FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/12UB/HMF/2019/0011**
Property	**:**	**308-310 Cherry Hinton Road, Cambridge CB1 7AU**
Applicants	**:**	**1. Natalia Martin-Cantero 2. Carmen Gonzalez-Nunez 3. Eliana Marin-Lopez 4. John Ospina-Bolivar 5. Andrez Moren-Cruz 6. Zulma Terrones 7. Nolan Gomez 8. Laura Kerkens**
Representative	**:**	**Mr McClenahan, Justice for Tenants**
Respondent	**:**	**1. Steve and Helen (UK) Ltd 2. Helen Onasanya 3. Stephen Onasanya**
Representative	**:**	**Fitzpatrick Solicitors**
Type of application	**:**	**Application for a Rent Repayment Order – section 40 of the Housing and Planning Act 2016**
Tribunal member(s)	**:**	**Judge Ruth Wayte Mrs M Hardman FRICS IRRV (Hons) Mr A Kapur**
Date and venue of hearing	**:**	**20 January 2020 at Cambridge Magistrates Court**
Date of decision	**:**	**4 February 2020**

DECISION

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1. **The tribunal makes a rent repayment order of £17,334 against the respondents, to be paid within 28 days.**
2. **The tribunal also orders the respondents to pay £1,000 in respect of the application and hearing fees.**

The application

1. The applicants seek a rent repayment order (RRO) under section 40 of the Housing and Planning Act 2016 ("the 2016 Act"). The applicants relied on the respondents having committed an offence under section 72 (1) of the Housing Act 2004, namely being the landlord of a house in multiple occupation (HMO) without the necessary licence.

2. The applicants were all foreign students and several have now returned overseas. They were represented throughout and at the hearing by Mr McClenahan of Justice for Tenants. The respondents were represented by solicitors and at the hearing by counsel, Miss Smith. No witnesses appeared on behalf of the Applicants, the Respondents relied on a single witness, Mr Ola Ojuri of Daniel Ford & Co, letting agents who act on behalf of the respondents. The second and third respondent did not attend the hearing.

The law

3. Sections 40-41 and 43-44 of the 2016 Act contain the provisions in respect of RROs. In summary, section 40 provides that the tribunal may make an RRO in favour of a tenant where a landlord has committed a relevant offence – in this instance the offence set out in section 72(1) of the Housing Act 2004, the control or management of an unlicensed HMO. Section 41 stipulates that an application by a tenant is limited to circumstances where the offence relates to housing that, at the time of the offence, was let to the tenant and was committed in the period of 12 months ending with the day on which the application was made. At the start of the hearing it was accepted by the respondents that an offence had been committed from 1 October 2018 as the property was and apparently still is being used as an HMO without a licence. The application for an RRO was received by the tribunal on 21 August 2019.

4. Section 43 states that the tribunal may make an RRO if satisfied, beyond reasonable doubt, that a landlord has committed the offence. Section 44 states that any RRO must relate to rent paid by the tenant in respect of a period not exceeding 12 months, during which the landlord was committing the offence. Any RRO must not exceed the rent paid in that period and in determining the amount the tribunal must, in particular, take into account:

    - the conduct of the landlord and the tenant;
    - the financial circumstances of the landlord and
    - whether the landlord has at any time been convicted of an offence to which that part of the 2016 Act applies.

5. The applicants also relied on two Upper Tribunal decisions: *Urban Lettings (London) Ltd v LB Haringey* [2015] UKUT 0104 (LC) and *Goldsbrough v CA Property Management* [2019] UKUT 311 (LC), discussed in more detail below.

Background

6. The property consists of two houses and outbuildings, arranged over one to two floors. It received planning permission on 17 September 1997 from Cambridge City Council for use as a Guest House (C1), with a condition that no more than nine guest bedrooms shall be used. A witness statement by Stephen Onasanya, the third respondent, states that the property was purchased by the first respondent, a company owned by the second and third respondents, in 2015 and was used as a guest house until July 2017.

7. On 22 July 2017 the first respondent granted a full repairing and insuring lease ("the lease") of the property to Lifestyle Club Limited ("Lifestyle Club"). The lease stated that the permitted use of the property was to be "within class C1 of the Town and Country planning (Use Classes) Order 1987", although the underletting provisions in clause 18 permitted underletting "by way of an assured shorthold tenancy agreement or any other tenancy agreement whereby the undertenant does not obtain security of tenure on expiry or earlier termination of the term granted by the underlease". The lease states that the rent is £7,000 per annum, although in fact the agreed rent was £7,000 per calendar month.

8. Mr Onasanya states that as far as he was aware, the property was being used as a guesthouse. In June 2019 the respondents stopped receiving the rent. Their agents, Daniel Ford & Co, went to the property where they were refused access by Simple Properties London Limited ("Simple Properties"). They were informed that Lifestyle Club had transferred the lease to them prior to being dissolved. Simple Properties started paying the rent and the respondents appear to have accepted them as their lessees, even though the lease has provisions allowing the landlord to re-enter the property in the event of an "Act of Insolvency" and that any assignment of the lease would require consent (not to be unreasonably withheld).

9. In fact, Lifestyle Club used the property as an HMO, advertising the rooms individually on various websites, targeted as student accommodation. The copy adverts provided by the applicants state that the accommodation is to be shared with 20+ other students. Andrez Cruz was the first of the applicants to let a room from October 2017 and the last were John Ospina and Eliana Martin who rented a double room from September 2018. Nolan Gomez and Laura Kerkens also shared a double room. The last applicant to leave was Carmen Nunez, in August 2019. The applicants contacted Justice for Tenants, a not for profit

tenant advice and support service, as they had concerns about the condition and management of the property and difficulties recovering their deposits when they left. They had all been given "licence" agreements, although there appeared to be no dispute in reality that they had exclusive occupation of their room and would therefore have had the status of assured shorthold tenants.

The issues

10. At the start of the hearing, Miss Smith for the respondents conceded that the property was being used as an HMO and that a licence would have been required since 1 October 2018 (when the definition of an HMO was changed to include single and double storey properties). The amounts claimed in respect of rent paid by the applicants from that date were also conceded, save for some queries in relation to Nolan Gomez and Laura Kirkens. Miss Smith also pointed out that Zulma Torrones had not provided a copy of her tenancy agreement, although conceded that there was evidence of payment of rent in respect of the property.

11. The respondents had originally denied that they could be liable for an RRO as they were not the landlord of the applicants. In response, the applicants relied upon the Upper Tribunal case of *Goldsbrough*, the full citation appearing in paragraph 5 above. That case also involved a "rent to rent" agreement and the Upper Tribunal Judge held that the owners of that property qualified as a landlord for the purposes of an application for an RRO as they were landlords of the property, having entered into a lease with the landlords of the applicants in that case. Applying that decision, which binds this tribunal, to the facts of this case means that the respondents also qualify as landlords for the purposes of the 2016 Act, as accepted by Miss Smith at the hearing.

12. However, the applicants also need to prove that the respondents have committed the HMO licensing offence and therefore that the respondents were persons "having control of or managing an HMO", as defined in the 2004 Act. This was disputed by the respondents. As an alternative, the respondent claimed that they had a defence of "reasonable excuse", both arguments based on the fact of the letting to Lifestyle Club and now Simple Properties.

13. If the tribunal is satisfied beyond reasonable doubt that the respondents have committed the offence, it also needs to decide whether to make an RRO and in determining the amount, to take into account the factors spelt out in paragraph 4 above. Finally, the applicants had requested that the tribunal order the respondents to repay the application and hearing fees of £1,000.

Were the respondents "persons having control" of the property?

14. Mr McClenahan for the applicants started with section 263(1) of the 2004 Act which defines a "*person having control*" as "*the person who receives the rack-rent of the premises*". Rack-rent is defined in section 263(2) as "*a rent which is not less than two-thirds of the full net annual value of the premises*". He argued that the rent negotiated with the Lifestyle Club of £84,000 per annum was a rack-rent. He relied on the Upper Tribunal case of *Urban Lettings*, full citation in paragraph 5 above; and in particular the quote of Lord Reid from the earlier decision of the House of Lords in *London Corporation v Cusack Smith* [1955] AC 337 at paragraph 42, as authority for the proposition that there can be more than one landlord in receipt of a rack-rent for a property where that property has been sub-let.

15. Miss Smith for the respondents maintained that the rack-rent was the rent paid by the occupants to Lifestyle Club and their successors. In the amended defence she had calculated that the rent received by them was in the region of £139,392 per annum, based on 20 rooms let 100% of the time at £135 per week for a double room, £110 per week for a single room and £170 per week for a studio. Two thirds of that figure was around £92,928. In the circumstances the respondents did not meet the definition in the 2004 Act.

16. The tribunal pointed out that the two-thirds limit in the 2004 Act was of the full net annual value rather than any gross income. Full net annual value is a term more commonly used in the valuation of property for rating, with the definition in the General Rate Act 1967 summarised as the rent received under a full repairing and insuring lease. Miss Smith's estimate of the gross income received by Urban Lettings from its tenants was unsupported by any evidence, other than the rent paid by the applicants and failed to take into account any of the expenses incurred by Lifestyle Club.

17. By way of contrast, the rent paid by the Lifestyle Club and its successors was clearly a rack-rent, negotiated in the market place by Daniel Ford & Co. The lease terms and the evidence of the agreement record that it was a full repairing and insuring lease. In the circumstances, the tribunal determines that the first respondent meets the definition of a "person having control" as set out in section 263 of the 2004 Act. The second and third respondent are liable for any offences of their company under section 251 of the 2004 Act.

Did the respondents' have a reasonable excuse?

18. The defence is having a reasonable excuse for not having a licence, as set out in section 72(5) of the 2004 Act. Miss Smith relied on the witness statement of Stephen Onasanya and the evidence of Ola Ojuri as support for the respondents' claim that they had no knowledge that the property was being used as an HMO. Mr Onasanya did not make himself available for cross-examination and therefore his statement has been given very little evidential weight. In any event, it would appear that Mr Ojuri negotiated the lease on the respondents' behalf.

19. Mr Ojuri had also provided a witness statement, which exhibited a copy of the lease and several emails with Paolo Aliatis, the owner of Lifestyle Club. As stated above, the lease does contain a clause detailing the permitted use of the property as "within class C1", although there is no mention of the limit of 9 guest rooms or indeed evidence that the actual planning permission was provided to Lifestyle Club. However, the lease also contains underletting provisions which permit the underletting of part of the property by way of assured shorthold tenancies, which is not compatible with use as a guest house. Those provisions appear to reflect the negotiations set out in the emails, where Mr Aliatis on 1 October 2016 offered £6.5K on the basis "*that there won't be restrictions to rent this out as bedrooms*". By 5 October 2016 the rent had increased to £7k. In his email of that date Mr Aliatis stated "*Please be aware that at the moment 4 rooms are not compliant (under 6.5 sq mts)*" (having previously referred to 17 bedrooms in total).

20. Mr Ojuri was unable to offer any explanation for those emails and appeared unaware that 6.5 square metres is the minimum legal size of a single room in an HMO. That said, he also struggled to explain what "FRI lease" meant in the email setting out the final terms dated 6 October 2016, although Miss Smith conceded it clearly meant full repairing and insuring, as set out in the statement of Mr Onasanya. Mr Ojuri was clear that he was trying to achieve the maximum rent available for his clients in order to cover their mortgage, although there was no evidence provided as to the amount of the repayments.

21. The tribunal is not satisfied that the respondents have a reasonable excuse. As Mr Ojuri admitted, their aim was to obtain the maximum return on the property and the emails were clear that it would be achieved by letting out as many of the rooms as possible and as an HMO. The lease contains conflicting provisions as to permitted use on the one hand and underletting on the other. There was no attempt to limit the bedrooms to 9 as set out in the planning permission. Finally, the property was clearly advertised on public websites as a "flatshare" or similar. In the circumstances the tribunal considers that any reasonably competent landlord and/or an agent acting on their behalf would have been aware that the property was being used as an HMO and that a licence would be required from 1 October 2018.

The amount of any RRO

22. The rent paid by the applicants from the 1 October 2018 to the date they vacated the property was agreed as follows:

Natalia Cantero	£ 1,732
Carmen Nunez	£ 6,330
Eliana Lopez and John Bolivar	£ 3,747
Andrez Cruz	£ 2,070
Zulma Torrones	£ 2,260

23. Ms Torrones could not locate a copy of her tenancy agreement but Mr McClenahan had provided evidence of payment of rent to "PMC – Unity House" for the relevant period. The property was marketed as Unity House and the tribunal is therefore satisfied that there is sufficient evidence to support her claim to an RRO despite the lack of an agreement.

24. The rent paid by the final couple, Nolan Gomez and Laura Kerkens was queried in two respects. Firstly, it was conceded that one month had been counted twice. Miss Smith also challenged the first payment of rent on the basis that there was no bank statement to cover it, as it was paid in cash. Mr McClenahan pointed to the tenancy agreement which recorded payment of the first month's rent, together with a number of other fees. He submitted that it was extremely unlikely that the couple would have escaped liability for that rent and the tribunal agrees. In the circumstances the tribunal determines that the rent paid by Nolan Gomez and Laura Kerkens for the relevant period was £ 6,973 and therefore the total rent paid by the applicants amounts to £ 23,112. In all cases, the amount is less than 12 months' rent.

25. The tribunal considers that this is an appropriate case for an RRO. As stated above, the motivation of the respondents appears to be purely about maximising the income without regard for the safety of the occupants. An application for a licence would probably have restricted the number of rooms which could be occupied and addressed any other safety issues, or it might have been refused on planning grounds.

26. The maximum amount of the RRO is £ 23,112. However, when considering the amount of the RRO the tribunal must take into account in particular the issues set out in paragraph 4 above, namely the conduct of the landlord and tenant and the financial circumstances of the landlord. There is no conviction to take into account in this case.

27. In terms of the landlords' conduct, there has been a failure to take responsibility for the occupants, although no aggravating factors. The tenants' complaints were all in respect of Lifestyle Club and their successors. There is also nothing to take into account in respect of the tenants' conduct. No evidence was provided of the Respondents' financial circumstances, although their lease with Simple Properties continues until 21 March 2020, with a rental income of £7,000 pcm and mention was made of a mortgage, although no details as to the amount were provided.

28. Taking all the circumstances into account, the tribunal considers that an appropriate amount for the RRO in this case is 75% of the rent paid by the applicants, or £17,334. This is to be paid to the applicants within 28 days in the following amounts to reflect their individual claims:

Natalia Cantero	£ 1,299
Carmen Nunez	£ 4,748

Eliana Lopez and John Bolivar	£ 2,810
Andrez Cruz	£ 1,552
Zulma Torrones	£ 1,695
Nolan Gomez and Laura Kirkens	£ 5,230

29. Finally, the tribunal also orders the respondents to pay the application and hearing fees of £1,000. Miss Smith conceded that such an order was likely to follow any RRO made against her clients.

Name: Judge Ruth Wayte **Date:** 4 February 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).