FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) SITTING
AT 10 ALFRED PLACE, WC1E 7LR

Case references	**:**	**LON/00AM/HMF/2020/0236** **LON/00AM/HMF/2021/0040**
HMCTS code	**:**	**V: CVPREMOTE**
Properties	**:**	**Flat 8 Simpson House, 2 Somerford Grove, London N16 7TX** **Flat 10 Simpson House, 2 Somerford Grove, London N16 7TX**
Applicants	**:**	**(1) Dr Jordan Osserman** **(2) Mr Daniel Mapp** **(3) Dr Foivos Dousos** **and** **(1) Mr Viet Tran**
Representative	**:**	**Mr Michael Sprack, counsel**
Respondent	**:**	**Simpson House 3 Ltd**
Representative	**:**	**Mr Jonathan Manning, counsel**
Type of application	**:**	**Rent repayments orders**
Tribunal members	**:**	**Judge Tagliavini** **Mr S Mason BSc FRICS**
Date of hearing.	**:**	**17 June 2021**
Date of decision	**:**	**21 July 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote paper hearing which has been consented to by the parties. The form of remote hearing was V: VIDEOREMOTE. 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 was referred are contained in the applicants' bundles 1 to 373 and 1 to 256 in addition to the respondent's bundle pages 1 to 263.

The tribunal's summary decision

(1) The tribunal makes a rent repayment order in the sum of £18,420.96 (rounded) in application LON/00AM/HMF/2020/0236 (Flat 8) to be divided equally between the three applicants i.e., £6,140.32 per applicant to be paid within 14 days of the date of this decision.

(2) The tribunal dismisses application LON/00AM/HMF/2021/0040 (Flat 10) due to it having been made out of time.

The applications

1. These are two applications for rent repayment orders (RRO) pursuant to section 40(3) of the Housing and Planning Act 2016 ('the 2016 Act') i.e., the respondent having the control or management of an unlicensed house in multiple occupation (HMO) under section 72(1\0 of the Housing Act 2004 ('the 2004 Act').

2. Application LON/00AM/HMF/2020/0236 concerns premises known as Flat 8, Simpson House, 2 Somerford Grove, London N16 7TX ('Flat 8') and application LON/00AM/2021/0040 concerns Flat 10 which is in the same building ('Flat 10'). The applicants in Flat 8 seek a rent repayment order for a 12 months' period of their occupation from 1 September 2019 to 31 August 2020 and a repayment order in the sum of £28,339.92 and a reimbursement of the application and hearing fee in the total sum of £300.

3. The applicant tenant of Flat 10 also seeks a rent repayment order due to the respondent's failure to obtain a HMO licence for the period 1 August 2019 to 30 January 2019 in the sum of £4,815.30, representing a 1/3 share of the monthly rent of £2,361.66 paid in that period, together with the reimbursement of his application and hearing fees in the total sum of £300.

4. At the start of the hearing, of the the applicant tenants of Flat 8, withdrew their reliance on the additional ground that the respondent had allegedly

committed an offence under section 1(2) of the Protection from Eviction Act 1977.

5. In its documentation, it was admitted by the respondent that an offence under section 72(1) of the Housing Act 2004 had been committed but reliance was placed on the defence of 'reasonable excuse' under section 72(5) of the 2004 Act.

The premises

6. Flat 8 and Flat 10 comprise two three-bedroom flats in a converted warehouse building comprising 70 flats of which the respondent is the landlord/freeholder. The London Borough of Hackney is the local authority responsible for designating areas requiring Additional Licensing of Houses in Multiple Occupation.

7. It was agreed by all the parties that the respondent is the freeholder and landlord of Flat 8 and Flat 10 during the relevant periods of the applicants' occupancy and claim period for a RRO. It was also accepted by the respondent that a HMO licence under the London Borough of Hackney's Additional Licensing Scheme in operation as of 1 October 2018 was required for Flat 8 and Flat 10 during the periods for which the RRO's are being claimed as HMOs, as both flats were occupied by three tenants who formed more than 1 household.

Preliminary matters

LON/00AM/2021/0040 (Flat 10 – 'out of time')

8. In signed witness statements dated 9 March 2021 and 21 April 2021, Mr Tran stated he was seeking a RRO for the period 1 August 2019 when he became an assignee of the tenancy agreement until he moved out of the premises on 31 January 2020. However, Mr Tran's application to the tribunal was dated 2 February 2021 and received by the tribunal on 5 February 2021, the latter being the relevant date on which the application is regarded as having been made. Therefore, the application appeared to be outside of the 12 months period in which the offence was committed and ending on the date on which the application for a RRO pursuant to s.41(2) of the 2016 Act

9. Mr Manning for the respondent, asserted that Mr Tran's application was 'out of time' and therefore must be dismissed by the tribunal. Mr Manning submitted that the effect of Mr Tran's giving up occupation of Flat 10 on 31 January 2020, was to render the premises no longer a licensable HMO as only two persons in two households remained in occupation under the tenancy agreement made initially in 2015. Therefore, the commission of the offence could not have continued and in any event, Mr Tran was no longer in occupation of Flat 10 as his only or main residence.

10. Mr Sprack submitted that Mr Tran remained a tenant until the substitute tenant in the proposed 'tenancy swap' had been approved by the respondent. As this had only occurred on or after 13 February 2020, Mr Tran remained a tenant of Flat 10 and therefore his application for a RRO had been made in time as the offence was continuing.

11. In his oral and written evidence to the tribunal, Mr Tran accepted that he had arranged a 'tenancy swap' with Ms Jodie Rigby and stated that he had given up his physical occupation of Flat 10 on 31 January 2020. Mr Tran also accepted he had been repaid by Ms Rigby in respect of the rent for the whole month of February 2020, who he stated had in fact moved into Flat 10 on 1 February 2020, despite not being approved by the respondent and only officially becoming a tenant of Flat 10 on 14 February 2021. However, no witness statement from Ms Rigby was provided to support these assertions.

The tribunal's decision and reasons

12. The tribunal accepts Mr Tran's evidence that he permanently moved out of Flat 10 on 31 January 2020 and was no longer in occupation of it as his only or main residence from that date and could not be treated as such, even if his liability to pay rent continued until the formal assignment of his tenancy to Ms Rigby on 14 February 2020.

13. The tribunal determines that any offence under s.72(1) of the 2004 Act in respect of Mr Tran, ended on the date he gave up his physical occupation of the subject flat as his only or main residence on 31 January 2021. Therefore, as Mr Tran's application for a RRO has been made more than 12 months after the offence having been committed, his application is out of time and must be dismissed.

LON/00AM/HMF/2020/0236 – (Flat 8)

The applicants' case

14. In support of their application, the applicants relied on their bundle of documents that included their respective witness statements and which they each adopted as their evidence-in-chief in giving their oral evidence to the tribunal. In addition, copies of the initial and subsequent tenancy agreements dated 14 September 2018 and 13 September 2019 and proof of rental payments were provided to the tribunal although these issues and supporting documents were disputed by the respondent. In addition to the applicants' oral and documentary evidence, Mr Emmanuel MFum spoke to his witness statement dated 27 March 2021.

15. The applicants also asserted that the conduct of the landlord had been poor due to the neglect of fire safety measures, the breakdown of the boiler and lack of heating and hot water, the poor maintenance of the building and lack of pest control measures.

16. The applicants asserted that a RRO representing a 100% of the rent for a 12 months' period should be repaid as both the landlord and its managing agent, Tower Quay Limited were vastly experienced in the letting and management of residential property. Mr Spragg submitted that the relevant offence had been proved to the requisite (criminal) standard of proof. Mr Sprack relied on a number of cases decided in the Upper Tribunal in support of his submissions that no deductions should be made from the starting point of the whole of the rent for the period claimed.

17. Mr Sprack submitted that the respondent had failed to demonstrate a defence of 'reasonable excuse' a reliance on the appointment of managing agents to alert them to a change in HMO licensing requirements would allow the respondent and other landlords to circumvent the purpose of the 2004 Act simply by the appointment of a managing agent.

18. Mr Sprack accepted that any RRO made by the tribunal should be evenly split between the three applicants although Mr Marc Sutton had also resided in the premises as the husband of Dr Osserman as permitted by clause A.14 of the lease(s).

The respondent's case

19. It was accepted that the respondent was the landlord receiving the rent for Flat 8 and should have obtained a licence under the Additional Licensing Scheme in effect from 1 October 2018. It was also accepted that a licence had not been obtained and an offence had been committed up to 22 September 2020 when tan application was made for the requisite licence. Therefore, the respondent relied upon the defence of 'reasonable excuse' under section 72(4) of the 2004 Act in opposition to the application for a RRO.

20. The respondent relied upon the oral evidence of Mr Lambros Hadjioannou who spoke to his witness statement dated 7 April 2021. In his evidence Mr Hadjioannou, a director of the respondent investment company, explained that the day-to-day management of Simpson House was carried out by its letting agent Tower Quay Limited with maintenance carried out by Septor Management Limited. However, Tower Quay Limited, had at no time advised the respondent of the additional licensing scheme or the need to apply for a licence. As soon as it became known on 1 September 2020 from a letter received from the London Borough of Hackney addressed to Tower Quay Limited, an application for a licence was promptly made to be held in the name of Lambros Hadjiammou. Therefore, in all the circumstances, the respondent had taken all steps that could reasonably be expected of a conscientious property owner to ensure that a HMO licence was obtained.

21. Mr Hadioannou stated that maintenance works had been carried out promptly when complaints had been received by Tower Quay and where the standard of works fell short of what would usually be expected, the tenants were appropriately compensated. This had included making an adjoining flat available to the applicants for the purpose of bathing. Acts of vandalism to by

third parties the front entry door system were often unpredictable, and the successful eradication of pests required a block wide plan and the co-operation of all the occupants in the building.

22. Mr Hadioannou stated that notwithstanding the fact that the respondent was able to pay any RRO ordered by the tribunal, he considered it unfair that a reputable landlord should be penalised when it chosen and relied upon a reputable managing agent to ensure the landlord was notified of the requirement to apply for a HMO licence.

23. The respondent also relied, with the permission of the tribunal, upon the witness statement of Saklesh Datta dated 14 May 2021. Mr Datta was unable to attend the hearing of the applications due to his ill health. In his witness statement, Mr Datta identified himself as a director of Tower Quay Limited and stated that he had only become aware of the additional licensing scheme when he received the letter in September 2020 from the London Borough of Hackney, advising Tower Quay of the need to obtain an HMO licence.

24. Mr Datta attributed his oversight to inform himself and the respondent of the need to obtain HMO licences to his ill-health and treatment for his cancer. Mr Datta stated that maintenance issues had been addressed when notified and denied that Tower Quay Limited had instruct anyone to film or harass Dr Osserman. Mr Datta exhibited to his witness statement, documentary evidence of his hospital appointments for treatment of his cancer on various dates in 2020 and 2021. However, no details of when the cancer diagnosis was made or when treatment first started were provided to the tribunal.

25. Mr Manning relied upon two authorities in support of his argument that the landlord could rely upon the absolute defence of 'reasonable excuse' where the existence of a licensing scheme is not known but is entitled to assume that a reputable letting/managing agent on which it relied, would know what it was doing.

The tribunal's decision and reasons

26. The tribunal finds that as the commission of an offence under s.72(1) of the 2004 Act has been admitted, the burden of proof falls upon the respondent to establish the defence of 'reasonable excuse' on the balance of probabilities: *IR Management Services Limited v Salford City Council [2020]* UKUT 81 (LC) and *D'Costa v D'Andrea & Ors* (2021) UKUT 144 (LC).

'Reasonable Excuse'

27. The 2004 Act and management regulations do not provide guidance as to what amounts to a 'reasonable excuse' and therefore the tribunal must consider all the circumstances that are relevant to the application, *R (Mohamed) v Waltham Forest LBC* [2015] EWHC 4290 (Admin). Although, the respondent gave evidence, that as an investment company it had relied on an experienced managing/letting agent to inform it of the need to apply for a

HMO, the tribunal does not accept that during period from May 2018 (notice of the additional licensing scheme was publicised) to September 2020 (letter in respect of the additional licensing scheme sent to Tower Quay Limited), that the respondent, a company with a large property portfolio, could not have become or made itself aware of the additional licensing scheme that had come into effect on 1 October 2018. The tribunal finds that it was not reasonable for the respondent to rely solely on its managing/letting agent Tower Quay Limited to inform it of the additional licensing scheme, particularly as any licence would be required to be in the name of an individual from the respondent company rather than the managing/letting agent.

28. The tribunal accepts that Mr Datta was, during at least part of the period 2018 to 2020 in ill-health and continues to receive medical treatment. However, it is not known when this ill-health began, or why an alternative employee was not arranged to act in place of Mr Datta if he became unable to continue to act effectively on behalf of the respondent. Therefore, the tribunal finds that the respondent has failed to establish an absolute defence of 'reasonable excuse' and determines that the applicants are entitled to a RRO.

Amount of rent repayment order

29. The tribunal accepts that the starting point in determining the amount of the RRO is the whole amount of the rent paid for the 12 months' period claimed. However, section 74(5) and (6) of the Housing Act 2004 sets out the matters that must be considered by the tribunal and state:

> *(5) In a case where subsection (2) does not apply, the amount required to be paid by virtue of a rent repayment order under section 73(5) is to be such amount as the tribunal considers reasonable in the circumstances.*
>
> *This is subject to subsections (6) to (8).*
>
> *(6) In such a case the tribunal must, in particular, take into account the following matters—*
>
> *(a)the total amount of relevant payments paid in connection with occupation of the HMO during any period during which it appears to the tribunal that an offence was being committed by the appropriate person in relation to the HMO under section 72(1);*
>
> *(b)the extent to which that total amount—*
>
> *(i)consisted of, or derived from, payments of relevant awards of universal credit or housing benefit, and*
>
> *(ii)was actually received by the appropriate person;*
>
> *(c)whether the appropriate person has at any time been convicted of an offence under section 72(1) in relation to the HMO;*

(d)the conduct and financial circumstances of the appropriate person; and

(e)where the application is made by an occupier, the conduct of the occupier.

30. The tribunal finds that the applicants' complaints of disrepair were dealt with appropriately and in a timely manner by the respondent's managing agent and the applicant's compensated for the inconvenience caused. Further, the tribunal is not persuaded that these complaints were of such significance as he applicants not only renewed their lease but openly stated they did not want to leave the subject premises at the expiry of their lease term. The tribunal finds that damage caused by unknown third parties to the door entry system and the pest problem presented great problems in respect of an effective solution but that they were not ignored by the respondent's managing agent. The tribunal finds the applicants' attitude towards the speed and ease in which repairs should be carried out to be somewhat unrealistic. However, the tribunal finds no reason to make any deductions to any RRO by reason of the applicants' conduct.

31. The tribunal also considers the conduct of the respondent in determining the appropriate amount of any RRO. The tribunal considers it is entitled to consider both any 'good' and 'bad' conduct by the landlord. As stated above the tribunal considers that overall, the respondent was reactive to complaints made by the applicants through its managing agents and its repairing contractors. Further, the tribunal finds that the respondent acted responsibly by engaging an experienced manging/letting agent and the ill-health of Mr Datta and its disabling impact upon him and his ability to manage subject property could not have been foreseen by the respondent.

32. The tribunal considers that a deduction limited to 35% should be applied to the amount of RRO order sought by the applicants, in order to reflect the respondent's ('good conduct'), thereby amounting to £18,420.95 (say £18,420.96 rounded) to be equally divided among the three applicants. Therefore, the tribunal makes a RRO order made in the sum of £6,140.32 per applicant which is to be paid to each applicant within 14 days of this decision.

Name: Judge Tagliavini Date: 21 July 2021

Rights of appeal from the decision of the tribunal

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).