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Case No: LC-2023-799

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: LON/OOBJ/HMF/2021/0085

Royal Courts of Justice,
Strand, London WC2A

29 August 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – rent to rent scheme – head tenant granting sub-tenancies for longer than the remaining term of head tenancy – whether relationship of landlord and tenant created between head landlord and subtenants – whether head landlord the person having control of unlicensed HMO – s.263(1), Housing Act 2004 – s.40, Housing and Planning Act 2016 – appeal allowed

BETWEEN:

AMLENDU KUMAR

Appellant

-and-

NIKOLA KOLEV (1)
LIAM NIVEN (2)
HOLLY MARSHALL (3)

Respondents

The Pyekle,
Holdernesses Road,
London SW17

Martin Rodger KC,
Deputy Chamber President

16 July 2024

Tom Morris, instructed by Anthony Gold Solicitors LLP, for the appellant
Cameron Neilson, of Justice for Tenants, for the respondents

The following cases are referred to in this decision:

Global Guardians Management Ltd & Ors v LB Hounslow & Ors [2022] UKUT 259 (LC)

Grosvenor Estates v Cochran [1999] 2 EGLR 83

Hastings BC v Braear Developments Ltd [2015] UKUT 145 (LC)

Metcalfe v Boyce [1927] 1 KB 758

Milmo v Carreras [1946] 1 KB 306

Pollway Nominees v Croydon LBC [1987] AC 79

Urban Lettings (London) Ltd v Haringey LBC [2015] UKUT 104

Introduction

1. This is an appeal brought with the permission of this Tribunal against a rent repayment order under section 40, Housing and Planning Act 2016 (the 2016 Act) made by the First-tier Tribunal, Property Chamber (the FTT) against the appellant, Mr Kumar in favour of the respondents, Mr Kolev, Mr Niven and Ms Marshall. The order required Mr Kumar to pay the respondents sums totalling £7,549.25 in respect of their occupation of an unlicensed house in multiple occupation (HMO).

2. Mr Kumar owned the freehold of the HMO but as far as he (and the respondents) were concerned he was not their direct landlord. He had let the whole house to a company called Like Minded Living Ltd (LML) in a "rent to rent" arrangement and LML granted the respondents their sub-tenancies of individual rooms in the HMO.

3. In *Rakusen v Jepsen* [2023] UKSC 9 the Supreme Court held that a rent repayment order may only be made against the tenant's immediate landlord who received the rent which is to be repaid. It might therefore have been thought that the FTT would have had no jurisdiction to make an order against Mr Kumar. But the peculiarity of this case is that the individual sub-tenancies granted by LML to the respondents were each expressed to be for a term which was longer than the remaining term of LML's own lease from Mr Kumar.

4. There is a long established principle of English property law, exemplified by the decision of the Court of Appeal in *Milmo v Carreras* [1946] 1 KB 306, that where a tenant grants a sub-tenancy for a term equal to or longer than the remaining term of their own tenancy, the purported grant takes effect as an assignment of the tenancy by operation of law; no relationship of landlord and tenant is thereby created between the tenant and the sub-tenant and the sub-tenant instead becomes the direct tenant of the head landlord, whether the parties know it, or want it, or understand it. The same principle applies where the tenant grants a sub-tenancy of part of the premises demised to them for a term equal to or longer than their own term; the effect is the same as an assignment of the head tenancy in relation to that part of the premises (*Grosvenor Estates v Cochran* [1999] 2 EGLR 83).

5. In this case the FTT considered that, by the operation of this rule, a relationship of landlord and tenant had come into existence between Mr Kumar and the respondents and that that relationship was sufficient to give it jurisdiction to make a rent repayment order against him. The main issue in this appeal is whether the FTT was right.

6. At the hearing Mr Kumar was represented by Tom Morris, and Mr Kolev, Mr Niven and Ms Marshall were all represented by Cameron Neilson of the advocacy organisation Justice for Tenants. I am grateful to them both for their interesting submissions.

The facts

7. Mr Kumar is the registered freehold proprietor of "The Pyekle", a two-storey house with three bedrooms and shared kitchen and bathroom facilities in Holderness Road, in Balham (the House).

8. On 4 April 2018 Mr Kumar let the whole House by a written agreement to LML for a term from 31 March 2018 to 30 September 2019 (the Headlease). The Headlease reserved a monthly rent of £2,600. It contained covenants by LML that it would "not permit more than four occupants to reside in the Property at any one time for the duration of the Tenancy" (clause 11.2).

9. LML then granted sub-tenancies of individual rooms in the House to the respondents and to two others, so that, in breach of the terms of the Headlease, the House came to be occupied by five individuals. That made the House an HMO which required a licence under Part 2, Housing Act 2004 (the 2004 Act). It is common ground that the House was not licensed.

10. The sub-tenancies to the three respondents were each granted for a term which continued beyond 30 September 2019, the term date of the Headlease. The first was granted to Ms Marshall on 10 August 2019 and was for a term of six months expiring on 9 February 2020. On 23 August 2019, a sublease of a different room was granted to Mr Niven for five months ending on 12 February 2020; this was followed by a further sub-tenancy to him of the same room on 10 January 2020 for a term of six months from 12 January. On 19 September 2019, a sub-tenancy of a third room was granted to Mr Kolev for a term of 12 months ending on 19 September 2020.

11. In its decision the FTT explained what happened when the Headlease expired on 30 September 2019:

> "What is notable about each of these tenancies is that they were granted before the expiry of the term of LML's tenancy but expired long after that term had ended. It seems that neither [Mr Kumar] nor LML saw any significance in this as they both carried on as if nothing had changed. LML managed the property on a day-to-day basis, reverting only to [Mr Kumar] for significant items of repair or maintenance. As far as [Mr Kumar] was concerned, he had handed over all legal and management responsibility to LML. LML collected the rents from [the respondents] and paid sums to [Mr Kumar] in purported discharge of the rent agreed in their tenancy. (In fact, [Mr Kumar] complained that he only received about half of the £2,600 per month due from LML.)"

The proceedings and the FTT's decision

12. The respondents made their application for rent repayment orders in February 2021 but for reasons which are unclear it was not determined until October 2023. The basis of the application was that Mr Kumar was said to have committed the offence, contrary to section 72(1), 2004 Act, of being a person having control of or managing an unlicensed HMO.

13. The FTT accepted Mr Neilson's submission on behalf of the respondents that the effect of LML granting sub-tenancies for terms continuing beyond the end of its own Headlease on 30 September 2019 was that LML effectively assigned the remainder of its interest in those parts of the House to the sub-tenants. Accordingly, from the grant of each sub-tenancy, Mr Kumar became each respondent's landlord.

14. In response to Mr Kumar's objection that he neither managed nor had control of the House, having let it to LML, the FTT referred to the definitions of "person having control" and "person managing" in section 263, 2004 Act, both of which it said applied to Mr Kumar.

15. By section 263(1), "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 an agent or trustee of another person), or who would so receive it if the premises were let at a rack rent. The FTT explained that a "rack-rent" is a rent which is not less than two-thirds of the full net annual value of the premises. It decided that Mr Kumar was the person who receives the rack-rent of the premises because: "LML were liable to pay him their own rent which itself satisfied the definition of a rack rent and he would have received the Applicants' rents but for the arrangement he had with LML".

16. Additionally, by section 263(3), in the case of an HMO, "person managing" means the person who, being an owner or lessee of the premises receives (whether directly or through an agent or trustee) rents or other payments from persons who are in occupation as licensees or tenants of parts of the premises or who would so receive those rents or other payments but for having entered into an arrangement 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. The FTT considered that Mr Kumar was also a person managing the House, but it did not explain how it arrived at that conclusion and Mr Neilson and Mr Morris both agree that it was wrong because Mr Kumar did not receive any rent from persons in occupation.

17. The respondents each sought a rent repayment order for the maximum period available under section 44(2), 2016 Act, which the FTT said was from 20 September 2019 to 1 April 2020. Mr Kumar explained to the FTT that for much of that period he was out of the country. He had relied on LML's professionalism after they had been recommended to him by his previous agents, Chestertons, whom he also trusted. As to the possibility that these facts might amount to a reasonable excuse for Mr Kumar being in control of an unlicensed HMO, which would provide him with a complete defence, the FTT said this:

> "The Tribunal raised with [Mr Kumar] whether he wished to seek to rely on the defence under section 72(5) of having a reasonable excuse. In response, [Mr Kumar] eschewed any claim that he was ignorant of his obligations as a landlord for licensing or housing standards. He has at least two other properties in the same borough, Wandsworth, and is familiar with compliance with standards set by the local authority."

18. The FTT said no more about the defence of reasonable excuse and appears to have proceeded on the basis either that Mr Kumar did not want to rely on it, or that his familiarity with HMO licensing meant that the fact that he let the House to an apparently reputable company while he was out of the country did not provide him with such an excuse. It was satisfied that Mr Kumar had committed the offence of having control of or managing an unlicensed HMO and that "as the [respondents'] landlord" he was a person against whom a rent repayment order could be made.

19. The FTT then went on to consider the amount of the award it should make and after an extended commentary on the applicable principles and having considered factors relied on by the parties, it decided that Mr Kumar should be required to repay 60% of the rent which each of the respondents had paid. Mr Kumar was therefore ordered to pay £2,490.98 to Mr Kolev, £2,586.67 to Mr Niven and £2,471.60 to Ms Marshall. In making that order the FTT did not remind itself that the respondents had paid their rent to LML and not to Mr Kumar (although in its earlier account of the facts it had recorded that, after the expiry of its Headlease on 30 September 2019 "LML collected the rents from [the respondents] and paid sums to [Mr Kumar] in purported discharge of the rent agreed in their tenancy").

Grounds of appeal

20. Permission to appeal was granted on the following four grounds:

(1) That Mr Kumar was not a landlord of the respondents within the meaning of section 40, 2016 Act, and received no rent from them so the FTT had no jurisdiction to make a rent repayment order against him.

(2) That Mr Kumar could not commit an offence under section 72(1), 2004 Act, because he was neither a "person having control" nor a "person managing" the House within the meaning section 263, 2004 Act.

(3) That the FFT had failed to deal properly with the defence of reasonable excuse.

(4) That the FTT had wrongly based its calculation of the amount of rent to be repaid on the amount received by LML rather than on the amount received by Mr Kumar, and had wrongly taken account of conduct by LML which could not be relevant to an award against Mr Kumar.

Ground 1: Was Mr Kumar the respondents' landlord?

21. The first ground of appeal is that Mr Kumar was not a person against whom a rent repayment order could be made because he was not the respondents' immediate landlord.

22. Section 40(1) and (2), 2016 Act, provide:

> "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."

23. In *Rakusen v Jepsen*, Lord Briggs and Lord Burrows JJSC (with whom the other three Justices agreed) referred to section 40(1) and (2) as "the central relevant provisions" of the 2016 Act. They analysed their effect, at [26], by reference to a hypothetical example in which a freeholder, X, grants a tenancy of a building containing 10 flats to Y who in turn grants a tenancy of a single flat to Z ("the sub-tenancy"), as follows:

> "Thus the description of a rent RRO is that it is an order "requiring the landlord under a tenancy of housing in England to… repay an amount of rent paid by a tenant". To what rent does "rent paid by a tenant" refer? Plainly, in our view, those words refer to rent paid by a tenant under the "tenancy of housing in England" referred to earlier in the same sentence. That is the sub-tenancy in the hypothetical example, if the tenant seeking repayment is (as in this case) the occupier Z. It will necessarily have been paid to the landlord under that tenancy, to Y in the example, so that an order for "repayment" naturally requires that landlord to pay back what he, she or it (henceforth "it") has received to the tenant who paid it."

24. They continued, at [28]:

> "This straightforward interpretation links the landlord with the tenancy that generates the relevant rent. It renders it artificial and unnatural to construe the opening words of section 40(2) as referring to any landlord other than the landlord under the tenancy which generates the relevant rent, that is the rent to be repaid under section 40(2)(a) and the rent in respect of which the universal credit is paid under section 40(2)(b). It excludes a superior landlord because it is not the "landlord under" the tenancy which generates the rent."

25. Further, at [31], referring to the words "repay … rent paid by a tenant" in section 40(2), Lord Briggs and Lord Burrows added:

> "Those words naturally refer to the landlord repaying the rent paid to the landlord by the tenant or, put another way, repaying the rent received directly from the tenant. Repayment of rent paid most naturally refers to a direct relationship of landlord and tenant. It is forced language to say that a superior landlord would be repaying rent to a tenant from whom it had never received any rent. In our example, Z has paid rent to Y not X and it is Y, not X, that may be required to "repay" that rent to Z."

26. There were two strands to the argument advanced by Mr Morris on behalf of Mr Kumar, each of which is said to be sufficient to justify allowing the appeal and setting the FTT's decision aside as having been made without jurisdiction.

27. The simplest way of putting the case is that because the respondents did not pay their rent to Mr Kumar, but paid it only to LML, Mr Kumar cannot be ordered to repay anything to them. That proposition is based solely on the FTT's finding of fact, which was not disputed, that the respondents continued to pay their rent to LML after 30 September 2019, and did not pay anything to Mr Kumar. It does not require

consideration of the effect of the grant of sub-tenancies for longer than the remaining term of the Headlease.

28. Referring to *Rakusen v Jepsen* Mr Morris submitted that a rent repayment order can only be made in respect of rent which is paid by a tenant directly to the landlord the subject of their application. It is not enough for there to be a direct relationship of landlord and tenant between the paying and receiving party. The respondent to an application for a rent repayment order must be both the immediate landlord of the applicant and a recipient of rent from the applicant under a tenancy between them. In this case Mr Kumar had received no rent from the respondents, so could not be required to repay anything to them.

29. This most basic way of putting the case is not undermined by consideration of the effect of the grant by LML of sub-tenancies longer than unexpired residue of its own Headlease. Mr Morris did not dispute the FTT's analysis that, when each of the sub-tenancies was granted, it took effect as an assignment of LML's legal estate in the particular room from LML to the individual sub-tenant. That was the effect of the principle in *Milmo v Carreras* which Mr Morris did not challenge.

30. Mr Morris and Mr Neilson did not disagree on the consequences of the assignment of the Headlease by operation of law. As a result there was privity of estate and a direct landlord and tenant relationship between Mr Kumar and the respondents on the terms of the Headlease; the tenant covenants in the Headlease became binding on the respondents (section 3, Landlord and Tenant (Covenants) Act 1995 (the 1995 Act)). The respondents could therefore sue Mr Kumar, or be sued by him, on the covenants in the Headlease, including the covenant to pay rent (see *Woodfall: Landlord and Tenant*, at 16.082). But the purported sub-tenancies were still valid contracts and LML was also entitled to sue the respondents for the rent due under them (or the profit rent if the respondents had paid the Headlease rent to Mr Kumar) because there was a binding contract between them, notwithstanding that it took effect in law as an assignment (see *Woodfall*, at 16.157).

31. Mr Morris therefore submitted that any payments made to LML by the respondents after 30 September 2019 were made to discharge their contractual liability to LML and were not payments of rent to Mr Kumar. Moreover (and this was the second limb of Mr Morris's argument), after 30 September 2019 LML continued to pay rent to Mr Kumar every month and an implied periodic tenancy thereby came into existence between them on the terms of the Headlease. As the respondents continued to pay their rents to LML, an implied periodic tenancy also came into existence between them and LML. The intended chain of title was restored by the first payments of rent after the expiry of the Headlease.

32. Mr Neilson accepted that, as between LML and Mr Kumar, the continued payment and acceptance of rent from 30 September 2019 gave rise to a new landlord and tenant relationship which was an implied periodic tenancy of the whole House on the terms of the Headlease. The relationship which had formerly existed between Mr Kumar and LML and which had been brought to a partial but premature end as the purported sub-tenancies of each of the rooms were granted, was re-established. But Mr Neilson did not accept that the chain of title was restored and suggested instead that the arrangement took effect as a lease of the reversion to the tenancies which now existed between Mr

Kumar and the respondents (which was said to be the effect of section 15, 1995 Act). By that route, he proposed, the respondents remained in a direct relationship of landlord and tenant with Mr Kumar and the sums which they paid to LML should be regarded as payments of the rent due under the tenancy which existed between each of them and Mr Kumar.

33. The first difficulty I have with Mr Neilson's submission is that it does not overcome the objection that the respondents made no payments to Mr Kumar. He suggested that it was not necessary to read the decision of the Supreme Court in *Rakusen v Jepsen* as requiring that the rent to be repaid must first have been received by the landlord against whom the rent repayment order is to be made. That submissions seems to me to be clearly inconsistent with the reasoning of the Supreme Court and I reject it.

34. It is therefore a sufficient and complete answer to the application for a rent repayment order that nothing was paid by the respondents to Mr Kumar so nothing can be ordered to be repaid by him to them.

35. In any event, I reject Mr Neilson's artificial analysis of the relationships between the various parties after 30 September 2019. The parties themselves had no intention of disturbing their pre-existing relationships and knew nothing of the assignment of the Headlease by operation of law. The arrangements which should be implied from the payments and acceptance of rent should mirror those which the parties understood and intended to exist, rather than being constructed simply for the purpose of sustaining a claim for a rent repayment order which would otherwise be unavailable.

36. As the FTT found, all parties continued as before, with the respondents paying rent for their individual rooms to LML and it paying rent to Mr Kumar for the whole House. The consequence of a landlord granting a tenancy to a third party with the agreement of the tenant is that the original tenancy is surrendered by operation of law and replaced by the new tenancy between the landlord and the third party (*Metcalfe v Boyce* [1927] 1 KB 758). By continuing to pay rent to LML the respondents must be taken to have acknowledged LML's entitlement to let to them. Additionally, the payments of rent by the respondents were inconsistent with the requirements of the Headlease (both as to the recipient and as to the amount of rent) and the proper inference from their continuing to pay their own rent to LML, thereby recognising it and not Mr Kumar as their immediate landlord, is that new implied periodic tenancies of their individual rooms came into existence. Any rights the respondents might unknowingly have had under the Headlease were surrendered by operation of law. It was those implied tenancies which conferred the respondents' rights of occupation, and not a statutory continuation of the Headlease after its contractual expiry (see section 5(4), Housing Act 1988 which provides that an assured periodic tenancy will not arise on the expiry of an assured tenancy for a fixed term if the tenant is entitled to possession of the same dwelling by virtue of another tenancy).

37. It follows that Mr Kumar was not the respondents' immediate landlord and they paid no rent to him. He was not a person against whom a rent repayment order could be made in their favour.

38. For these reasons I allow the appeal and set aside the rent repayment order made by the FTT.

Ground 2: Was Mr Kumar a "person having control of or managing an HMO"

39. By section 72(1), 2004 Act a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under Part 2 of the Act but is not so licensed. The FTT was satisfied that Mr Kumar was both a person having control and a person managing the House, which it is agreed was an unlicensed HMO. The meaning of these expressions has already been explained in paragraphs [16] and [17] above.

40. The parties agree that the FTT was wrong to suggest that Mr Kumar was a person managing the House. He did not satisfy the description in section 263(3), 2004 Act because he received no rent or other payments from the persons who were in occupation as tenants of parts of the premises; he received his rent from LML, not from the respondents.

41. The second ground of appeal turns on the FTT's finding that both Mr Kumar and LML were persons having control of the House, notwithstanding the fact that it was let to LML and that LML exercised day to day control over it. The issue concerns the proper interpretation of section 263(1), 2004 Act which (so far as relevant) defines "person having control" as "*the* person who receives *the* rack-rent of the premises".

42. Mr Morris recognised that more than one landlord in a chain of title may receive a rack-rent for a house, and that the FTT had been entitled to find that the rent paid by LML to Mr Kumar was a rack-rent. His submission was that the definition of "person having control" in section 263(1) allows for there to be only one such person. The definition uses the definite article and contemplates one rack-rent received by one party (although a number of persons may jointly comprise the person having control where they each receive rents for different parts of the premises which in aggregate amount to a rack-rent for the whole).

43. Mr Morris referred to the discussion of the long statutory history of section 263, 2004 Act in the speech of Lord Bridge in *Pollway Nominees v Croydon LBC* [1987] AC 79, at 91-92:

> "[T]he rationale of the use of the formula to designate the person on whom the relevant obligation is cast is surely plain. The owner of that interest in premises which carries with it the right, actual or potential, to receive the rack rent, as the measure of the value of the premises to an occupier, is the person who ought in justice to be responsible for the discharge of the liabilities to which the premises by reason of their situation or condition give rise."

44. Mr Morris also referred to two decisions of this Tribunal, one of HHJ Behrens, *Urban Lettings (London) Ltd v Haringey LBC* [2015] UKUT 104, and one of my own *Hastings BC v Braear Developments Ltd* [2015] UKUT 145 (LC), which were said to support his

submission, although neither decided in terms that there could only ever be one person having control of any one property.

45. For the respondents, Mr Neilson submitted that any person who was in receipt of the rack-rent of premises, whether from persons in occupation or from someone with an intermediate leasehold interest, was a person in control within the meaning of section 263(1), 2004 Act. He referred to a more recent decision of the Tribunal (Mr Justice Fancourt, Chamber President) in *Global Guardians Management Ltd & Ors v LB Hounslow & Ors* [2022] UKUT 259 (LC) at [74]-[79], which concluded:

> "Any person who falls within the definitions of "person having control" and "person managing" commits an offence if the HMO is unlicensed. The definitions show that a person who receives rent may commit an offence regardless of whether they have an interest in the property or are entitled to the rent. It is not the purpose of Part 2 to identify only one person having control of the premises and one person managing them."

46. Mr Neilson also pointed out that section 72(1), 2004 Act provides that a person commits an offence if he is "a person" having control of or managing an unlicensed HMO and does not require that he be "the person" doing so.

47. I do not think the passage cited by Mr Neilson from *Global Guardians* is as supportive of his argument as he suggested. The Tribunal was considering whether the property in question was let at a rack-rent and the submission that it was logically impossible for the person who received the income from the property and another person to whom part of that income was passed on both to be persons in control of the property because both could not be in receipt of a rack-rent. The argument did not turn on whether more than one person could be a person having control.

48. It is not necessary for me to determine in this appeal whether there may be more than one person having control of an HMO, and without intending any disrespect to the careful arguments of Mr Morris and Mr Neilson, I prefer not to reach a conclusion on that question. It is preferable to leave it to be considered in a case where it makes a difference.

Ground 3: The defence of reasonable excuse

49. As I have already decided that Mr Kumar was not a person against whom a rent repayment order could be made, and that the appeal must therefore be allowed, the question whether Mr Kumar had a reasonable excuse for being in control of an unlicensed HMO does not arise. However, the FTT decided that he had committed a criminal offence and if that was a conclusion it ought not to have arrived at, he is entitled to have the public record corrected.

50. I have already explained that the FTT asked Mr Kumar whether he wished to rely on the defence of reasonable excuse provided by section 72(5), 2004 Act but that, after recording that he had "eschewed any claim that he was ignorant of his obligations as a landlord for licensing or housing standards", it made no further reference to the

availability of the defence. When it considered the quantum of the award it should make, and the question of mitigation, it returned to the fact that Mr Kumar had let the whole of the House and had relied on others. The FTT said this:

> "The Tribunal does understand why [Mr Kumar] reposed trust in LML because they had been referred by Chestertons and could be expected to display an appropriate level of professionalism. However, that is not sufficient reason to fail to provide any supervision at all. It would still be prudent to exercise the power that all landlords have and insist that the tenancy with LML have provisions requiring compliance with licensing and other standards and for checking that this is being done. [Mr Kumar] pointed out that there was a clause in the tenancy with LML limiting the occupancy of any sub-tenants to 4 people but the fact is that he took no steps to check that this was being complied with, let alone to enforce it."

51. In my judgment the FTT's assessment of the facts was incomplete and inadequate. It should, in terms, have addressed the question whether Mr Kumar had a reasonable excuse. The answer to that question had nothing to do with whether he was familiar with the obligations of a landlord in relation to licensing an HMO. The facts which Mr Kumar was entitled to rely on were, first, that he had let the whole property to an apparently reputable tenant on the recommendation of an agent whose judgment he trusted; secondly, that he had included a provision in the tenancy agreement that the property was not to be made available to more than four occupiers (and so would not be an HMO required to be licensed); thirdly, that the apparently reputable tenant had breached that provision without Mr Kumar's knowledge; and finally, that for part of the period during which the offence was said to have been committed, 20 September 2019 to 1 April 2020, he had been abroad and, at the end of the period, was unable to return due to Covid restrictions.

52. There was no basis for the FTT's suggestion that Mr Kumar was obliged to "supervise" the letting of the House to the respondents. His relationship was with LML, not with the respondents. The FTT's suggestion that it would have been prudent to insist that the tenancy with LML include "provisions requiring compliance with licensing and other standards", overlooked the fact that the provisions which he did include, and which would have avoided the need for licensing altogether, were breached. The question was not what would have been prudent, but whether, having regard to all the relevant factors he had a reasonable excuse when LML broke its agreement with him and the House became an HMO without his knowledge. The FTT said that LML's default mitigated Mr Kumar's "own fault to a degree" but the suggestion that he was at fault at all depended on the absence of a reasonable excuse, which was not properly addressed by the FTT.

53. Had this been the only ground of appeal I would have set aside the FTT's decision on this ground alone and would have substituted a decision that Mr Kumar had a reasonable excuse for having control of an unlicensed HMO, and so had not committed any offence.

Ground 4 – The quantum of the rent repayment order

54. Mr Neilson conceded that the FTT's assessment of the quantum of the rent repayment order was flawed and that the fourth ground of appeal must succeed in any event. That

was because the award had been based on the amount of rent received by LML, and not the amount received by Mr Kumar. Nor did Mr Neilson resist the proposition that the FTT had not been entitled to take account of conduct by LML in relation to repairs to the House when determining the amount to be repaid by Mr Kumar.

55. In the event, neither of these issues arises for consideration, because the rent repayment order ought never to have been made.

Disposal

56. For these reasons the appeal is allowed, the decision of the FTT is set aside and the rent repayment order is discharged.

Martin Rodger KC,

Deputy Chamber President

29 August 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.