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

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| **Case reference** | : | **LON/00AN/HMF/2020/0061** |
| **HMCTS code (paper, video, audio)** | | **V: CVPRemote** |
| **Property** | : | **6 Bellamy Close, London W14 9UT** |
| **Applicant** | : | **Karen Tamioe Dezotti** |
| **Representative** | : | **Mr Russ McPartland** |
| **Respondent** | : | **Margaret Florence Cabo** |
| **Representative** | : | **Mr Andrew Walker** |
| **Type of application** | : | **Application for a Rent Repayment Order by tenants Sections 40 – 44 Housing and Planning Act 2016** |
| **Tribunal member(s)** | : | **Judge Dutton**<br>**Ms S Coughlin MCIEH** |
| **Venue** | : | **Remote video hearing** |
| **Date of decision** | : | **18 March 2021** |

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**DECISION**

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## Covid-19 pandemic: description of hearing

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V CVP Remote. A face-to-face hearing was

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not held because it was not practicable and no-one requested the same, and all issues could be determined in a remote hearing. The documents that the Tribunal were referred to are in a bundle of some 430 pages, the contents of which have been noted.

## DECISION

**The tribunal orders that there be a Rent Repayment Order made against the respondent in the sum of £9,600 payable within 28 days.**

**In addition, the tribunal orders the respondent to refund to the applicant the application and hearing fees in the sum of £300.**

## BACKGROUND

1. On 1 May 2020 the applicant commenced proceedings against the respondent seeking to recover rent paid in the period 5 June 2018 to 4 July 2019, totalling £9,600. A claim was also made for interest and a refund of the fees paid to the tribunal.

2. Directions were first issued on 23 October 2020 and subsequently amended on 5 January 2021. The directions provided for a remote video hearing on 17 February 2021.

3. Prior to the hearing we were provided with two bundles of papers, one produced by the applicant and one by the respondent. In addition, the Applicant provided a bundle in response to the Respondents submissions We have considered these in reaching our decision.

4. There has been something of a history of interim applications by Ms Cabo. The first in time appear to be applications on 10 and 15 December 2020, which were rejected by the tribunal (Deputy Regional Judge Martyński). The Upper Tribunal refused permission to appeal on 4 January 2021. A further application was made on 7 February 2021, this time relating to the late admission of witness statements and the inclusion of additional documents. This was initially refused in total, but subsequently, on review, Ms Cabo was allowed to introduce some documents (bank statements)

## EVIDENCE

5. For the applicant it is said that the Property, 6 Bellamy Close, London W14 9UT (the Property), is a three-storey terraced house (including an attic conversion) with 6 bedrooms. It is alleged that the Property meets the standard test as an HMO as set out at section 254 of the Housing Act 2004 (the 2004 Act) and should have been licensed under the provisions of section 61 of the Act. However, it is alleged that the Property has at no time been licensed, as confirmed by correspondence from the London Borough of Hammersmith and

Fulham and that accordingly an offence under s72(1) of the 2004 Act has been committed.

6. In a witness statement dated 30 May 2019, prepared as much for the local authority as for this case, the applicant confirmed that she had lived at the Property since September 2016. She says that it is a 6 bedroomed house, with a kitchen and three bathrooms. She gives a history of her initial enquiries into letting the Property confirming that she had contacted Mr Francesco Grasso, who in due course is discovered to be the husband of the respondent. Shortly after receiving details as to the rental payments she was supplied with a copy of a 'tenancy agreement', which was headed 'Licence to Occupy a room as a Holiday Let', with Top Holdings Limited shown as the Licensor. The licence fee was £200 per week and with bills came to a total of £867 per calendar month. Contrary to the Licence Ms Dezotti considered she was renting the room at the Property as her main residence. She says she was not conversant with the law at this time.

7. She says that when she moved in there were either four or five people living at the Property. Although identities have changed, she says that there were always at least four other people living at the Property. At the time of the statement it would seem that there were 6 people living there. Although the initial months payment and a deposit were paid into the account of Daniel Joseph Cabo, the respondent's brother, thereafter we were told that from October 2016 to August 2018 she paid the rent in cash, at the request of Mr Grasso, who collected it from the property and gave a receipt, some copies of which she produced, including those for June, July and August 2018. Later Ms Dezotti said she wanted to pay by standing order and this was agreed by Top Holdings and from September 2018 to May 2019 this was the manner in which the rent was paid, into the account of Daniel Joseph Cabo.

8. The statement then proceeds to deal with issues of disrepair, including blocked drains and a faulty boiler, which we noted.

9. Towards the end of 2018 Ms Dezotti says she started to make enquiries into her status and legal rights. She contacted the local authority to report that the Property was, in her opinion, an unlicensed HMO. This resulted in her contacting Mr Armel Collard a Public Protection and Safety Officer in the Environmental Health Services for the London Borough of Hammersmith and Fulham. He confirmed that the Property did not have an HMO licence.

10. In what is referred to as an extended statement, Ms Dezotti explains the enquiries she made to support her claim against Ms Cabo rather than Top Holdings Limited. She discovered that Ms Cabo was the legal owner of the Property and, in her judgement, she was the ultimate beneficiary of the rent paid. In support of this through, it would seem the "good offices" of Facebook, she was able to find that

Ms Cabo had been married to Mr Grasso for some 22 years and had recently celebrated a wedding anniversary, that by researching the obituary of Ms Cabo's mother she discovered that Daniel Cabo was her brother. She referred to the Upper Tribunal case of Goldsbrough & Anor v CA Property Management Ltd, to which we will return.

11. Included in the applicant's bundle was a detailed statement from Mr Collard and witness statement from fellow occupiers, Mr Rimmer, Ms Marvulli and Mr Wandzilak. None attended the hearing. Mr Rimmer's statement indicated that he lived at the Property from January 2018 to February 2019 and that others had lived there longer. Ms Marvulli's statement showed that she had lived at the Property from September 2018 to March 2019 and that in that time 6 people lived there. Mr Wandzilak's statement disclosed that he had lived at the Property from May 2016 to June 2019 and had paid in cash.

12. Mr Collard's witness statement ran to some 27 pages. It gave a history of his time with the council and his initial dealings with Ms Dezotti. He said that he had checked a database and found that there had not been an application for an HMO licence in respect of the Property. What he did discover was that in 2014 a colleague, Stan Keable, had carried out investigations and he exhibited Mr Keable' findings. These showed that at the time the council had not instituted an additional Licensing Scheme and that the Property would only be an HMO if 3 storey or more in height, occupied by 5 or more people who were not members of the same family and that there were shared kitchens, toilets and bathrooms. It appears that a speculative visit was made, following a complaint and he was able to gain access where he saw 3 tenants were at home. He was told the landlord was Mr Grasso and that he called each week to collect rent. Mr Keable discovered that there were 6 bedrooms with 2 beds in each and no fire precautions.

13. The report goes on to recount the dealings Mr Keable had with Mr Grasso and Ms Cabo. The latter said that she lived at the Property and that it was not occupied by 5 or more people. Mr Grasso said the Property was occupied by him, or his family and the investigation went no further as in May 2014 Mr Keable had revisited the Property and found it to be empty. This seemed to follow a visit two tenants had made to Mr Keable when they told him they had been given 3 weeks to leave by Mr Grasso.

14. Mr Collard's statement goes on to recount the investigative steps he undertook in respect of the Property owner, the history of any application for a licence and company records. He was also given a link to an advertising web site showing rooms to rent at the Property in June 2019. A warrant was obtained to enter the premises, which he did for the first time on 24 September 2019, although access could not be gained. A repeat visit took place on 28 October 2019, when access was possible. The statement records in

detail what was seen, including the accommodation, the occupancy levels and the condition of the Property.

15. Notices were sent to Top Holdings and to Ms Cabo, as he details at paragraphs 78 – 84 of his statement. The response received from Top Holdings stated that Ms Cabo was the freeholder, and that Top Holdings was the leaseholder in receipt of rents. The response from Ms Cabo stated that she was the freeholder and Top Holdings was a lessee with no written agreement paying a peppercorn rent. Moreover, if there were any occupiers their rent was paid to Top Holdings. He records the deficiencies in the responses to these Notices from both Top Holdings and Ms Cabo. These include a failure to disclose the tenancy agreements for the 6 people he had determined were living at the Property, only 4 had been included, and that the electrical certificate was deficient. Subsequently Mr Borufka, a tenant at the property, contacted Mr Collard expressing his concerns about the letting arrangements and that he had reported Mr Grasso as a Rogue Landlord. This caused him to liaise with Donna Schopen, an officer in the Council's trading standards department, leading to Mr Borufka attending to make a statement. Mr Collard continued with enquiries and established that the Property continued to be let to 5 or 6 people, but no HMO licence had been applied for.

16. We received a bundle of papers prepared on behalf of the respondent Ms Cabo. This included a witness statement by Ms Cabo and her husband Mr Grasso, Bank and Companies House documents, including company accounts, the management agreement with Top Holdings Limited, Mr Grasso's company, agreements between Top Holdings and Mr Daniel Cabo and Ms Van Orden and documents relating to Ms Dezotti.

17. In Ms Cabo's statement she complains about the investigations conducted by Ms Dezotti into her private life. She asserts that her finances are separate from Mr Grasso's and that she has never acted as a director, shareholder, partner or shadow director in any of Mr Grasso's business enterprises. She denies also having ever received any financial enrichment from Top Holdings, Mr Grasso or his employees or agents.

18. It appears that in 2005 she acquired the Property intending to live there, which she did, she says for a significant time. We were told that there were uncertainties in the area centred around the redevelopment plans for West Kensington Estate, which started in 2012 and caused her to put on hold plans she had to sell the property. In addition, and it would seem at around the same time, her mother, who lived in the USA, became ill and she needed to travel there on frequent occasions. This caused her to review her plans and she decided not to sell and instead to find a property management company who could manage the Property for her. In

2016 she entered into a 'simple management agreement' with Top Holdings Limited.

19. This company is owned by her husband, but she said they had been living apart for more than 15 years and ran completely different financial arrangements. She said that she had negotiated the contract on an arms-length basis and was aware that Top Holdings specialised in short term lets. A copy of the agreement was exhibited. She told us that she paid Top Holdings a peppercorn. It appears from her statement that Top Holdings operates and lets a number of Airbnb properties and used Mr Cabo and Ms Van Orden as agents to manage these properties.

20. She says that until contacted by the Council she had little interest in the Property and received no profit. She explained her dealings with the Council when they asked for information and expanded on her dealings with Top Holdings, whilst making no comment as to whether that company was entitled to grant tenancies under the terms of the management agreement she had with them. She again denied receiving "any moiety of their letting revenues". If the company had breached the law, she denied that she was a landlord within the meaning of the Housing and Planning Act 2016 (the Act).

21. Her statement went on to say that Top Holdings was never granted exclusive possession of the Property. She goes on to address her understanding of the law and the definition of control and management to be found at s263 of the 2004 Act.

22. The management agreement between Ms Cabo and Top Holdings Limited was exhibited to Ms Cabo's statement. It is dated 16 January 2016. At clause 1) of the agreement it is recorded that Ms Cabo cedes all management rights to the Property, on terms, for a period of 5 years. It states that it is not intended to create a landlord/tenant relationship. Further it states that Ms Cabo is aware that Top Holdings does not manage properties in the usual course of its business but will perform the duties under the agreement on a strictly private basis. The agreement provides for Ms Cabo to pay one peppercorn per annum. The agreement at clause 6) sets out the obligations of Top Holdings to maintain the Property and at clause 7) the right for the company to allow holiday lettings and to retain any income derived. It is the responsibility of Ms Cabo to insure and pay Council Tax, with the company paying other outgoings. There are rights of inspection and to terminate after the first 12 months on 6 weeks notice.

23. On 20 January 2021 Mr Grasso made a statement in support of his wife's position. He confirms he is the director and sole shareholder of Top Holdings, a company specialising in short term lets. Letting in this manner, he says, avoids the need for an HMO licence. He admits being married to Ms Cabo and that their finances are separate. He confirmed the background to Top Holdings managing

the Property, although at the time the agreement was entered into he was in Italy. He confirmed the terms of the management agreement. The statement goes on to explain the "confusion" of the response from the company to the Council when enquiries were made under the 2004 Act in 2019. We noted all that was said. He explained the roles played by Mr Cabo and Ms Van Orden in receiving rent as agents.

24. The statement went on to expand on the rent arrangements with Ms Dezotti and asserts that it was her request to pay in cash for the reasons set out in the statement. The company accounts are intended to show that Top Holdings is a substantial entity. No admission is made as to whether the company breached s72(1) of the 2004 Act and asserts that Ms Cabo is not managing or controlling the Property as defined under s263 of the 2004 Act. He also denies that Ms Cabo received any money from the Property and asserts that she has no criminal liability.

**HEARING**

25. Mr McPartland made a lengthy opening reciting the history of Ms Dezotti's occupancy. He told us that in June 2017 the Council designated the whole of the borough as an additional licensing area, so that any HMO with 3 or more tenants would need to be licensed. He alleged that Ms Cabo was the liable person as she was in control of the property and was trying to divert liability to others. Her responses to the Council in 2019 showed she was the freeholder and had control of the Property. Her position with Top Holdings was artificial. She paid Council tax and was akin to the position found in the UT case of Goldsbrough & Anor v CA Property Management. If she was not the landlord, then no one would be, on the basis of the agreement showing Top Holdings as managing the Property. Top Holdings had been incorporated in 2015.

26. Mr Collard gave oral evidence at the hearing and relied on his witness statement as his evidence in chief. He was cross-examined on this statement by Mr Andrews acting for Ms Cabo. He was asked whether the 2014 investigation by Mr Keable led to any action being taken. He confirmed no formal action was taken and it pre-dated the financial penalty powers that are now vested in the local authority. Mr Collard said that from looking at the documents he suspected an offence had been committed but Mr Keable decided not to proceed due to lack of evidence, there being no tenants at the Property at the time of his last inspection.

27. Notices had been served on Ms Cabo and Mr Grasso seeking confirmation as to documentation and copies of the latest gas and electrical certificates. The response from Ms Cabo was that she lived at the Property and it was not occupied by five or more people and Mr Grasso gave a similar response. Mention was made that

Top Holdings had not been joined in the proceedings, but Mr Collard believed that Ms Cabo was the freeholder and therefore had the control of the Property.

28. Mention was made of the fact that summonses had been issued against Ms Cabo, Mr Grasso and Top Holdings. Apparently five offences were alleged including control of an HMO, which was unlicensed, failing to provide information, faulty safety measures, gas and electrical breaches and failure to give a full statement about tenants. No summons was produced to support this.

29. Asked why Ms Cabo was the party who was being pursued he confirmed that she was the freeholder entitled to the rent if let and that the Council believed that she was in fact receiving the rent. Having learnt that Ms Cabo was married to Mr Grasso, Mr Collard thought it was reasonable to assume that she would be receiving the rent.

30. Questions then moved on to the status of Top Holdings and whether or not he considered it was an 'insubstantial' company. The accounts had been produced and he was asked whether he had looked at those. He said he had. An overview of those accounts indicated that although there had been profits in the years 2017 to 2020, in the year 2018 there had been a loss and in the balance sheet as at 31st March 2020 it appears that the company was trading in a deficit position for 2020 and the year before.

31. In questioning from the Tribunal, Mr Collard confirmed that he had visited the Skelton Street address and Argyll Mansions but was not able to say who was at either. At Argyll Mansions there appeared to be a flat being let by Top Holdings, but it was not the registered office for the company. On the question of summonses, he said that these were only drafts although he thought there was a return date for 26th August 2020, which had been put off because of the pandemic.

32. Asked who could apply for a licence for the Property he said that if a managing agent applied, they would need a copy of an agreement in place for a substantial period of time and not one, that as in the case appeared to be determinable upon either party giving six weeks' notice.

33. Mr Collard was asked by the Tribunal why improvement notices had not been served. He indicated that if an HMO licence had been applied for and granted there would have been conditions, which would have included the improvements to the Property. Whilst he accepted action could have been taken under Part I of the 2004 Act this would require conversion works, access was not easy, there was also a lot of work to do with many other pressing cases. Asked about his views on the rent position he confirmed it was based on supposition and the documents in the case, but his experience led him to the conclusion that Ms Cabo was receiving remuneration.

34. Miss Dezotti then gave her evidence relying on the two statements that she had made, dated 30th May 2019 and 22 November 2020. She was cross-examined by Mr Walker who asked why when she moved in in 2016 she agreed to only a three-month let. Her response was that she did not take a short term let and understood that she would be able to stay at the Property for a period that she wished. In her view it was a rolling contract but she had little or no knowledge of the law at the time she signed it and has only now carried out some investigations.

35. She confirmed that it was Mr Grasso who had asked her to pay cash, which he collected from the property leaving a receipted invoice but she became uncomfortable with this method and persuaded Mr Grasso that she should pay by way of bank standing orders. This was agreed and she was notified to pay to Daniel Cabo's account. An allegation was made that Mr McPartland had stayed with Miss Dezotti at the Property and therefore had breached the tenancy agreement, but he denied that he had done so and said that he stayed with his parents when he was in the country.

36. Asked what evidence Miss Dezotti had to show that Ms Cabo was receiving rent she said that the cash in hand was in her view evidence that rent was reaching Ms Cabo and also the bank transfers.

37. Asked about Miss Van Orden, it transpired that she is a mentee for Ms Cabo at her company Luxe Designers. She was asked what impact the lack of licence had on her occupation. It was after she started researching that she realised that she might have to be paying council tax but had no details and was worried that she may have a future liability for council tax. This caused her to carry out further research and it was then that she discovered that a licence was required.

38. In answer to questions from the Tribunal she said that she did not know Miss Van Orden and she had researched her and found that she worked for Ms Cabo. She does not recall her ever living at the Property and nor had she met Daniel Cabo. In addition, she had had no contact with Emily Wilson who appears to be a director of Top Holdings.

39. Asked about the basis for her claim for interest, she said she had gone onto the Gov.uk website but could add nothing more than that.

40. Mr McPartland carried out some re-examination and confirmed that Miss Dezotti came to the UK in 2015 having spent much of her life in Brazil and before that in Italy. Her knowledge of the law was limited, and she said in answer to a question from him that the Property had deteriorated during her period of occupancy.

41. After the lunch adjournment we heard from Mr Grasso. Somewhat surprisingly it appeared that he was sharing the same room as Ms Cabo and because it was alleged that they were no longer a couple and Ms Cabo considered herself to be vulnerable to Covid, both he and Ms Cabo wore masks throughout the hearing. He did, however, confirm that he was who he said he was.

42. He denied that monies were given to Ms Cabo. He said he looked after several properties and that the use of the accommodation at the Property was on a random basis with a number of people from all over the United Kingdom. His specialisation was dealing with short term lets for consultants etc and that sometimes those people wanted to pay in cash and he accepted the position. He always left a receipt for the cash and used the cash to pay for services such as plumbers. In answer to questions from the Tribunal he confirmed that he thought he managed about 30 properties and that at least two others were dealt with on the same basis as the arrangement with Ms Cabo i.e. he was allowed to retain all rent monies received. They, however, were not people related to him but were of Arabic descent and the properties were used for short term Airbnb lettings.

43. Asked by Mr Andrews about the company accounts, he said that these were micro-accounts and that in his view it was a substantial entity.

44. A copy of Mr Daniel Cabo's bank statements in the bundle showed that he was collecting money for what appeared to be several properties as agent for, in some cases Top Holdings, but it appears maybe others. The only entry showing from Miss Van Orden was in relation to Mr Rimmer, but this was a payment out of the account. Although this evidence had been put forward to show that Mr Rimmer paid money into Miss Van Orden's bank account he conceded that this was probably the return of the deposit. He confirmed that any rent that was received was paid to Top Holdings only and not to Ms Cabo and that Mr Cabo and Miss Van Orden only received commission. He denied having received any summonses from the Council.

45. Cross-examined by Mr McPartland he was asked about the company's accounts and that in the March 2020 account there appeared to be no assets.

46. He confirmed that he thought he began renting the Property in about 2016 but that in 2014 it was not being rented. His view was that Mr Keable was mistaken. In 2014 a licence was not applied for as he did not consider it necessary. As to the Property, he was not able to say how many people lived there at any one time as people 'come and go' but he did not say it was empty. When asked about various adverts on the Spareroom site, which gave details of the number of current occupiers he did say that he did not want the Property to seem empty as people wanted to be "chummy chummy." Asked why rent was paid to agents and then accounted to Top Holdings he said

he left the agents to chase for the payments and to manage the properties. He thought the commission payable to the agents in respect of Bellamy Close was somewhere between 6 and 7%. Asked what Mr Cabo, for example, did to earn the commission, he said he marketed the Property, entered into correspondence, had meetings with tenants and that Miss Van Orden did the same.

47. Asked whether at various times he could be marketing six rooms he said that that could be the case and asked which of the two agents marketed those rooms, he said it would depend on how busy they were.

48. It was put to him that the only advertisements that Miss Dezotti had found were in the names of Mr Grasso not mentioning Mr Cabo or Miss Van Orden. His response was that each agent had their own accounts and there were a number of property portals through which advertising could be undertaken.

49. As to Miss Van Orden, he confirmed that her passion was fashion and he had introduced her to Ms Cabo who was her mentor. Apparently, Miss Van Orden is at university in Glasgow and at one stage he had arranged for Miss Van Orden to live at the Property, although he did not wish to do so but this was at the wish of Ms Cabo. Mr Grasso said that Miss Van Orden had been at the Property from June of 2018 for about six weeks.

50. He confirmed in re-examination by Mr Andrews that his normal business was short term holiday lets.

51. Asked by the Tribunal how often there would be more than five people at the Property, he said that there would be usually three to six in the Property but perhaps five or seven. He was asked why in an application form and licence to occupy sent to Miss Dezotti on 13th September 2016 he said as follows: *"The licence may sound like a "concentration camp" but please don't get spooked by those draconian rules. Ultimately, I don't live in the flat and I certainly do not want to interfere with your lives. I cater to young professionals like yourself who are mainly focussed on their careers and therefore need a peaceful and tranquil home where they can retire after a long day at work, a home where there is structured environment in place to avoid any potential disturbance.*

*I still want this flat to be your home where you must be comfortable and feel free to do whatever you want, still with the full respect towards your fellow tenants who will have the same respect towards you."*

52. He was questioned as to use of the word 'home' but did not in truth make a response of any moment. It was also put to him that the agreement with Miss Van Orden and Mr Cabo was not simply a

marketing agreement but also included management and appeared to indicate that a list of properties would be provided to the agents for them to deal with. In this case he accepted there appeared to be three people all handling the lettings in the Property. He did not consider that they were, in fact, allocated any particular rooms. When asked who would be responsible for disrepair, he thought realistically it would be Mr Cabo but in this case Miss Dezotti had contacted him. For his part he could not remember which rooms Mr Cabo had been dealing with and there was no designation. If there was an emergency certainly Miss Dezotti called him. He was unable to provide a cogent explanation of how the Property was to be managed by 3 different people.

53. In respect of Top Holdings, he confirmed there were no employees and no office. Apparently, Emily Wilson was not directly employed but he had asked her to deal with the response to the Council, on which she referred to herself as director of the company, in respect of the notices that they had served.

54. On the question of the terms of the letting, he indicated that in his view nobody wanted a six-month AST as they did not want the commitment. They could stay for as long as they liked. Asked about whether the Property should be licensed, he appeared to accept it was a borderline case, but he did not want that burden or the hassle and therefore did not wish to consider the Property was one for which a licence was necessary. In his view the management agreement obviated the necessity for an HMO licence.

55. We then heard from Ms Cabo, as we indicated above wearing a facemask. We had some general details of her employment history. She confirmed she had not benefitted from the rent either from the agents or Top Holdings. There was, she said, no structure in place that Mr Cabo or Miss Van Orden received money that would have been paid to her. No cash payments were paid to her.

56. In respect of her relationship with Mr Grasso, she said they married in 1998 but lived apart. There had been no divorce, but their finances had always been kept separate. She confirmed that she had lived in the United States for some time nursing her mother who had died in 2017. She spoke of her career and her enjoyment at designing handbags. It appears that she is now on a freelance contract in respect of the banking fraternity, and she provided evidence of a significant income from this.

57. She was questioned about the forms that had been sent to her by the Council. She said that she had not really understood those and that as Top Holdings had been managing, she had left them to deal with them. Also, that she had acted under the advice of Mr Andrew Walker her representative when completing the forms in the way she had. She confirmed she had never met Miss Dezotti but she felt that she was now hassling her and that her behaviour was very low.

58. Cross-examined by Mr McPartland she was asked why Mr Cabo had been given the surname Beattie when it was her brother although she had seemed to deny this as one stage. Her response was unclear.

59. She confirmed that she did pay the council tax for the Property as well as the mortgage, which was £1,761.78 per month and the insurance.

60. Asked about her occupancy of the Property, she said that she had lived in it from 2005 to 2013 and then for a while in 2015. She confirmed that she had bought with a mortgage but has re-mortgaged since then and that the arrangement with Top Holdings was not a business transaction, although she noted that the agreement had expired and had not been renewed. She was asked why she had not sought the assistance of a letting agent to deal with the Property whilst she was away. Her response was that she wanted a short-term solution to enable short-term lets and for her to be able to move in if she wished.

61. Asked about the circumstances surrounding the Council's involvement in 2014 she said she had been contacted about the state of the Property and had carried out some renovation work. She said that in 2014 her niece was living there with others sharing and she had moved back in November 2014 as she had changed jobs. She stayed there until mid-2015. At that point or shortly thereafter she set up the management agreement with Top Holdings. Asked why in 2019, having been told by the Council that the Property was an unlicensed HMO, she had not applied for same, she said that Top Holdings was handling that issue and she did not have time for it, nor did she manage the Property.

62. 61. In answer to questions put by the Tribunal about the payment of the council tax, she said she did this through her Amex card and thought it was about £115 per month. Asked why she had not used an agency she said she would have to sign on and pay a fee, which would not be refundable, and she was still concerned about the state of West Kensington in 2012 as the redevelopment she thought was continuing. Her idea was to have Top Holdings look after the Property so that if she wanted to live there in the future she could come back. She indicated that probably she would wish to sell.

63. Mr Walker made a closing statement. Mention was made of reference by Mr McPartland in his opening to a First Tier Tribunal case in respect of 50 Crabtree Lane in London under reference LON/00AN/HMF/2020/0051 where it is said the decision of the Tribunal matched the circumstances of this case. Mr Walker's concern, however, was that this was produced at the last minute and was an attempt to highjack the respondent.

64. He took us to section 263 of the 2004 Act concerning control and management. He said that Ms Cabo did not receive rent from the Property and accordingly she did not fall into either of those categories. The management agreement he says was not a tenancy, no payments were made to Ms Cabo and this stopped it from being an HMO. In those circumstances the unreasonable doubt threshold had not been reached.

65. Mr McPartland responded saying that the evidence of Mr Collard showed an offence had been committed. Ms Cabo was a superior landlord as envisaged in the Goldsbrough v CA Investment case. A managing agent without a lease cannot be a landlord. The rent was paid in cash to Mr Cabo and Miss Van Orden and that this was in truth a cynical attempt at trying to avoid licensing. He reminded us that she had been made aware in 2014 of the licensing obligations and again in 2019 but had done nothing to mitigate her position by applying for a licence in the intervening period.

**FINDINGS**

66. In relation to the law applicable to this matter we set out below the relevant sections of the 2004 Act and the Housing and Planning Act 2016.

67. The first question we need to concern ourselves with is whether an offence under section 72(1) of the 2004 Act has been committed. To do so we must consider whether the Property was a house in multiple occupation. Section 254(1) of the 2004 Act sets out the definitions and it is a question of whether or not it met the conditions in sub-section (2), the standard test. The standard test provides that the building or part of the building will be an HMO if it consists of one or more units of living accommodation which are not self-contained, that the living accommodation is occupied by people who do not form a single household, that the living accommodation is occupied by those people as their only or main residence, that their occupation of the accommodation is the only use, that rents are paid and finally that two or more households who occupy the living accommodation share one or more of the amenities.

68. It is our finding that this Property does constitute a mandatory HMO. It is three storey property, there is clear evidence before us that five and/or six people occupied the premises and did so during the occupancy by Miss Dezotti. Evidence to support this can be found in the witness statements that we have referred to from Mr Rimmer, Miss Marzulli and Mr Wandzilak as well as of course Miss Dezotti. They did not attend the hearing, but their statements were not challenged. It seems clear, therefore, that there were long term tenants at this Property from 2016 until 2019 and the evidence adduced, and not in truth contradicted by Mr Grasso, is that on most occasions there were five or six people living at the Property,

as their main or only residence, and at all times at least three. This would also mean that the Property was one to which the additional licensing scheme of the local authority would apply under s61 of the 2004 Act.

69. In support of the fact that we do not consider that the agreement with the tenants were intended to be short term lets, but was something of a sham, is the use of the wording in Mr Grasso's letter to Miss Dezotti referring to her use as a 'home'. Also, his concern that he wanted to make sure the Property appeared to be let so that people living there could be "chummy chummy" with each other. This does not suggest a short-term holiday rent situation. Accordingly, on the criminal balance of beyond reasonable doubt we are of the view that the Property was an HMO and that a licence was required and that the failure to do so breached section 72(1) of the 2004 Act.

70. The question we then need to consider is who has the control and or is managing the Property. The definition of this is set out section 263 of the Act, which is stated in full below. In this case, it is clear, that Ms Cabo is the freeholder of the Property. Top Holdings appear to be entrusted with maintaining the Property but with no property interest. Indeed, their rights can be terminated upon six weeks' notice. Ms. Cabo's evidence was that she is separated from Mr Grasso, but that does not appear to be borne out by the on-line information Miss Dezotti collected. Further we find it is unrealistic to accept that Ms Cabo would pay the mortgage, the council tax and the insurance, at a total of around £2,000 per month and allow her allegedly estranged husband to receive and retain the totality of the rent, which could be in the region of £60,000 per annum, without her having some benefit.

71. The person in receipt of the rack rent is alleged to be Top Holdings Ltd albeit some rents are paid into the bank accounts of Mr Cabo and Miss Van Orden. This appears to mean that Ms Cabo does not fall under the definition of 'person having control' in s.263 (1). However, following the Upper Tribunal decision in Rakusen v Jepsen and others [2020] UKUT 0298 (LC), it would seem, that there can be more than one party entitled to receive a rack rent. Such a person is, in our finding Ms Cabo and accordingly she is a person in control.

72. We do not find this arrangement between Ms Cabo and Mr Grasso to be credible and we are further concerned that Mr Grasso claims to be managing other properties under similar arrangements, which undermines the intention of the Act.

*73.* It seems to us however, that even if this arrangement is true Ms Cabo will still fall within the definition of 'person managing the property' under section 263(3)(b) which says as follows; *"In this Act person managing means in relation to premises the person who, being an owner or lessee of the premises – (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 and other payments are received through another person as agent or trustee that other person."*

74. We therefore consider that Ms Cabo falls within the definition in s.72 (1) and is the person committing the offence.

75. We must then consider whether Ms Cabo is the landlord in relation to the Property under thew 2016 Act. Top Holdings have a contract for management but have no legal interest in the Property. The company cannot therefore be a landlord. They are acting on behalf of Ms Cabo and she must be the landlord of the property.

76. Although not specifically raised by the Respondent we have considered whether Ms Cabo has a reasonable excuse for the offence. We had evidence from the Council that this Property had been the cause of investigation in 2014, and that Ms Cabo was aware of this and the requirement to license, yet nothing was done and by 2016 it was being let for alleged short-term purposes, done we find, with the intention of seeking to avoid the responsibilities under the 2004 Act and the 2016 Act. It was accepted by Mr Grasso that the Property was being occupied by usually 5 or 6 people and it must have been clear to him that they were using the Property as their only or main residence. Ms Cabo stated during the hearing that she did not want to know about property law, however we do not consider that this constitutes a reasonable excuse given the correspondence with the council in 2014.

77. One then has to look at the rent repayment orders under the 2016 Act and section 41 thereof which says:
*"(1) A tenant or local 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 rent repayment order only (a) if 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."*
The application was made in May of 2020 and the last date of Miss Dezotti's tenancy is 7$^{th}$ June 2019. On that basis, therefore, the provisions of section 41(2)(b) are covered.

78. We then turn to section 44, the amount of the order, and at section 42(3) it says this: *"The amount 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 the rent under the tenancy during that period."* The applicant has applied for an order covering the period of 12 months ending on 4 June 2019, a sum of £9,600.

Following the decision of the Upper Tribunal in Vadamalayan v Stewart this sum represents the starting point of our considerations. The Respondents did not put forward or provide any evidence of utility payments to be subtracted from this amount.

79. Nothing in the 2016 Act says that the landlord has to receive the rent. The applicant has chosen not to pursue Top Holdings as it is considered that the company is insubstantial, and any award would go unpaid. Certainly, the accounts, which are not full accounts, show that the company has been trading in a deficit position for the last 2 years, at least.

80. Following the Rakusen case there is no additional requirement for the landlord to be the immediate landlord of the tenant in whose name the order is sought. The only jurisdictional filter is the landlord in question must have committed one of the relevant offences and before an order may be made the FTT this must be satisfied on the criminal standard of proof that is the case. We are satisfied that is the case.

81. No real argument was put to us that conduct of either party should be taken into account. Although Ms Dezotti complained that there had been issues with drainage and the boiler it did not prevent her living at the Property for a substantial period of time. The conduct of the Respondent did not provide any grounds for reducing the repayment amount. Further there was no argument on the question of the financial circumstances of the landlord as she insisted throughout the hearing that her financial circumstances were very good such that she did not need an income from the property. Nor did we consider that there were any other factors which would indicate a reduction of the amount.

82. In those circumstances, we determine there should be a rent repayment made to Miss Dezotti. In her schedule she refers to the sum as being £9,639 but her application is for £9,600, which is the award we make. We award also the refund of the Tribunal fees but not interest as there is no provision in the Act for an interest payment to be added to the rent repayment order. The payments due should be made within 28 days.

Andrew Dutton

Judge: A A Dutton

Date: 18 March 2021

**ANNEX – 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 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 to 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 (ie 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.

## Extract from the 2016 Act

40 Introduction and key definitions

(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.

(3)A reference to "an offence to which this Chapter applies" is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

| | ***Act*** | ***section*** | ***general description of offence*** |
|---|---|---|---|
| 1 | Criminal Law Act 1977 | section 6(1) | violence for securing entry |
| 2 | Protection from Eviction Act 1977 | section 1(2), (3) or (3A) | eviction or harassment of occupiers |
| 3 | Housing Act 2004 | section 30(1) | failure to comply with improvement notice |
| 4 | | section 32(1) | failure to comply with prohibition order etc |
| 5 | | section 72(1) | control or management of unlicensed HMO |
| 6 | | section 95(1) | control or management of unlicensed house |
| 7 | This Act | section 21 | breach of banning order |

(4)For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

44 Amount of order: tenants

(1)Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2)The amount must relate to rent paid during the period mentioned in the table.

| *If the order is made on the ground that the landlord has committed* | *the amount must relate to rent paid by the tenant in respect of* |
|---|---|
| an offence mentioned in row 1 or 2 of the table in section 40(3) | the period of 12 months ending with the date of the offence |
| an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3) | a period, not exceeding 12 months, during which the landlord was committing the offence |

(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.

(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.

## Housing Act 2004

### 72 Offences in relation to licensing of HMOs

(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.

(2)A person commits an offence if—

(a)he is a person having control of or managing an HMO which is licensed under this Part,

(b)he knowingly permits another person to occupy the house, and

(c)the other person’s occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3)A person commits an offence if—

(a)he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b)he fails to comply with any condition of the licence.