FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/HMF/2019/0092**
HMCTS code	**:**	**V: VIDEO**
Property	**:**	**26 Ericcson Close, London SW18 1SG**
Applicants	**:**	**Ms C Vieira, Mr J Chin Wan, Ms N Brown, Ms I V Vasileva, Mr A Gallo, Mr A Vasilev.**
Representative	**:**	**Mr A Maddan of counsel**
First Respondent	**:**	**S D Smile Properties Limited**
Representative	**:**	**Lawson & Daughters**
Second Respondent	**:**	**Yourhouse London Limited**
Representative	**:**	**Mr K Josef**
Type of application	**:**	**Application for a Rent Repayment Order**
Tribunal members	**:**	**Judge Pittaway** **Ms R Kershaw BSc**
Date of Hearing	**:**	**25 February 2021**
Date of decision	**:**	**10 March 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the tribunal at the hearing were;

1. A respondents' bundle (110 pages)
2. The applicants' bundle (189 pages)

the contents of which the tribunal has noted.

At the hearing Mr Maddan of counsel of represented the applicants, Mr Corson of Lawson & Daughters represented the First Respondent and Mr Josef of Obaseki Solicitors represented the Second Respondent.

The tribunal heard evidence from each of the applicants, except Mr Chin Wan, and from Ms A Freccia of YourhouseLondon Limited. The tribunal heard submissions from Mr Corson, Mr Josef and Mr Maddan.

The tribunal had regard to the decisions in the following cases referred to;
Thurrock Council v Palm View Estates [2020] UKUT 0355 (LC)

Decisions of the tribunal

1. The property was not an HMO which required mandatory licensing.

2. The tribunal determines that tribunal fees paid by the applicants should not be reimbursed.

The background

3. The tribunal received an application dated 8 November 2019 under section 41 of the Housing and Planning Act 2016 ("**the 2016 Act**") for a rent repayment order ('**RRO**') in respect of 26 Ericcson Close, London SW18 1S ('the **Property**'). The London Borough of Wandsworth is the local housing authority.

4. The original application named several other occupants as applicants and named the Second Respondent as the representative of the First Respondent.

5. On 9 December 2020 the Tribunal issued Directions, which named all the original applicants and which named the Second Respondent as the First Respondent's representative. The directions set out the issues which the Tribunal would need to consider. The respondent, having been sent the application and supporting documents by the tribunal, was advised to seek independent legal advice. The respondent was directed to file a bundle of documents for use by the tribunal by 6 January 2021 and the applicants to file a bundle of documents by 3 February 2021.

6. Official copies for the freehold of the property in the applicants' bundle showed S D Smile Properties Limited to be the registered proprietor of the freehold interest in the Property, and Yourhouse London Limited its tenant under an agreement dated 8 July 2019. At the hearing it was confirmed by the representatives of both S D Smile Properties Limited and Yourhouse London Limited that Yourhouse London Limited was not S D Smile Properties Limited's representative and that it should be treated as a separate respondent. The tribunal therefore directed Yourhouse London Limited to be named as a Second Respondent to the application pursuant to Rule 10 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

7. Of the original applicants there was no evidence in the applicants' bundle of the respective claims for O Al Abbar, A F Dal Mas and M Dattilo and E Pandolfi, either as to the relevant periods of their claims or the amounts sought. Mr Maddan did not have instructions from them. The tribunal therefore directed that they be removed as applicants from the application pursuant to Rule 10 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

8. The application has been brought by the applicants jointly. They allege that in respect of the period of their respective occupations the First Respondent and the Second Respondent (together the '**respondents**') committed an offence under section 72(1) of the Housing Act 2004 (the **'2004 Act'**) in controlling or managing a House in Multiple Occupation without a licence.

9. The application did not specify the exact period of each of their respective claims nor the actual amount sought by each. At the hearing their claims were clarified as follows;

Tenant	Period of occupation for which repayment sought	Amount
C Vieira	20 July 2019 to before 30 November 2019 £750 p.m. + contract sum of £295.89	£3,295.89
A Vasiler	1 August 2019 to 1 March 2020 £720 p.m. + contract sum of £23.67	£5063.67
I Vasilieva	31 July 2019 to 28 February 2020	£5274.65

	£750 p.m. + contract sum of £24.65	
A Gallo	23 September 2019 to 4 April 2020 £850 p.m. + contract sum of £223.56	£5,323.56
N Brown	15 July 2019 to 29 October 2019 £700 p.m. for Sept and Oct, £627.41 for Aug, £545.73 for July and key deposit of £161.66	£2173.14
J Chin Wan	1 November 2019 to 28 February 2020 £800 p.m.	£3,200

10. The witness statement of Ms Freccia of YourHouse London Limited was only provided to the other parties and the tribunal the day before the hearing. Both Mr Maddan and Mr Corson confirmed that they had no objection to it being used in evidence.

The Property

11. The Property is described in the application as a 6-bedroom flat with two shared bathrooms, a shared kitchen and no communal area.

12. No party requested an inspection and the tribunal did not consider that one was necessary.

The tribunal's decision and reasons

13. The tribunal has had regard to the statements of case, the evidence that it heard, the witness statements in the bundles the witness statement of Ms Freccia, the submissions made at the hearing on behalf of the parties, and the case law referred to in reaching its decision. As appropriate, and where relevant to the tribunal's decision these are referred to in the reasons for the tribunal's decision.

14. The relevant legal provisions are set out in the Appendix to this decision.

15. The issues before the tribunal to determine were

- Was the property one which required an HMO licence ?
- If it did, the quantum of any RRO ?
- By which of the respondents should any RRO be paid, and if it should be paid by both of them how it should be apportioned between them?

Did the property require an HMO Licence?

16. In their 'case summary' the applicants stated that the property was one which required a mandatory licence by reason of being a house in multiple occupation as set out in the House in Multiple Occupation (Prescribed Description) (England) Order 2018 SI 2018/222 (the '**2018 Order**') and satisfying the standard self-contained test set out in s.254(3) of the Housing Act 2004. While there was some discrepancy in the evidence of Mr Vasilev and Ms Brown as to the number of occupants at the property from time to time Ms Freccia provided details of occupation of the property from 15 July 2019 when Ms Brown took occupation.

17. On the evidence before it the tribunal find that from 1 August 2019 the property was occupied by at least five people. The tribunal are satisfied that the property met the standard self-contained test set out in s.254(3) of the 2004 Act.

18. In support of the property being an HMO the applicants referred the tribunal to an e mail of 6 November 2019 from Ms Joy Collins of the Regulatory Services Partnership for the London Boroughs of Merton, Richmond and Wandsworth, in the applicants' bundle, in which she stated that there was no licence at the address of the property.

19. The tribunal finds that the email from Ms Joy Collins does not evidence that an HMO licence is required for the property. It only confirms that no HMO Licence existed for the property.

20. Mr Corson submitted that the property does not require an HMO licence. He accepted that it might be deemed to be an HMO because it was occupied by five or more occupants but it is exempt from the requirement to be licensed because it falls within the exception set out in regulation 4(c)(ii) of the 2018 Order as it is a purpose-built flat situated in a block comprising three or more self-contained flats.

21. Mr Josef concurred with Mr Corson's submission. He also referred the tribunal to an e mail from Mr Uche, an Environmental Health Practitioner for the Regulatory Services Partnership (Environmental Health) for Merton, Richmond and Wandsworth Councils of 5 September 2019, in the respondents' bundle, addressed to Mr J Mghabghab of Lawson and Daughters

which stated that properties such as they had viewed the previous day were not licensable HMOs. Mr Uche had attached the Guidance for Local Housing Authorities to the e mail and specifically referred to the statement in it, '*Such flats are only required to be licensed if they are not purpose built flats situated in a block of three or more self-contained flats*.' Mr Josef also submitted that Wandsworth Council had acted as if the property did not require an HMO licence, despite having visited while it was occupied.

22. Mr Corson accepted that the e mail of 5 September 2019 was not written as the result of the subject property having been visited, but as the result of a visit to a similar property.

23. Mr Maddan submitted that the e mail of 5 September 2019 was not specifically directed to the property, it was generic. It did not address how the property that was actually inspected was used, nor whether any works had been carried out to it. He referred the tribunal to the decision in *Thurrock Council v Palm View Estates* as authority for the proposition that it is not a valid defence to the offence of controlling or managing an unlicensed HMO to rely on what a local authority official has told a landlord, nor is such reliance a 'reasonable excuse' for the purposes of s.72(5) of the 2004 Act. He argued that it is the landlord's responsibility to obtain any necessary HMO licence and that it could have applied for one even if it thought it would be refused.

24. The tribunal has no reason to doubt Mr Corson's evidence that the property that Wandsworth inspected was similar to the property. It also accepts Mr Maddan's submission that Mr Urche's e mail is not conclusive that the property did not required an HMO licenceIt is necessary for the tribunal to decide whether the property was one which required a mandatory HMO licence while occupied by the applicants. No HMO licence would be required if the property was a purpose-built flat in a block of three or more self-contained flats. This is a specific exception set out in Regulation 4(c) (ii) of the 2018 Order.

25. From the evidence that the tribunal heard it is clear that the property is in a block of at least eight flats, that the block was purpose-built and that the flats, including the property are self-contained. It is also clear that work had been carried out to the flat before the applicants took occupation, but there was no evidence before the tribunal as to what this work had consisted of. Ms Freccia had visited the property while the works was being done but given the stage at which the works then were was unable to confirm what works had been undertaken. Mr Maddan suggested, without supporting evidence, that it had originally been a three-bedroom flat. The tribunal heard evidence that it was now a flat with six bedrooms, two showers, a small kitchen and no amenity area. There was no suggestion that the flat had been extended outside its original demise.

26. Mr Maddan submitted that the flat was not built for the purpose for which it was now used. Mr Maddan referred the tribunal to the Guidance for Local Housing Authorities which is included in the respondents' bundle. In

particular he referred the tribunal to paragraph 2.3 b) which states, '*Purpose-built is not defined in the regulations and therefore takes its ordinary and natural meaning, i.e. the building was originally designed and constructed for a particular use.*'

27. In Mr Maddan's submission the meaning of 'particular use' is not linked to planning law. It does not mean 'residential' but is an expression that should be considered in context, and in his submission that context is that of the 2004 Act, which was designed to ensure the well-being of tenant occupants. In his submission, in that context, Wandsworth's approach, as evidenced in Mr Uche's e mail, was wrong. He submitted that it was not sufficient for a flat to be 'purpose-built' if it was not built for the purpose to which it is now put and submitted that its use as a house in multiple occupation was not the use for which it had been constructed. He submitted that the flat was originally designed as a family home for social housing and had undergone substantial renovation/ been remade within its four walls to make it a house in multiple occupation, at the high risk end of that designation, by reason of room size and lack of amenities. He submitted that the fact that one bedroom had been changed back to a sitting room after an inspection by Wandsworth Council suggested that even Wandsworth Council thought that the property was over-occupied or lacking in amenity space if it had six bedrooms. Mr Maddan invited the tribunal to take a different view from Wandsworth Council and determine that the current use was not its original 'particular use'. Mr Maddan told the tribunal that he had been unable to find any authority of the particular point.

28. The expression that the tribunal is required to consider from the 2016 Order is "purpose-built". Reference in the Guidance for Local Housing Authorities to the building being constructed 'for a particular use' is an explanation of the term used in the Order but is not the term used. By focusing on the expression 'particular use' Mr Maddan has invited the tribunal to adopt one meaning of the expression 'purpose built'.

29. What the tribunal has to decide is not whether that flat has a particular use but whether the property is a 'purpose-built flat', given the ordinary and natural meaning of those words. It is what the property was constructed as that is relevant to the 2016 Order, not how it is used. The property was built as a flat and remains a flat. It is a purpose-built flat whether it contains three or six bedrooms.

30. The tribunal is mindful of the further statement in paragraph 2.3 b) of the Guidance for Local Housing Authorities which states, *'A purpose-built flat is <u>not</u> subject to mandatory licensing even if the flat is in multiple occupation'*.

31. Mr Maddan's distinction between a three-bedroom and six-bedroom flat is a nice one, but the tribunal finds that it is not a distinction that is present in the 2018 Order The tribunal accept Mr Maddan's submission that how the rooms within a flat are used (for example all being used as all bedrooms) may put the tenants at greater risk but the tribunal has to have regard to the actual

wording of the 2016 Order. The 2016 Order contemplates occupation by not less than five persons but nonetheless excludes purpose-built flats situated in a block comprising three or more self-contained flats.

32. The tribunal agree with Mr Colson that the property may fall within the definition of an HMO but it was exempt from the requirement to be licensed because it falls within the exception set out in regulation 4(c)(ii) of the 2018 Order as a purpose-built flat situated in a block comprising three or more self-contained flats.

33. The tribunal therefore determine that the property does not require a mandatory HMO license.

The quantum of any RRO and payability.

34. Having decided that the property does not require a mandatory HMO licence the tribunal is not required to determine the quantum of a RRO payable if it were an HMO (and in particular whether the parties' conduct would be relevant in determining its amount) nor how any RRO should be apportioned between the First Respondent and the Second Respondent.

35. The tribunal would encourage the representatives of the parties, if acting in future applications, to consider whether there are preliminary issues that might be determined before the substantive hearing. If the issue of whether the property was an HMO had been considered as a preliminary issue it might have obviated the need for six witnesses to attend the hearing.

Fees

36. As the tribunal has made no RRO in favour it is not appropriate that the applicants should have their fees refunded.

Name: Judge Pittaway **Date:** 10 March 2021

Rights of appeal

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

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

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

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

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

Appendix of Relevant Legislation

Housing Act 2004

55 Licensing of HMOs to which this Part applies

(1)This Part provides for HMOs to be licensed by local housing authorities where—

(a)they are HMOs to which this Part applies (see subsection (2)), and

(b)they are required to be licensed under this Part (see section 61(1)).

(2)This Part applies to the following HMOs in the case of each local housing authority—

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

(b)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.

(3)The appropriate national authority may by order prescribe descriptions of HMOs for the purposes of subsection (2)(a).

(4)The power conferred by subsection (3) may be exercised in such a way that this Part applies to all HMOs in the district of a local housing authority.

56 Designation of areas subject to additional licensing

(1) A local housing authority may designate either -

(a) the area of their district, or

(b) an area in their district,

as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.

61 Requirement for HMOs to be licensed

(1) Every HMO to which this Part applies must be licensed under this Part unless–

(a) a temporary exemption notice is in force in relation to it under section 62, or (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

72 Offences in relation to licensing of HMOs

(1) 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)) but is not so licensed.

75 Other consequences of operating unlicensed HMOs: restriction on terminating tenancies

(1) No section 21 notice may be given in relation to a shorthold tenancy of a part of an unlicensed HMO so long as it remains such an HMO.

254 Meaning of "house in multiple occupation"

(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) it meets the conditions in subsection (3) ("the self-contained flat test");

(c) it meets the conditions in subsection (4) ("the converted building test");

(d) an HMO declaration is in force in respect of it under section 255; or

(e) it is a converted block of flats to which section 257 applies.

(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.

(3)A part of a building meets the self-contained flat test if—

(a)it consists of a self-contained flat; and

(b)paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat).

(4)A building or a part of a building meets the converted building test if—

(a)it is a converted building;

(b)it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);

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

(d)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);

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

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

258HMOs: persons not forming a single household

(1)This section sets out when persons are to be regarded as not forming a single household for the purposes of section 254.

(2)Persons are to be regarded as not forming a single household unless—

(a)they are all members of the same family, or

(b)their circumstances are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority.

(3)For the purposes of subsection (2)(a) a person is a member of the same family as another person if—

(a)those persons are married to , or civil partners of, each other or live together as if they were a married couple or civil partners;

(b)one of them is a relative of the other; or

(c)one of them is, or is a relative of, one member of a couple and the other is a relative of the other member of the couple.

(4)For those purposes—

(a)a “couple” means two persons who … fall within subsection (3)(a);

(b)“relative” means parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin;

(c)a relationship of the half-blood shall be treated as a relationship of the whole blood; and

(d)the stepchild of a person shall be treated as his child.

(5)Regulations under subsection (2)(b) may, in particular, secure that a group of persons are to be regarded as forming a single household only where (as the regulations may require) each member of the group has a prescribed relationship, or at least one of a number of prescribed relationships, to any one or more of the others.

(6)In subsection (5) “prescribed relationship” means any relationship of a description specified in the regulations.

Section 260 HMOs: presumption that sole use condition or significant use condition is met

(1)Where a question arises in any proceedings as to whether either of the following is met in respect of a building or part of a building—

(a)the sole use condition, or

(b)the significant use condition,

it shall be presumed, for the purposes of the proceedings, that the condition is met unless the contrary is shown.

(2)In this section—

(a)"the sole use condition" means the condition contained in—

(i)section 254(2)(d) (as it applies for the purposes of the standard test or the self-contained flat test), or

(ii)section 254(4)(e),

as the case may be; and

(b)"the significant use condition" means the condition contained in section 255(2) that the occupation of the living accommodation or flat referred to in that provision by persons who do not form a single household constitutes a significant use of that accommodation or flat.

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and 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.

(3) A reference to "an offence to which this Chapter applies" is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

	Act	*section*	*general description of offence*
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act	section 1(2), (3) or	eviction or harassment of

	Act	*section*	*general description of offence*
	1977	(3A)	occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if –

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if –

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

43 Making of a rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord had been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

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(2) The amount must relate to rent paid during the period mentioned in this 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 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,

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

The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018

Citation and Commencement

1.—(1) This Order may be cited as the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018.

(2) This Order comes into force on 1st October 2018.

Application

2. This Order applies in relation to an HMO in England(**2**).

Interpretation

3. In this Order "the Act" means the Housing Act 2004.

Description of HMOs prescribed by the Secretary of State

4. An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act if it—

(a)is occupied by five or more persons;

(b)is occupied by persons living in two or more separate households; and

(c)meets—

(i)the standard test under section 254(2) of the Act;

(ii)the self-contained flat test under section 254(3) of the Act but is not a purpose-built flat situated in a block comprising three or more self-contained flats; or

(iii)the converted building test under section 254(4) of the Act.