate. Each stated there was an absence of a gas safety certificate, an electrical installation condition report, the landlord's details, the how-to rent guide and lack of fire extinguishers or fire blankets. Accounts differed in relation to allegations of harassment.

19. In relation to allegations of harassment, Ms Canfield stated that on the 23 May 2020 Mr Murad (the handyman) came to the property unannounced and spoke to her in the living room. He asked about her financial situation and stressed that there would be no further extension to her contract past the one month already discussed with Ms Gukuta. Ms Canfield sent an email the next day to TNG International Ltd to extend the contract a further two weeks only to ensure that she was out of the property as soon as possible.

20. Ms Ducasse alleged that on 23 May 2020 Mr Murad came into the house unannounced and asked to enter Ms Ducasse's bedroom to privately discuss the tenancy agreement. He gave an over-generalised explanation about future changes to the property to force her to end her tenancy. Ms Ducasse told Mr Murad that she would be leaving the property anyway. On 25 June 2020 Ms Gukuta moved a family of five into the property, despite knowing the property was an unlicensed HMO, causing overcrowding. On 30 July 2020 Ms Ducasse had a manipulative email exchange with Natasha [an assistant of the landlord] where race and profession were brought into the discussion. Ms Ducasse asked Natasha to stop emailing her, but she continued to do so. On 19 August 2020 Ms Gukuta and Mr Murad arrived at the property unannounced and started

to remove furniture and kitchenware stating that the property needed to be vacated and that they thought “we had left the day before”. Ms Ducasse had sent an email to say that there was no guarantee that she could leave on the 18th. The police were contacted and advised that they had limited powers in the circumstances. On 22 August 2020 Mr Murad removed the television from the communal living area.

21. Mr Worth stated, in relation to alleged harassment, that Mr Murad entered the property without permission on several occasions to show prospective tenants around the house during the pandemic. On 25 June 2020 Ms Gukuta moved the family of five into the property, sharing one room. On 27 July 2020 Ms Gukuta sent a text message informing him that he had to vacate the property by 18 August 2020. This was never followed up by an official notice. On 19 August 2020, before he had started packing up his belongings to vacate the property, Ms Gukuta and Mr Murad were emptying the house in a hurry.

22. Mr Rafi, in relation to alleged harassment, stated that he was faced with constant harassment and unco-operative behaviour from the landlord. Reported maintenance issues were not addressed and required constant follow-up. The landlord used their handyman to physically confront him at the property and convince him to leave through intimidation tactics and aggressive verbal behaviour. A section 21 notice to obtain possession was not served and the landlord failed to secure the deposit in a deposit protection scheme. The landlord decided to rent to a family of five people comprising two adults and three young children in July 2020, knowing that the property was not suitable for that, and was also in contravention of HMO rules. Mr Rafi believed that this was a deliberate action to cause nuisance to the rest of the tenants and convince them to leave the property voluntarily.

The Respondents’ Case

23. Ms Cafferkey submitted that witness statements did not specify witnesses addresses or occupation. Counsel emphasised that Tribunal must be satisfied beyond reasonable doubt that the respondent had committed an offence to which chapter 4 of the Housing and Planning Act 2016 applied. In relation to failure to licence a person commits an offence contrary to section 72 (1) of the Housing Act 2004 if he is a person having control of or managing an HMO which is required to be licensed but is not so licenced. An HMO is defined under section 254. Such a building will be an HMO if it meets the standard test. The salient requirements are that living accommodation is occupied by persons who do not form a single household, living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it, rents are payable in respect of at least one of those persons in occupation and two or more of the households share one or more basic amenities.

24. Part 2 of the Housing act 2004 applies to HMOs that fall within the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018. The most significant requirement here is that the accommodation be occupied by five or more persons. Further the property will not be a prescribed HMO that does not meet the above requirements so that if the number of people occupying falls below five the property is not an HMO. Ms Cafferkey also submitted that it is a defence if the person has a reasonable excuse of not having a licence under s. 72 (5). The respondent's evidence was that they addressed this question by looking at L.B. Newham's website. That council operates a selective licensing scheme which provided that postcode E20 was excluded.

25. Ms Cafferkey submitted that based on the applicants' witness statements only four of the five applicants occupied the property at any one time. This was because Mr Donnelly left on 30th of April 2020 and Mr Worth did not move in until 13 May 2020. In addition, although the occupancy table on page 71 of the bundle made a reference to "YT", Yung-Ru Tseng and who was said to occupy from January 2020 to 21 March 2020, no other evidence was provided. The Tribunal could not assume that this person occupied the property as their only or principal home or that any rent payments were made.

26. As to the person having control and the person managing, under section 263, Housing Act 2004, the "person having control" 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). Ms Cafferkey submitted that the first respondent did not receive the rack rent this was paid into Ms Gukuta's sole personal account. "Person managing" means, in relation to premises the person who being an owner or lessee of the premises receives (whether directly or through an agent or trustee) rents from persons who are in occupation as tenants or licensees of part of the premises and or would so receive those rents rather payments but having entered into an arrangement (whether in pursuance of a court order otherwise) with another person who is not an owner or lessee of the premises by virtue of which the other person receives the rent or other payments and includes, where those rents rather payments are received through another person as agent or trustee, the act that other person. Ms Cafferkey submitted that there can be only one person managing.

27. Counsel submitted that the respondents had a reasonable excuse for not obtaining a licence based on their research on LB Newham's website.

28. In relation to the Protection from Eviction Act 1977, Ms Cafferkey set out the provisions at section 1(3A) which state that the landlord of a residential occupier or an agent the landlord shall be guilty of an offence if (a) he does act likely to interfere with the peace or comfort of the residential occupier… or (b) he persistently withdraws or withholds services reasonably required for the occupation of the premises as a

residence, and (in either case) he knows or has reasonable cause to believe that the conduct is likely to cause the residential occupier to give up occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises.

29. With reference to the witness evidence in relation to these allegations (see above) Ms Cafferkey submitted that there was no proof or lack of actual participation by Ms Uyiekpen. Further, Ms Ducasse Mr Rafi and Mr Worth had all agreed to leave by 18 August 2020. They had been advised by Foxtons to leave. Ms Gukuta did not have reasonable cause to believe that her actions were likely to cause the occupiers to leave the property because she believed they had already left or were leaving on that date.

30. In relation to quantum, only one rent repayment order could be made as per *Ficarra v Hannah James* [2020] UKUT 298. As to quantum, sums paid for utilities of £5462 should be deducted. If the offence of failure to licence was proved, the amount must relate to the rent paid during the period when the offence was committed, not exceeding 12 months. If the unlawful eviction offence was proved, this must relate to the rent paid in the 12 months preceding the date of the offence. Items worth £1,190 were supplied to the tenants. Beyond this, the Tribunal could consider circumstances generally and in particular the conduct of the parties, the financial circumstances of the landlord and whether the landlord had previously been convicted of a relevant offence. The property was high end and reductions of rent were agreed by the landlord. There was no gas at the property; a "How to Rent" guide was left at the property; there were fire alarms; there were no professional managing agents, but the tenants had the landlord's contact details. It was not accepted that a duty to provide firefighting equipment existed.

<u>The Respondent's witnesses</u>

31. Ms Uyiekpen gave evidence having submitted a signed witness statement. This may be summarised as follows. She and her friend Thriller Gukuta decided to embark on a 'rent to rent' strategy. They followed guidance from a YouTube channel where there was no reference to the need to obtain the landlord's consent, but had Ms Uyiekpen used common sense or professional advice she would have found out that she needed to do so. She entered into the assured shorthold tenancy with Mr Wiseler. The property was let unfurnished and Ms Gukuta purchased the furniture and paid outgoings. Rent was £3200 per month. Ms Gukuta and Ms Uyiekpen agreed that the latter would be the named person on the tenancy agreement. Ms Uyiekpen stated, "we were to let the property to sub-tenants as TNG international properties." Ms Gukuta would have day to day contacts with the tenants. They agreed to share profits at six month intervals, but by then had incurred losses at the point when the

property was handed back. They advertised the property on spare room.com.

32. When they met tenants, they introduced themselves as managing the house stating that it was not their house. Ms Gukuta provided bank details to receive rent. They left a welcome pack of essential information including the government "how to rent" guide. The tenants were happy and well looked after. As a result of lockdown Ms Uyiekpen eventually gave rent reductions as requested.

33. In July 2020 there were two spare rooms and three tenants. It was hard to find tenants and a Brazilian family were in desperate need of short-term accommodation and Uyiekpen agreed to let the two empty rooms to them. They comprised parents and three children. The existing tenants were extremely abusive to the family, the police were called, and the family left after only one week. This situation prompted the tenants to contact Foxtons. The landlord became aware of the subletting and sent an email asking her to leave the property in 30 days. Ms Uyiekpen admitted everything to Foxtons. The tenants were not unlawfully evicted. Ms Gukuta informed them that they needed to leave and served section 21 notices on the tenants. The tenants told Ms Uypiekpen that they were going to move out because they had stopped paying their bills. On 19 August 2020, Mr Murad attended the property with a colleague. Ms Uypiekpen believed that the tenants had moved out. Ms Uyiekpen and Ms Gukuta had to remove their property in order to provide vacant possession. However, on 19 August 2020 the tenants were still there. They contacted Foxtons and upon advice from Foxtons Mr Murad stopped removing property. The tenants did not leave and were not forced do so. Ms Uyiekpen was not personally present.

34. Ms Gukuta gave a witness statement and supplemental witness statement. She was friends with the first respondent, and they worked together on the 'rent to rent' scheme. She took the lead in the venture and collected rent and dealt with outgoings. Various services were provided, and tenants' requests met. Ms Gukuta served section 21 notices on the tenants and did not unlawfully evict them. However she was not able to annex copies of section 21 notices. She did try to do some research as to whether the property required a licence. She looked at the London Borough of Newham's website which indicated that the postcode E20 was excluded. She also asked Foxtons about whether a licence was needed, and they told her it was not. When she attended the property on 19 August 2020 with Mr Murad, she believed that the remaining tenants had already moved out.

Findings

The Status of Ms Gukuta

35. The term "landlord" is undefined in the 2016 Act. In considering that definition, all principles of law and equity are within the purview of the Tribunal, unless expressly constrained by statute or a rule of law arising from the judgment of a superior court of record, binding on this Tribunal. The issue is one of the meaning of the word "landlord" not the jurisdiction of the Tribunal. Therefore the Tribunal does not consider *Contour Homes* relevant, as there the definition of landlord was not in issue. Further, the application is concerned with the tenancies between TNG International Properties and the applicants, and not title paramount. The Tribunal rejects the submission that para 1.035 of Woodfall is incorrect. *Goldsborough* was not concerned with estoppel. Further, Ms Uyiekpen did not suggest that Ms Gukuta was her managing agent. On the contrary she stated in evidence that profits would be split between each of them.

36. Recital 1 of the subtenancies stated: "the Landlord is the owner of residential property available for rent and is legally entitled to grant this tenancy." In the bundle, one of the tenancies was signed in typeface "Haz Gukuta, TNG International Properties" and Mr Worth's and Mr Rafi's agreements were contained a signature by Ms Gukuta. The Tribunal rejects the submission that estoppel cannot apply because it has not been accepted in criminal cases, for which no authority was cited. Further, the Tribunal is a civil court of law and its findings do not amount to criminal convictions, even though in this jurisdiction, it is required to find that a criminal offence has been committed to the criminal standard of proof.

37. The Tribunal finds that this scheme was a joint enterprise between both respondents who together used the name "TNG International Properties," which is not a corporate entity. The Tribunal further finds that Ms Gukuta having signed at least three of the subtenancy agreements as "TNG International Properties" without any qualification (such as "as agent for") is estopped from denying that she is a landlord. It is not disputed that the first respondent was a landlord. The Tribunal does not accept the submission that only a single entity or individual may be a landlord. The Interpretation Act 1978 makes clear that the singular contains the plural. The Tribunal finds that Ms Gukuta was correctly joined as Second Respondent.

<u>Licencing</u>

38. The Tribunal found each of the applicants to be honest and truthful witnesses and in general accepts their evidence.

39. As stated above, the Tribunal finds that both the first and second respondents were the landlord in this case trading as TNG international properties. The Tribunal finds that the respondents had no intention to comply with the relevant restrictions in the assured shorthold tenancy which the first respondent signed. It also finds that the tenancy agreements with the subtenants contained false representations that the first and second respondents were owners and had the right to sublet. Ms Gukuta accepted in answer to a question from the Tribunal that those statements in the tenancy agreement were untrue. Consequently, the Tribunal considers that the evidence from each of the respondents must be treated with considerable caution. Where there is a conflict between the applicant's evidence and that of the respondents in general the Tribunal accepts the evidence of the applicants.

40. However, the Tribunal is only able to make a rent repayment order if satisfied beyond reasonable doubt that the offence under section 72(1) had been committed. In that regard the Tribunal accepts the submissions of Ms Cafferkey that, within the period in respect of which the claim has been made within the statement of case, there were a maximum of four tenants, who had provided witness statements. The Tribunal accepts counsel's submission that it has no evidence as to the relevant status of Yung-Ru Tseng (YT) and could not therefore be satisfied that she met the necessary qualifications to permit the making of a rent repayment order. The Tribunal finds that once the Brazilian family had moved into the property between 25 July 2020 and 1 August 2020, that those conditions were satisfied. However that time period falls outside the applicants' statement of case. Further and in any event the Tribunal in exercise of its discretion would decline to make a rent repayment order covering only a six day period having regard to the nature of the claim.

41. For these reasons, the claim on this ground fails.

<u>The alleged harassment offence</u>

42. The Tribunal finds that section 21 notices were not served as none were exhibited to any witness statement or otherwise supplied in an extensive bundle. The Tribunal accepts the applicant's evidence on this point.

43. However the legal burden on the applicants in relation to the Protection of Eviction Act claim is a high one. This is because they must prove beyond reasonable doubt not only that the landlord did an act likely to interfere with the peace or comfort of the residential occupier or (b) he persistently withdrew services reasonably required for the occupation of the premises, but also that "*the landlord knew or had reasonable cause to believe that the conduct was likely to cause the residential occupier to give up occupation*". The difficulty for the applicants is that the evidence supports the proposition that they were intending to leave in any event. Accordingly the Tribunal is not satisfied beyond reasonable doubt that such acts as took place caused any of the tenants to leave. In addition, the Tribunal accepts that Ms Uyiekpen was not present at the relevant times

and that there is insufficient evidence against her on that ground also. For these reasons, the Tribunal cannot be satisfied beyond reasonable doubt that an offence took place.

44. For these reasons this claim also fails.

45. As both claims have failed for the reasons above it is unnecessary for the Tribunal to consider whether the reasonable excuse defence is made out or matters relating to quantum.

Reimbursement of Costs

46. As the applicants have been unsuccessful, the Tribunal refuses this application.

Name: C Norman FRICS **Date:** 23 January 2022

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.