FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/HMG/2020/0019**
HMCTS code (paper, video, audio)	:	**V: CVPREMOTE**
Property	:	**Flat J, 249 Fordwych Road, London NW2 3LY.**
Applicants	:	**(1) Ms Carlotta Fava** **(2)Ms Francesca Villa** **(3)Ms Francesca Veneziani**
Representative	:	**In Person**
Respondents	:	**(1) Mr Marcus Lao** **(2) Ms Samantha Khoo**
Representative	:	**Mr Michael Field of counsel** **Freemans Solicitors**
Type of application	:	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal members	:	**JUDGE SHAW** **Ms J MANN MCIEH**
Venue	:	**VIDEO HEARING**
Date of decision	:	**31st March 2021**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPEREMOTE . A face-to-face hearing was not held because of the Covid-19 Pandemic, and all parties were agreeable to a remote hearing. It was practicable to resolve all issues with a remote hearing. The documents referred to by the Tribunal are in digital bundles, submitted by the parties respectively., and supplemented by some further documents produced shortly before the hearing. All of the documents produced have been carefully considered by the tribunal.

Introduction

1. This case involves an application by the Applicant tenants listed above, for a Rent Repayment Order in respect of the Property at Flat J, 249 Fordwych Road, London NW2 3LY. ('the Property'). Mr Marcus Lao and his wife Ms Samantha Khoo are the freehold owners of the Property and the Respondents to the application. The application is made because it is contended that the Respondents committed the offence of having control of a house in multiple occupation which was, and is, required to be licensed, but was not so licensed, contrary to section 72(1) of the Housing Act 2004.

2. By virtue of a Tenancy Agreement dated 2nd March 2018, the Respondents let the property to the Applicants for a term of two years from 1st March 2018 until 29th February 2020 at a monthly rent of £1,516.67. Each of the Applicants occupied her own room, and had shared kitchen and bathroom facilities. It is no longer an issue in this case that the Applicants were unrelated, and that in the circumstances, the Property constituted a house in multiple occupation, which required, but did not have, an HMO licence. The Applicants occupied the Property until 21st March 2020, upon which date they vacated. They seek a Rent Repayment Order in the sum of £18,200 for the statutory period of 12 months.

3. As mentioned, the Respondents do not deny that the Property was required to be licenced. Their contention is that by virtue of section 96(4) of the 2004 Act, they have a *"reasonable excuse"* for not having the required licence. In the alternative, they contend that the Tribunal should exercise its discretion under section 44(4) of the 2016 Act, so as not to make an RRO for the full sum applied for by the Applicants.

4. Directions were given by the Tribunal on 26th November 2020, and a hearing of the matter took place by video link on 1st March 2021. The Applicants attended in person, and the first named Applicant, Ms Carlotta Fava, spoke, ably, on behalf of herself and her erstwhile flatmates at the Property, the second and third named Applicants. All of the Applicants are Italian, and had returned to Italy to visit their families, but had been unable to return because of the pandemic. They all participated by video from Italy. The Respondents likewise were not in the UK , but in Queensland Australia, where they have lived for many years, and were living at the time the Property was let. They participated in the hearing by video. They were represented by Mr Michael Field, in-house counsel at Freemans Solicitors. Both Applicants and Respondents provided very helpful statements and documentary evidence, which the Tribunal has considered carefully.

5. It is proposed first to make reference to the relevant statutory provisions in this case, and then to summarise the parties' respective evidence, before then giving the Tribunal's determination on the law and evidence.

The Law

6. Section 95 of the 2004 Act provides that:

    "A person commits an offence if he is a person having control of or managing a house which is required to be licenced under this Part (see section 84(1)) but is no so licenced."

    There was no argument from Mr Field for the Respondents to the effect that a licence was not required, nor was it disputed that the "control or management" requirements, defined elsewhere in the Act, are satisfied in this case.

    "(4) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse.....for having control of or manging the house in the circumstances mentioned in sub-section (1)..."

    It is this provision which is primarily relied upon by Mr Field, supplemented by some case-law, to be referred to below. In the alternative, reliance is placed (upon the question of the quantum of any order) upon section 44(4) of the 2016 Act:

    "(4) In determining the amount the tribunal must, in particular, take into account—
    (a)the conduct of the landlord and the tenant,
    (b)the financial circumstances of the landlord, and
    (c)whether the landlord has at any time been convicted of an offence to which this Chapter applies."

The Applicants' Case

7. It was a feature of this case that there was virtually no significant conflict on the facts, and the Tribunal was impressed by the clarity and frankness of both sides in giving their evidence. Ms Fava told the Tribunal, that she and her friends, the other Applicants, had *"no issues"* either with the Respondents or the Property. She agreed that the Respondents were *"good landlords"* and that she and the other Applicants had had *"a lovely time in the property."* Indeed, ironically, it was their request to extend the tenancy (coupled with a routine check carried out by the Respondents' agents) which led to the occupation coming to an end, and the discovery that the appropriate licence had not been obtained. They had been "*very comfortable"* in the Property, and the Tribunal was shown photographs of the interior, which do indeed illustrate a well-appointed and congenial apartment. It is right also to point out as emphasised by Ms Flava (and not disputed by the Respondents), that she and the other Applicants were good tenants and had kept the flat well.

8. It was towards the end of the term of the tenancy agreement (29th February 2020) that what appears to have been the only episode of tension between the parties occurred. As put by the Applicants in their Statement in Reply:

> *"On 21st January 2020 we, the tenants, asked to extend our tenancy agreement due to expire on 1st March 2020 and on 28th January Mr Lau replied that as he did not have a license, he could not extend our tenancy and we would have had to leave by 1st of March. We then asked to extend it until the end of March and decided on 22nd, hoping to find something before that date. We later asked to have until 1st of April 2020 as it was exceedingly difficult to find a house to rent at the time, however we managed to leave the house on 20th March 2020, and paid the rent until 22nd March as per agreement with Mr Lau."*

Accordingly, as understood by the Tribunal, by agreement between the parties, the Applicants stayed on in the property, beyond the term date, until 20th March. Nonetheless, the Applicants felt aggrieved that, having been good tenants for 2 years, they had not been granted until 1st April to vacate the property and find alternative accommodation. The result

was that they actually took a new tenancy of a flat further from their places of work, and at a rent higher than they had wished to pay. They were later informed independently, although the First Respondent had frankly told them as much, that it would have extended the unlawful letting to have granted another tenancy, because by that time he had been informed of the licencing requirement. Having been informed of the full position themselves, the Applicants made this application.

9. In cross examination, Ms Fava readily accepted that both the Respondents, and the couple (their former nanny and her partner) they had asked to supervise the day to day management of the maintenance of the Property, namely Cecilia and Traian, had responded quickly and efficiently in respect of any maintenance issues, sometimes on the very day of notification.

The Respondents' Case

10. The first Respondent gave oral evidence on behalf of himself and his wife, the Second Respondent, and also produced his written statement, dated 4th February 2021. He confirmed that he and his wife had bought the property in 2002, and had initially lived in it from 2002-2006. They then moved out and let the property. At one stage they had applied for and obtained, for a short while an HMO licence, but the licence was conditional upon certain expensive roofing worked being carried out, which they were disinclined to embark upon, and the licence was revoked shortly after having been granted. They had therefore always let the property thereafter to couples who were a single household.

11. Apart from a short period when their former nanny and partner rented the flat (the couple who later managed the property for them) they had always used as letting agents, Park Heath, a well-known and long established firm, with several branches in North London. They have been established in both lettings and sales for nearly 40 years, and their letter heading and website proudly advertise the fact that they were the 2016 winners of the Times and Sunday Times Award for London Letting Agents of the Year. They had

always given good service to the Respondents, and introduced them to the Applicants as potential tenants in 2016. The initial response of Mr Lau was, given his previous partial knowledge of licencing laws, was to check with the agent assigned to the property, a Ms Jess Jacobs, whether an HMO licence was required . Given the importance of this evidence, reaffirmed by Mr Lau orally, the relevant section of Mr Lau's statement is set out below:

"On 25 January 2018 I received an email from Jess Jacobs, a specialist in the residential lettings team in the Hampstead, South Hampstead and Kensal Rise offices of Park Heath.
5. She asked for a spare set of keys for Fordwych Road, so she could conduct viewings for prospective tenants. She did this and this ultimately led to the email at 7.19pm on 8 February 2018 (pages 32-33). This confirmed that she had an offer on Fordwych Road, from three prospective tenants. It set out their work details and prospective main terms of the agreement. 25
6. I replied (page 34) at 2200 hours on 8 February 2018 [N.B. This tranche of emails shows Australian time, which is 10 hours ahead of the UK time]. The email stated as follows: - "Hi Jess, that is great news!! Could you please confirm whether that is considered two households? Just worried about the new regulations regarding the limit of households per flat……"
7. I raised this with her as I had been in Australia since selective licencing had been introduced in Camden in 2015. I was not completely familiar with the regulations and only had a very broad understanding. I am a busy full time IT technical business analyst for a worldwide company and was therefore largely reliant upon the expertise of Ms Jacobs. Her job involved locating perspective tenants and therefore required a complete understanding of the regulations, to properly service her clients. 8. My wife is also a busy professional and in fact had left overseeing the management of the property from Australia to me. We also have a busy family life, with two children, Amelie and Sofia. At the time of this email, they were 9 and 6 years old

respectively. In short, I was completely reliant upon Park Heath and Ms Jacobs to ensure compliance with the licencing regulations.
9. Ms Jacobs replied –(page 35) at 2210 on 8 February 2018 as follows:- "Hello No, you wouldn't be required for an HMO as they are sisters. 26 They can move on in the next 6 weeks! Hopefully, I can double check this."

12. Pausing here, the information supplied by the agents was wrong in 2 respects. First, the Respondents are not sisters (they told the Tribunal, and the Tribunal accepts, that they had never made any such suggestion) and secondly, the impression was later given that 2 of the Applicants had the same surname "Villa", in information supplied to the Respondents by the agents. Again the Applicants confirmed, and the Tribunal accepts, that they had never given such information – indeed they had supplied their passports which of course have their correct names.

13. In a further effort to avoid any statutory breach, Mr Lau suggested that a clause be added to the Tenancy Agreement confirming that the family connection. The clause was so added and read:

"The Tenants represent and warrant that Carlotta Fava Villa and Francesca Villa are related persons (sisters) for the purposes of the HMO Licencing Laws and Regulations."

It had been the Respondents' understanding that provided the letting involved no more than 2 households, no licence was required. This too was wrong, and yet the agents included such a clause, compounding yet further the misinformation supplied. Again, quoting from Mr Lau's statement:

"It was my understanding based upon these exchanges of communications and the additional wording placed in the tenancy agreement by the agent that an HMO licence was not required for these tenants. Had I thought that a licence was required, I would have

immediately told Ms Jacobs not to let the property to the tenants. I deferred to her expert view."

14. The Tribunal accepts what was said by the Applicants in respect of this clause (which they signed without question) which was that they simply did not pick it up when the Agreement was presented to them – English is not their first language, and the document is a long one couched in legal terms, not all of which they understood – but they too had no reason to question what appeared to be a standard term Tenancy Agreement presented to them by professional agents.

15. All of the above narrative is confirmed in the e-mail exchanges presented to the Tribunal, as is the surprise and concern expressed by the Respondents, when in January 2020, they are informed by the selfsame agents, but this time from new personnel, that as part of their regular checks, they have discovered that the respondents are letting without an HMO licence, when a licence is in fact required. The rest of the history is not especially relevant for the purposes of the relevant facts. Both sides essentially agree as to the extra time given to the Applicants to vacate. The Respondents argue that in the event, they were given actually or nearly, the notice to which they were contractually entitled. The Applicants say they should have been treated with greater indulgence, given their good history as tenants. Neither version is of primary relevance in considering whether, and if so for how much, an RRO should be directed.

Analysis and Decision of the Tribunal

16. In submissions on behalf of the Respondents it was argued that statutory defence of *"reasonable excuse"* under section 95(4) applies in this case. The Tribunal is mindful of guidance given in the superior courts, to which it was directed by counsel for the Respondents.

First, in *I R Management Services Limited v Salford City Council [2020] UKUT 81 (LC)* the Deputy Chamber Property Chamber President, Judge Martin Rodger QC, was primarily concerned with the standard of proof to be

applied in the analogous provision of section 72(5) of the 2004 Act. He determined that the civil standard of balance of probabilities applied, and rejected the contention that it would be *"excessively difficult"* for a defendant to a criminal prosecution or an appellant against a civil penalty to establish the defence, which he determined should be tested in accordance with the civil standard of proof. He also encouraged tribunals to consider the defence, even in circumstances in which an unrepresented party had not expressly articulated it.

Secondly, in *R (Mohamed) v Waltham Forest LBC [2020] EWHC 1083* (again relating to the similar defence of reasonable excuse under Section 72(5) of the Act). Dingemans LJ stated that *"if a Defendant did not know that there was an HMO which was required to be licenced, for example because it was let through a respectable letting agency to a respectable tenant with proper references who had then created the HMO behind the Defendant's back, that would be relevant to the defence........the existence of the statutory defence and the fact that a reasonable excuse for not having a licence cannot be made out, lessens the need to have the mental element as part of the defence. The dicta in Cannock District Council v Grant recognising that such an absence of such a knowledge might be relevant to the defence of reasonable excuse is incompatible with a requirement to prove knowledge that there was an HMO requiring to be licenced".*

17. Against that background the Tribunal is satisfied on the civil standard (indeed would have been so on the criminal standard) that the "reasonable excuse" defence is made out and applies in this case, for the reasons advanced on their behalf:

    (a) Neither of the Respondents is a professional landlord. They took the responsible course of appointing professional agents to guide them through the now sometimes complex labyrinth of licencing regulation. For the reasons set out above they were badly let down and indeed misled by those agents.

(b) At the time of the letting, they were resident in a different jurisdiction on the other side of the world, in a different time zone, and were all the more reliant on the agents, in whom they had every reason to place their trust and confidence. They themselves were living busy professional and family lives, making it all the more appropriate that they take professional advice – which they did.

(c) On the face of it, they were expressly misled as to the family relationship between the Applicants (as to which there was none), and implicitly, as to the adequacy of even the misrepresented relationship in avoiding the need for licencing.

(d) The First Respondent himself, in an (uninformed and inaccurate) effort to ensure statutory compliance, suggested the inclusion of a clause in the tenancy agreement, which the agents readily acceded to and the Applicants unwittingly signed

(e) The Respondents' desire to stay within the law, and their general effort to be good landlords was endorsed by the Applicants to the extent that they were swiftly and efficiently responsive to such maintenance requests as occurred – all of which is consistent with their account that they throughout understood that they were acting appropriately, both in respect of the Applicants and their legal obligations.

(f) The scenario presented in this case is very similar to that described by Dingemans LJ above. This was a respectable letting agency letting to respectable tenants with proper references. The Respondents were responsible landlords, doing their very best to stay within the law, and had they not been misled by their agents, would never have let to these Respondents because of the need for an HMO licence. Indeed, this is yet further confirmed by the fact that they declined the tenancy extension, at possible cost to themselves, when requested by the Applicants, and elected to let thereafter only to a single family unit.

Conclusion

18. For the *reasons set out above the Tribunal finds that the statutory defence of "reasonable excuse"* applies in this case, and has been established by the

Respondents. Accordingly, no Rent Repayment Order is made. Since the first contention of the Respondents has been made out, it is unnecessary for the Tribunal to make a finding on the second argument that section 44(4) applies to mitigate the quantum of the award. However, should it be needed, the Tribunal would have found that a sum less than the full rent paid should be ordered for repayment, both because of the conduct of the Respondents as itemised above, and because they have no previous similar offences recorded against them.

19. Accordingly, the Tribunal declines to make an RRO in this case. No application for an order for costs was made on either side, and none is made.

JUDGE SHAW **31st 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).