FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/HMF/2020/0254**
HMCTS	**:**	**V: CVPREMOTE**
Property	**:**	**95 Southampton Way Camberwell London SE5 7SX**
Applicants	**:**	**Charles Maddocks (1)** **Henry Rose (2)** **Jack Dicks (3)** **Sonam Tobgyal (4)**
Representative	**:**	**In person**
Respondent	**:**	**Frances Property Management Limited**
Representative	**:**	**Mrs E Hastings in writing.**
Type of Application	**:**	**Application for a Rent Repayment Order by Tenant**
Tribunal Member	**:**	**Anthony Harris LLM FRICS FCIArb** **Rachael Kershaw**
Date and Venue of Hearing	**:**	**7 June 2021 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**7 June 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing. The form of remote hearing was V: CVPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Applicant has filed a Bundle of Documents which totals 551 pages and to which page

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references are made in this decision. Written submissions were made on behalf of the Respondent with a bundle of 31 pages.

Decision of the Tribunal

1. The Tribunal makes a rent repayment order against the Respondent in in favour of each applicant for the amounts set out in the table below

Tenant	Rent pcm	Rent paid
Mr Maddocks	£ 705.00	£ 8,460.00
Mr Rose	£ 670.00	£ 8,040.00
Mr Dicks	£ 670.00	£ 8,040.00
Mr Tobgyal	£ 705.00	£ 8,460.00
		£33,000.00

This is to be paid by 9 July 2021.

2. The Tribunal determines that the Respondent shall also pay the Applicants £300 by July 2021 in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

3. By an application, dated 26 November 2020, the 1st Applicant sought a Rent Repayment Order ("RRO") against the Respondents pursuant to Part I of the Housing and Planning Act 2016 ("the 2016 Act"). The Respondent is the freeholder of 95 Southampton Way SE5 7SX ("the House").

4. On 4 February 2021, the Tribunal gave Directions. Those Directions were amended on 13 April 2021 and Applicants 2,3 and 4 were added. Pursuant to the Directions, the Applicants filed a Bundle of Documents. By 22 April 2021, the Respondents were directed to file a Bundle of Documents upon which they relied in opposing the application. The Respondent has filed a bundle and written submissions.

The Hearing

5. The application to the tribunal indicated the Applicants would be content with a paper determination. The Respondents agreed with that approach. On 17 February 2021 the Upper Tribunal in Raza v Bradford Metropolitan District Council said

The FTT is responsible for the fairness of its procedure. Litigants may well consent to a procedure without understanding the implications of doing so, and it may be unfair to hold them to that agreement. In

Enterprise Home Developments LLP v Adam *the Deputy President referred to "the perils of determining disputed issues of fact on the basis of written material provided by unrepresented parties, without either the parties or the tribunal having the opportunity to supplement that material by asking and answering questions at an oral hearing." As that decision points out, even where the parties have indicated that a paper determination is acceptable it is nevertheless for the FTT to consider whether that is an appropriate procedure.*

The difficulty with the procedure adopted by the FTT in these three cases was that these landlords were at risk of being found to have committed a criminal offence, there were factual issues in dispute, and the FTT made findings of fact on the basis of evidence that had not been tested in cross-examination. That made the procedure unreliable. It was also unfair because it resulted in a finding that a criminal offence had been committed without giving the landlord the opportunity to cross-examine the witnesses who gave evidence against him, or to respond, under cross-examination, to the case against them. There might be cases where written evidence about disputed facts was sufficiently clear and consistent for a tribunal to make findings of fact on the balance of probabilities. But it is difficult to imagine cases where the FTT could be so sure of contested facts, based on written evidence only, that it could find them proved to the criminal standard, beyond reasonable doubt. And even if the FTT could be sure, it would nevertheless be unfair, for the reasons explained, in a case where the party concerned was at risk of being found to have committed a criminal offence.

6. Decisions of the Upper Tribunal are binding on this tribunal and the case was therefore set down for a hearing.

7. The 4 Applicants appeared at the hearing and were questioned by the tribunal on the contents of the bundle and asked to confirm that their witness statements were true. Additionally, the Applicants were asked to confirm that they had lived in the house as their sole or main residence for the whole of the period claimed. They all did so and confirmed that they had not moved out during any period of lockdown due to the Covid pandemic.

8. The Respondent wrote to the tribunal stating they would not be attending and wanted the case dealt with on written submissions. The tribunal took into account those submissions.

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

9. 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."

10. Section 40(3) lists seven offences "committed by a landlord in relation to housing in England let by that landlord". These include the offence under section 72(1)) of the Housing Act 2004 ("the 2004 Act") of control or management of an unlicenced HMO.

11. 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.

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

"(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted)."

13. 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.

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

> "(4) In determining the amount the tribunal must, in particular, take into account—
>
> (a) the conduct of the landlord and the tenant,
>
> (b) the financial circumstances of the landlord, and
>
> (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies."

15. Section 56 is the definition section. This provides that "tenancy" includes a licence.

The Housing Act 2004 ("the 2004 Act")

16. Part 2 of the 2004 Act relates to the designation of areas subject to additional licensing of houses in multiple occupation (HMO). By section 56, a local housing authority ("LHA") may designate the area of their district or an area of the district is subject to Additional Licensing in relation to the designated HMOs specified.

17. Section 72 specifies a number of offences in relation to the licencing of houses. The material parts provide (emphasis added):

> "(1) A person commits an offence if he is a person having control of or managing 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) or
> (b) an application for a licence had been duly made in respect of the house under section 63

18. It is to be noted that this section does not use the word "landlord". Section 263 defines the concepts of a person having "control" and/or "managing" premises. These definitions are wide enough to include a number of different people in respect of a property. Where there is a chain of landlords, more than one may be liable. It may also extend to a managing agent.

19. Section 263 provides (emphasis added):

> "(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
>
> (2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.
>
> (3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–
>
> > (a) receives (whether directly or through an agent or trustee) rents or other payments from–
> >
> > > (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
> >
> > (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
>
> and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

20. Section 263 was recently considered by Martin Rodger QC, the Deputy President, in *Rakusen v Jepson and Others [2020] UKUT 298* (LC) ("R*akusen*"). The situation is complex given the range of people, apart from the immediate landlord, who may be deemed to be persons "having control" and/or "managing" premises.

21. The Upper Tribunal ("UT") noted that Section 263(1) is divided into two limbs: if a house is let at a rack rent the person having control is the person who receives the rack-rent; if the house is not let at a rack rent (for example because the only letting is at a ground rent) the person having control is the person who would receive the rack-rent if the premises were subject to a letting at a rack rent. The formula used in the definition has a considerable history going back at least to 1847 (as Lord Bridge of Harwich explained in *Pollway Nominees Ltd v Croydon LBC* [1987] 1 AC 79). The purpose of the definition is to identify the person (or group of persons who collectively have the relevant interest) who may be made subject to a statutory obligation to undertake work or make a contribution to the cost of public works.

22. In *London Corporation v Cusack-Smith* [1955] AC 337, Lord Reid considered a chain of leases and subleases where several were at a rack rent and was of the opinion that more than one person could be in receipt of a rack rent at one time. Where a house is let under a single tenancy at its full value, who then sublets the house either as a whole or as individual rooms to different sub-tenants, again at full value, both the superior landlord and the intermediate landlord will be in receipt of the rack rent of the premises and will satisfy the definition in section 263(1) of a person having control.

23. The status of "person managing" is more restrictive. The key qualification is the receipt of rent from the persons who are in occupation (whether directly or through an agent or trustee). Where a superior landlord lets a house to an intermediate landlord who then sublets to tenants or licensees in occupation, ordinarily only the intermediate landlord receives rent from those tenants or licensees. The superior landlord will receive rent from the intermediate landlord, who is not an agent or trustee for the superior landlord, so the superior landlord will not be a "person managing" for the purpose of section 263(3).

24. In *Rakusen*, the UT noted (at [59]) that the policy of the London Borough of Camden is that licences will not be granted to landlords holding less than a five year term (that being the usual duration of a licence) and that Camden considers the most appropriate person to be a licence holder in such situations to be the superior landlord. Similarly, when deciding on whom to serve an improvement notice, a LHA is likely to consider the practicality of the recipient being able to carry out the necessary remedial works. If the intermediate landlord has no significant repairing obligations and no right to carry out major repairs to the building, the LHA may well consider that the appropriate recipient of an improvement notice is the superior landlord.

25. In *Rakusen*, the Deputy President considered the purpose of the 2016 Act before summarising his conclusion:

> "64. Finally, I bear in mind that the policy of the whole of Part 2 of the 2016 Act is clearly to deter the commission of housing offences and to discourage the activities of "rogue landlords" in the residential sector by the imposition of stringent penalties. Despite its irregular status, an unlicensed HMO may be a perfectly satisfactory place to live, and the main object of the provisions is deterrence rather than compensation. The scope of the additional jurisdictions conferred on the FTT is defined by reference to the commission of specific offences, with the only qualification identified being that the person committing the offence must be a landlord. I can think of no policy reason why the objective of deterring such offences should extend only to immediate landlords and not to superior landlords. If such a limitation had been intended it could have been made clear, as it was in section 73(1), 2004 Act. The facts of this case are not unusual and the

phenomenon of intermediate landlords taking relatively short leases of houses with few repairing responsibilities with a view to subletting them to occupational tenants is sufficiently commonplace to have acquired the recognised label "rent-to-rent". The effectiveness of rent repayment orders would be considerably reduced if the "rogue landlords" whom the orders are intended to deter could protect themselves against the risk of rent repayment by letting to an intermediate while themselves retaining responsibility for licencing and for the condition of the accommodation.

65. The conclusion I have reached, therefore, is that the FTT does have jurisdiction to make a rent repayment order against any landlord who has committed an offence to which Chapter 4 applies, including a superior landlord. There is no additional requirement that the landlord be the immediate landlord of the tenant in whose favour the order is sought. That appears to me to be the natural meaning of the statute and is consistent with its legislative purpose. The only jurisdictional filter is that the landlord in question must have committed one of the relevant offences, and before an order may be made the FTT must be satisfied to the criminal standard of proof that that is the case. Although a narrower interpretation is possible it would involve reading the language as prescribing an additional condition which is not clearly stated, and which would detract from the simplicity and effectiveness of the statutory regime."

The Evidence

26. On 15 October 2015, the London Borough of Southwark introduced an Additional Licencing Scheme designating the whole of the Borough as an area for Additional Licensing of Houses and Flats in Multiple Occupation We are satisfied that the House required a licence under the Scheme as an HMO.

27. The bundle included confirmation from Southwark Council that the house did not have a licence and further the Respondent admitted that the house did not have a licence. The tribunal accepts the evidence.

28. The four Applicants signed an Assured Shorthold Tenancy Agreement for a term of 12months from 14 September 2019 until 13 September 2020. The landlord was named as Frances Property Management Ltd. The rent was to be £2,750.00 per month with a deposit of £3173.00. The tenancy ran for an additional week at the insistence of the Landlord.

29. This evidence was not disputed.

30. The Respondent stated it was not aware of the need for a licence until it received the application for a Rent Repayment Order. The additional licensing scheme in force at the time of the tenancy has come to an end

and it is not possible to apply for one. The calculations made by the Applicants of the rent payments are agreed to be correct.

31. The Respondent states it was not aware of the need for an HMO licence although that is not an excuse. Mandatory licensing is well known, but Additional licensing is for an intermittent period particular to an individual council. The Respondent argues that the local authority should have a duty of care when applying such a scheme to ensure all property owners are notified. This could be done using Council tax records. The tribunal does not accept that any such duty exists. It is for Landlords to know the law.

32. The evidence of the Applicants regarding the condition of the property is disputed, there are satisfactory means of escape, smoke detectors and fire extinguishers. It is accepted the requirements of an HMO licence would have required the fire alarms to be interlinked. The property has a gas safety certificate.

33. The level of a Rent Repayment Order seems disproportionate and stacked against landlords. If the property were as bad as suggested it is surprising the tenants took on the tenancy at all.

34. The tribunal is satisfied, beyond reasonable doubt, that the House was an HMO, it was required to be licensed and was not licensed.

The period of the offence

35. Under section 41(2)(a) of the Housing and Planning Act 2016 a tenant may apply for a rent repayment order 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 was made.

36. The tribunal is satisfied that the offence was committed during the period of the tenant's occupation commencing on 14 September 2019 which was within the period of 12 months ending on the day the application was made which was 20 November 2020.

The relevant landlord

37. The definition of a landlord is discussed above under section 263 of the Housing Act and amplified by the decision of the Upper Tribunal in *Rakusen v Jepson and Others [2020] UKUT 298* (LC). The tribunal is satisfied beyond reasonable doubt that the Respondent is the freeholder of the property and is the landlord for the purposes of section 263.

Repayment Order

38. The tribunal is satisfied that the conditions for the making of a Rent Repayment Order have been made out. Under section 44 of the 2016 Act the amount the landlord may be required to repay must not exceed the rent paid in that period. The tribunal must also take into account the conduct of the landlord and tenant and the financial circumstances of the landlord and whether the landlord has been convicted of an offence.

39. The tribunal has no evidence of a conviction.

40. Although the bundles contained considerable evidence relating to the condition of the property it is not necessary for this tribunal to deal with those matters.

41. The amount of rent paid in the relevant period is £33,000 made up as follows.

Tenant	Rent pcm	Rent paid
Mr Maddocks	£ 705.00	£ 8,460.00
Mr Rose	£ 670.00	£ 8,040.00
Mr Dicks	£ 670.00	£ 8,040.00
Mr Tobgyal	£ 705.00	£ 8,460.00
		£33,000.00

42. No evidence has been submitted on behalf of the Respondent relating to financial circumstances.

43. The tribunal is satisfied there is no conduct on the part of the landlord or the financial circumstances of the Respondent to justify a reduction in the level of rent to be repaid.

44. The tribunal finds no evidence of any conduct on behalf of the Applicants which is relevant to this assessment.

Our Determination

45. The Tribunal is satisfied beyond reasonable doubt that the Respondents have committed an offence under section 72(1) of the 2004 Act of control of an unlicenced HMO. The House was a property that required a licence under Southwarks Additional Licencing Scheme. At no time during the Applicant's period of occupation, was it so licenced.

46. We are further satisfied that the respondents were "persons having control" of the House as they received the rack-rent of the premises the Applicants.

47. The tribunal makes a rent repayment order in favour of the Applicants in the total sum of £33,000.00 as set out below by 9 July 2021.

Tenant	Rent pcm	Rent paid
Mr Maddocks	£ 705.00	£ 8,460.00
Mr Rose	£ 670.00	£ 8,040.00
Mr Dicks	£ 670.00	£ 8,040.00
Mr Tobgyal	£ 705.00	£ 8,460.00
		£33,000.00

48. We are also satisfied that the Respondents should refund to the Applicant the tribunal fees of £300 which he has paid in connection with this application by 9 July 2021.

A Harris LLM FRICS FCIArb
Valuer Chair
7 June 2021

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

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

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e., give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.