FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AM/HMF/2020/0001** **LON/00AM/HMF/2020/0002** **LON/00AM/HMF/2020/0003**
Property	:	**5 Hartwood Court, Devan Grove, London, N4 2GH**
Applicants	:	**(1) Mr Paul Shepherd** **(2) Mr Robert Fogg** **(3) Mr Andrew Sothcott**
Representative	:	**BPP University Pro Bono Unit**
Respondent	:	**Auric Harbour Limited**
Representative	:	**N/A**
Type of application	:	**Application for a rent repayment order by tenants** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	:	**Judge Amran Vance**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of Hearing	:	**18 December 2020**
HMCTS Code	:	**CVPREMOTE**

DECISION

DECISIONS

1. I make a Rent Repayment Order in the sum of **£30,003.29**. This sum must be paid by the Respondent, to the Applicants, within 28 days of the date of issue of this decision.

BACKGROUND

2. These applications concern requests for a Rent Repayment Order ("RRO") made by the former tenants of 5 Hartwood Court, Devan Grove, London, N4 2GH ("the flat"), a three-bedroom flat on the first floor of a five-storey apartment block in the London Borough of Hackney.

3. In their applications, the Applicants named the Respondent as Auric Harbour Limited ("Auric"), a company registered in the British Virgin Islands ("BVI"). The address specified for Auric was a PO Box address in the BVI, and its correspondence address was stated as being that of its agent, Celestial Globe, at 57 Loampit Vale, London, SE13 7FR.

4. In subsequent directions issued by the tribunal, dated 21 January 2020, the Respondents were specified as both Auric and Celestial Globe Limited ("Celestial Globe"). Following the issue of those directions Celestial Globe contended that it was, at all relevant times, a managing agent, and not a landlord, and that as a RRO can only be made against a landlord, it was not a correct Respondent to this application. Directions were issued for this question to be determined as a preliminary issue, and in a decision dated 20 October 2020 I determined that Celestial Globe was not a landlord of the property in question. I was satisfied that the evidence before me indicated that at all material times Celestial Globe was a managing agent of the building, acting as agent for Auric, and not a landlord. Directions were issued the same day in which Celestial Globe was removed as a respondent, with the case proceeding against Auric Harbour Limited alone.

5. The Applicants state that they were tenants of Flat 5 from 7 November 2018 until 6 November 2020. They seek a RRO in respect of the 351 day-period 7 November 2018 - 24 October 2019 ("the Relevant Period"), in the amount of £30,003.29. The grounds on which their applications are pursued is that the flat was required to be licensed as a House in Multiple Occupation ("HMO") under the Additional Licensing Scheme designated by London Borough of Hackney on 10 May 2018, but was not so licensed. That Scheme required all rented properties within the borough consisting of households of three or more unrelated individuals to be licensed as an HMO. The Scheme is operative until 30 September 2023.

6. It is the Applicants case that they each occupied the flat throughout the period of their tenancy as their sole residence, and that as there were three occupants, unrelated to each other, it was required to be licensed as a HMO. As it was not so licensed, they say that the Respondent has committed an offence of being in management or control of an unlicensed HMO, and that this entitles them to a RRO. They say that the offence ceased on 24 October 2019, when an application was made to London Borough of Hackney for a HMO License for the flat.

Hartwood Court

7. The Property is one of 19 flats situated at Hartwood Court ("the Building"), which comprises part of land held by London Borough of Hackney under freehold title LN38524. By a lease dated 3 September 2013, London Borough of Hackney granted a lease of part of the land comprised in its freehold title to Berkeley Homes (North East London) Limited ("Berkley"), namely land on the north-east side of Woodberry Grove (registered under title AGL292372). Berkley then granted a sub-lease of the Building to Auric. Auric's leasehold interest is registered at the Land Registry under title number AGL395749.

8. When I determined preliminary issue, it was Celestial Globe's case that in 2016, Auric granted a power of attorney to SKLM Management Ltd ("SKLM") to grant assured shorthold tenancies in respect of the 19 flats in the Building. A copy of the Power of Attorney in question ("the Power of Attorney"), signed but undated, is exhibited to a witness statement provided by Mr Tao Yu, dated 14 August 2020, who describes himself as a Senior Property Consultant employed Celestial Globe.

9. In his statement, Mr Yu explains that on 10 October 2016, SKLM appointed Celestial Globe Estates as its agent to manage the Building, and that when that agreement came to an end in October 2019, Auric entered into a direct agreement with Celestial Globe to continue to manage the Building. Copies of both the 10 October 2016 and 10 October 2019 management agreements are exhibited to Mr Yu's witness statement.

The Applicants' Tenancy Agreements

10. The First Applicant, Mr Shepherd, has provided two witness statements, dated 11 September 2020 and 12 November 2020, in which he says as follows:

    (a) he, and the Third Applicant, Mr Southcott, were shown around the Property in September 2018 by a representative of Celestial Globe Estates;

    (b) the Applicants subsequently entered into a tenancy agreement commencing on 7th November 2018, for a period of 12 months, which named Celestial Globe Estates as their landlord, and Celestial Globe Estates Ltd as the landlord's agent;

    (c) on 13 November 2018, the Applicants were asked by Mr Tao Yu, at Celestial Globe, to sign a second tenancy agreement for the Property, one which named London Where Ltd as the landlord, and Celestial Globe Consultancy Ltd as its agent. Both tenancy agreements state that the tenancy was to commence on the same date, 7 November 2018. Shortly afterwards, Mr Yu sent Mr Southcott an electronic message that read:

        "The reason for re-sign is that Celestial Globe is only for letting and after move in and for any property management issues will be dealt with by London Where."

(d) he sent Mr Yu an email on 13 November 2020, querying why the Applicants were being asked to sign a new contract, to which Mr Yu responded, the following day, as follows:

> *"The reason is just London Where is managing agent and Celestial Globe is just for letting part, nothing special".*

(e) after being told by Mr Yu that the new agreement superseded the first agreement, the Applicants each signed the replacement agreement.

(f) between November 2018 and January 2019, the Applicants paid rent to Celestial Globe. From January 2009 onwards, at the request of Celestial Globe, they then started paying rent to SKLM Management Ltd.

11. In his witness statement, Mr Yu seeks to explain the circumstances surrounding entry into the two tenancy agreements. He states that he was instructed by his manager to prepare the first tenancy agreement and used a template document to do so. He says that he mistakenly identified Celestial Globe as the landlord in the agreement and that when he submitted his files to his manager, for checking, his error was identified and he was asked to prepare a new tenancy agreement, this time specifying "London Where" as the landlord.

12. In doing so he made a further error by describing London Where as "London Where Ltd" in the second tenancy agreement, when London Where is a trading name of SKLM Management Ltd, and not a limited company.

The Applications and the Final Hearing

13. Two postal addresses, and one email address, are identified as Auric's address on the proprietorship register of its for its sub-lease, as recorded at the Land Registry. Firstly, the flat address of 5 Hartwood Court. Secondly, its BVI PO Box address of PO Box 957, Offshore Incorporations Centre, Road Town, Tortola, British Virgin Islands. The email address specified is londonbo@163.com. At the hearing of this application on 18 December 2020, Ms Lennox of BPP University Pro Bono Unit, stated that the Applicants had sent a hardcopy of the RRO application to Auric at its BVI postal addresses, as well as the address specified in the tenants' tenancy agreements, that of Celestial Globe. Copies were also sent by email to the email address for Auric specified in the Land Registry entries, londonbo@163.com. She stated that no response had been received to her correspondence or emails, although no bounce-back error message had been received in respect of her emails.

14. Communications from the tribunal, directed to Auric, have been sent to the londonbo@163.com email addresses. I am informed that none of those emails have bounced. Auric have not responded to the tribunal's communications, and have played no part in these proceedings. It has not complied with the tribunal's directions that required it to provide a bundle of documents in response to the application, and it did not attend the CMH that took place on 21 July 2020, or the final hearing of the application. As such, the application has been determined based on the documents provided by the Applicants and the oral arguments and evidence presented at the CMH and the final hearing.

15. The final hearing on 18 December 2020 took place as a remote video hearing. The Applicants were represented by Ms Lennox. Also present were all three of the Applicants, each of whom gave short oral witness evidence.

The Law

16. Section 72(1) of the Housing Act 2004 ("the 2004 Act") provides as follows:

> "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) and is not so licensed."

17. Section 263 provides the following definitions of persons having control of, or managing, premises:

> "(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 …
>
> (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.

18. Section 77 defines an "HMO" as a house in multiple occupation as defined by sections 254 to 257. Section 254 provides:

> "(1) For the purposes of this Act a building or a part of a building is a " house in multiple occupation" if–
>
> (a) it meets the conditions in subsection (2) ("the standard test");
>
> (b) – (e) .....

(2) A building or a part of a building meets the standard test if—

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

19. Not all HMOs have to be licensed, but only those to which Part 2 of the 2004 Act applies. Section 55(2) provides that Part 2 of the 2004 Act applies to the following HMOs:

"any HMO in the authority's district which falls within any prescribed description of HMO, and

(a) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation."

20. The relevant provision in this application is section 55(2)(b), as the flat is in an area that was designated by London Borough of Hackney, on 10 May 2018, as subject to additional licensing.

21. Section 40 Housing and Planning Act 2016 ("the 2016 Act") states as follows:

"(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."

22. Among the relevant offences is the s.72(1) HMO licencing offence.

23. Section 43 provides that this tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt that the offence has been committed, and that where the application is made by a tenant the amount is to be determined in accordance with section 44 which, in respect of the s.72(1) offence limits the amount of the award to the rent paid during a period "not exceeding 12 months, during which the landlord was committing the offence."

24. Section 43(4) says as follows:

> (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
>
> (b) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

25. In *Vadamalayan v Stewart* [2020] UKUT 183 (LC) the Upper Tribunal (Lands Chamber) held that the starting point for a RRO should be the whole of the rent for the relevant period and that the only basis for deductions are those matters identified in section 43(4).

The Applicants' Case

26. The Applicants' primary case is that despite the landlord in the tenancy agreement being specified as London Where Ltd, their landlord at all material times was, in fact, Auric. They also contend that Auric committed the offence referred to in s.72(1) HA 2004, namely, being a person having control of or managing an unlicensed HMO which was required to be licensed.

27. Alternatively, they contend, relying on the cases of *Rakusen v Jepsen* [2020] UKUT 298 (LC) and *Goldsbrough v CA Property Management Limited* [2019] UKUT 311 (LC) that as the superior landlord for the flat, it is liable for a RRO under sections 40 and 43 of the 2016 Act.

28. The Applicants also assert that SKLM (trading as London Where), acted as agents for Auric until 9 October 2019, and that SKLM appointed Celestial Globe to manage the flats at Hartwood Court, including the subject flat. It is their case that after 10 October 2019, Auric then directly instructed Celestial to manage the flats in Hartwood Court.

Reasons for Decision

Has Auric committed the s.72(1) offence?

29. I find that Auric was a person managing the flat for the purposes of the s.72(1) offence. The Applicants say that between November 2018 and January 2019 they paid their rent to Celestial Globe and that in January 2019, SKLM told them to pay their rent to SKLM. I accept their evidence and note that their payments are evidenced in the Applicants' bank statements included in the hearing bundle.

30. Under paragraph 1 of the of the Power of Attorney, Auric granted SKLM the power to grant Assured Shorthold Tenancies ("ASTs") in respect of the individual flats at Hartwood Court, as well as the power to manage those flats on behalf of Auric. In return, SKLM was to pay Auric an annual fee of £300,000. Paragraph 5(b)(ii) allows SKLM to keep all rental income generated from those ASTs.

31. Ms Lennox submitted submit that Auric was a person having control of the flat for the purposes of s.263(1) on the basis that it received the rack-rent of the flat. In her submission, the annual fee paid by SKLM to Auric under the Power of Attorney agreement must represent the rack-rent of all the flats at Hartwood Court, identified in the schedule to the agreement, of which the subject flat was one.

32. The problem with that submission is that the Applicants rent was paid to SKLM, and SKLM had no interest in the flat, other than that granted by the Power of Attorney. It did not hold a tenancy of the flats, and I do not consider the annual fee payable to Auric can be characterised as constituting the rack rent for the flats in the block, in the absence of a tenancy granted by Auric to SKLM. Rather, it appears to be a contractual payment. Given that this offence must be proved to the criminal standard, I am not satisfied that the Applicants have established that Auric was a person having control of the flat for the purposes of s.263(1).

33. However, I am satisfied, beyond reasonable doubt, that Ms Lennox's alternative submission is correct. This was that, firstly, the relationship between Auric and SKLM was one of principal and agent, as evidenced by entry into the Power of Attorney. Secondly, that Auric was a person managing the flat as defined by s.263(3). In my judgment, both limbs of Section 263(3) are met. Firstly, I find that the annual fee paid to Auric by its agent, SKLM, as evidenced by the Power of Attorney, constituted payment of rent, or other payment, from the Applicants, who were tenants of a HMO (thereby satisfying section 263(3)(a)). Even if that conclusion is wrong, I find that Auric was a lessee of the flat, who would have received rent or other payments from the Applicants, but for having entered into the Power of Attorney, pursuant to which SKLM (a person who was not an owner or lessee of the flat) received the rent from the Applicants, and Auric received its annual fee. As such, the provisions of section 263(3)(b)) are satisfied.

34. I also find that the flat constituted a HMO. In oral evidence at the final hearing of this application, all three Applicants confirmed that: they paid a monthly rent for their individual room in the flat; that they occupied as their only residence; that the flat was occupied with three other sharers who were not members of their household; and that facilities, including the bathroom, kitchen, and living

room were shared between them. On that evidence, which see no reason to doubt, the standard test in section 254(2) of the 2004 Act is met.

35. I am also satisfied that the flat was a HMO that was required to be licensed pursuant to s.55(2)(b) of the 2004 Act, under London Borough of Hackney's additional licensing Scheme. A copy of the Council's designation dated 10 May 2018, in which it designated the entire area of its district, as subject to Additional Licensing under section 56 of the 2004 Act was included in the hearing bundle. The email communications between the Applicants and Olusola Otukoya, a Private Sector Housing Officer with the Council in November 2019, also evidence that the first time a HMO license was applied for in relation to the flat was on 24 October 2019.

36. There is nothing to suggest that any defence under s.72(4) is available to Auric, and I am therefore satisfied, beyond reasonable doubt, that it has committed the s.72(1) offence.

Should the tribunal make a RRO?

37. Section 43(1) of the 2016 Act provides that the tribunal may make a RRO if satisfied, beyond reasonable doubt, that a landlord has committed a prescribed offence, including the s.72(1) offence, whether or not the landlord has been convicted of that offence. An RRO can therefore only be made against a 'landlord'. It is now established, following the Upper Tribunal cases of *Goldsbrough* and *Rakusen*, that the reference to a landlord in section 43(1) includes a superior landlord, who can be liable to the making of an RRO under s.40, so long as it has committed a relevant offence. I am satisfied that Auric was the landlord of the flat, and that when SKLM trading as London Where entered into the tenancy agreement with the Applicants, it did so as an agent for Auric. I have found that Auric has committed the s.72 offence, and I therefore consider it appropriate to make a RRO in the Applicants favour, against Auric.

38. When calculating the amount of the award, the starting point is to first identify the amount of rent paid during a period not exceeding 12 months during which the landlord was committing the offence. The Applicants' tenancy began on 7 November 2018. The offence commenced on that date and ended on 23 October 2019 when the licence application was made (351 days). The monthly rent paid was £2,600 which equates to a daily rate of £85.48. For the 351 days during which the offence was committed the rent paid was therefore £30,003.29.

39. Auric has not engaged in this application, and there is no evidence before us that supports reducing the amount of the RRO from that maximum figure having regard to the provisions of s.44(4) of the 2016 Act. The Applicants state that as per clause 10.1 of their tenancy agreement, they paid for the cost of utilities themselves. Having regard to the section 43(4) factors, I see no reason to make any reductions from the maximum amount, and therefore make a RRO in the sum of £30,003.29.

Judge Amran Vance

Date: 9 February 2021

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. 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 date this decision is sent to the parties.

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