



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00AH/HMK/2020/0021**

HMCTS : **V: CVPREMOTE**

Property : **49 Russell Hill Road, Croydon, CR8
2XB**

Applicants : **1. Katarzyna Kaszowska;
2. Sebastian Dirycz;
3. Dermot Welsh;
4. Rosie Maliper;
5. Marco Cavalcanti;
6. Lucy Enriquez;
7. Carmen Sylvia Reyes;
8. Diego Iudicissa;
9. William Massey
10. Evermercy Kasure**

Representative : **George Penny (Flat Justice)**

Respondents : **1. Joost van Gestel
2. Dominic White**

**Representative for
Second Respondent** : **Laura Phillips (Counsel) instructed
Greenwoods GRM LLP**

Type of Application : **Application for a Rent Repayment
Order by Tenant**

Tribunal Member : **Judge Robert Latham
Antony Parkinson MRICS**

**Date and Venue of
Hearing** : **12 February 2020 at
10 Alfred Place, London WC1E 7LR**

Date of Decision : **22 February 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Applicants have produced a Combined Bundle of Documents which totals 420 pages. Page references in this decision are to the electronic page number in the Bundle.

Decision of the Tribunal

1. The Tribunal accedes to the Applicants' application to remove Joost van Gestel as a respondent to this application.
2. The Tribunal is satisfied that it has no jurisdiction to make a rent repayment order against Dominic White.
3. The Tribunal makes no order for the refund of the tribunal fees which have been paid by the Applicants.

Introduction

1. The Tribunal is required to determine this application which has been made under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for ten rent repayment orders ("RROs") in respect of 49 Russell Hill Road, Croydon, CR8 2XB ("the Property").
2. This application raises a number of interesting and difficult issues which we are required to determine. The Property is owned by the London Borough of Croydon ("Croydon"). It used to be a Children's Home. In 2015, it was vacant and Croydon was anxious for it to be occupied pending its decision as to its future. It therefore entered into a property guardian protection scheme with Camelot Guardian Management Limited ("Camelot"). This is part of Camelot Europe, a group of companies based in Holland who are vacant property specialists in nine European countries. We are required to determine the nature of the agreement between Croydon and Camelot and determine whether the Property required a licence as either a prescribed HMO or a house under Croydon's Selective Licencing Scheme. Croydon took the view that no licence was required. We disagree.
3. On 6 November 2019, Camelot entered into a creditor's voluntary liquidation. On 28 March 2019, Camelot had pleaded guilty to 15 offences at the Chelmsford Magistrates Court in respect of another property which it operated under a property guardian protection scheme. This included

the offence under section 72(1) of the Housing Act 2004 (“the 2004 Act”) The Applicants contend that Camelot was put into liquidation to avoid substantial fines. The Respondents deny this.

4. The Respondents are two directors of Camelot. Mr Joost van Gestel was the Chief Executive Officer and the sole shareholder. He lives in Holland and controls the Camelot Europe linked companies. The Applicants have applied to discontinue their case against him. Despite objections from the Second Respondent, we have agreed to remove him as a respondent to this application.
5. On 1 February 2019, Mr Dominic White was appointed as a director and managing director of Camelot. He holds no shares, but receives a salary. The Applicants contend that by virtue of section 251 of the 2004 Act, he had also committed offences under sections 72(1) and 95(1) of the 2004 Act in failing to licence the Property and that they are entitled to pursue him for a RRO. They argue that Parliament intended the 2016 Act as a harsh and fiercely deterrent regime of penalties against rogue landlords, which should be construed as permitting them to seek a RRO against a person who neither is a landlord nor a person who has received any rent. We disagree.

The Application

6. On 24 June 2020, the ten Applicants issued their application each seeking RROs against Mr Joost van Gestel and Mr Dominic White. They have been assisted by Flat Justice, a Community Interest Company. In Section 4 of their application, they state that their landlord was Camelot which entered into liquidation in November 2019. The application is therefore brought against the directors as allowed by section 251 of the 2004 Act. In Section 9, they state that they rely on offences under section 72(1) (control or management of an unlicensed HMO) and 95(1) (control or management of an unlicensed house) of the 2004 Act. RROs are sought for the period 1 December 2018 to 30 November 2019. The ten Applicants seek RROs ranging from £3,878.64 to £3,934.63, the differences reflecting the rents that they paid. The total sought is £39,114.32.
7. The Tribunal has given Directions on a number of occasions as a result of which the Applicants have produced a Combined Bundle of Documents which totals 420 pages. The Bundle includes the following:
 - (i) The “Property Protection Proposal” which Camelot made to Croydon on 16 August 2016 and which was accepted by Croydon on 2 September 2016.
 - (ii) The “Licence Agreements” between Camelot and each of the ten Applicants. Each of these are in identical terms.
 - (iii) Proof of the rental payments made by each of the Applicants;

- (iv) Witness statements from nine of the ten Applicants;
 - (v) The Second Respondent's Statement of Case;
 - (vi) Two witness statements from Mr White.
8. Mr van Gestel has played no part in these proceedings. The application was served on him at a London address which he had provided to Companies House. The Applicants applied to discontinue the case against him, an application which the First Respondent opposed. On 8 February 2021, Judge Vance directed that we should deal with this application (see Issue 1 below). At the hearing, the Tribunal was provided with an address in Holland together with an email address for Mr van Gestel.
9. On 29 January 2021, Judge Martynski refused an application from the Applicants to join the following as parties to the application: (i) Ian Colclough; (ii) Croydon; and (iii) Watchtower Security Solutions Limited ("Watchtower"). This application related to events which arose after 6 November 2019, the date on which Camelot entered voluntary liquidation. The events which occurred after this date are largely irrelevant to the matters which we are required to determine.

The Hearing

10. Mr George Penny, from Flat Justice, appeared on behalf of the Applicants. He was accompanied by Mr Blue Weiss, a colleague. He provided a Skeleton Argument and Bundle of 14 authorities. The following tenants attended the hearing: (i) Ms Katarzyna Kaszowska; (ii) Mr Sebastian Dirycz; (iii) Mr Dermot Welsh; (iv) Ms Rosie Maliper; (v) Mr Marco Cavalcanti; (vi) Mr Diego Iudicissa; (vii) Mr William Massey; and (viii) Mr Evermercy Kasure. The tenants are still residing at the property. They are all single or childless couples.
11. Mr Penny adduced evidence from:
- (i) Ms Kaszowska and her partner Mr Dirycz. They are Polish. Ms Kaszowska is a landscape architect, whilst Mr Dirycz is a general builder and carpenter. Ms Kaszowska described how she had previously been a property guardian in Great Portland Street and in Balham. They have occupied rooms in the current Property since 1 June 2017. The attraction of the schemes are the low rents.
 - (ii) Mr Massey is a bus driver. He has occupied a room at the Property since January 2017. He had had no previous experience with a property guardian scheme. He had seen the accommodation advertised on the internet. The attraction to him was that the property was in Purley.
 - (iii) Mr Welsh is a Class 1 driver and retailer.

(iv) Diego Iudicissa is from Argentina. He is divorced. He is a lecturer in Spanish at an Adult Education institution.

Mr Penny highlighted various passages in the statements of Ms Maliper and Ms Kasure.

12. Ms Laura Phillips (Counsel) appeared for the Second Respondent. She was accompanied by Ms Kathryn Gilbertson from her instructing solicitor, Greenwoods GRM LLP. She provided two Skeleton Arguments and a Bundle of three additional authorities. She urged the Tribunal to determine the issue as to whether a RRO could be sought against a director as a preliminary issue. We were satisfied that it would be counterproductive to do so.
13. Ms Phillips adduced evidence from Mr White. He described how he had been working in the Children and Outdoor Learning Sector and had been head hunted to join Camelot on 1 January 2019. At that time, Camelot had some 350 guardians in 50 properties. Mr White is currently managing director of Watchtower. Mr van Gestel is also a director. Watchtower had been established in July 2019 as a separate business relating to CCTV. After Camelot had gone into liquidation, the Liquidator had assigned a number of contracts to Watchtower, including the agreement in respect of the Property. Mr White denied that Camelot had been put into liquidation to avoid the fines which Camelot was likely to face for the 15 housing offences for which it was awaiting sentence before the Chelmsford Magistrates. His salary remained the same when he transferred from Camelot to Watchtower.
14. At some stages during the hearing, some participants lost contact. The hearing was suspended for the short periods that either an advocate or member of the tribunal were disconnected. However, this did not significantly interfere with the conduct of the hearing.
15. We are grateful to both advocates who provided invaluable assistance on the range of difficult issues which we are required to address, ensuring that the hearing was completed within the time allocated. We are also grateful to the witnesses, all of whom did their best to assist the Tribunal. Ms Phillips did not accept the evidence from the Applicants as to the conditions of their rooms. However, she accepted that this was not critical to the issues which we are required to determine.
16. There are six issues which we are required to determine:
 - (i) Should we remove Mr van Gestel as a respondent?
 - (ii) Was there a duty on Camelot to licence the property as either a prescribed HMO or under Croydon's Selective Licencing Scheme? Croydon suggest that there was no such requirement.

(iii) Are we satisfied beyond reasonable doubt that Camelot has committed an offence under either section 72(1) or 95(1) of the 2004 Act? It is common ground that if there was a duty on Camelot to licence the Property, it would have required a licence as both a prescribed HMO and under Croydon's Selective Licencing Scheme. However, the Second Respondent relies on the defence of reasonable excuse, namely that Croydon advised Camelot that no licence was required.

(iv) If an Offence has been committed by Camelot, has this been committed with the consent, connivance, or neglect of a director?

(v) Is it open to us to make a RRO against a director? We address this issue after having considered how such liability might arise.

(vi) If so, what RROs should be made?

The Law

The Housing and Planning Act 2016 ("the 2016 Act")

17. Section 40 provides (emphasis added):

“(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.”

18. Section 40(3) lists seven offences “committed by a landlord in relation to housing in England let by that landlord”. These include offences under section 72(1) and 95(1) of the 2004 Act of control or management of (i) an unlicensed HMO; and/or (ii) an unlicensed house.

19. Section 41 deals with applications for RROs. The material parts provide:

“(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.

20. Section 43 provides for the making of RROs (emphasis added):

“(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 has been convicted).”

21. Section 44 is concerned with the amount payable under a RRO made in favour of tenants. By section 44(2) that amount “must relate to rent paid during the period mentioned” in a table which then follows. The table provides for repayment of rent paid by the tenant in respect of a maximum period of 12 months. Section 44(3) provides (emphasis added):

“(3) The amount that the landlord may be required to repay in respect of a period must not exceed—

(a) the rent paid 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.

22. Section 44(4) provides (emphasis added):

“(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.”

23. Section 56 is the definition section. This provides that “tenancy” includes a licence.

The Housing Act 2004 (“the 2004 Act”)

24. Part 2 relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed. It is common ground that the Property would fall within the definition of a prescribed HMO were a licence to be required.

25. On 16 March 2015, Croydon introduced a Selective Licencing Scheme pursuant to section 80 of the 2004 Act which extends to any privately rented house which is an HMO. Again, it is common ground that the Property would fall within the Selective Licencing Scheme were a licence to be required.
26. A licence under the 2004 Act may be held by a person who is not the immediate landlord of the occupier of residential premises. Section 64 lays down no ownership condition for the grant of a licence. The local housing authority (“LHA”) must be satisfied that an applicant is a fit and proper person to be the licence holder, and that, out of all the persons reasonably available to be the licence holder in respect of the house, they are the most appropriate person.
27. Section 72 specifies a number of offences in relation to the licencing of HMOs. The material parts provide (emphasis added):
- “(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.
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- (5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—
- (a) for having control of or managing the house in the circumstances mentioned in subsection (1).
28. Section 95 specifies a number of offences in relation to the licencing of houses. The material parts provide (emphasis added):
- “(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85 (1)) but is not so licensed.
- (4) In proceedings against a person for an offence under subsection (1), or (2) it is a defence that he had a reasonable excuse—
- (a) for having control of or managing the house in the circumstances mentioned in subsection (1).
29. It is to be noted that neither of these sections use the word “landlord”. Section 263 defines the concepts of a person having “control” and/or “managing” premises. These definitions are wide enough to include a number of different people in respect of a property. Where there is a chain of landlords, more than one may be liable. It may also extend to a managing agent.
30. Section 263 provides (emphasis added):

“(1) In this Act “person having control”, in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) “rack-rent” means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act “person managing” means, in relation to premises, the person who, being an owner or lessee of the premises—

(a) receives (whether directly or through an agent or trustee) rents or other payments from—

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.”

31. Section 263 was recently considered by Martin Rodger QC, the Deputy President, in *Rakusen v Jepson and Others* [2020] UKUT 298 (LC) (“*Rakusen*”). The situation is complex given the range of people, apart from the immediate landlord, who may be deemed to be persons “having control” and/or “managing” premises.
32. The Upper Tribunal (“UT”) noted that Section 263(1) is divided into two limbs: if a house is let at a rack rent the person having control is the person who receives the rack-rent; if the house is not let at a rack rent (for example because the only letting is at a ground rent) the person having control is the person who would receive the rack-rent if the premises were subject to a letting at a rack rent. The formula used in the definition has a considerable history going back at least to 1847 (as Lord Bridge of Harwich explained in *Pollway Nominees Ltd v Croydon LBC* [1987] 1 AC 79). The purpose of the definition is to identify the person (or group of persons who collectively have the relevant interest) who may be made subject to a statutory obligation to undertake work or make a contribution to the cost of public works.

33. In *London Corporation v Cusack-Smith* [1955] AC 337, Lord Reid considered a chain of leases and subleases where several were at a rack rent and was of the opinion that more than one person could be in receipt of a rack rent at one time. Where a house is let under a single tenancy at its full value, who then sublets the house either as a whole or as individual rooms to different sub-tenants, again at full value, both the superior landlord and the intermediate landlord will be in receipt of the rack rent of the premises and will satisfy the definition in section 263(1) of a person having control.
34. The status of “person managing” is more restrictive. The key qualification is the receipt of rent from the persons who are in occupation (whether directly or through an agent or trustee). Where a superior landlord lets a house to an intermediate landlord who then sublets to tenants or licensees in occupation, ordinarily only the intermediate landlord receives rent from those tenants or licensees. The superior landlord will receive rent from the intermediate landlord, who is not an agent or trustee for the superior landlord, so the superior landlord will not be a “person managing” for the purpose of section 263(3).
35. In *Rakusen*, the UT noted (at [59]) that the policy of the London Borough of Camden is that licences will not be granted to landlords holding less than a five year term (that being the usual duration of a licence) and that Camden considers the most appropriate person to be a licence holder in such situations to be the superior landlord. Similarly, when deciding on whom to serve an improvement notice, a LHA is likely to consider the practicality of the recipient being able to carry out the necessary remedial works. If, as in this case, an intermediate landlord has no significant repairing obligations and no right to carry out major repairs to the building, the LHA may well consider that the appropriate recipient of an improvement notice is the superior landlord.
36. Section 251 provides for offences by bodies corporate. It does not create a new offence, but rather allows proceedings based on existing offences to be brought against directors personally for actions by corporate bodies under their control. The section provides (emphasis added):
 - (1) Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
 - (a) a director, manager, secretary or other similar officer of the body corporate, or
 - (b) a person purporting to act in such a capacity,
 he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

37. Schedule 14 specifies buildings which are not HMOs for the purposes of the licensing provisions in Part II. Paragraph 2 includes a building “where the person managing or having control of it is a local housing authority”.

The Background

38. “Property Guardians” are a business model under which a Guardian Company provide on-site security to a property which is temporarily vacant by granting people (“guardians”) the right to live in it. The property may be either owned by a public authority or a private developer. Camelot have been running such schemes for a number of years.
39. The Property at 49 Russell Hill Road is owned by Croydon. It used to be a children’s Home. The Applicants describe it as a two storey L-shaped building which had been converted for residence with 13 individual rooms. The ground floor has one kitchen, one shower and two toilets. The first floor has a smaller kitchen, two showers and three toilets.
40. On 16 August 2016 (at p.389), Camelot sent Croydon a “Property Protection Proposal” for the Property. This was accepted by Croydon who signed it on 2 September 2016. The agreement is stated to be for a minimum contract period of 17 weeks. The notice period is 31 days. On 26 September 2016, Croydon amended the agreement to confirm that they would provide the property for a minimum of 25 weeks from 26 September 2016. Camelot agreed to pay £10 per guardian per week. This was to be reviewed after 6 months.
41. Croydon provided Camelot with the keys to the property. It was an essential part of the agreement that Camelot should have exclusive possession to prevent the property from being squatted or vandalised. Camelot agreed to replace the front door lock, add locks to the Guardian rooms and provide Croydon with a set of keys. Mr White described how Croydon would always insist that a Camelot staff member was present when Croydon needed to inspect.
42. Croydon remained responsible for the cost of utilities. Croydon agreed to ensure that the hot water boiler remained operational throughout. The agreement was premised on Croydon having “a valid gas safety certificate as well as other statutory and regulatory certification in place throughout the period of Camelot’s occupation”.
43. Camelot undertook to comply fully with all health and safety, environmental health, electrical and gas safety regulations. Camelot undertook to undertake a fire risk assessment prior to occupation and

once a year thereafter. However, the maintenance of the fire detection and/or alarm system was for Croydon. Croydon opted to use their own contractors for any emergency repairs.

44. Mr White assured the tribunal that this was all the documentation relating to the letting. We are satisfied that the agreement created a tenancy between Croydon and Camelot, Camelot having exclusive occupation of the Property for a term and at a rent (see *Street v Mountford* [1985] AC 809).
45. Mr White did not join Camelot until February 2019. However, relying on the company's records, he told us that, as the agreement was going to last at least six months, Camelot had approached Croydon to apply for an HMO licence. Croydon told Camelot that a licence was not required. The issue was discussed again in 2018. In 2019, he had raised the issue and was again assured that no licence was required.
46. We accept this evidence. Indeed, it is confirmed by an email which Croydon sent to Watchtower, dated 2 December 2019 (at p. 295). Mrs Fuller stated: "I confirm as the property is owned by the Local Authority, it is exempt from licensing".
47. Mr Penny referred the Tribunal to a report from Bristol News, dated 22 December 2016 (at p.256-260). In October 2015, Bristol City Council had required Camelot to apply for HMO licences in respect of two council owned former elderly people's homes which were subject to a Property Guardian Scheme. Mr White stated that he was unaware of this, which was understandable given that it had arisen some years before he joined Camelot.
48. Between 23 December 2016 and 9 February 2018, Camelot signed "Licence Agreements" with each of the Applicants. Each guardian was allocated a specific room. The licence fees ranged from £238.33 to £359.67 per month, a sum substantially less the rents that would be charged for private rented accommodation. However, this scheme generated a gross income for Camelot of some £40,000 per annum, from which fees of some £5,000 pa were paid to Croydon.
49. Mr Cavalcanti's agreement, dated 23 December 2016, in respect of Mr Cavalcanti is at p.304. The agreement states that the occupant will not have the right to exclusive occupation of any part of the living space. The space will rather be shared with the other guardians. However, there will also be at least one room for each individual (or couple) sharing the space. The guardians were given keys to their rooms. Some were moved to another room, apparently with no new agreement being signed.
50. The parties agreed that it is irrelevant as to whether the Applicants occupied their rooms as tenants or licensees (see section 56 of the 2016

Act at [23] above). We tend to the view that they were mere licensees as this was a legitimate sharing arrangement (see *A.G.Securities Ltd v Vaughan* [1990] 1 AC 417). The right to move an occupier from one room to another is inconsistent with exclusive possession (see *Westminster City Council v Clarke* [1992] 2 AC 288). Mr Penny did not seek to suggest that the agreement was a sham. We are fortified in our view by the decision of Mr Justice Butcher in *Camelot Guardian Management Limited v Heiko Khoo* [2018] EWHC 2296 (QB) in which the judge construed an identical agreement and held (at [39]) that it created a licence. He dismissed the appeal and upheld the decision of the lower court. The appeal involved a property at Ingestre Court, London W1 which was owned by the City of Westminster.

51. The Applicants make a number of complaints about the condition of the Property. Ms Kaszowska complained that the window in her room was boarded and there was heavy mould and a leaking ceiling. On one occasion, she woke to see a Camelot manager standing over her whilst she was sleeping in her bed. Ms Maliper complains that her room was cold and damp. The heating was never fixed. Ms Kusure was moved to a different room because there was no handle to her window.
52. Mr White stated that he had not seen the Asbestos report which Croydon had been asked to provide. The Applicants have not been provided with any gas or electrical safety certificates, or fire risk assessments.
53. On 27 May 2020 (at p.91), Croydon carried out an Inspection. This identified a Category 1 Fire Hazard and recommended a comprehensive fire alarm system. Two of the first floor showers were found to be in disrepair which were assessed as being Category 2 Hazards. The property is likely to have been in a similar condition in 2019.
54. Camelot had systems for reporting repairs: (i) there was a telephone number; (ii) by email; and (iii) a web portal. The Applicants suggested that little was done when disrepair was reported. However, at an early stage a second kitchen was installed. Mr Massey, who became a guardian in January 2017, complained of the high turnover of the manager responsible for the Property. There was a list in the lobby with a list on which new names were added. He had contact with a succession of five managers.
55. Matters came to a head soon after Mr White was appointed as managing director in February 2019. On 28 March, Camelot pleaded guilty to 15 housing offences at the Chelmsford Magistrates Court in respect of a property known as “The Old Rectory” which was a former care home. This included an offence under section 72(1) of the 2004 Act. On 6 November 2019, Camelot entered a creditor’s voluntary liquidation. On 10 January 2020, when Camelot returned for sentence, the Judge concluded that he was only to impose modest fines of £100 on the Liquidator for each offence together with a costs order of £10,000.

56. On 14 November 2019 (at p.106) Mr White wrote to the guardians informing them that Camelot Europe had restructured its UK business and that Watchtower had become their licensor. It is apparent that the Liquidator had agreed to assign the licences to Watchtower.
57. The current situation is far from satisfactory, albeit that it is outside the issues that this Tribunal is required to determine. Since November 2019, the Guardians have withheld their licence fees. They have established the Plum Tree Housing Cooperative. In March 2020, they prepared a Brief for the Property (at p.132-147). A set of photographs (at p.156-8) illustrate what they have done to improve the Property. Their objective is for the Cooperative to lease the Property directly from Croydon. Croydon is unwilling to do so, because it does not wish to enter into any direct relationship with the residents which could result in long term duties to rehouse them. The defects which were identified on 27 May 2020, have yet to be remedied. On 14 July 2020 (at p.219), Croydon informed Chris Philp MP that Watchtower are currently managing the Property on behalf of the Council.

Issue 1: Should we remove Mr van Gestel as a respondent?

58. The Applicants have applied to discontinue their application against Mr van Gestel, the First Respondent, pursuant to Rule 10 of the Tribunal Procedure (First-tier Tribunal) Property Chamber) Rules (“the tribunal Rules”). Mr Penny made his application on two grounds. First, Mr van Gestel is resident in Holland and he was uncertain whether the application had been properly served on him. Ms Phillips responded that he was aware of the application and her solicitor provided the Tribunal with his email and postal addresses. Secondly, Mr Penny stated that the Applicants did not consider that they were able to satisfy the Tribunal that the offences under sections 72(1) and 95(1) of the 2004 Act had been committed by Camelot “with the consent or connivance of, or be attributable to any neglect” on his behalf (see [36] above). Although he was the Chief Executive Officer and majority shareholder, he resided in Holland and left the day-to-day management of the Property to Mr White.
59. Ms Phillips opposed the application on the ground that it would be wrong for Mr White to be solely liable for any offence committed by Camelot were it to be found that the directors were liable for a RRO. Between 1 October 2017 and 6 November 2019 (when Camelot had gone into liquidation) Mr Petrus Harbraken had also been a director.
60. The Tribunal concluded that it was appropriate to remove Mr van Gestel as a respondent. It is for an applicant to decide against whom to seek a RRO and the grounds for making their application. We are reassured by the fact that section 43(1) gives the tribunal a discretion as to whether to make a RRO if the statutory grounds are established. Had we been satisfied that the Applicants had brought their application against the

wrong director, it would have been open to us to exercise our discretion not to make a RRO against Mr White.

Issue 2: Was there a duty on Camelot to licence the Property?

61. In her email, dated 2 December 2019, Mrs Fuller, Croydon's HMO Team Manager, stated that the Property was exempt from licensing "as the property is owned by the local authority". This cannot be correct. On this argument, any landlord of a flat leased from Croydon would be exempt from the licencing regime.
62. We are satisfied that we should rather have regard to paragraph 2 of Schedule 14 of the 2004 Act which provides that buildings are not HMOs for the purposes of the licensing provisions "where the person managing or having control of it is a local housing authority".
63. We are satisfied that the issue as to whether Camelot was obliged to licence the Property as an HMO turns on the relationship between Croydon and Camelot:
 - (i) If Croydon granted Camelot an interest in land, Camelot would be the person both "having control" of and "managing" the Property. Camelot would be the person "having control" as the person who receives the rack-rent of the Property from the guardians. Camelot would also be "managing" the Property as it receives "rents or other payments" from the persons who are in occupation of the HMO as tenants or licences.
 - (ii) If Croydon merely granted Camelot a personal right in respect of the Property, the position would be different. Croydon would retain legal possession of the Property. Croydon would be the person "managing" the Property as the "owner" who received rents or other payments through an agent from the persons who are in occupation of the HMO as tenants or licences. However, it would still be Camelot who had "control" as the person who received the rack rent. The modest fee of £10 per week per guardian which Camelot paid to Croydon would not amount to a "rack-rent". Camelot, as agent, was receiving some £40,000 per annum from the Property, whereas Croydon, as principal, was receiving only some £5,000 per annum (see [48] above).
64. We have found that Croydon granted Camelot an interest in land (see [44] above). We are thus satisfied that Camelot was under a duty to licence the Property. It would have been open to Croydon not to grant such an interest, but rather to utilise Camelot as its managing agent. In such circumstances, there would have been a direct contractual relationship between Croydon, as principal, and the guardians. Our understanding is that this is just the type of relationship that Croydon has sought to avoid.

65. Ms Phillips suggested that it would inappropriate for Camelot to hold an HMO licence given its limited interest in the Property. After 25 weeks, Croydon is able to terminate its interest by 31 days-notice. We are satisfied that either Croydon or Camelot needed to accept responsibility for ensuring that the property complied with basic housing standards. In accepting an interest in land with the intention of using it as an HMO, Camelot had assumed that responsibility.

Issue 3: Has Camelot has committed a relevant offence?

66. It is common ground were Camelot to be a person “having control of” or “managing” the Property, this was an HMO which required a licence under both as a prescribed HMO or as one under Croydon’s Selective Licencing Scheme. Ms Phillips rather relies on the defence of “reasonable excuse” under sections 72(5) and 95(4) of the 2004 Act. She accepts that she must establish the defence on a balance of probabilities (see *IR Management Ltd v Salford City Council* [2020] UKUT 81(LC)).
67. We are satisfied that this defence has been established. There can be no better excuse for a landlord to fail to licence an HMO than to be told by the relevant local housing authority (“LHA”) that no licence is required. We accept that Croydon’s email, dated 2 December 2019, postdates the events with which we are concerned. However, we are satisfied that both Camelot and Mr White had previously made a number of similar inquiries, and that Croydon had given similar assurances (see [45] - [46] above).
68. Mr Penny sought to argue that it was not sufficient for Camelot to have relied upon the advice of a Croydon Environmental health Officer. They should have known from events in Bristol and Chelmsford that a licence was required. They should have taken legal advice or sought advice from Croydon’s Legal Department. We do not accept these arguments. The issue as to whether a licence is required will always be fact sensitive. The cardinal rule for any landlord who is in doubt about this complex area of the law, is to seek advice from the relevant LHA.

Issue 4: Has any offence has been committed by a director?

69. Given our finding that no offence has been committed by Camelot, it follows that we are satisfied that no offence was committed by Mr White. However, in seeking a RRO against Mr White, the Applicants have an additional hurdle under section 251 of the 2004 Act of establishing that any offences committed by Camelot, have been committed with his consent or connivance or be attributable to any neglect” on his behalf (see [36] above).
70. Mr Penny relied on *Sutton v. Norwich City Council* [2020] UKUT 90 (LC)., a decision of Martin Rodger QC, the Deputy President, and Peter McCrea FRICS. He refers us to the following passage (emphasis added):

“By section 251(1) Mr Sutton would commit the same offence and would be liable to be proceeded against and punished for it if, as the Council allege, FLAL’s offence was committed with his consent or connivance, or because of his negligence. Proof of the elements of the offence under section 251(1) does not require that Mr Sutton should have received an improvement notice in his own right, nor does it require that he be a person on whom an improvement notice could have been served. Mr Sutton’s suggested liability is based on his having been a director, not on his having been the owner or person managing the property.”

71. Ms Phillips referred us to *Huckerby v Elliott* [1970] 1 All ER 189 and the judgment of Lord Parker CJ at p.193j to 194e in respect of the scope of the duties on a director. Mr White only became a director in February 2019. He was entitled to rely upon the inquiries which had been made by his colleagues. He acted on the advice which he sought from the relevant LHA.
72. The Applicants have failed to discharge the additional burden of satisfying us beyond reasonable doubt that Mr White has committed any offence under section 75(1) or 95(1) of the 2016 Act. In particular, the Applicants have failed to satisfy us that any such offence was committed with his consent or connivance or attributable to any neglect on his behalf.

Issue 5: Is it open to us to make a RRO against a director?

73. We finally turn to the issue as to whether a RRO can be made against a director who neither is a landlord nor a person who has received any rent from the Property. We have dealt with this jurisdictional issue last as it has been instructive to see how the Applicants have sought to frame their case against Mr White.
74. Mr Penny relies upon the recent UT decisions of *Goldsbrough v CA Property Management Ltd* [2019] UKUT 311 (LC); [2020] HLR 18 (“*Goldsborough*”) and *Rakusen* to argue that tenants can cast their net widely in order to secure an effective remedy against a rogue landlord. The UT has established that there may be more than one landlord against whom a tenant can seek a RRO under the 2016 Act. He also relies on *Vamalayan v Stewart* [2020] UKUT 183 (LC); [2020] HLR 38, in which Judge Elizabeth Cooke observed (at [19]) that “Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence”. This observation related to how a tribunal should compute a RRO. She was not addressing the persons against whom a RRO could be made.
75. Ms Phillips referred the Tribunal to *Sweet v Parsley* [1970] AC 132 and the passage of Lord Reid at 149D where he stated the “universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.” She also referred the Tribunal to *Wilson v R* [2013] EWCA Crim 1780 (at

[26] – [40]) in which the Court of Appeal (Criminal Division) considered Article 32(8) of the Regulatory Reform (Fire Safety) Order 2005, which is drafted in identical terms to section 251 of the 2004 Act. It does not create a distinct offence.

76. We are satisfied that it is not sufficient for a tenant to establish that a director of a landlord company has committed an offence under sections 75(1) or 95(1) of the 2004 Act. A RRO can only be made against a “landlord”. Were Parliament to have intended this quasi-criminal jurisdiction to extend to a director, clear words would have been required. There is nothing in Part 1, Chapter 1 of the 2016 Act to suggest that this was Parliament’s intention.
77. On the contrary, as submitted by Ms Phillips, the word “landlord” is used throughout the 2016 Act:
- (i) Section 40 confers on the tribunal to make a RRO “where a landlord has committed an offence”. Section 40(3) refers to a table of offences that is committed “by a landlord in relation to housing in England let by that landlord”.
 - (ii) Section 43(1) provides that a tribunal may make a RRO “if satisfied, beyond reasonable doubt, that a landlord has committed an offence”.
 - (iii) Section 44(3) refers to “the amount that the landlord may be required to repay”. There is no suggestion that a tribunal can make a RRO against any person who is not a landlord.
 - (iv) Section 44(4) refers to the matters which a tribunal must take into account in determining the amount of any RRO. This includes: (a) the conduct of the landlord; (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. Mr Penny conceded that the relevant landlord in this case is Camelot. It would seem surprising were the tribunal to be required to have regard to the conduct and financial circumstances of Camelot, in determining the RRO to be made against Mr White.
78. The penal provisions in the 2016 Act provide for the repayment of rent paid by the tenant during the relevant period. It would be surprising were the legislation to require a person to repay rent that they had not received. The decision in *Goldsbrough* and *Rakusen* raise interesting issues where more than one landlord is liable to a RRO. Is the order to relate to the rent paid by the tenant, or the rent received by the relevant landlord? However, there is nothing in these decisions to suggest that a RRO could be sought against someone who is not a landlord.

79. The Applicants are seeking to make Mr White liable for a RRO even though he received no rent. They are also seeking to make him liable for a period before he became a director. We can see no justification for this approach. If this were to be permitted, tenants could seek RROs against the wider class of persons specified in section 251 of the 2004 Act, namely a manager, secretary or “other similar officer”.

Issue 6: If so, what RROs should be made?

80. Had it been open to us to make a RRO, having regard to the decision in *Vamalayan*, we would assessed this at 100% of the rent which was paid during the relevant period. We would have restricted this to the period 1 February 2019 (when Mr White became a director) until 6 November 2019 (when Camelot went into liquidation). However, we are satisfied that we have no jurisdiction to make a RRO against the First Respondent.

Refund of Application Fees

81. In the light of our determinations, we make no order for the repayment of the tribunal fees which have been paid by the Applicants.

Conclusions

82. We are satisfied that this tribunal has no jurisdiction under the 2016 Act to make a RRO against a director of a landlord company. A RRO can only be made against “a landlord”.
83. If we are wrong on this, we make the following findings:
- (i) We are satisfied that Croydon granted Camelot an interest in land and that Camelot was under a duty to ensure that the HMO was licenced as a prescribed HMO and under Croydon’s Selective Licencing Scheme.
 - (ii) We are satisfied that Camelot did not commit any offence under sections 75(1) or 95(1) as it had a reasonable excuse for not licencing the Property. It had been advised by the relevant LHA that no licence was required.
 - (iii) We are satisfied that Mr White did not commit any offence under sections 75(1) or 95(1). First, Camelot had not committed any offence. Secondly, the Applicants have failed to satisfy us that any such offence was committed with his consent or connivance, or attributable to any neglect on his behalf.
84. This case has raised a range of difficult issues relating to property guardian protection schemes. It highlights the need for any property owner and property guardian company to have much greater clarity as to the nature

of the legal interest that is granted and their respective rights and obligations under any such agreement. Whilst it is desirable for short life housing to be brought into use, it must comply with the minimum housing standards imposed by the Housing Acts.

Judge Robert Latham
22 February 2021

RIGHTS OF APPEAL

1. 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.
2. 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.
3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must 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.