FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/HMF/2020/0028**
Property	:	**First Floor Flat 2, 5 St Johns Wood Road, London NW8 8RB**
Applicant	:	**Richard Cooke (1) Michael Clarke (2)**
Representative	:	**Flat Justice Community Interest Company**
Respondent	:	**Ebenezer Bethel UK Limited**
Representative	:	**Mr Faisel Sadiq of Counsel**
Type of application	:	**Application for a rent repayment order by tenant Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016**
Tribunal member(s)	:	**Judge H Carr** **Ms S Coughlin MCIEH**
Date and venue of hearing	:	**19th February 2021 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**12th April 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: SKYPEREMOTE. A face-to-face hearing was not held it was not practicable and all issues could be determined in a remote hearing. The tribunal were provided with an electronic bundle prepared by the applicants comprising 73 pages, and electronic bundle prepared by the respondent comprising 29 pages. Further documents were submitted by both parties together with skeleton arguments prior to the hearing. The determination below takes account all the documentation received from the parties.

Decisions of the tribunal

(1) The tribunal determines to make a Rent Repayment Order in the sum of £10,176,65.

(2) The tribunal determines that the respondent reimburse the applicants for their application and hearing fees, totalling £300.

(3) The tribunal makes the determinations as set out under the various headings in this decision.

The application

1. The applicant tenants seek a determination pursuant to section 41 of the Housing and Planning Act 2016 (the Act) for a rent repayment order (RRO).

2. The applicants seek a RRO in the sum of £12,294.01. The period for which the RRO is sought is from 26th January 2019 to 16th December 2019. This is a period of 10 months and 21 days. The applicants made their application on 25th February 2020.

3. The applicants allege that the respondent landlord has committed the offence of control or management of an unlicensed HMO under s,72(1) of the Housing Act 2004.

The hearing

4. Mr Clarke and Mr Cook attended the hearing together with their representative Mr Alex Ivory. The respondent company was represented by Mr Faisel Sadiq of Counsel. Attending on behalf of the respondent company were Mr Anando Mukerjee who is sole shareholder and sole director of the respondent company and Mr Sunando Mukerjee who is the brother of Mr Anando Mukerjee and has the day to management responsibility for the business of the respondent.

5. Counsel for the respondent raised a preliminary issue concerning the introduction of new materials by the applicants. The material to be introduced by the applicants comprised a standard form lettings contract.

6. The tribunal did not consider that the material prejudiced the respondent and therefore allowed it to be submitted. However the tribunal made it clear that it would be prepared to hear submissions from Counsel if during the course of the hearing it emerged that the respondent was being prejudiced by the material. It also determined that material in rebuttal of the applicants' argument in connection with the template agreement would be admitted.

The background

7. The property is a three bedroomed first floor flat. Each bedroom had a double bed and an ensuite bathroom. Kitchen facilities in the property were shared between the occupiers.

8. The respondent is the long leaseholder of the property. The respondent purchased the property in 2016. In 2018 the respondent instructed Prime Metro Properties Limited to find a tenant for the property. Subsequently Prime Metro Properties Limited introduced So Soon Ltd to the respondent. A rent-to-rent agreement was signed in September 2018.

9. The applicants became tenants on 26th January 2019. They signed an agreement described as a room let agreement which was for a six month period with a three month break clause. At the time they moved into the property it was already occupied by four other persons. The landlord named in the agreement is Western Rooms Ltd. The sole director of Western Rooms Ltd is Mr Farhad Anvari who is known as

Freddie. Mr Anvari was also the respondent's contact with its tenant, So Soon Ltd.

10. The agreement with the applicants purports to be a holiday let or a single room occupancy and it states that the tenant acknowledges that the agreement does not confer on the tenant any security of tenure under the Housing Act 1988.

11. The applicants paid rent of £1,150 per calendar month. This represents a daily rate of £37.81p,

12. The applicants came into contact with the respondent after a rent payment to Western Rooms was rejected by the bank in September 2019. The applicants believe this was due to the company being the subject of a compulsory strike off by Companies House. The applicants searched the land registry and discovered that the respondent was the long leaseholder.

13. On 19th September 2019 Mr Cooke emailed the respondent in connection with the missed rent payment. There was some correspondence over the next couple of days which is discussed in the substance of the decision.

14. A purported notice to quit was sent to the applicants by Mr Farhad Anvari on 17th October 2019, via email.

15. The applicants left the property on 19th January 2020 following an agreement with Mr Anvari.

16. The respondent has been unable to locate So Soon Ltd or Mr Anvari since July 2020.

17. The applicants made their application to the tribunal on 24th February 2020.

The issues

18. The issues that the tribunal must determine are;

    (i) Is the tribunal satisfied beyond reasonable doubt that the landlord has committed the alleged offence?

    (ii) Does the landlord have a defence of a reasonable excuse?

(iii) What amount of RRO, if any, should the tribunal order?

(a) What is the maximum amount that can be ordered under s.44(3) of the Act?

(b) What account must be taken of

(1) The conduct of the landlord

(2) The financial circumstances of the landlord:

(3) The conduct of the tenant?

(iv) Should the tribunal refund the applicants' application and hearing fees?

The determination

Is the tribunal satisfied beyond reasonable doubt that the respondent has committed the alleged offence?

19. The applicants provided a copy of an email dated 8th January 2020 from Christopher Lartey, Environmental Health Enforcement Officer with Westminster City Council. This confirmed that the property is an unlicensed House in Multiple Occupation and that it has been unlicensed throughout the tenancy of the applicants.

20. It also stated that the owners of the property applied for a licence on 17th December 2019.

21. The applicants provided information about the occupancy of the property which indicated that during the relevant period the property was occupied by 6 people making up three separate households. The only periods that the property was occupied by fewer than 6 people was in short intervals between tenancies.

22. The occupiers stated that the property was their main residence in their statements.

23. The applicants also provided evidence that they had paid rent monthly over the period for which they are claiming a RRO - 26 January 2019 – 16 December 2019. The payments were made to Western Rooms limited until September 2019. Following the rejection of their rent payments they made payments to Mr Farhad Anvari

24. The Respondent admits that if the property was used an HMO it needed to be licensed and admits that there was no HMO license in place for the Property during that period. It does not dispute the applicants' contention that the property was used as an HMO during the period to which the application relates. It also admits that it was a person "…having control of or managing…" the property.

25. It acknowledges that the current position as a result of *Rakusen v Jepson* is that the tribunal has jurisdiction to make a RRO against the respondent even though the respondent is not the immediate landlord of the applicants. However it considers the Rakusen case to have been decided wrongly and, if the case is overturned on appeal, it reserves its rights in relation to this.

The decision of the tribunal

26. The tribunal determines that the respondent has committed the alleged offence.

The reasons for the decision of the tribunal

27. The tribunal relies on the evidence from the applicants , the information from the local authority and the concessions of the respondent.

Does the respondent have a reasonable excuse defence?

28. The respondent submits that it has a reasonable excuse defence to the alleged offence under s. 72(5) (a) of the Housing Act 2004. It agrees that the burden of proof for establishing the defence falls on the respondent who has to establish the defence on the balance of probabilities.

29. In summary the respondent argues that it was not aware that the property was being used as an HMO and it had taken steps to avoid this happening.

30. He describes the steps it took as follows:

    (i) It let the property to So Soon Limited on 18th September 2018. It understood from its estate agent, Prime Property that So Soon Ltd was a professional landlord with experience in rent-to-rent agreements. Mr Shamanzar was the sole director of So Soon Ltd.

    (ii) Prior to entering into the tenancy Mr Sunando Mukerjee, as part of his role in the day-to-day

management of the business asked for and received, an assurance from Prime Management that the property would for the use of a single individual or a single family.

(iii) Mr Mukerjee told the tribunal that he took care to ensure that the agreement meant that only a family or a couple could occupy the property by amending the draft tenancy agreement so that it included this clause

> The tenant will ensure that the property is only used by it as a domestic residential single private dwelling (and not for any other purposes (including any commercial purposes)

(iv) On 19th September 2019 the respondent received an email from Mr Cooke explaining that the rent cheque had bounced, asking the respondent to confirm that it is the landlord of the property and asking how the rent was to be paid.

(v) Mr Mukerjee responded to this email after contacting Mr Anvari who informed the respondent that he had given 'them' a notice to leave

(vi) The respondent received a second email dated 20th September 2019 from Mr

Cooke which informed the respondent that Mr Anvari had served an eviction notice and asking if Mr Anvari was still the agent for the property.

(vii) Mr Mukerjee emailed Mr Cooke on the following day, having spoken to Mr Anvari, saying that he was glad that things seemed to be sorted and to continue paying rent to Mr Anvari in the usual way.

(viii) The respondent says that at no point was it aware that the property was an HMO until it received a letter from Westminster Council on the 12th December informing it that the property was being used as an HMO and on 16th December 2019 it lodged an application for an HMO licence.

31. The applicants argue that the respondent has failed to establish the defence on the balance of probabilities:

(i) The applicants do not accept that the respondent took steps to prevent the property being used as an HMO. They argue that the agreement was a basic rent-to-rent agreement and it did not specifically prohibit multiple occupation of the property.

(ii) They suggest that the respondent took very little care in the arrangements it made in connection with the property. They point out that the sole director of So Soon Ltd, Mr. Shamanzar, was convicted of a licensing offence contrary to s.72(1) HA 2002 and a management regulation offence contrary to s.234(4) HA 2004 on 1 November 2018. Mr Shamanzar was placed on the Greater London Authority's Rogue Landlord Database.

(iii) The applicants argue that there were steps that the respondent could have taken to ensure that the property was not used as an HMO. Under special condition 4 of the rent-to-rent agreement, the respondent had the power to inspect the Property every six months. If it had performed that obligation at any point during the two years that Western Rooms let out the Property, it would have easily discovered that the Property was being let as a licensable HMO.

(iv) Under clause 5.1 of the rent-to-rent agreement, the tenant, So Soon Ltd was to provide the respondent with a list of all occupiers/sub-tenants of the property. If the respondent had utilised this power, it would have discovered that the property was being let as a licensable HMO.

(v) The applicants argue that the respondent was made aware that the arrangements between it and SoSoon Ltd were not as they appeared and that the property was multiply occupied as a result of the exchanges between Mr Cooke and the respondent in September 2019.

(vi) Although the respondent claims that it is not a professional landlord, it has several properties and is therefore experienced in letting arrangements.

32. The tribunal asked Mr Sunando Mukerjee about inspections. Despite the best efforts of counsel, the tribunal was very unclear on Mr Mukerjee's evidence. At one point he told the tribunal that he had not inspected the property. At another he said that either he or Prime Management had inspected the premises. He was not able to produce any evidence of inspections, any indication that notice had been given to anyone that inspections were going to take place. Nor were there any reports on the inspections.

33. The tribunal asked the applicants what evidence there would have been that there were multiple occupiers of the property if there had been inspections. They were told that there would have been drying clothes around the flat and that all the occupiers kept their shoes outside of the doors to their rooms. Clearly if an inspection had entered the bedrooms there would have been evidence of six adult occupiers.

34. The tribunal asked Mr Mukerjee about why he did not get the names of the subtenants of the property from the tenant. Mr Mukerjee told the tribunal that he did get a list of occupiers a few weeks into the tenancy. The list comprised only Mr Shamanzar. The applicants asked whether the respondent was surprised that Mr Shamanzar was in occupation when the agreement was a rent to rent agreement and the property was a large and expensive flat. Mr Mukerjee said that he was not surprised, as it was an appropriate flat for an executive or someone seeking to relocate a family. He also said that he had asked for a list of occupiers subsequently but this was never received. At one point in the tribunal he said that he had chased vigorously but provided no evidence of this. At another point he told the tribunal that he asked for a list but he was never sent the details and he failed to follow this up with Mr Avanti.

35. The tribunal also asked about the response to Mr Cooke's September emails. Mr Mukerjee said that he had a WhatsApp call with Mr Anvari who suggested that there was a problem with rent payments. He disagreed with the applicants that the communication showed that there were multiple tenants in the property, He was not made at all suspicious by the communication from Mr Cooke. He accepted what Mr Anvari had told him, that Mr Clarke was a troublesome tenant. The applicants raised the language in the emails - Mr Cooke refers to 'us' and Mr Anvari refers to them. Mr Mukerjee said that Mr Anvari's English was poor and so he overlooked linguistic discrepancies. He said that the applicants did not inform him that there were multiple occupiers.

36. When asked for clarity about the relationship between Mr Anvari and the respondent Mr Mukerjee said that Mr Anvari had accompanied him to the property when the Council inspected for the purposes of the licensing application in December 2019.

The decision of the tribunal

37. The tribunal determines that the respondent has failed to establish a defence of reasonable excuse.

The reasons for the decision of the tribunal

38. The tribunal notes that the agreement was a rent-to-rent agreement. It also notes that the respondent took some steps to ensure that the agreement ruled out certain forms of occupation.

39. It rejects the argument made by the applicants that the respondent should have been aware of the status of Mr Shamanzar. His conviction was not until November 2018 and however diligent the respondent might have been, it could not have known this in September 2018.

40. However the tribunal does not consider that the steps that were taken were sufficient to establish a defence of reasonable excuse. It notes that the agreement does not specifically prohibit lettings as an HMO and it notes that there is no requirement that the tenant provides copies of its agreements with the subtenants. The tribunal would have expected to see these amendments if prohibition of multiple occupation was the objective of the respondent.

41. Moreover it is one thing to make amendments to a contract, and another to ensure that the terms of the contract are complied with. There were powers available to the respondent to ensure that the property was not used for multiple occupation. The respondent had the power to inspect. On the evidence before it the tribunal determines that the respondent did not carry out inspections. If it had done so it would have become aware that the property was multiply occupied. There were double beds in each of the bedrooms and the tribunal accepts the evidence of the applicants that there were other signs of multiple occupation.

42. Nor does the tribunal accept that the respondent used its power to request the names of occupiers other than at the commencement of the agreement.

43. In addition the tribunal considers there were a number of occasions when the respondent should have been suspicious of the nature of the occupancy of its property. The first of these was when Mr Shamanzar was listed as the occupier, despite his assurances that So Soon Ltd was in the business of finding corporate tenants. The second was when the communications were received from Mr Cooke and the third was the response of Mr Anvari to those communications. Yet the respondent seems to have ignored warning signs of possible misuse of the property. This is not credible to the tribunal. Whilst the respondent states that it is not a professional landlord, it rents out a number of properties in London and is therefore aware of the conditions in the rental market.

The very least it could have done on each of these occasions was to inspect the property and find out how it was being occupied.

44. Further the tribunal is troubled by the relationship between the respondent and Mr Anvari. It is surprised that the respondent was not more concerned when Mr Anvari was discussing evicting Mr Cooke. Mr Mukerjee seemed happy to rely on Mr Anvari's account which suggests a close relationship. Nor does Mr Mukerjee appear to have been concerned that Mr Anvari's company had been struck off. It is particularly surprised that Mr Mukerjee continued to do business with Mr Anvari following Westminster Council contacting the respondent about the need for a licence. Yet Mr Mukerjee told the tribunal that he was accompanied by Mr Anvari when he met the Council at the property. The tribunal considers that the normal behaviour of a property owner who discovers that its property is being occupied illegally is to terminate relations with the person or business which put it in that position. Yet this does not appear to have happened.

45. Taking all these matters into consideration, the tribunal does not accept that the respondent has a reasonable excuse defence.

Should the tribunal make an award of a RRO? If so, for what amount?

46. The applicants are applying for the a Rent Repayment order for the period 26 January 2019 – 16 December 2020.

47. The applicants are seeking a sum of £12,294.01. This is made up of 10 monthly payments of £1.150 and 21 days of a daily payment of 37.808.

48. The applicants refer the tribunal to **Vadamalyan v Stewart [2020] UKUT 183 (LC)**. They argue that the starting point for a RRO should be 100% of the rent paid. They also argue that there are no factors which would point to the RRO being reduced.

49. The applicants argue that the conduct of the respondent has been poor. In particular

    (i) The respondent allowed the Property to be sub-let by a disreputable landlord without carrying out proper checks.

(ii) The applicants were not provided with copies of the Gas Safety Certificate on or before the start of their tenancy

(iii) The applicants were not provided with copies of the Government's How to Rent Guide

(iv) Shortly after the applicants first contacted Westminster City Council and the respondent about the bounced rent payment, Mr. Anvari sought to evict the applicants giving them one months' notice to quit. Since the applicants were occupying the Property under a statutory periodic tenancy, the proper notice period was two months.

50. The applicants ask the tribunal to note that the respondent has not provided any information about its financial circumstances.

51. The respondent concedes that if the tribunal does not find that it has a reasonable excuse defence then the RRO is payable as claimed.

The decision of the tribunal

52. The tribunal determines to make a RRO of £10,176,65.

The reasons for the decision of the tribunal

53. The tribunal notes the arguments of the applicants and the concession of the respondent.

54. However it also notes that the applicants' evidence (the occupancy table provided in the applicants' bundle) is that between 12 May 2019 and 6 July 2019 there were fewer than 5 people in the property. During that period no offence was being committed and therefore the tribunal cannot make a rent repayment order for that period. The tribunal notes that the correctness of this approach was confirmed by the Upper Tribunal in **Irvine v Metcalfe and others [2021] UKUT 0060 (LC)** . The tribunal therefore has reduced the amount awarded by 8 weeks rent. It has calculated this sum using the £37.81p daily rent provided by the applicants. Therefore the amount that is being deducted is £2117,36p,

55. In the light of the above determinations the tribunal also orders the respondent to reimburse the applicants their application fee and hearing fee.

Name: Judge H Carr **Date:** 12th April 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).