FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/HMF/2023/0323.**
Property	**:**	**Flat 3, 8 Reighton Road, London, E5 8SG.**
Applicants	**:**	**James Kiely** **Hollie Saunders** **Joseph Higgins**
Representative	**:**	**Tom Page, University of London Housing Services.**
Respondents	**:**	**Bostall Estates Limited.**
Representative	**:**	**Jeff Hardman (Counsel) instructed by Jury O'Shea LLP**
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	**:**	**Judge Robert Latham** **Louise Crane MCIEH**
Date and Venue of Hearing	**:**	**11 April 2024 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**7 May 2024**

DECISION

Decision of the Tribunal

1. The Tribunal is satisfied that it has no jurisdiction to determine the application 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 15 November 2023. The offence ceased to be committed on 15 November 2022. The application was therefore made one day out of time.

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

3. 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 (119 pages). The Tribunal will refer to this by the pre-fix: "A1.__"

(ii) The Respondent's Bundle (153 pages). References: "R1.__".

(iii) Applicant's response to Respondent's Bundle (170 pages). References: "A2.__".

(iv) Witness Statement of Lakhbir Singh Heer and exhibits (39 pages). References: "R2.__" – page references are the electronic numbering.

(v) Witness Statement of Andy Hopkins and exhibits (8 pages). References: "R3.__" – page references are the electronic numbering.

(vi) The parties have also filed Skeleton Arguments and a Bundle of Authorities.

The Application

2. By an application, dated 15 October 2023, but emailed to the Tribunal on 15 November 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 3, 8 Reighton Road, London E5 8SG ("the Flat"). This is a three level split level flat in a converted street property with three flats. The Flat has a communal kitchen/living room. The Flat is in the London Borough of Hackney ("Hackney").

The Hearing

3. Mr James Kiely presented the case on behalf of the Applicants. He is a trainee psychologist at UCL. The Applicants have been assisted by Mr Tom Page, from the UCL Housing Services. Ms Hollie Saunders and Mr Joseph Higgins also attended. Ms Saunders is a service manager for the Nia Project, a women's rights project. Mr Higgins is a musical technologist for Spitfire Audio. Mr Kiely gave evidence. No one required Ms Saunders and Mr Higgins to give evidence.

4. Mr Jeff Hardman (Counsel) instructed by Jury O'Shea LLP, appeared for the Respondent. The day before the hearing, the Respondent served witness statements from Mr Lakhbir Singh Heer (a director of the Respondent company) and from Mr Andy Hopkinson (a Lettings Manager with Estate Management Services (London) Ltd ("EMS")). The Respondent has appointed EMS to manage its portfolio of properties. Mr Hopkinson has been personally responsible for managing the Flat. The Respondent and EMS are closely connected in that they have common shareholders and offices. However, they are separate legal entities. Mr Heer had had no personal involvement in the management of the Flat. The Applicants had no objection to the late service of these witness statements. Mr Heer attended the hearing and gave evidence. Mr Hopkinson did not attend. No explanation was provided for his absence.

5. Both parties provided Skeleton Arguments. Mr Hardman provided a Bundle of 12 authorities. At the beginning of the hearing, the Tribunal provided the parties with three recent cases: (i) *Flat 501 Jerome House; LON/00BK/HMF/2023/0113* - a decision of this Tribunal on "computing time", in respect of which Judge Latham has granted permission appeal to the Upper Tribunal; (ii) *Marigold v Wells* [2023] UKUT 33 (LC) - the leading authority on "reasonable excuse"; and (iii) *LDC (Ferry Lane) v Garro* [2024] UKUT 40 (LC) - the most recent decision of the Upper Tribunal on the assessment of RROs. The Tribunal granted the parties a short adjournment to consider these authorities.

Issues Raised by the Application

6. This application has raised a range of issues relating to whether this application was made in time:

(i) Did the Applicants make their application to this Tribunal on the 15 November 2023 when they emailed their application to the tribunal? The Respondent contends that the application was not made until the Applicants paid the requisite tribunal fee of £100 on 14 December 2023. We are satisfied that the application was made on 15 November 2023.

(ii) An application for a RRO may only be made if the offence of control or management of an unlicenced HMO was committed "in the period of 12

months ending with the day on which the application was made". It was common ground that this period of 12 months commenced on 16 November 2022.

(iii) The Respondent contends that if it made an application for a licence on 16 November 2022, the last day on which an offence was committed would be 15 November 2022. The Applicant disputes this and contends that an offence would be committed on 16 November 2022, up to the time on that day that the application was duly made. In *Flat 501 Jerome House*, this Tribunal determined that 15 November 2022 would be the last day on which the offence was committed. It has granted permission to appeal on this point to the Upper Tribunal.

(iv) The Respondent contends that it "duly made" an application for a HMO licence to the Hackney on 16 November 2022, albeit that it was unable to complete the application because Hackney's online site was not permitting it to make an application. Hackney contends that the application was not "duly made" until the requisite fee of £950 was paid on 15 December 2022. The Applicants support this contention. The Tribunal agrees.

(v) Alternatively, the Respondent contends that it had a reasonable excuse of having control or management of an unlicenced HMO from 16 November 2022 until the fee was paid on 15 December 2022. The Applicants dispute this. On Thursday, 8 December, Hackney had informed the Respondent that payment system was now "up and running". The Applicants contend that the offence is a continuing one and that the Respondent should have paid the requisite fee "as soon as reasonably practicable" and no by later than Monday, 12 December. The offence was therefore committed between 13 and 15 December. The Tribunal is satisfied that the fee was paid within a reasonable time of the Respondent being told that Hackney's system was up and running and that the Respondent is able to continue to rely on the defence of reasonable excuse up to 15 December.

(vi) The Tribunal therefore concludes that the application to this tribunal was issued one day out of time.

(vii) This is an unfortunate case. The Applicants were aware of the 12 month time limit. However, Hackney had informed them that the Respondent had not made an application for a licence until 15 December 2022. Their application form is dated 15 October 2023. They believed that they had until 14 December 2023 to submit their application. They emailed their application to the tribunal on 15 November 2023. This Tribunal has no discretion to extend time in these circumstances.

(viii) Should there be an appeal in this matter, we go on to consider what RRO we would have made, had the application been made in time.

The Housing Act 2004 ("the 2004 Act")

7. 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.

8. 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."

9. 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.

10. Section 56 permits a local housing authority ("LHA") to designate an area to be subject to an additional licencing scheme. On 10 May 2018, Hackney published an additional licencing scheme whereby all HMOs not covered by the mandatory scheme in the borough require a licence (at R1.145). The additional licensing scheme came into force on 1 October 2018.

11. 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."

12. Section 63 provides for making applications for an HMO licence:

"(1) An application for a licence must be made to the local housing authority.

(2) The application must be made in accordance with such requirements as the authority may specify.

(3) The authority may, in particular, require the application to be accompanied by a fee fixed by the authority."

13. 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.

14. 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.

15. 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")

16. 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.

17. 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."

18. 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."

19. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". The seven offences include the

offence of "control or management of unlicenced HMO" contrary to section 72(1) of the 2004 Act.

20. 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.

21. 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)."

22. 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.

23. 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."

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

The Defence of Reasonable Excuse

25. The defence or reasonable excuse was recently 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."

26. 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?

The Tribunal Rules

27. This Tribunal is a creature of statute. Its powers to regulate proceedings largely stem from the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules") made pursuant to the Tribunal, Courts and Enforcement Act 2007.

28. Rule 26 specifies how proceedings before the tribunal are to be started (emphasis added):

> "(1) An applicant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of application.
>
> (2) Such an application must be signed and dated and, unless a practice direction makes different provision, include—
>
> (a) the name and address of the applicant;
> (b) the name and address of the applicant's representative (if any);
> (c) an address where documents for the applicant may be sent or delivered;
> (d) the name and address of each respondent;
> (e) the address of the premises or property to which the application relates;
> (f) the applicant's connection with the premises or property;
> (g) the name and address of any landlord or tenant of the premises to which the application relates;
> (h) the result the applicant is seeking;
> (i) the applicant's reasons for making the application;
> (j) a statement that the applicant believes that the facts stated in the application are true;
> (k) the name and address of every person who appears to the applicant to be an interested person, with reasons for that person's interest;
> (l) .....; (m) .....:
> (n) all further information or documents required by a practice direction.
>
> (3) .....; (4)....;
>
> (5) The applicant must provide with the notice of application any fee payable to the Tribunal."

29. Rule 11 makes provision for the non-payment of Fees:

> "(1) In any case where a fee is payable under an order made under section 42 of the 2007 Act (fees), the Tribunal must not proceed further with the case until the fee is paid.

(2) Where a fee remains unpaid for a period of 14 days after the date on which the fee is payable, the case, if not already started, must not be started.

(3) Where the case has started, it shall be deemed to be withdrawn 14 days after the date on which the Tribunal sends or delivers to the party liable to make payment a written notification that the fee has not been paid."

Hackney's Procedures for an HMO Application

30. Hackneys Policy's for applying for an HMO Licence are set out in a document "Licensing Policy for Private Rented Housing" (at R2.15-48). Section 3 specifies the "Requirement to Licence" (emphasis added):

> "Every property falling within the scope of any of the licensing schemes outlined above must be licensed unless a Temporary Exemption Notice (TEN) is in force (see paragraph 3.3 below), or if it is subject to an Interim or Final Management Order made by the Council; or if it is subject to any of the exemptions set out in paragraphs 3.1 to 3.3.
>
> A person commits an offence if they are a person having control of, or managing, a property which is required to be licensed under any of the schemes, but is not so licensed. It is a defence against proceedings under this offence if the person has duly made a full application for a licence under the scheme, has a reasonable excuse for not applying for a licence or has notified the Council that they are taking lawful steps to ensure the property no longer requires a licence. An application is not considered to be duly made if it is an incomplete application or the licence fee has not been paid as part of the application. If a licence applicant has a valid reason why their application cannot be a full application they should contact the Council's Private Sector Housing Team. Contact details are at the end of this document."

31. Section 4 provides for "Making a Licence Application":

> 4.1 Licence applications must be made on-line via the Council's website by searching "Hackney Property Licensing" or by typing https://propertylicensing.hackney.gov.uk/ in a web browser. The on-line application system will guide applicants through the process and help select the appropriate licence for a particular property. Applicants who have a particular difficulty in applying on-line should contact the Council's Private Sector Housing Duty Line through the contact details at the end of this policy document. When making a licence application, the following documents should be at hand in a format that can be uploaded to the on-line

application system. Documents marked§in the list will help the Council to efficiently and accurately process the application but their absence will not prevent the application being made. Those marked with an asterisk* are mandatory and an application cannot be accepted without them:

Documents must be in a format that can be uploaded to the on-line application system.

● room sizes (square metres) and property amenities§
● details about the property structure and safety equipment*
● name and addresses of persons and organisations with an interest in the property*
● payment card details (for payment of fee)*
● licence holder date of birth*
● sketch plan of the layout of each floor§
● electrical installation condition report (EICR) §
● gas safety certificate, from a registered gas safe engineer*
● BS test report for any fire alarm system (HMOs only) §
● BS test report for any emergency lighting system where (where present in HMOs only)§
● landlord accreditation scheme certificate (if landlord and manager is accredited)§
● copies of tenancy agreements§

*Statutory requirement under SI373:2006 The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006

§ Requested to facilitate efficient and accurate processing of the application.

Failure to submit mandatory(*above) documentation may mean that an application cannot be properly processed and may be regarded as not having been duly made. This may harm a landlord's or agent's defence against any proceedings taken against them for failure to licence a property (offences under section 72 or 95 of the Housing Act 2004).

The Background

32. On 24 March 2003, the Respondent was registered as the leasehold owner of the Flat (see A1.54). On 10 May 2018, Hackney introduced an Additional Licencing Scheme (at R1.145). On 6 August 2018, the Respondent signed a management agreement with EMS (at R2.7).

33. On 8 October 2020, the Respondent granted the first tenancy agreement to the three Applicants for a fixed term of 12 months from 8 October 2020

at a monthly rent of £2,426.67. On 23 July 2021, Mr Keily sent an email to EMS expressing their satisfaction with the Flat (at R3.5).

> "Firstly, we would like to thank yourselves and our landlord for providing us with a clean, safe and well maintained flat, particularly in your responsiveness to our requests for maintenance work over recent months. It has provided much-needed stability over what has been a very uncertain year for everyone."

34. On 24 September 2021 (at A1.17-31), the Respondent granted the second tenancy agreement to the three Applicants for a fixed term of 12 months from 8 October 2020 at a monthly rent of £2,426.67. On 21 September 2022 (at A1.33-47), the Respondent granted the third tenancy agreement to the three Applicants for a fixed term of 12 months from 8 October 2021 at an increased monthly rent of £2,725. On 24 August, the Applicants had sent an email (at R1.33) stating that they had agreed to pay the increased rent because "we do like living here".

35. On 16 November 2022, EMS submitted an application to Hackney for an HMO licence. They made a number of applications as it was apparent that they had become aware that they were managing a number of properties which were unlicenced. The procedures specified by Hackney, required EMS to make the application online. The draft application is at R1.11-18. Unfortunately, EMS were unable to complete the process as the site, operated by a third party, refused to accept any payment.

36. At 16.00, EMS sent an email to Hackney in the following terms (at R2.10):

> "We have completed another 8 licensing applications in regard to property licensing however the site, is not permitting us to make the payment and is coming up with the following message:
>
> > 'Your account cannot currently make live charges. If you are the site owner, please activate your account at https://dashboard.stripe.com/account/onboarding to remove this limitation. If you are a customer trying to make a purchase, please contact the owner of this site. Your transaction has not been processed.'"

37. At 18.02, Hackney sent a response to EMS (at R1.19):

> "Good Afternoon, I am sorry to hear about the troubles you are having with our website. Please be advised that the payment system is currently down and we are working on it. I have made a note of your email and will advise when it is back up and running. Apologies for any inconvenience this may have caused and we will be in touch shortly."

38. Hackney did not advise EMS that the system back up and running. On 5 December 2022, EMS sent the following email to Hackney (at R1.19):

> "I write further to the below as we have not received confirmation as to whether we are now able to pay for the licenses as outlined below. Could you please advise whether we can now make payment?"

39. On Thursday, 8 December 2022 at 13.06, Hackney informed EMS that they could now complete their application (at (R1.20):

> "I can now advise that the payment system is back up and running. Please log back into your account and make payment to submit the application."

40. On Thursday, 15 December 2022 at 13.17, EMS made a payment of £7,600 to Hackney which included £950 in respect of the licence application for this Flat (at R3.16). Mr Herr explained that EMS operates and manages its outgoing payments by way of a weekly payment run which takes place on a Wednesday of each week. Payment of the HMO licence fee was therefore arranged on the next payment run being Wednesday, 14 December 2022.

41. On 7 October 2023, the Applicants vacated the Flat at the end of their tenancy. They had paid a deposit of £2,653.85. There was a dispute as to what deductions should be made. In due course, it was agreed that £2,130,85 should be refunded. On 6 August 2023, the Applicants had sent EMS an email (at R1.35) stating "we have had a wonderful time in this flat, but we will now all be moving on".

42. On 15 November 2023 at 11.14, the Applicants emailed their application to this tribunal for a RRO (at A1.4-14). On 13 December 2023 (at R1.150) sent a copy of the application to the Respondent and stated that it had been received on 15 December 2023. On the same day, the tribunal wrote to the Applicants acknowledging receipt of their application. This also confirmed that the application had been received on 15 November 2023 and gave details of how the fee of £100 could be paid online. The Applicants were asked to confirm within 14 days that they had made the payment and provide the "online payment reference number". On 14 December 2023, the Applicants paid the requisite fee.

43. On 29 January 2024 (at A2.51), Hackney sent the following email to the Applicants:

> "A licence application is only considered submitted once the payment is made, without the payment, the application is not received on our end."

44. On 12 February 2024 (at R3.20), Hackney sent the following email to EMS:

> "Further your email to Barbara regarding the above application I have checked the application and payment system, the system shows that on 16/11/20222 you submitted Electrical & Gas safety certificates and tenancy agreement only. you duly submitted the online application on 15/12/2022 and subsequently tried to make payment pertaining to this case and others on the same date 15/12/2022 which were initially declined the payment was successfully processed at 13:17 on the 15/12/2022 hence this is the date the application was valid."

Issue 1: When did the Applicants "make" their application for a RRO?

45. We are satisfied that the Applicants "made" their application for a RRO on 15 November 2023. We reject the submission of the Respondent that the application was not made until 14 December 2023 when the fee was paid.

46. Any application to this tribunal must be made in accordance with the Tribunal Rules. The application form has been designed to enable an applicant to make an application in accordance with the Rules.

47. The application form contemplates that an application can be made online without the fee being paid:

(i) Page 1 of the application form now encourages applicants to submit their applications by email, albeit that a paper application can be made. The form states that a fee is payable for the application. It goes on to explain that the fee can now be paid by an on-line banking payment. The Applicants ticked a box which stated: "If you want to be sent online banking payment details by email, please tick this box".

(ii) Page 10 of the form explains that the application fee is £100. However, an applicant may be entitled to "Help with Fees". The application for "Help with Fees" is made online to a government website. An applicant is required to enter a reference number if s/he has completed an online application for help with fees.

48. The standard procedure is that which was followed in this case. Having received the application, the tribunal wrote to both the Applicant and the Respondent. Both were told that the application had been "received" on 15 November 2023. The Applicants were sent details of how to make their electronic payment and required to pay this within 14 days. The Applicants did this. The Tribunal notes that an applicant who is entitled to "Help with Fees" may not know the fee that they are required to pay until their application has been determined.

49. The Tribunal is satisfied that the particulars provided on the application form accurately reflect the procedures contemplated by the Tribunal Rules.

50. Rule 26(1) 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 Tribunal notes that Rule 26(5) provides that an applicant must provide with the notice of application any fee payable to the Tribunal. Further, Article 4(3) of First-tier Tribunal (Property Chamber) Fees Order 2013 (2013/1179) provides that any fee for an application is due at the same time as the application is made.

51. However, this must be read in the context of Rule 11. This provides that where any fee is payable, the Tribunal must not proceed further with the case until the fee is paid. Thus, the application is "made" on the date that it is received by the Tribunal, but it will not be processed until any fee that may be payable, is paid. The electronic fee can only be paid when an applicant knows how this is to be paid. If that fee is not paid electronically when this is requested, Rule 11(2) provides that where a fee remains unpaid for a period of 14 days after the date on which it is payable, the case must not be "started" (i.e. processed). Thus, in the case of an electronic application, the fee only becomes payable, when the applicant is notified of how the requisite fee can ben paid.

52. The Tribunal is therefore satisfied that the payment of the fee is a procedural requirement, in respect of which the tribunal could, if necessary, extend time under rule 6(3)(a) of the Tribunal Rules. It does not affect the date on which an application is made.

Issue 2: Is an offence committed on the day that the landlord applies for an HMO licence?

53. Mr Kiely argues that an offence is committed of the day on which an application for a licence is made. Section 72(4)(b) of the 2004 Act provides that it is a defence if "at the material time ..... an application for a licence had been duly made". On the assumption that the landlord applied for an HMO licence at 15.00 on 16 November 2022, Mr Kiely would argue that the offence was committed up to 14.59 on that day.

54. This Tribunal considers the Applicants' argument that an offence would be committed up to 14.59 on 16 November 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.

55. This is the decision which this Tribunal reached on 15 January 2024 in *Flat 501 Jerome House; LON/00BK/HMF/2023/0113*. If this decision is wrong, it is now for the Upper Tribunal to provide a ruling on this important issue.

Issue 3: When was the Respondent's application for an HMO licence "duly made"?

56. The Tribunal is satisfied that the Respondent had only "duly made" an application for a licence when the requisite fee was paid on 15 December 2022. The Tribunal rejects the Respondent's submission that the application was duly made on 16 November 2022, when it had provided all the requisite details online up to the point of making the payment.

57. An application for an HMO licence must be "duly made" (section 72(4)(b) of the 2004 Act) "in accordance with such requirements as the authority may specify" (section 63(2) see [12] above). Hackney's procedures are discussed at [30] – [31] above. These provide that "an application is not considered to be duly made if … the licence fee has not been paid as part of the application". We can see the practical sense of this requirement. What would a LHA do if an application had been made, but the fee was not paid? Could a rogue landlord circumvent the statutory procedures by submitting an application without a fee, and then prevaricate over the payment of the fee when demanded? Would a landlord have a defence where an application to be submitted, but the under-resourced LHA failed to request the relevant payment for a prolonged period.

58. The Tribunal is satisfied that this finding causes no practical problems for a landlord. It is able to rely on the statutory defence of "reasonable excuse".

Issue 4: Has the Respondent established a defence of "reasonable excuse"

59. The Tribunal is satisfied that the Respondent has established a reasonable excuse for having control or management of an HMO for the period 16 November to 15 December 2022. Applying the three stage test suggested by the Deputy President in *Marigold v Wells*:

(i) The Respondent contends that it had a reasonable excuse because EMS sought to make an application on 16 November 2022, but was unable to complete the application by making the payment. It was impossible to make the payment because Hackney's payment system was down. It made

the payment on 15 December 2022. This was made within a reasonable time of being informed by Hackney on 8 December, that the system was now back up and running. The Respondent notes that whilst Hackney had told EMS that it would inform it, when the system was up and running, EMS had had to chase up Hackney.

(ii) The Tribunal accepts that these facts are proved.

(iii) The Tribunal is satisfied that, viewed objectively, these proven facts amount objectively to a reasonable excuse for the default and the time when that objectively reasonable excuse ceased.

60. The Applicants contend that the Respondent should have made the payment "as soon as reasonably practicable" when notified that the system was back up and running. On Thursday, 8 December 2022, Hackney had informed EMS that the system was up and running. EMS should have made the requisite payment no later than Monday, 12 December 2022. Although this would only have revived the offence for the limited period of 13 to 15 December 2022, this would have ensured that their application was made in time and enable them to seek a RRO for the 12 months ending on 8 December 2022.

61. The Tribunal rejects the Applicants' argument. We are satisfied that upon being notified by Hackney that their system was back up and running, EMS was required to make the requisite payment within a reasonable time. We would consider 14 days to be a reasonable time. The payment was rather made within 7 days. In certain circumstances, a managing agent would need to secure payment of the fee from their principal. However, Mr Heer conceded that EMS had both the authority and the funds to make the payment. However, we accept that EMS had managed its outgoing payments by way of a weekly payment run which took place on a Wednesday of each week.

The Tribunal's Conclusions on the Preliminary Issue

62. 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 [20] above). The Tribunal has reached the following conclusions:

(i) The last day on which an offence of control or management of an unlicenced HMO was committed was **15 November 2022**. Whilst the Respondent did not "duly make" their application to Hackney for an HMO licence until 15 December 2022, it has established a defence of "reasonable excuse" from 16 November 2022.

(ii) The Applicants made their application to this Tribunal for a RRO on **15 November 2023**. It is necessary for the Applicants to establish that the

offence was committed on or after 16 November 2022. Their application was therefore issued one day out of time.

Issue 5: What decision would have been reached had the application been issued in time?

63. 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.

64. The Tribunal is satisfied beyond reasonable doubt that the Respondent committed the offence of management of an unlicenced HMO contrary to section 72(2) of the 2004 Act during the period 10 May 2018 and 15 November 2022. The Respondent was the "person managing" the Flat, as it was leaseholder of the Flat who received rent from the tenants through EMS who was acting as its agent.

65. The Respondent sought to raise a defence of reasonable excuse. The Respondent contends that it had delegated the responsibility to licence the Flat to EMS. We do not accept this as a defence of reasonable excuse. Mr Heer stated that the Respondent owns 17 properties, a number of which would have been flats. We are satisfied that the Respondent had a duty to ensure that its properties were properly licenced. The management agreement does not place that responsibility on EMS. We note the close relationship between the Respondent and EMS. There seems to have been a signal failure by EMS to ensure that the properties in its portfolio were properly licenced.

66. 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:

> "20. The following approach will ensure consistency with the authorities:
>
> a. 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."

67. These guidelines have recently been affirmed by the Deputy President in *LDC (Ferry Lane) v Garro*. 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%).

68. 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. The Applicants claim a RRO for the 12 month period to 16 November 2022. Over this period, they made 10.75 monthly payments of £2,300 (£24,725) and 1.25 monthly payments at £2,725 (£3,406): £28,131.

69. Mr Hardman suggested that any RRO should be in the range of 20 to 50% of the rent. Mr Kiely suggested 85%.

70. We are first required to consider the seriousness of the offence. This is a professional landlord which owns a number of properties. The offence was committed over a considerable period of time. We do not accept that the fact that EMS managed the Flat afforded any mitigation.

71. We have regard to the following:

(a) The conduct of the landlord. We note that the tenants complained of some disrepair. We are not satisfied that this was significant. There are a number of emails at R2.68-81. The Respondent has provided EMS's maintenance log at R3.6-9.

(b) The conduct of the tenants: There are no factors which would justify any reduction. Whilst there was some reduction from the deposit, this seems to have reflected no more than normal wear and tear.

(c) The financial circumstances of the landlord: Mr Heer stated that the Respondent owns some 17 properties. This is a significant portfolio.

(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.

72. We would have assessed the RRO in this case at 45% of the rent of £12,659.

73. 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
7 May 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.