FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AY/HMF/2020/0250**
HMCTS Code	:	**V: CVPREMOTE**
Property	:	**28 Hainthorpe Road, London SE27 0PH**
Applicants	:	**(1) Ricardo Freitas** **(2) Todor Spasov** **(3) Danail Asenov**
Applicants' Representative	:	**John-Luke Bolton of Cambridge House (assisting as a layperson)**
Respondent	:	**Huseyin Duhan Seherli**
Respondent's Representative	:	**Sente Masemola, Counsel**
Type of application	:	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	:	**Judge T Cowen** **Ms S Coughlin MCIEH**
Dates of Hearing	:	**11 May 2021, 24 June 2021, 13 July 2021**
Date of Decision	:	**3 November 2021**

DECISION

The Tribunal orders that:

(1) The Respondent is required to make a rent repayment to the First Applicant in the sum of **£1,602.83**.

(2) The Respondent is required to make a rent repayment to the Second Applicant in the sum of **£2,285.53**.

(3) The Respondent is required to make a rent repayment to the Third Applicant in the sum of **£2,285.53**.

(4) The Respondent is required to reimburse the Applicants' tribunal fees in the sum of £300.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

On the first day of the hearing, 12 May 2021, it became apparent that Third Applicant, Danail Asenov, was unable to understand, read or speak English. On the second day of the hearing, 24 June 2021, he gave evidence through a Bulgarian interpreter provided by the Tribunal.

The documents before the tribunal at the hearing were in the form of electronic bundles.

The Tribunal took account of all of the documents submitted and all of the evidence and submissions made at the hearing, and the written submissions filed after the hearing, in reaching its decision.

REASONS FOR ORDER

The application

1. This application for a rent repayment order under section 41 of the Housing Act 2016 was issued on 3 November 2020. It was based on an allegation that the Respondent has committed the following offence:

   > Managing an unlicensed HMO under section 72(1) of the Housing Act 2004 from 28 August 2019,

   which is an offence to which Chapter 4 of the Housing and Planning Act 2016 applies, pursuant to section 40(3) of that Act.

2. The application was made originally only in the names of the First and Second Applicants. The Second Applicant was originally claiming on behalf of himself and his roommate Danail Asenov. The Tribunal has decided to add Danail Asenov as the Third Applicant under rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to regularise the position. This does not increase or change the nature of the application overall and causes no prejudice to the Respondent.

3. The amount claimed by way of rent repayment in respect of this period is as follows:

   3.1. the sum of **£6,750** in respect of the First Applicant, being 9 months' rent from 17 January 2020 at £750 per calendar month, the last payment reclaimed having been made on 28 September 2020.

   3.2. the sum of **£7,200** in respect of the Second and Third Applicants, being 13 months' rent, of which 12 were paid at £550 per calendar month and one was paid at £600, all of which paid for the occupation of the room they shared in the Property.

   making a total claim of **£13,950**.

The Evidence

4. All of the Applicants gave oral evidence at the hearing. The evidence of the Third Applicant was given through an interpreter. The Applicants answered questions put by the Respondent's counsel and by the Tribunal.

5. The Respondent also gave oral evidence at the hearing and answered questions put to him.

6. There was substantial controversy about the evidence of the Third Applicant. During the process of exchange of written evidence, the Respondent disclosed a typed witness statement of Danail Asenov (before he was added as the Third Applicant). The statement was dated 1 March 2021, appeared to be signed by the Third Applicant and contained some handwritten emendations to the text. The substance of this statement essentially was that his roommate, Todor Spasov, the Second Applicant had not been paying his share of the rent: "I pay the full rent each month" and "…since moving into the room, Todor has never given me his half of the rent. I ask him for his half every month and but he refuses to pay each time because he says that" and then someone has added in handwriting: "Half of the rent was paid by him sometimes."

7. The typed part of the statement read together with the handwritten part does not entirely make sense, but the overall effect of that statement, if true, would be to extinguish or substantially reduce the Second Applicant's

claim for rent repayment, on the basis that he had paid little or no rent himself.

8. The statement then goes on to say that the Third Applicant wants the Second Applicant to leave the property: "I want Todor to leave because he is not paying his part of the rent and also [". The sentence ends there and the typed square bracket seems to indicate that something should have been added, but nothing was added.

9. Then the Applicants provided a further witness statement in the name of Danail Asenov, the Third Applicant. It is dated 8 April 2021. It contradicts the content of the first statement and explains how the first statement came to be made.

10. The contradiction of the first statement is in paragraph 3 as follows:

> … Todor always pays m[e] precisely. He has never missed any rent payments. There are a few times he has paid me late. But he is fully paid up and has never not paid his part of the rent."

11. The explanation for the first statement is in paragraphs 5 and 6 as follows:

> "The landlord asked me to sign a piece of paper. I refused to sign it because I couldn't read it and I wanted it to be translated before I signed it. The landlord informed me that it needed to be signed urgently as he needed to give it to his lawyer. I therefore signed it under the pressure of the landlord without knowing what it was.
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> "I took a photo of the document and showed it to Todor Spasov. Todor explained to me that the document that I had signed was a witness statement regarding this case…."

12. The Third Applicant accepted that the signature at the foot of both of the statements is his. Both of these statements cannot be true. Either one of them is true or neither of them is true. We heard the Third Applicant and the Respondent give oral evidence about this matter. From seeing those parties give evidence and face questions, we make the following findings:

    12.1. The Third Applicant cannot read, write or speak English, save for very rudimentary words and phrases.

    12.2. The first witness statement dated 1 March 2021 was typed by the Respondent's solicitors upon the Respondent's instructions. The Respondent added the handwritten emendations.

12.3. The Respondent went to visit the Third Applicant in his room, showed him the draft witness statement and told him that it was a document which the Third Applicant needed to sign in order to secure the renewal of his tenancy of the room.

12.4. The Third Applicant did not understand at the time that he was signing a witness statement for tribunal proceedings, nor that it contained the terms summarised above.

12.5. He did not agree with the content of the first witness statement. He confirmed, with the assistance of a Tribunal appointed interpreter, that he did not agree with the content of that statement.

12.6. When he and the Second Applicant realised what he had signed, the Third Applicant made the second witness statement.

12.7. The second witness statement was prepared by the Applicants' representative, Mr Bolton, who took down the Third Applicant's evidence with the aid of some translation software.

12.8. The Third Applicant signed the second statement knowing that he was signing a witness statement for these Tribunal proceedings. He confirmed, with the assistance of the Tribunal appointed interpreter, that the content of the second witness statement was true.

12.9. The Respondent claimed in his evidence that the Third Applicant signed the first witness statement knowing what it was and agreeing to its content. We did not find the Respondent to be a credible witness. In particular, on this issue, it was pointed out to him that there was a discrepancy between the content of the first witness statement and the financial records of payment. At that point, during his oral evidence, the Respondent tried to explain the discrepancy by saying that there was a loan arrangement between the Second Applicant and the Third Applicant. This alleged loan arrangement did not appear in the first witness statement of the Third Applicant nor in any of the statements made by the Respondent himself. The Respondent tried to blame his own solicitor for leaving it out. The Tribunal formed the impression that the Respondent was inventing the loan arrangement story while he was giving oral evidence, in order to explain away the discrepancy. We therefore do not accept the evidence of the Respondent where it conflicts with the evidence of the Applicants.

13. We find that the second document which is described as the Third Applicant's witness statement dated 8 April 2021 is true and that the contents of the first document signed by the Third Applicant on 1 March 2021 are not true and that the Third Applicant signed it without knowing what it was or what it contained.

Findings of Fact

14. As a result of hearing and reading the evidence and submissions and reviewing the documents relied upon in support, we have made the following findings of fact.

The Property

15. The Property is a three storey house with the following configuration:

    15.1. On the ground floor: two double bedrooms and a self-contained flat

    15.2. On the first floor: two double bedrooms (one with ensuite shower room) and a bedsit

    15.3. On the second floor: a self-contained loft conversion flat (occupied by the Respondent)

16. This amounts to a total of five rooms and two self-contained flats.

17. The Respondent has been the registered proprietor of the freehold of the Property since 22 February 2000.

The Applicants' Tenancies and Occupation

18. On 28 August 2019, the Respondent entered into a tenancy agreement of the Property with the Second and Third Applicants jointly for a six month term commencing on 1 September 2019, at a monthly rent of £550 with a deposit payable of £550. That tenancy agreement also did not specify which part of the Property would be occupied by the Second and Third Applicant and his family, but it is common ground that they have shared occupation of the other first floor bedroom, since they moved in. The Second Applicant's statement stated that he and the Third Applicant did not move in until 1 October 2019. That appears to have been an error. The Respondent's evidence was that the Second and Third Applicants moved in on 1 September 2019. We find that they moved in on 1 September 2019. The Second and Third Applicants were still occupying the Property at the date of the hearing.

19. On 14 January 2020, the Respondent entered into a tenancy agreement of the Property with the First Applicant for a six month term commencing on 17 January 2020, at a monthly rent of £750 with a deposit payable of £750. The tenancy agreement did not specify which part of the Property would be occupied by the First Applicant and his family, but it is common ground that he and his family moved in on 17 January 2020 and occupied the first floor bedsit, with exclusive use of an en suite WC. They shared the use of a bathroom and kitchen facilities with the Second and Third Applicants. The First Applicant moved out in November or December 2020.

Other occupants

20. Throughout the period since the Second and Third Applicants moved into the Property, there were the following additional households occupying rooms in the Property and sharing bathroom and kitchen facilities with the Applicants:

Name	Start of tenancy	Room
Simplice Ahoaegnon	04.03.2012	Ground floor bedroom
Maria Treitas	20.12.2018	Ground floor bedroom
Condruta Constantinescu	07.05.2018	First floor bedroom

21. In addition, there were two self-contained flats in the Property: a first floor flat which was occupied by Giannakis Zacho from 21 August 2020 and a top floor flat which was occupied by the Respondent.

22. The Respondent admits that the tenancies were granted and that the tenants occupied the stated parts of the Property.

Licensing

23. From the date when the Second and Third Applicants moved in, the Property was an HMO within the meaning of the "standard test" in section 254(2) of the 2004 Act because:

    23.1. It consisted of one or more units of living accommodation (excluding the self-contained flats);

23.2. The living accommodation was occupied by the Applicants and others, being at least three persons who did not form a single household, as their only or main residence.

23.3. The Applicants were paying rent.

23.4. The Property was not used for any purpose other than as a dwelling for its said occupants.

23.5. The households who occupied the living accommodation shared basic amenities, namely bathroom facilities and cooking facilities.

24. During the relevant period, the Property therefore required a licence under section 61 of the Housing Act 2004.

25. The Respondent was in control of the Property or was managing it within the meaning of section 263 of the Housing Act 2004, because he was receiving rent from the Applicants. There was no evidence as to whether the rent payable under the tenancy agreements was a rack-rent, but if the Property was let at a rack-rent, then the Respondent is a person who would have received it.

26. There is an email dated 22 September 2020 from Carol Bennett, Environmental Health Officer of the London Borough of Lambeth, which confirms that (after her inspection of the Property), the Property required an HMO licence and that the Respondent did not have the requisite licence for the Property. A letter from Lambeth to the Respondent dated 18 September 2020 had stated the same facts. The letter also recorded that the Respondent had expressed an intention to try to end the Property's HMO status by persuading some of the occupants to leave. He was informed that this would not work. We have seen WhatsApp messages sent from the Respondent to the Applicants which demonstrate that he was trying to reduce the number of tenants in order to avoid having to apply for an HMO licence.

27. On 25 September 2020, the Respondent applied for an HMO licence. The licence was granted on 8 October 2020. Under section 72(4) of the Housing Act 2004, it is a defence for the Respondent that an application had been made for an HMO licence at the material time, while the application is still effective. It follows that the Respondent had a defence from 25 September 2020 onwards.

28. All of the above findings of fact (save for the difference about the date on which the Second and Third Applicants moved in) are common ground between the parties. The Respondent did not contest any of those facts.

29. We therefore find, beyond reasonable doubt, that from 1 September 2019, when the Second Applicants moved into the Property until 25 September 2020, the Respondent was a person having control of or managing Property which was required to be licensed, but was not so licensed.

Reasonable excuse

30. The Applicants have therefore proved to the requisite standard of proof all of the elements of the alleged offence. The Respondent, however, claimed that no offence was committed by him, because he relied upon the statutory defence of reasonable excuse.

31. Pursuant to section 95(4), it is a defence if the Respondent had a reasonable excuse for the acts or omissions which would amount to the commission of the offence. According to the Upper Tribunal in *IR Management Services Limited v Salford City Council* [2020] UKUT 81, the burden of proof lies with the Respondent to prove on the balance of probabilities that there is a reasonable excuse.

32. The Respondent's reasonable excuse defence is as follows. He says that he knew that the Property was an HMO and he knew that managing an HMO could require a licence, but he believed that the Property did not need a licence at the time. The reason for his belief was that he been told about it by a local authority environmental health officer, Gibrille Musa, in 2018. The Respondent claims that he was told by Mr Musa that the property did not need an HMO licence because it only had two storeys and because it had a resident landlord. He was told by Mr Musa that he would only need a licence if he moved out of the Property, thereby ceasing to be a resident landlord.

33. The requirement for a specific number of storeys was removed by law in October 2018 and the Respondent claims that he was not advised of this change by the local authority.

34. The evidence for the Respondent's defence of reasonable excuse was contained in letters and emails. Mr Musa was not called to give evidence.

35. After the Respondent was notified by Carol Bennett of the need for a licence on 16 September 2020, he emailed her on 18 September to say that he was very confused because of what he had been told by Mr Musa. Then in October, he emailed Petra Connolly of the Council and Mr Musa himself to ask them to tell Carol Bennett that the Respondent had been advised that he was exempt in 2018 because of the number of storeys and because he was a resident landlord.

36. Mr Musa did not reply directly to the Respondent. Instead, in April 2021, Mr Musa sent an email to the Applicants' representative which said as follows:

> "I can confirm that following my visit to inspect the above property and based upon the evidence gathered at the time of my visit on the 19th January 2018 I told the landlord and owner of the property that since there are 2 tenants in the property and he is a resident landlord, the property do not require a HMO licence at the time due to the number of tenants in occupation."

37. This confirms that Mr Musa did give the Respondent information about his HMO status, but it is not the same that the advice the Respondent claims to have relied upon. The significant differences are that Mr Musa highlighted that an additional reason for the exemption in 2018 was "due to the number of tenants in occupation" and he did not mention the number of storeys.

38. As we have already stated, the Respondent bears the burden of proof in relation to his defence of reasonable excuse. The Respondent is represented by solicitors. They did not obtain a witness statement from Mr Musa and they did not call Mr Musa to give oral evidence and be cross examined.

39. The Tribunal is therefore left in the situation that the only evidence of the advice upon which the Respondent relies is the Respondent's own evidence and the email from Mr Musa. We have already indicated that we did not find the Respondent to be a credible witness and we are therefore cautious in accepting any contentious evidence he gives which is not corroborated by another witness or by documents. In this case, the evidence given by the Respondent is contradicted by a document, namely the April 2021 email from Mr Musa.

40. It can be said that the Respondent was told by Mr Musa in 2018 that the Property did not require an HMO licence and that this was because of him being a resident landlord.

41. In effect, in this case the Respondent claims to have held a mistaken belief about the law as a result of advice given to him by a council employee. Ignorance of the law can amount to a reasonable excuse in certain circumstances. In the case of *Perrin v Commissioners for HMRC* [2018] UKUT 156 TCC at para 82, the Tribunal said: "Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long." Obviously in this case, we should substitute "landlord" in the

place of "taxpayer". In other words, ignorance of the law can be a reasonable excuse, but not by itself. There needs to be evidence of the circumstances and reasonableness of the ignorance.

42. In this case, we find that there is not enough evidence for us to find on the balance of probabilities that the Respondent received advice from Mr Musa that he would only need an HMO licence if he moved out of the Property. It was therefore not reasonable for the Respondent to rely on a mistaken belief, if he genuinely had one, that he could move as many tenants into the Property as he wanted to without needing an HMO licence.

43. The Respondent's counsel submitted that we should take account of the following statement of the law in *Thurrock v Daoudi* [2020] UKUT 209(LC) - a case about selective licensing, but equally applicable here - at paragraph 26:

> "Although, as the Government's Guidance points out, a landlord is running a business and ought to be expected to understand the regulatory environment in which that business operates, not all businesses are the same. A decision maker might reasonably take the view that a landlord with only one property was less culpable than a landlord with a large portfolio."

44. It is true that the Respondent is a landlord with only one property (as far as we are aware) and does not have a large portfolio. We also take note of the following in paragraph 27 of the same case:

> "No matter how genuine a person's ignorance of the need to obtain a licence, unless their failure was reasonable in all the circumstances, their ignorance cannot provide a complete defence."

45. In the present case, the Respondent gave evidence that he went on a landlord accreditation course in 2018 or 2019, in which he would have had the opportunity to learn about the need for an HMO licence. Whatever information he received from Mr Musa was therefore not his only source of knowledge about the law and it would not have been reasonable for him to treat it as such. The Respondent was, at the very least, on notice of the general requirement for an HMO licence in the law and it was not reasonable for him to increase the number of tenants in 2019, without at least checking first, even if he was under a mistaken belief.

46. In *D'Costa v D'Andrea* [2021] UKUT 144, Ms D'Costa claimed (and the FtT accepted) that a council employee had told her that she did not need a licence and that "he, or the local authority, would tell her if the position

changed and the property needed a licence". The Upper Tribunal decided that this constituted a reasonable excuse. The quoted words are important because they removed the obligation from the landlord to take reasonable steps to keep informed. In effect, in D'Costa, the council was saying to the landlord: you do not need to keep yourself informed, because we will inform you.

47. That is different from the situation here. Unlike the D'Costa case, Mr Musa is not alleged to have promised that he would notify the Respondent of any change in future. This means that the Respondent continued to have the obligation to take reasonable steps to keep informed and did not do so.

48. In our judgment, for all the reasons stated above, the Respondent has not established a defence of reasonable excuse.

The making of a rent repayment order

49. It follows from all of the above that the Respondent is guilty of an offence to which Chapter 4 of the 2016 Act applies, for the purposes of section 40(3) of that Act. Because of the clear documentary evidence, the credible oral evidence of the Applicants, and the admissions made by the Respondent, we are sure of the truth of these findings beyond reasonable doubt, which is the appropriate standard of proof.

50. As a result of our above findings and pursuant to section 40(1) of the 2016 Act, we have power to make a rent repayment order in this case in respect of the offences and the period set out above.

51. This application by tenants is made under section 41(2) of the 2016 Act. We have found that the offences relate to housing that, at the time of the offences, was let to the Applicants as tenants. The application was made on 3 November 2020. We have also found that the licensing offence was committed between 1 September 2019 and 25 September 2020. Therefore the offence was committed during the period of 12 months ending with the day on which the application was made. This satisfies the requirements of section 41(2) of the 2016 Act.

52. We therefore may make a rent repayment order under section 43(1) of the 2016 Act.

53. It remains for us to consider the conduct of the parties and the landlord's financial circumstances as required by section 44 of the 2016 Act. We have no evidence that the Respondent has been convicted of any offence to which Chapter 4 of the 2016 Act applies, for the purposes of section 44(4)(c) of the 2016 Act.

54. Before considering whether any deductions should be made by reason of conduct and financial circumstances, it is necessary to calculate the maximum amount of rent which could be awarded against the Respondent. That is the "starting point" referred to in the recent Upper Tribunal decisions on this issue, most recently by the President of the Lands Chamber of the Upper Tribunal in *Williams v Parmar* [2021] UKUT 244 (LC) at paragraph 25.

The maximum amount of the rent repayment order

55. The First Applicant was in occupation from 17 January 2020 until November 2020. We have found that the Respondent ceased to commit the offence when he applied for a licence on 25 September 2020. The First Applicant therefore can claim a repayment of rent only for the period between 17 January 2020 and 25 September 2020. During that period, he paid a monthly rent of £750. We find that he did pay rent in that sum for all of that period. The amount of rent he paid therefore in respect of his occupation between those dates is the sum of £6,600 being 9 months at £750 less the 22 days between 25 September 2020 and the next rent payment date of 17 October 2020.

56. It is necessary to deduct from that sum the amount of universal credit which the First Applicant received in respect of housing. It was agreed between the parties that the appropriate amount to deduct would be 58% of the monthly rent, being £440 per month. That leads to a deduction of £3,828 over the same period.

57. The parties also agreed at the hearing that the Respondent had paid for the gas, electricity and water at the Property. They further agreed that the total sum of £498 should be deducted from the First Applicant's claims in respect of those utilities. They also agreed that the monthly sum of £35.71 (being a total of £295.20) should be deducted in respect of council tax which the Respondent had also paid.

58. The **maximum** rent repayment order which could be made in favour of the **First** Applicant is therefore the sum of **£1,978.80**.

59. The Second and Third Applicants have jointly occupied the Property from 1 September 2019 onwards. The maximum period for which they can claim is a period of 12 months. Between 1 September 2019 and 31 August 2020 (the first 12 months during which the Respondent was committing the offence) they paid £550 per month for 12 months amounting to £6,600. Neither of the Second or Third Applicants was in receipt of a housing element of universal credit during that period.

60. We heard evidence from the Second and Third Applicants that one of them (usually the Third Applicant) paid all of the rent each month to the

Respondent and was then reimbursed for half of the rent by the other. We saw bank statements and screen shots of mobile banking which corroborated that evidence. We accept the Applicants' evidence that they each paid half of the rent throughout the relevant period.

61. It was agreed that the total sum of £332 should be deducted from each of the Second and Third Applicant's claims in respect of utilities. And the same monthly sum of £35.71 (being a total of £428.52) should be deducted from each of their claims in respect of council tax.

62. The **maximum** rent repayment order which could be made in favour of the **Second** Applicant is therefore the sum of **£2,539.48**.

63. The **maximum** rent repayment order which could be made in favour of the **Third** Applicant is therefore the sum of **£2,539.48**.

64. We now turn, as required by section 44(4)(a) of the 2016 Act, to take account of the conduct of the landlord and the tenants and the financial circumstances of the Respondent.

Conduct: The Law

65. Some of the recent authorities were helpfully summarised by the Upper Tribunal in *Awad v Hooley* [2021] UKUT 55 (LC) at paras 38-40 as follows:

> '38. In *Vadamalayan v Stewart* [2020] UKUT] 183 (LC) the Tribunal said that it was no longer appropriate for rent repayment orders to be limited to the repayment of the profit element of the rent. Nor is it correct for the FTT to deduct from the maximum amount the amount of any fine or civil penalty imposed on the landlord:
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> > "19. The only basis for deduction is section 44 itself. and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence."

39. More recently in *Ficcara v James* [2021] UKUT 38 (LC) the Deputy President said this:

> "49 ... the Tribunal's decision in *Vadamalayan* ... rejected what, under the 2004 Act , had become the convention of limiting the amount payable under a rent repayment order to the amount of the landlord's profit from letting the property during the relevant period. The Tribunal made clear at [14] that that principle should no longer be applied. In doing so it described the rent paid by the tenant as "the obvious starting point" for the repayment order and indeed as the only available starting point.
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> 50. The concept of a "starting point" is familiar in criminal sentencing practice, but since the rent paid is also the maximum which may be ordered the difficulty with treating it as a starting point is that it may leave little room for the matters which section 44(4) obliges the FTT to take into account, and which Parliament clearly intended should play an important role. A full assessment of the FTT's discretion as to the amount to be repaid ought also to take account of section 46(1). Where the landlord has been convicted, other than of a licensing offence, in the absence of exceptional circumstances the amount to be repaid is to be the maximum that the Tribunal has power to order, disregarding subsection (4) of section 44 or section 45 .
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> 51. It has not been necessary or possible in this appeal to consider whether, in the absence of aggravating or mitigating factors, the direction in section 44(2) that the amount to be repaid must "relate" to the rent paid during the relevant period should be understood as meaning that the amount must "equate" to that rent. That issue must await a future appeal. Meanwhile *Vadamalayan* should not be treated as the last word on the exercise of discretion which section 44 clearly requires; neither party was represented in that case and the Tribunal's main focus was on clearing away the redundant notion that the landlord's profit represented a ceiling on the amount of the repayment."

40. I agree with that analysis. This appeal cannot be the last word either. It is no more than a useful example of an unimpeachable exercise of discretion on the part of the FTT, and says nothing further about the amount to be awarded in the absence of anything that weighs with the FTT under

> section 44(4) . The only clue that the statute gives is the maximum amount that can be ordered, under section 44(3) . Whether or not that maximum is described as a starting point, clearly it cannot function in exactly the same way as a starting point in criminal sentencing, because it can only go down; however badly a landlord has behaved it cannot go up. It will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4) . The statute gives no assistance as to what should be ordered in those circumstances; nor can this Tribunal in the absence of a suitable appeal.'

66. Since *Awad*, the decision of the President in *Williams v Parmar* (see above) at paragraph 26 has confirmed the approach set out in *Ficcara*. The President went on to reject an argument that the amount of a rent repayment order should be based on reasonableness (which was the previous test under the repealed provisions of the 2004 Act) or a tariff. He then added the following helpful passage at paragraph 51:

> "It seems to me to be implicit in the structure of Chapter 4 of Part 2 of the 2016 Act, and in sections 44 and 46 in particular, that if a landlord has not previously been convicted of a relevant offence, and if their conduct, though serious, is less serious than many other offences of that type, or if the conduct of the tenant is reprehensible in some way, the amount of the RRO may appropriately be less than the maximum amount for an order. Whether that is so and the amount of any reduction will depend on the particular facts of each case. On the other hand, the factors identified in para 3.2 of the guidance for local housing authorities are the reasons why the broader regime of RROs was introduced in the 2016 Act and will generally justify an order for repayment of at least a substantial part of the rent."

67. In summary, the following general principles can be derived:

    67.1. The amount payable does not need to be limited to the amount of the landlord's profit from letting the property during the relevant period.

    67.2. The total amount of rent paid by the tenant during the relevant period is the maximum penalty available, but it should not be treated in the same way as a "starting point" in criminal sentencing, because it can only go down, however badly a landlord has behaved.

    67.3. The amount of any reduction will depend on the particular facts of the case

67.4. It will be unusual for there to be absolutely nothing for the FtT to take into account under section 44(4), especially if the offence is less serious than many other offences of that type, but the award will usually be for at least a substantial part of the rent.

68. In relation to the tenant's conduct, the Upper Tribunal said in paragraph 34 of *Awad*: "The FTT is expressly directed to take the tenant's conduct into account; it is not directed to consider that conduct only insofar as it had an effect upon the offence itself, although of course the conduct must be relevant."

69. We turn now to the tenant's conduct.

Conduct of the tenants: the evidence

70. The Respondent gave evidence that he had received complaints about antisocial behaviour on the part of the Applicants. We saw some WhatsApp messages from other tenants complaining that the Applicants were shouting, banging doors, playing loud music, leaving lights on, taps running, and urinating around toilet, as well as leaving the security entrance doors open. They were accused of overusing the washing machine. We also were referred to witness statements allegedly signed by other tenants relating similar complaints. None of these other tenants gave oral evidence. In the light of the matters described above, we were wary of accepting witness statements signed by witnesses for the Respondent who did not appear to give evidence.

71. Likewise, the Applicants gave evidence of inconsiderate behaviour by other tenants, such as smoking in the house and playing loud music.

72. There is some evidence of noise and disturbance and mess and people being unable to get to facilities such as laundry. But there is not sufficient evidence that these Applicants were to blame. In addition, such problems are the result of overcrowding, which is exactly the issue which the HMO licensing scheme is designed to remedy.

73. There is evidence that the First Applicant was consistently late with his rent throughout the relevant period. In paragraph 38 of *Kowalek v Hassanein* [2021] UKUT 143 (LC), the Upper Tribunal said: "I can think of no reason why relevant conduct should not include the conduct of a tenant in relation to the obligations of the tenancy. Failing to pay rent without explanation … is a serious breach of a tenant's obligations. Parliament intended that the behaviour of the parties to the tenancy towards each other should be one factor to be taken into account." We have decided to deduct 10% from the rent repayment order in respect of the First Applicant to reflect this aspect of the First Applicant's conduct.

74. The Respondent initially gave evidence and produced photographs to allege that the First Applicant had breached his obligations to keep the Property clean and in repair. After it was established during the oral evidence that the photographs produced by the Respondent did not show what the Respondent said that they showed and there was no expert evidence, the Respondent's counsel indicated in closing that the Respondent would no longer rely on alleged water leaks and plaster damage against the First Applicant.

75. This was a further support to the Tribunal that the Respondent was not a credible witness.

76. We therefore find that there is no negative conduct on the part of the tenant's which is relevant to the amount of rent repayable, other than the late payment by the First Applicant.

Conduct of the landlord: the evidence

77. The Applicants rely on a number of complaints against the conduct of the Respondent as landlord:

77.1. When he was informed in September 2020 that he needed an HMO licence, the landlord's immediate response was not to apply for a licence, but rather to try to evict a sufficient number of tenants to reduce the number below the licensing threshold. To that end, he called and texted the Applicants telling them that they had 14 days to move out of the Property. It was only when the Respondent was informed that he was not permitted to evict any tenants in that way at that time, that he decided to apply for a licence.

77.2. The Respondent carried out works to the Property in September 2020, but these were carried out in a way which was not considerate to the tenants as occupiers. An unnecessary amount of noise and dust was created. The contractors entered the property without warning and did not take COVID-19 precautions such as wearing masks to keep the occupants safe.

77.3. The Respondent himself visited the Applicants' rooms uninvited and with no warning on numerous occasions.

77.4. The way in which the Respondent produced the evidence which we found not to be credible was also relevant conduct. The Respondent obtained the Third Applicant's signature on a witness statement by sitting on the Third Applicant's bed and telling him that it was a document necessary for the renewal of the tenancy. The Respondent used pictures of other tenant's rooms in order to

try to claim that they showed that the Third Applicant's room was out of repair.

77.5. The house was generally unsanitary. All of the Applicants saw mice inside the Property and the First Applicant experienced interruptions with the hot water supply.

78. We accept the evidence of the Applicants in relation to these aspects of the Respondent's conduct.

79. We also take into account in the Respondent's favour that he did apply successfully for a licence soon after he received notification from the Council and thereby remedied the offence reasonably quickly.

80. Balancing out all of these matters in our consideration of the factors listed in section 44 and taking into account the guidance given in the authorities quoted above, we take the view that the landlord's poor conduct is towards the more serious end, but it is not at the most serious level. We therefore deduct only 10% from the maximum possible rent repayment order to reflect the landlord's conduct, as we have found it.

Landlord's Financial Circumstances

81. We have not decided to deduct any further amount to reflect the financial circumstances of the landlord. The Respondent did supply documentary evidence of his expenses in maintaining the Property and the mortgage on the Property, but he did not supply any documentary evidence and we did not hear any oral evidence of his general financial circumstances. We have no details of the Respondent's means and we therefore do not take any account of his financial circumstances.

Award

82. As a result of all of the above, we have decided to make rent repayment orders in the following amounts:

82.1. In respect of the First Applicant, we first deduct 10%, by reason of late rent payment, from the maximum amount calculated above (£1,978.80) leaving £1,780.92. We then deduct a further 10% in respect of our findings relating to the landlord's conduct, leaving the sum of **£1,602.83**

82.2. In respect of the Second Applicant, we deduct 10% from the maximum amount calculated above (£2,539.48) in respect of our findings relating to the landlord's conduct, leaving the sum of **£2,285.53.**

82.3. In respect of the Third Applicant, we deduct 10% from the maximum amount calculated above (£2,539.48) in respect of our findings relating to the landlord's conduct, leaving the sum of **£2,285.53**

Dated this 3rd day of November 2021

JUDGE TIMOTHY COWEN

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).