FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AP/HMF/2019/0075**
HMCTS code (paper, video, audio)	**:**	**V: CVP REMOTE**
Property	**:**	**203 Downhills Way, London N17 6AH**
Applicant	**:**	**Mr Steven Cox, Mr Stefano Andre and Mr Daniele Franz**
Representative	**:**	**Mr McClenahan (Justice for Tenants)**
Respondent	**:**	**Mrs Nuray Hussein**
Representative	**:**	**Mr Peter Stanway, Stanway Little Associates**
Type of application	**:**	**Rent Repayment Order** Housing and Planning Act 2016 section 40 - 44
Tribunal members	**:**	**Judge N Carr**
Date of hearing	**:**	**21 September 2020**

DECISION

DECISION

(1) The Respondent must repay to the Applicants, via the lead Applicant Mr Steven Cox, the sum of £5,949.88 representing the rent for the period 27 – 30 May, June, July and August 2020;

(2) Pursuant to rule 13(2) of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013, I order that the Respondent must pay the Applicants' fees for the Application and Hearing Fee, in the sum of £300.

REASONS

The application

1. This has been a remote video hearing as requested by the Applicants. The form of remote hearing was V: CVP REMOTE. A face-to-face hearing was not held because or it was not practicable due to the covid-19 pandemic, and all issues could be determined in a remote hearing. The documents that I was referred to are the Applicants' application and, the Applicants Primary Bundle running to 194 pages and the Applicants' Supplementary Bundle of witness statements and further documentary evidence filed on 12 January 2020 and now provided in a digital bundle of 24 pages ('the Supplementary Bundle'), the contents of which I have noted.

2. The hearing was difficult, not because of the parties or subject matter, but because of my own poor internet connectivity. It therefore took substantially longer than ought to have been necessary, for which I can only apologise. I am grateful to the parties for their forbearance.

3. The Applicants seek a determination pursuant to section 41 of the Housing and Planning Act 2016 ('the Act') for a rent repayment order ('RRO') in connection with their occupation of 203 Downhills Way, N17 6AH ('the Property').

4. The Application was made on 10 October 2019. Directions were made on 4 November 2019, with which the Applicants duly complied.

5. The Respondent was due to file and serve her statement of case by 7 January 2020, but failed to do so. On 3 February 2020, that direction was extended to 9 March 2020 at the Respondent's request, citing non-receipt of documents as they had been sent to the wrong address. Again, the Respondent failed to comply.

6. On 18 March 2020 I caused a letter to be sent directing that the Respondent, by her representative, file and serve her bundle of documents and an explanation for her failure to comply with the previous deadline by 1 April 2020, failing which the tribunal might debar her from further participation in proceedings.

7. On 19 March 2020 the Regional Judge postponed all hearings and stayed all directions due to the covid-19 pandemic. On 24 March 2020, the tribunal premises were closed, and remain so at the date of writing to all bar a skeleton staff and a single face-to-face hearing a day in an appropriate case. It was therefore unclear whether the Respondent complied with my direction, which was in any event automatically stayed.

8. On 27 May 2020, the Applicant wrote to the tribunal to notify that the Respondent had continued to fail to comply. On 29 June 2020, I directed that, unless the Respondent sent to the tribunal her full response and bundle of documents, together with her explanation for her failure to comply with previous directions (supported by evidence) and an explanation of why she should not be debarred from participation in proceedings by 13 July 2020, she would be automatically debarred and any statement of case struck out. I explained that any necessary application for reinstatement would need to be made within 28 days of the taking effect of the automatic barring order.

9. On 13 July 2020 at 5.43pm (and therefore after close of business) the Respondent's representative purported to send the Respondent's bundle in accordance with my order. It was described as the statement of the Respondent Mr H A Hussein, who is in fact the Respondent's son. The Respondent had not provided her own evidence (simply countersigning Mr Hussein's statement), nor authority for her son to represent her. Neither had the two other directions regarding explanation for the previous failures to comply been in any way addressed.

10. On 16 July 2020 I therefore confirmed that the Respondent had automatically been debarred from further participating in proceedings, and that any application to lift the bar had to be made by 11 August 2020. No such application was made.

11. The tribunal nevertheless continued to copy all correspondence to the Respondent.

12. On Friday 18 September 2020, less than 1 clear day before the hearing, Mr Stanway wrote to the tribunal to state that Mr Hussein was unable to take part in the hearing and required an adjournment, due to having to self-isolate in advance of an operation.

13. I refused that request, on grounds that (1) Mr Hussein was not a party to the proceedings (as had previously been raised); (2) the Respondent had been debarred and had made no application to reinstate, therefore had no standing to make such an application; (3) in any event a video hearing would not require Mr Hussein to leave self-isolation.

14. I confirmed that the case would go ahead on the Applicants' evidence alone as had been previously indicated, and I therefore invited the Applicants to agree to the matter being determined on the papers in light of their witness statements and exhibits provided. The Applicants indicated, however, that they would prefer to continue with the video hearing.

15. At the hearing, Mr McClenahan of Justice for Tenants acted for the Applicants as their advocate. He referred to a bundle filed with the

Applicants' application of some 194 pages ('the Primary Bundle'). Unfortunately, I did not have a digital copy of the document. I am grateful to Mr McClenahan for providing a copy to me during the hearing, and for referring me to the page numbers of those documents on which the Applicants placed particular reliance. I have now had the further opportunity to review and digest those documents.

16. Mr Cox and Mr Franz were also in attendance. The Respondent had been debarred, and was not in attendance nor represented, and no-one attended as an observer.

Background

17. The property which is the subject of this application is a 2-storey terraced house with a living room, kitchen and further reception/bedroom on the ground floor and 2 bedrooms and a bedroom/storage room on the first floor together with a family bathroom.

18. The Applicants entered into an assured shorthold tenancy agreement with the Respondent for a fixed term of 12 months (with a break clause after 6 months) commencing on 1 October 2018 at a total rent of £1,900 per month, payable in advance on the 1st of each month. By clause 3d of the agreement, other outgoings (council tax, water rates, energy charges etc) were to be paid by the Applicants.

19. Pursuant to section 56 of the Housing Act 2004 ('the 2004 Act'), on 12 February 2019 the London Borough of Haringey ('LBH') designated the borough of Haringey subject to additional licensing. The scheme became operative on 27 May 2019. Categories of HMOs requiring additional licensing include "*an entire house or flat which is let to 3 or more tenants who form two or more households and who share a kitchen, bathroom or toilet*".

The issues

20. The relevant issues for determination are as follows:

    (i) Did the property require a license?

    (ii) Did the property have a license?

    (iii) Had an application for a license been 'duly made' under section 63 of the 2004 Act?

    (iv) Has there been a notification under section 62(1) of the 2004 Act (temporary exemption from licensing requirement) which is still effective in accordance with section 72(8) of the 2004 Act?

(v) If the property did not have a license, whose responsibility was it to obtain one?

(vi) Did the Respondent have a reasonable excuse for not having a license?

(vii) If not, am I satisfied beyond reasonable doubt that the offence has been committed by the Respondent as the individual in control of an unlicensed HMO?

(viii) If I am so satisfied, should I make an RRO, and if so what is the appropriate amount in accordance with section 44 of the Act.

Evidence

21. Mr Franz referred to his witness statement contained in the Secondary Bundle and adopted it. He gave evidence as follows.

22. Alex Marks were the Agents of the Respondent at whose offices the Applicants had signed the tenancy agreement. He was told he'd receive a physical copy of that signed agreement, but it never arrived.

23. The property was in poor condition when they moved in – it was dirty and mouldy throughout. Alex Marks had promised that would be rectified before the Applicants' moving in date, but it wasn't. The Applicants endeavoured, without success, to remove the mould with anti-mould spray. They discovered the problem was more extensive than they had even seen when they have viewed the property – for example furniture was covered in mould. A wall socket was hanging out in the living room and itself also covered in mould, and they were unable to use it throughout their tenancy. The Applicants had had to purchase their own dehumidifier. I was referred to pictures of the condition of the property at pages 71 *et seq* of the Primary Bundle.

24. There then developed problems with a mouse infestation. As evidenced at page 61 of the bundle, the tenants had to take care of the mice themselves with little to no help from the Respondent or Alex Marks. They had ended up having to pay the pest control operative from the rent, as the Respondent failed to do so (despite promising to). They took to putting everything into writing as the Respondent never responded to emails – the Respondent always wanted to use phonecalls. As they came not to trust the Respondent, the Applicants tried to use email as much as possible to keep a record.

25. Throughout the tenancy they had emailed Mr Hussein, as they had been given no copy email for the Respondent. Their emails were also always cc'd to Alex Marks. Alex Marks were always the ones who responded if there was a response. Mr Hussein never responded. Alex Marks didn't

tell the Applicants that they weren't managing the property and so the Applicants continued to email them.

26. At the commencement of the tenancy, the Applicants had not been provided with the How to Rent Guide, Gas Safety Certificate or proof of protection of their Tenancy Deposit. Mr Franz recalled that there was a Tenancy Pack in place at the property from the Alex Marks. However, when they had checked the contents, it had been addressed to who they could only assume were the previous tenants, as it was not addressed to the Applicants (rather had different name son it) and the documents dated from 2017. No gas safety engineer attended the property at any point during tenancy as far as Mr Franz remembered.

27. They also discovered that their Tenancy Deposit had not been protected. They spoke to their neighbours at number 205, who were also the Respondent's tenants, and were warned that those individuals had heard from other tenants of the Respondent that they'd not get their deposit back.

28. They decided that they would withhold their last month's rental payment, and that the Respondent would have to use the deposit for it. No part of their deposit had since been returned, and no reasons for withholding it had been given.

29. Mr Cox confirmed that he supported everything Mr Franz had said, and had nothing further to add.

Decision and reasons

30. Having considered the documents provided and the Applicants' evidence and representations, the I have made determinations on the various issues as follows.

(i) Did the property require a license?

31. As set out above, LBH designated their borough an area of additional licensing in February 2018 as is permitted pursuant to Part 2 of the Act sections 56 – 60. The scheme was brought into effect on 27 May 2018. This is confirmed in an email from Mrs Glayne Russell dated 9 January 2020 in the Supplemental Bundle and on page 36 of the Primary Bundle.

32. The lead Applicant has provided evidence at pages 21 and 22 of the Supplemental Bundle that the Applicants were paying council tax to LBH, and that the property is in the West Green ward of LBH.

33. The applicable category of the additional licensing scheme is "*an entire house or flat which is let to 3 or more tenants who form two or more*

households and who share a kitchen, bathroom or toilet". Witness Statements have been provided by the Applicants, in which they describe the property as a two-storey terraced house in which there are 3 bedrooms, one kitchen, two reception rooms and one bathroom. The third bedroom upstairs was more of a box room, and so Mr Cox used the downstairs additional reception room as his bedroom. They confirm that they all resided at the property for the relevant period, shared kitchen and bathroom facilities, and were three unrelated individuals (therefore forming three 'households').

34. I am therefore satisfied that the property required a license.

(ii) Did the property have a license?

35. The lead Applicant contacted LBH in January 2020 by email. In her email of 9 January 2020, Mrs Russell confirmed that LBH's records detail that an application for a license was begun on their system 'Metastreet' on 25 November 2019 (and thus after the Applicants' tenancy had ended), but not completed. Until a completed application had been submitted, no effective application had been made and no license applied for.

36. There is no other evidence to suggest that the property did in fact have a license.

37. I am therefore satisfied that the property did not have a license.

(iii) Had an application for a license been 'duly made'?

38. The same email from Mrs Russell demonstrates that an application for a license had not been duly made at any time before the Applicants' tenancy ended (and that continued to be the case up to at least January 2020).

39. I am therefore satisfied that the exception does not apply.

(iv) Had there been a notification under section 62(1) of the 2004 Act (temporary exemption from licensing requirement) which is still effective in accordance with section 72(8) of the 2004 Act?

40. There is no evidence on which I could determine that a temporary exemption had been notified. The Respondent has been debarred, Mrs Russell does not mention any such.

41. I am therefore satisfied that none such had been given, and that therefore this exemption does not apply.

(v) If the property did not have a license, whose responsibility was it to obtain one?

42. The Applicants have exhibited their tenancy agreement, which names Mrs Nuray Hussein as their landlord. They have also provided Official Copies of the Land Registry Title Register, demonstrating that Mrs Hussein is the freehold owner of the property (and, indeed, of number 205).

43. Section 72 of the 2004 Act sets out that a person commits an offence if he is in control or management of an HMO that requires to be licensed under Part 2 of the Act but is not so licensed. Section 263 of the 2004 Act sets out the meaning of control or management:

263 Meaning of "person having control" and "person managing" etc

(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 the agent or trustee of another person), or would so receive if the premises were let at a rack rent.

44. Pages 11 – 20 of the Supplemental Bundle demonstrate that £1,900 a month (save in one month when a lower sum was sent as a result of payment by the Applicants for pest control) were sent as follows: "MRS NURAY HOUSSE REFERENCE 203 DOWNHILLS WAY , MANDATE".

45. I am therefore satisfied that the Respondent had control of the unlicensed HMO for the purposes of the 2004 Act.

(vi) Did the Respondent have a reasonable excuse for failing to license the HMO?

46. The Respondent's statement of case was struck out and she was debarred from participation in proceedings. No explanation has therefore been given for failing to license, and no reasonable excuse has been put forward.

47. I am therefore satisfied that there is no reasonable excuse for failing to license the property.

(vi) Am I satisfied beyond reasonable doubt that the offence has been committed by the Respondent?

48. Taking into account all of the above matters and evidence, I am satisfied beyond reasonable doubt that Mrs Nuray Hussein has committed the offence of being in control of an HMO that requires to be licensed under

Part 2 of the 2004 Act but was not so licensed, pursuant to section 72 of the 2004 Act.

(vii) Should I make an RRO, and if so what is the appropriate amount in accordance with section 44 of the Act?

49. Section 43 of the Act is permissive, in that it sets out that I *may* make an RRO if I am satisfied beyond reasonable doubt that the landlord has committed an offence to which chapter 4 of the Act applies. Row 5 of the table in section 40 of the Act makes clear that a section 72 offence is such an offence.

50. I am satisfied that I should make such an order in this case. There are no mitigating features before me to suggest that I should not.

51. In those circumstances, section 44 sets out the following:

44 Amount of order: tenants

(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.

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(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.

52. I am therefore not able to award an RRO for a period in excess of 12 months during which the Respondent was committing the offence. In any event in this case, the additional licensing scheme was not brought into force until 27 May 2019 and the tenants vacated the property at the end of the term, on 30 September 2019, and so any order must be limited to that period.

53. As set out in ***Vadamayalan v Stewart and Ors*** [2020] UKUT 0183 (LC) the starting point is 100% of the rent for the relevant period. The maximum award I can therefore make is four months and 4 days, being £7,849.88.

54. As referred to above, there is evidence between pages 11 – 20 of the Supplemental Bundle of regular payments of £1,900 being paid to the Respondent.

55. Those payments were being made from the account of Ahim Property Enterprises Limited. Evidence at page 9 of the Supplemental Bundle demonstrates that this is a company of which one of the Applicants (Mr Stefano Andre) is a director). The co-director, Mr Rufus Scheiner, has confirmed in a witness statement at page 7 of the Supplemental Bundle, that those payments were made by the company on behalf of Mr Andre personally as sums owed by the company to him. Effectively, they just skipped the middle man. Mr Scheiner has also confirmed that any RRO should be made directly to the Applicants.

56. However, there is a difficulty presented by the case as regards the rent payment for the month of September 2019.

57. Mr Franz's evidence is that the deposit was used as the last month's rent. At page 190 of the Primary Bundle is exhibited an email dated 30 August 2019 from Mr Andre to 7 people, amongst whom can be identified Mr Hussein's and Alex Marks's email addresses (and indeed it is the latter's email to which he is responding). In it, he states as follows:

"I am also writing to inform you in relation to our last month's rental payment…

For clarity of communication, we will not be paying our last month's rent due to the fact that we have not been provided with any evidence of our deposits being protected in a government-approved deposit protection scheme. This was something we stressed was important at the start of the tenancy and it has not been done.

As such, we have significant concerns that our deposit will be unlawfully withheld and therefore we will be holding back on the last month's rent.

If you can provide proof in the form of prescribed information and a deposit protection certificate showing that our full security deposit is protected correctly in a scheme we will pay the rent as normal before 1st September 2019.

58. Clause 2b of the Tenancy Agreement states that, as regards the Deposit, "*The Tenant is not to use this money as payment for any rent due under this agreement.*"

59. Mr McClenahan invited me to consider that, although Mr Andre doesn't expressly say in his email that if the protection information was not forthcoming, the Tenancy Deposit was to be used in lieu of rent, that was it's clear intention, and nominating the use of the deposit for the rent payment was the equivalent of making the rent payment for September.

60. I ask Mr McClenahan to consider the position that I could not consider that such nomination was a rent payment because the Applicants were not entitled to make that nomination. Albeit that the Respondent had apparently breached her obligations under section 213 of the 2004 Act, the Applicants' remedy in that regard was as set out in sections 214 – 215 of the 2004 Act. It was not to enter into their own breach of the tenancy agreement. County Court proceedings could have been brought for repayment of the deposit and any damages if the Applicants' doubts were, after vacating the property, proven well-founded. That was their means of redress. Instead, despite the very clear terms of the agreement regarding the deposit, the Applicants chose 'self-help'. Albeit that they were acting in accordance with their worst suspicions, two wrongs did not, as it were, make a right.

61. Mr McClenahan accepted the legal position, but asserted his client's position was that as a matter of fairness, given that the Respondent had not returned the deposit, the most likely explanation was that it was at least partly retained as rent (there having been no other explanation proffered). I had the discretion to therefore treat it as if it were rent and order it to be repaid.

62. Attractive though the argument as to the overall fairness of the situation might be, unfortunately I cannot agree with Mr McClenahan. There is a binding contract between the parties. Even if the Respondent did not fulfil her obligations under the agreement as regards the tenancy deposit scheme, that did not give the Applicants a 'free-pass' to breach their obligations. Clause 2b is very clear: the Applicants were <u>not</u> permitted to use their deposit in lieu of rent.

63. Had events taken their course, the Respondent might have returned the deposit. We simply do not know (albeit that, in light of events subsequently, it might be considered likely that the Respondent would have kept the deposit given that the balance has to date not been returned). The Applicants' redress, their worst suspicions being borne out, was, and remains, that as set out within sections 213-215 of the 2004 Act. Instead, they presented the Respondent with a fait accompli– they suspected they wouldn't get their deposit back so they gave the Respondent no choice but to retain it for rent in September 2019.

64. That, however, was not a rent payment. The reality is that the Applicants' own email admits of the situation – that they have withheld rent. Were I to interpret a withholding of rent as its opposite, that would produce an absurdity. It would require me to relabel the deposit payment and rent payments 'payment at large', even though it is clear from the contract that they are distinct and unelidable.

65. It seems to me that the Act provides a remedy for the Respondent's conduct that is, in its nature, restitutionary. The use of the word 'repayment' surely admits of no other interpretation. The order 'repayment' of a sum not in fact paid would, in effect, to be to either award damages, or to order repayment of the Tenancy Deposit, neither of which are remedies this tribunal has the power to afford the Applicants.

66. Unfortunately, therefore, there is no payment for the month of September that I can award. The route in the County Court via section 213 – 215 of the 2004 Act gives the Applicants their remedy as against the deposit, and no doubt the Applicants would cite this Decision as a defence to any counterclaim for payment of September's rent.

67. Turning then to the other matters that I must take into account, each of the Applicants has confirmed that they received neither Housing Benefit nor universal credit.

68. In regard to the financial circumstances of the Respondent, I am not aware of them, the Respondent's statement of case having been struck out and the Respondent debarred from taking further part in this case.

69. Similarly, I am not aware of whether the Respondent has previously been convicted of any offence to which chapter 4 of the Act applies, and lacking positive evidence thereof, I assume she has not. It does appear she is a Landlord with at least two properties.

70. In terms of the conduct of each party, it is again a simple fact that I have no evidence of any conduct by the Applicants that ought to be taken into account.

71. The Applicants were very clear about the condition of the property from the beginning and throughout the tenancy. It was grubby and mouldy. They couldn't use the power socket in the living room. They had to try to deal with a mouse infestation themselves, and then had to pay the contractor's bill as he could get no response from the Respondent. Emails were ignored. The balance of the deposit still has not been returned. There was no gas safety certificate, no How to Rent Guide, and no visit by a gas safety engineer during the term that the Applicants can remember. All of this is poor conduct on the Respondent's part. Being a Landlord of at least two properties, the Respondent ought to be more aware of the legal requirements applicable. The Respondent's unprofessional conduct was well-exemplified in the approach she had taken to proceedings. Mr McClenahan pointed out that this was exactly the type of property that would benefit from licensing.

72. The Applicants' conduct, on the other hand, he characterised as unusually professional in individuals making their first foray into the private rented sector after university.

73. Taking all of those matters into account, I see no reason to depart from awarding full repayment of the rent for the four-day period 27 – 30 May 2019 and three months for June, July and August 2019, in the total sum of £5949.88.

74. Mr McClenahan also sought, and I direct, that the Respondent pays to the Applicants the fees associated with these proceedings totalling £300.

Name: Judge N Carr **Date:** 23 September 2020

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).