FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/HMF/2023/0113**
HMCTS	**:**	**Face to Face Hearing**
Property	**:**	**Flat 501, Jerome House, 14 Lisson Grove, London, NW1 6TS**
Applicants	**:**	**1. Kimberley Ruth Sing Tze Moh** **2. Alessandro Facciorusso** **3. Sofia Sania Serrano**
Representative	**:**	**Joey Carr (Safer Renting)**
Respondents	**:**	**1. Quest Estates Limited trading as Fraser and Co** **2. Rimal Properties Ltd**
Representative	**:**	**Karol Hart (Freeman Solicitors)**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant – Housing and Planning Act 2016**
Tribunal Member	**:**	**Judge Robert Latham** **Fiona Macleod MCIEH**
Date and Venue of Hearing	**:**	**29 November 2023 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**15 January 2024**

DECISION

Decision of the Tribunal

1. The Tribunal consents to the Applicants withdrawing their claim against the First Respondent.

2. The Tribunal is satisfied that it has no jurisdiction to determine the application against the Second Respondent as the alleged offence was not committed in the period of 12 months ending with the day on which the application was made. The application was issued on 4 May 2023. The offence ceased to be committed on 3 May 2022. The application was therefore issued two days out of time.

3. The Tribunal makes no order for the reimbursement of the tribunal fees which have been paid by the Applicants.

4. The Tribunal goes on to consider the orders that we would have made had we been satisfied that we had jurisdiction to determine the application. This is for the benefit of the Upper Tribunal, should there be an appeal in this matter.

Materials before the Tribunal

1. The Tribunal has had regard to the following Bundles which have been filed by the parties:

(i) Applicants' Bundle (388 pages). The Tribunal will refer to this by the pre-fix: "A1."

(ii) Applicant's response to Respondent's Bundle (36 pages). References: "A2.".

(iii) Applicant's Submissions on Jurisdiction (15.12.23) (4 pages)

(iv) First Respondent's Submissions and Appendices (82 pages);

(v) Second Respondent's Bundle (45 pages). References: "R2."

(vi) Second Respondent's Skeleton & Authorities (118 pages);

(vii) Second Respondent's Submissions on Jurisdiction (8.12.23) (63 pages).

The Application

2. By an application, dated 4 May 2023, the Applicant tenants seek a Rent Repayment Order ("RRO") against the Respondents pursuant to section 41 of the Housing and Planning Act 2016 ("the 2016 Act"). The application relates to Flat 501, Jerome House, 14 Lisson Grove, London, NW1 6TS

("the Flat"). Jerome House is a block of modern private flats in Marylebone. The Applicants seek a RRO in the sum of £18,533,43 in respect of the rent which they paid between 31 August 2021 and 4 May 2022.

3. The Second Respondent, Rimal Properties Ltd, is the leaseholder of the Flat having acquired the leasehold interest on 30 October 2014 for £1.272m (see A1.73). The lease is dated 1 October 2014 and is for a term from 20 February 2014, expiring on 25 September 2204. The Second Respondent is registered in the British Virgin Islands. It has engaged Apex Financial Services (Jersey) Limited ("Apex") as its financial service provider. Apex is regulated in Jersey. Claire Thomson, a representative of Apex, has provided a witness statement (at R2.10).

4. The First Respondent, Quest Estates Limited trading as Fraser and Co, is a firm of letting agents. On 2 March 2021, Apex on behalf of the Second Respondent, appointed the First Respondent to manage the Flat, together with Flats 401 and 503 Jerome House. The Residential Lettings Agreement is at R2.13-40.

5. On 28 November 2023, the Applicants notified that they were minded to discontinue their application against the First Respondent, recognising that it is not a "landlord" against whom a RRO could be sought. The Tribunal consented to this withdrawal pursuant to Rule 22 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules").

6. On 27 June 2023, the Tribunal gave Directions pursuant to which the parties have filed their Statements of Case and evidence upon which they seek to rely.

Preliminary Issue

7. On 21 July 2023, the First Respondent applied to strike out the application on the ground that it was issued out of time. Section 41(2)(b) of the 2016 Act provides that a tenant may only apply for a RRO if the offence was committed in the period of 12 months ending on the date on which the application was made (see [27] below). The Tribunal notified the parties that the application would be determined on the papers. None of them objected to this.

8. On 3 August 2023, Judge Nicol found that the application had been issued in time. He based his decision on the decision of a First-tier Tribunal ("FTT") decision in *Robinson v JKR Properties Ltd* (LON/00AE/HMF/2020/0199) which had relied on the House of Lords's judgment in *Dodds v Walker* [1981] 1 WLR 1027. The First Respondent had also argued that it was not a landlord against whom a RRO could be made. However, Judge Nicol concluded that this could not be decided as a

preliminary issue as he had not seen the agreement between the Second and First Respondents.

9. The First Respondent sought permission to appeal this decision. On 17 October, Martin Rodger KC, the Deputy Chamber President, refused permission to appeal for the following reasons:

> "1. There is no realistic prospect of a successful appeal in this case.
>
> 2. The facts necessary to substantiate the applicant's case that the application for a rent repayment order was made more than twelve months after the offence ceased to be committed are not said to have been admitted and have not yet been determined. Until it is determined when a valid application for a licence was made under section 63, Housing Act 2004, it would be premature to consider whether the application for a rent repayment order ought to be struck out as not having been made within time.
>
> 3. In any event, the point may not arise, as the applicant claims that it is not a person against whom a rent repayment order can be made. If that case is made out, there would be no need for the applicant to appeal.
>
> 4. The better course is therefore for the application for a rent repayment order to be determined by the FTT in full before any application for permission to appeal is considered. Having said that, the point raised in this application would be suitable for consideration on an appeal if the necessary facts have been first been determined by the FTT."

The Hearing

10. Ms Joey Carr, from Safer Renting, appeared for the Applicants. She adduced evidence from the three applicants. Ms Kimberley Ruth Sing Tze Moh is from New Zealand and is a 3 D technical designer. Mr Alessandro Facciorusso is Italian and is a software developer. He is currently unemployed. Ms Sofia Sania Serrano is also Italian. She is a marketing executive.

11. Mr Karol Hart, from Freeman Solicitors, appeared for Second Respondent. He had previously acted for the First Respondent. He stated that the Second Respondent had only become aware of the proceedings on 7 November 2023. If so, this is solely the fault of the First Respondent which has been agent for the Second Respondent. Clause 5.1 of the Applicants' tenancy agreement specified that any legal proceedings on their landlord should be served on the First Respondent.

12. On 10 November 2023, the Second Respondent had served their Bundle of Documents. This included a witness statement from Ms Claire Thomson, a representative from Apex. She is based in Jersey and was not available to give evidence. The Tribunal gave the Second Respondent permission to adduce evidence from Mr Keith Fraser who is a director of the First Respondent, a company which is owned by his brother. He had not made a witness statement. However, he had signed a statement of truth on the First Respondent's Submissions (at R1.1-11). Mr Fraser stated that his brother had brought him in to assist with the management of the company. The First Respondent manages some 800 properties. Mr Fraser stressed that he was neither a letting agent or a managing agent. He took a somewhat belligerent attitude toward the Tribunal contending that any reasonable person would have recognised that the application was out of time. The Tribunal pointed out the Deputy Chamber President had refused the First Respondent permission to appeal.

13. The Tribunal made a ruling that no party would be permitted to adduce evidence which could and should have been in their witness statements. The Tribunal permitted Mr Fraser to give evidence on the matters addressed in the First Respondent's Submissions. It was open to Mr Hart to seek to clarify anything in those submissions. However, the Tribunal did not permit Mr Hart either to adduce evidence outside the Submissions or to cross-examine his own witness. Mr Fraser was suffering from a cold. The Tribunal gave him permission to give evidence out of sequence at 14.00.

14. At the beginning of the hearing, the Tribunal indicated that we would need to revisit the issue as to whether the application had been made in time. Neither party had addressed this in their written submission. The Tribunal therefore gave Directions for the Second Respondent to file their submissions by 8 December and for the Applicants to file their submissions in response by 15 December.

The Housing Act 2004 ("the 2004 Act")

15. The 2004 Act introduced a new system of assessing housing conditions and enforcing housing standards. Part 2 of the 2004 Act relates to the licensing of HMOs. Section 61 provides for every prescribed HMO to be licensed.

16. HMOs are defined by section 254 which includes a number of "tests". Section 254(2) provides that a building or a part of a building meets the "standard test" if:

> "(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

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

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

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

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

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

17. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 prescribes those HMOs that require a licence. Article 4 provides that an HMO is of a prescribed description if it (a) is occupied by five or more persons; (b) is occupied by persons living in two or more separate households; and (c) meets the standard test under section 254(2) of the 2004 Act.

18. Section 56 permits a local housing authority ("LHA") to designate an area to be subject to an additional licencing scheme. On 30 August 2021, the City of Westminster ("Westminster") introduced an additional licencing scheme whereby all HMOs not covered by the mandatory scheme where there are two or more households and three or more people sharing facilities (see A1.98).

19. 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."

20. Section 64 deals with the grant or refusal of a licence. It is to be noted that there may be more than one person who may be the appropriate licence holder. In such circumstances it is for the LHA to determine who is the most appropriate person to hold the licence.

21. Section 72 specifies a number of offences in relation to the licencing of HMOs. The material parts provide:

"(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.
.....

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–

(a) a notification had been duly given in respect of the house under section 62(1) (a temporary exemption notice), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(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).

....

> (8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either-
>
> > (a) the authority have not decided whether to .... grant a licence, in pursuance of the notification or application.

22. It is to be noted that there may be more than one person who may commit an offence under section 95 as having "control of" or "managing" a house. However, when it comes to the making of a RRO, this can only be made against the "landlord".

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

23. Part 2 of the 2016 Act introduced a raft of new measures to deal with "rogue landlords and property agents in England". Chapter 2 allows a banning order to be made against a landlord who has been convicted of a banning order offence and Chapter 3 for a data base of rogue landlords and property agents to be established. Section 126 amended the 2004 Act by adding new provisions permitting LHAs to impose Financial Penalties of up to £30,000 for a number of offences as an alternative to prosecution.

24. Chapter 4 introduces a new set of provisions relating to RROs. An additional five offences have been added in respect of which a RRO may now be sought. In the decision of *Kowelek v Hassanein [2022] EWCA Civ 1041; [2022] 1 WLR 4558,* Newey LJ summarised the legislative intent in these terms (at [23]):

> "It appears to me, moreover, that the Deputy President's interpretation of section 44 is in keeping with the policy underlying the legislation. Consistently with the heading to part 2, chapter 4 of part 2 of the 2016 Act, in which section 44 is found, has in mind "rogue landlords" and, as was recognised in *Jepsen v Rakusen* [2021] EWCA Civ 1150, [2022] 1 WLR 324, "is intended to deter landlords from committing the specified offences" and reflects a "policy of requiring landlords to comply with their obligations or leave the sector": see paragraphs 36, 39 and 40. "[T]he main object of the provisions", as the Deputy President had observed in the UT (*Rakusen v Jepsen* [2020] UKUT 298 (LC), [2021] HLR 18, at paragraph 64; reversed on other grounds), "is deterrence rather than compensation". In fact, the offence for which a rent repayment order is made need not have occasioned the tenant any loss or even inconvenience (as the Deputy President said in *Rakusen v Jepsen*, at paragraph 64, "an unlicensed HMO may be a perfectly satisfactory place to live") and, supposing damage to have been caused in some way (for example, as a result of a failure to repair), the tenant may be able to recover compensation for it in other proceedings. Parliament's principal concern was thus not to ensure that a tenant could recoup any particular amount of rent by way of

recompense, but to incentivise landlords. The 2016 Act serves that objective as construed by the Deputy President. It conveys the message, "a landlord who commits one of the offences listed in section 40(3) is liable to forfeit every penny he receives for a 12-month period". Further, a landlord is encouraged to put matters right since he will know that, once he does so, there will be no danger of his being ordered to repay future rental payments."

25. 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—
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> (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."

26. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". By section 56, a tenancy includes a licence. The seven offences include the offence of "control or management of unlicenced HMO" contrary to section 72(1) of the 2004 Act.

27. 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.

28. Section 43 provides for the making of RROs:

> "(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)."

29. 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—
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> (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.

30. Section 44(4) provides:

> "(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."

31. Section 47(1) provides that an amount payable to a tenant under a RRO is recoverable as a debt.

The Background

32. On 30 October 2014 (at A1.73-78), the Second Respondent was registered as freehold owner of the Flat. The Second Respondent Company is registered in the British Virgin Islands. It has engaged Apex as its "financial service provider". Apex is regulated in Jersey. Ms Thomson states that Apex instructed the First Respondent to manage the Flat, whereby it would be responsible for placing tenants in the property and notifying Apex of any additional requirements. She states that Apex only became aware of the proceedings on 7 November 2023.

33. On 19 November 2020, Westminster consulted on a proposal to introduce an additional licencing scheme. On 21 April 2021 (at R2.41), Westminster designated an additional licencing scheme whereby all HMOs not covered by the mandatory scheme where there are two or more households and three or more people sharing facilities. The scheme came into force on 30 August 2021 and applies for a period of five years.

34. On 2 March 2021, the Second Respondent entered into a management agreement with the First Respondent (at R2.14.40). Clause 3 sets out the landlord's undertakings. Clause 3(j) (at R2.20) relates to the 2004 Act and provides:

> "Certain types of Property may require a licence before it can be let. It is your responsibility to determine whether you need a property licence and to obtain that licence."

It is apparent that Ms Thomson had not read this agreement.

35. On 4 May 2021 (at A1.31-56), the First Respondent granted an assured shorthold tenancy to the Applicants. The tenancy is for a term of 12 months from 13 May 2021 at a rent of £2,296.97 per month. The tenants paid a deposit of £2,650. The Second Respondent is named as the landlord. By Clause 5.1, the tenants are notified in accordance with sections 47 and 48 of the Landlord and Tenant Act 1987, that any notices in proceedings should be served on the landlord at the address of the First Respondent.

36. The Flat benefited from an air heat source pump. This should have ensured that the Flat was heated to a reasonable standard in the winter months and kept cool during the summer. The Applicants complain that there were problems with this throughout the tenancy. The flat was too hot during the summer and too cold during the winter. Ms Serrano's room was the only one which was effectively ventilated/heated. Ms Moh and Mr Facciorusso were in a relationship and shared the large bedroom. Mr Facciorusso used the third bedroom as his office. The Applicants first complained of the disrepair on 14 May 2021 (at A1.145). The Applicants provided a number of photographs (at A1.125-141) which confirm problems of condensation induce dampness and modest mould growth. The condensation caused some of the plasterwork to deteriorate.

37. We are satisfied that the landlord failed to remedy this defect. This seems to have been a block system and the ultimate responsibility would fall on the head lessor for Jerome House. In November 2021, the First Respondent gave the Applicants a budget of £150 to buy three electrical heaters. These should only have been a temporary measure until the block system could be repaired. The electric heaters were expensive to run. We are satisfied that the Applicants tended to keep their windows closed during the winter months because of the absence of any effective heating. This would have aggravated the condensation. The Applicants complained that they suffered chest infections and stress due to the disrepair. They have not provided any medical evidence. We are satisfied that there was significant, but not substantial disrepair.

38. The Applicants also complained about a number of other items of disrepair, namely the washing machine, the microwave, the dimmer

switch and the fire extinguishers. These matters seem to have been resolved within a reasonable time.

39. On 29 November 2021 (at A1.145), the Applicants complained that the heating/ventilation system was still defective after 6 months. At this stage, the Applicants contacted Westminster. As a consequence, the First Respondent provided the budget for the heaters. On 7 December 2021, Westminster wrote to the First Respondent and alerted it to the fact that the Flat was an HMO that required a licence.

40. On 12 April 2022 (at R1.31), Westminster wrote a second letter to the First Respondent about the need for a licence and the offence of control or management of an unlicenced HMO. On 26 April, Westminster referred the Applicants to Safer Renting.

41. On 4 May 2022, at 13.44 (at R2.44), the First Respondent submitted an application to Westminster for a HMO licence. Upon the application being duly made, the Respondents would have had a defence to an offence of control or management of an unlicenced HMO (see section 72(4)(b) of the 2004 Act).

42. On 12 May 2022, the Applicants vacated the Flat. On 4 May 2023 at 15.36 (at A1.13-26), the Applicants issued their application for a RRO. The first issue which the Tribunal is required to determine is whether "the offence was committed in the period of 12 months ending with the day on which the application is made".

43. On 1 September 2022, Westminster imposed a Financial Penalty of £10k on the First Respondent. This was to be reduced to £8k if it was paid within 28 days. The First Respondent appealed to this Tribunal. On 23 June 2023, the Tribunal reduced the Financial Penalty to £5k with a 20% reduction if the sum was paid within 28 days. The Tribunal rejected the First Respondent's defence of reasonable excuse.

Issue 1: Was the application issued in time?

44. The following matters are not in dispute:

(i) Section 41(2)(b) of the 2016 Act requires that "the offence was committed in the period of 12 months ending with the day on which the application is made" (see [27] above).

(ii) The application was issued by email (and was thereby "duly made") at 15.36 on 4 May 2023.

(iii) The First Respondent made an application for an HMO licence at 13.44 on 4 May 2022.

(iv) Section 72(4)(b) of the 2004 Act provides that the Second Respondent had a defence if "at the material time .... an application for a licence had been duly made in respect of the house under section 63" (see [21] above).

The Submissions of the Parties

45. Mr Hart, on behalf of the Second Respondent, contends that the last day on which the offence was committed was 3 May 2022. He disagrees with the suggestion that the offence would have been committed up to 13.43 on 4 May. In support of his argument, he relies on *Matthew v Sedman* [2021] UKSC 19; [2022] AC 299 at [18] and [46] – [49].

46. However, Mr Hart argues that this is irrelevant. The application was issued on 4 May 2023. The issue is whether the offence was committed in the period of twelve months ending on that date. The Tribunal would only have jurisdiction if the offence was committed in the 12 month period of 5 May 2022 to 4 May 2023. No offence was committed on, or after, 5 May 2022. The application is therefore out of time.

47. Mr Hart argues that the FTT decision of *Robinson v JKR Properties Ltd* which had relied on the House of Lords's judgment *in Dodds v Walker* was wrongly decided. *Dodds* v Walker construed the computation of time under Part II of the Landlord and Tenant Act 1954. The wording of that that statute is quite different.

48. Ms Carr, on behalf of the Applicant, argues that the starting point should be the last date on which the offence was committed. Relying on *Robinson v JKR Properties Ltd* (at [27]), she argues that the application for the HMO licence was "duly made" at 13.44 on 4 May 2022. At that point, the landlord is able to rely on the statutory defence and ceased to commit an offence under section 72(1) of the 2004 Act. Thus, the last day on which the offence was committed was 4 May 2022. It ceased to be committed at 13.44 on that date. It did not cease to be committed on 3 May 2022. Ms Carr relies on *Marigold v Wells* and Ors [2023] UKUT 33 (LC) (at [40]) and *R (Mohamed) v London Borough of Waltham Forest* [2020] EWHC 1083 (Admin), in support of her argument that licensing offences are "continuing offences" and continue to be committed up until the point that a licence application is "duly made".

49. Ms Carr contends that the offence ended on 4 May 2022 and therefore the cause of action accrued at 24.00 on 4 May 2022. The Applicant was therefore obliged to apply for a RRO in the period of 12 months running from 24.00 on 4 May 2022, namely by 24.00 on 4 May 2023.

50. Ms Carr relies on the long-standing rule of judicial interpretation of statute that, so as not to frustrate the intention of Parliament, the meaning of the words should be given their most literal meaning as per the *Sussex Peerage Case* (1844; 11 Cl&Fin 85):

> "The only rule for construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the law giver."

51. Ms Carr gives the following example:

> "If I were to say on 13 December: "I will meet you 'in' one month's time," I would unambiguously mean on 13 January, not 12 January. Similarly, if I was to say on 13 December 2023: "I will meet you here 'in' 12 months or on the last day 'in' the period of 12 months, ending with the day of our meeting," the unambiguous meaning would be that I will meet you on 13 December 2024."

The Tribunal's Determination

52. The Tribunal is required to determine two issues:

(i) Was an offence committed on 4 May 2022? The application for a licence was made at 13.44 on this day.

(ii) When did the period of 12 months ending with the day on which the application for a RRO was made begin? The application was made at 15.36 on 4 May 2023. Did that period of 12 months begin on 4 or 5 May 2022?

53. Our starting point is to consider what was decided by the House of Lords in *Dodds v Walker* and by the Supreme Court in *Matthew v Stedman*.

54. In *Dodds v Walker*, the House of Lords was considering the time limit for an application for a new tenancy under Part II of the Landlord and Tenant Act 1954. Section 29(3) provides that no application for a new tenancy under section 24 (1) (emphasis added):

> "shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section 25 of this Act.""

55. Section 29 of the Landlord and Tenant Act 1954 deals with applications that can be made after the giving of a landlord's notice. Therefore, the months begin to run from the day after the notice. The landlord gave its notice on 30 September 1978. The tenant issued its application on 31 January 1979. It was accepted that the date on which the landlord gave notice was to be excluded. However, notwithstanding that September was a 30 day month, it was held that the period elapsed on the corresponding

day in the fourth month, namely, January 30, and therefore the tenant's application was made one day too late.

56. In *Robinson v JKR Properties Ltd* (at [29]) the FTT relied upon the following passages from the speeches in *Dodds v Walker*:

> "Lord Diplock at 1029B-C) "My Lords, reference to a 'month' in a statute is to be understood as a calendar month. The Interpretation Act 1978 says so. It is also clear under a rule that has been consistently applied by courts since *Lester v Garland* (1808) 15 Ves 248 [1803-13] All ER Rep 436 that, in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established, and is not disputed by counsel for the tenant, that when the relevant period is a month or a specified number of months after the giving of a notice the general rule is that the period ends on the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given."
>
> Lord Russell of Killowen at 1030 C/D: "My Lords, it is common ground that in this case the period of four months did not begin to run until the end of the date of the relevant service on 30th September, i.e. at midnight 30th September-1st October. It is also common ground that ordinarily the calculation of a period of a calendar month or calendar months ends on what has been conveniently referred to as the corresponding date. For example, month period, when service of the relevant notice was on 28th September, time would begin to run at midnight 28th-29th September and would end at midnight 28th-29th January, a period embracing four calendar months. It is to be observed that the number of days in the court month period in that example is in one sense inevitably limited by the fact that September and November each contains but 30 days."

57. Applying this decision, the FTT held (at [30]) that the period of 12 months for making this application started to run at midnight on 30 September/1 October 2019 (the last day during which the offence was committed) and ended at midnight on 30 September/1 October 2020. Thus, the application was made to the tribunal at 19.08 on the last possible day.

58. Mr Hart seeks to distinguish *Dodds v Walker* on the ground that the language adopted by section 41(2)(b) of the 2016 Act is quite different. The 1954 Act provides that the application shall be "made not less than two nor more than four months <u>after</u> the giving of the landlord's notice". The 2016 Act rather refers the offence being committed "<u>in</u> the period of 12 months" ending on the date that the application is made. We agree that the

language is different and that *Dodds v Walker* does not assist with the issue that we are required to determine.

59. In *Matthew v Sedman*, the cause of action accrued at midnight on 2 June 2011. The claim was issued on Monday, 5 June 2017. The claimants sought to argue that the claim was issued within the 6 year limitation period prescribed by the Limitation Act 1980. They contended that the cause of action was to be treated as having accrued during part of 3 June 2011, which day was therefore not to be counted for limitation purposes, with the consequence that the claim had been brought in time, having been issued on the first working day after the expiration of the limitation period on Saturday, 3 June 2017. This argument was rejected. The Judge held that the cause of action had accrued at the first moment of 3 June 2011, but that that day would nevertheless be counted for limitation purposes. The Court of Appeal dismissed the claimants' appeal, holding that the claimants' cause of action had accrued at the very end of 2 June 2011 so that 3 June 2011 fell to be included in the limitation period.

60. The Supreme Court upheld the decision that the claim was out of time. Lord Stephens JSC, with whom the other members of the Court agreed, held (at [47] – [50]) that that the reason for the general rule which directed that the day of accrual of a cause of action should be excluded from the reckoning of a limitation period, is that the law rejects a fraction of a day. The justification for this rule is that it would prevent part of a day being counted as a whole day for the purposes of calculating a limitation period, which would have prejudiced claimants and interfered with the time periods stipulated by the Limitation Act. The justification relating to fractions of a day, did not apply in a midnight deadline case, because the day which commenced immediately after the accrual of the cause of action was a complete undivided day, whether the cause of action was held to have accrued at the very end of one day or the very start of the next. Further, there was no longstanding authority which excluded a complete undivided day from counting towards the calculation of a limitation period and to do so in a midnight deadline case would unduly distort the limitation period laid down by Parliament and prejudice defendants by lengthening the statutory limitation period by a complete day. It followed that midnight deadline cases constituted an exception to the general rule, with the consequence that the whole day which followed a midnight deadline was not to be excluded from the calculation of a limitation period. In the present case, 3 June 2011 should be included in the computation of the limitation period since it was a whole day. Accordingly the claim against the defendants was out of time.

61. We must first consider whether an offence was committed on 4 May 2022. The application for a licence was made on this day. Section 72(4) of the 2004 Act provides that it is a defence if "at the material time ..... an application for a licence had been duly made". The Tribunal is satisfied that the last day on which the offence was committed was **3 May 2022**.

62. We consider that Ms Carr's argument that an offence was committed up to 13.44 on 4 May to be unduly technical. We accept that the offence of control or management of an unlicenced HMO is a continuing offence. However, we are construing a statute that creates a criminal offence. If there is any ambiguity, we should lean in favour of the potential offender. Any landlord is entitled to know, without ambiguity, what action the State requires of him, if he is to comply with the law. It is highly artificial to suggest that an offence is committed for part of a day and that the extent of the offending depends upon the time of the day on which the application for a licence was made. The 2004 Act provides a defence from "the material time" on which the application for a licence was made. "The material time" should be construed as the day on which the application was made, and not the minute and hour of the day on which the application was made.

63. The second issue is when the period of 12 months ending with the day on which the application for a RRO was made, begins. The application was made on 4 May 2023. Did that period of 12 months begin on 4 or 5 May 2022?

64. Rule 26 of the Tribunal Rules provides that an applicant must start proceedings before the tribunal "by sending or delivering to the tribunal a notice of application". The application was made at 15.36 on 4 May 2023.

65. Section 41(2)(b) of the 2016 Act requires the offence to have been committed "in the period of 12 months ending with the day on which the application is made". We are satisfied that the relevant 12 month period commenced on **5 May 2022** and ended on 4 May 2023. The 2016 Act refers to "the day" on which the application was made. Thus, the relevant 12 month period ran from the start of 5 May 2022 until the end of 4 May 2023. Again, it is highly artificial to suggest that a period of 12 months runs from 24.00 on 4 May 2022 to 24.00 on 4 May 2023. This is seeking to add an extra day to the period of 12 months.

66. We are therefore satisfied that the application was issued two days out of time. The offence ceased to be committed on **3 May 2022**. The relevant period of 12 month during which the offence needed to have been committed, ran from **5 May 2022**

67. Judge Latham notes that he is reaching a different decision to that which he reached in *Robinson v JKR Properties Ltd*. Judge Nicol, in reaching his decision that this application was in time, relied on this decision. Judge Latham is satisfied that in the light of the fuller argument before this tribunal, his earlier decision was wrong.

Issue 2: What decision would have been reached had the application been issued in time?

68. The Tribunal goes on to consider the orders that we would have made had we been satisfied that we had jurisdiction to determine the application. This is for the benefit of the Upper Tribunal, should there be a successful appeal in this matter.

69. The Tribunal is satisfied beyond reasonable doubt that the Second Respondent committed the offence of control of an unlicenced HMO contrary to section 72(2) of the 2004 Act during the period 30 August 2021 and 3 May 2022. It is common ground that Westminster had introduced an Additional Licencing Scheme on 30 August 2021. At all material times thereafter, the Flat required a licence. An application for a licence was not made until 4 May 2022.

70. We are further satisfied that the Second Respondent was the "person managing" the premises as it was leaseholder of the Flat who received rent from the tenants through the First Respondent who was acting as its agent.

71. The Second Respondent sought to raise a defence of reasonable excuse under section 72(5) of the Act (see [21] above). Mr Hart argued that the reasonable excuse was that the Second Respondent was not aware of the requirement to licence the property, between 30 August 2021 and 4 May 2022 and had relied on the First Respondent, their managing agent to inform them of the need to licence the property. It was not informed of this requirement until the period when the licence application was submitted during May 2022.

72. This defence was considered by the Upper Tribunal in In *Marigold & Ors v Wells*. Martin Rodger KC, the Deputy Chamber President, stated at [40]:

> "The offence of having control of or managing an unlicensed HMO contrary to section 72(1) of the 2004 Act is a continuing offence which is committed by the person having control or managing on each day the relevant HMO remains unlicensed. To avoid liability for the offence the person concerned must therefore establish the defence of reasonable excuse for the whole of the period during which it is alleged to have been committed."

73. In assessing whether a respondent has established the defence of reasonable excuse for the whole of the period during which the offence is alleged to have been committed, the Upper Tribunal endorsed the approach of the Upper Tribunal, Tax and Chancery Chamber, in *Perrin v HMRC* [2018] UKUT 156 (TCC) at [81]. Applying this to the context of landlord and tenant:

> (i) First, establish what facts the landlord asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the landlord or any other person, the landlord's own experience or

relevant attributes, the situation of the landlord at any relevant time and any other relevant external facts).

(ii) Second, decide which of those facts are proven.

(iii) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the landlord and the situation in which the landlord found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the landlord did (or omitted to do or believed) objectively reasonable for this landlord in those circumstances?

74. It is for the Second Respondent to establish a defence of reasonable excuse. It has failed to do so. No one associated with the Second Respondent company has made a witness statement. It is registered in the British Virgin Islands. The Tribunal knows nothing about the company. No evidence has been adduced as to the steps that it takes to keep abreast with the requirement of UK law.

75. The only evidence adduced has been a witness statement from Ms Claire Thomson from Apex. She is based in Jersey. She was not available to be cross-examined on her statement. The Directions issued by the Tribunal reminded the parties that any witness is expected to attend the hearing. She states that Apex expected the First Respondent to notify it of any licencing requirements. However, the management agreement which Apex signed with the First Respondent placed the responsibility on the landlord to determine whether a licence was required (see [34] above).

76. The 2016 Act gives the Tribunal a discretion as to whether to make an RRO, and if so, the amount of the order. We are satisfied that this is an appropriate case for a RRO to be made.

77. In *Acheapong v Roman* [2022] UKUT 239 (LC); [2022] HLR 44, Judge Elizabeth Cooke has given guidance on the approach that should be adopted by Tribunals (at [20]):

> "The following approach will ensure consistency with the authorities:
>
> A1. Ascertain the whole of the rent for the relevant period;
>
> b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.

> c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:
>
> d. Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).
>
> 21. I would add that step (c) above is part of what is required under section 44(4)(a). It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked."

78. In the recent decisions of *Simpson House 3 Ltd v Osserman* [2022] UKUT 164 (LC) and *Hallett v Parker* [2022] UKUT 165 (LC), the Deputy President distinguished between the professional "rogue" landlord, against whom a RRO should be made at the higher end of the scale (80%) and the landlord whose failure was to take sufficient steps to inform himself of the regulatory requirements (25%).

79. Section 44 provides that the period of the RRO may not exceed the rent paid over a period of 12 months during which the landlord was committing the offence. We have found that the offence of managing an unlicenced HMO was committed over the period 30 August 2021 to 3 May 2022, a period of 8 months and 5 days. None of the Applicants were in receipt of universal credit. There are no other deductions from the rent that need to be made. The maximum RRO which we would be entitled to make is £18,759.

80. Mr Hart that any RRO should be in the range of 25 to 50% of the rent. Ms Carr rather argued for a figure of 85%.

81. We are first required to consider the seriousness of the offence. This is a professional landlord which owns three flats in the block. It instructed managing agents to manage the Flat. However, the management agreement placed the responsibility on the landlord to ensure that any licence was required. We consider this to be a serious offence, but not one of the most serious. Our starting point is therefore 50%.

82. We have regard to the following:

(a) The conduct of the landlord. We are satisfied that we should have regard to the disrepair, namely the defective ventilation and heating system. This was a problem throughout the tenancy. We increase the RRO by 10%.

(b) The conduct of the tenants: There are no factors which would justify any reduction.

(c) The financial circumstances of the landlord: No evidence has been adduced on this.

(d) Whether the landlord has at any time been convicted of an offence to which this Chapter applies. There is no evidence that the Respondent has been convicted of any offence. However, we give limited weight to this. LHAs are under considerable financial pressures and are only able to take action in limited cases. A conviction would rather have been an aggravating factor.

(e) We have had regard to the Financial Penalty which Westminster imposed on the First Respondent. We do not consider that this justifies any reduction to the RRO made against the Second Respondent.

83. We would have assessed the RRO in this case at 60% of the rent of £18,759, namely £11,256.

84. Given our finding that the application was issued out of time, we make no order for the reimbursement of the tribunal fees of £300 which have been paid by the Applicants. We would have made such an order, had we been satisfied that we had jurisdiction to make a RRO.

Robert Latham
15 January 2024

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.