FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BB/HMF/2022/0017**
Property	**:**	**Flat 1, New Century House, 8 Jude Street, London E16 1FG**
Applicant	**:**	**Ms Ittaliyah Smith**
Representative	**:**	**Flat Justice Community Interest Company**
Respondent	**:**	**Mrs Sahitha Tyagi**
Representative	**:**	**In person**
Type of application	**:**	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	**:**	**Deputy Regional Judge N Carr** **Mr Trevor Sennett MA FCIEH**
Date of Hearing	**:**	**26 September 2022**
Date of Decision	**:**	**24 October 2022**

DECISION AND REASONS

DECISION

1. The Tribunal is satisfied beyond reasonable doubt that the Respondent, without reasonable excuse, committed the offence of control or management of a house required to be licensed pursuant to part 3 of the Housing Act 2004, but that was not so licensed, contrary to section 95(1) of the Housing Act 2004, during the period 1 October 2020 – 1 August 2021;

2. The Respondent must repay to the to the Applicant the sum of £3347.37 by 22 November 2022;

3. The Respondent must pay the Applicant's costs of the application in the sum of £300, also by 22 November 2022.

REASONS

(1) By an application dated 6 January 2022, the Applicant, represented by Flat Justice, applied to the Tribunal for a rent repayment order pursuant to section 40 and 41 of the Housing and Planning Act 2016 ('the 2016 Act') on grounds that the then three named Respondents, Mrs Sahitha Tyagi, Aria Private Limited and Maxillia Properties Limited had committed an offence of failure to license the subject property pursuant to section 72(1) of the Housing Act 2004 ('the 2004 Act'). In the application, the sum sought by way of repayment was for the period 6 October 2020 – 1 August 2021, during which it was said eight and a half months' rent was paid. The full sum was claimed, less £744.49 to take into account Universal Credit payments, resulting in a claim for rent in the sum of £12,005.51. The Applicant further seeks to be repaid the application and hearing fee, in the total sum of £300.

(2) Directions were initially given by the Tribunal on 24 March 2022. On 1 April 2022, at the Applicant's request, the two other Respondents were removed from the proceedings, leaving just Mrs Tyagi. Directions were therefore reissued on 5 April 2022.

(3) By letter dated 20 May 2022, Flat Justice wrote to the Tribunal to state that there had been a miscalculation of the amount of rent sought. The principal sum less the housing element of universal credit was £11,956.47. They provided a table and calculations, and calculated that the sum paid by the Local Housing Authority for the housing element of universal credit was £1,543.53.

(4) Each party filed a bundle in accordance with the Directions, the Applicant filed an optional Reply, and each party filed a Skeleton Argument. To Mrs Tyagi's was attached further evidence of her income, to which the Applicant did not object. With her Skeleton, the Applicant's representative attached a bundle of caselaw containing 28 authorities. As I explained to Ms Sentance, the recent decision of the Court of Appeal in *Kowalek v Hassanein* [2022] EWCA Civ 1041 was absent from that bundle (which contained the decision of the Upper Tribunal), and that was a relevant decision in respect of the question arising in these proceedings about use of the deposit as a rental payment. *Dowd v Martins & Ors* [2022] UKUT 249 (LC) was also decided before the hearing, confirming the approach in *Acheampong v Roman; Choudhary v Razak* [2022] UKUT 239 (LC).

(5) We have considered all of the documents filed. Where we refer to the Appellant's main bundle below we use the designation **[A]** followed by a page number, and (where the document is not the main bundle) a description of the document. We take the same approach for the Respondent's bundle **[R]**.

(6) There are also extant proceedings in the County Court, brought by the Respondent against the Applicant, for rent arrears and terminal damage. We considered whether we ought to stay these proceedings pending the County Court proceedings, however on investigating Caseman, the Applicant's defence was struck out some months ago for failure to comply with an unless order. We were therefore satisfied that there was no current risk of conflicting decisions justifying postponing this decision.

(7) The hearing was attended by Ms Sentance of Flat Justice representing Ms Ittaliyah Smith, who attended as a witness, as did Mr Thilaksan Sivanantham. Mrs Tyagi appeared for herself, and her managing agent, Mr Nur Islam, attended to give witness evidence.

Concerns about the conduct of the Application

(8) Firstly, the application was brought on the basis of section 72(1) of the 2004 Act. However, the Applicant's statement of case four months later relies on the section 95(1) offence. The application form is not just a technical formality; it is the basis on which the Tribunal's directions are given. If it is inaccurate, it can lead to delays and difficulties later. More importantly, the application form is the first 'warning shot across the bow' for a respondent. It is important that the actual allegation made is raised by the application, to give a respondent the opportunity to consider their legal position from an early stage. Given that what is being alleged is a criminal offence, the respondent to an application is entitled to know the precise particulars of the offence. Application forms must be completed carefully.

(9) We raised a number of issues with the Applicant's evidence bundle. Firstly, Flat Justice had annotated the evidence using text boxes to highlight parts of the it, and to add commentary in narrative boxes at the sides. This is not acceptable practice. The evidence should be provided 'as is', in clean form, without a party's representative constructing a narrative on the face of it. That belongs in a Skeleton Argument or oral submission.

(10) Secondly, the bank statements provided on the Applicant's behalf were redacted of all information save for money moving from Ms Smith's account to the Respondent's Managing Agent. Given that it was a clear part of the Respondent's case that Ms Smith and Mr Sivanantham were joint tenants each responsible for the rent, and that a key part of the narrative provided by Flat Justice in the question of 'conduct' was that Ms Smith had a financial explanation for her failure to pay rent for three months, the transactional evidence was clearly relevant and potentially supportive or undermining of one or the other party's case on conduct and therefore disclosable.

(11) Originals were not brought to the hearing. Absence of the original documents at the hearing hindered the Tribunal. When we were provided with the unredacted documents after the hearing, in particular the bank statements, they presented a starkly different picture to what was asserted in evidence, and in the Skeleton Argument and oral submissions made by Ms Sentence. We have carefully considered whether to reconvene to give Ms Smith an opportunity to explain the wide gap between what she and Mr Sivanantham told us in

evidence, and what the accounts reveal. However, her evidence was clear, his was an echo of it, and we have material before us that allows us to make an assessment of its reliability and credibility. Ms Smith and Mr Sivanantham were at all times in a position to know what the accounts showed about their financial activity.

(12) Ms Sentance made further submissions that amounted to evidence when the accounts were delivered to the Tribunal after the hearing, when she was not invited to do so (and indeed, as they amounted to evidence, had no entitlement to give).

(13) Given that there was a clear allegation that one of the tenancy agreements was fraudulent, the Applicant was also apparently not asked to bring the original document on which she relied to the hearing. In the event we found it unnecessary to see it as we were satisfied we were able to make a finding on the basis of the evidence we had heard and what was in the bundles.

(14) Professional representatives and parties should note that original documents might be needed in any hearing; even more so in cases in which there is an allegation of the fraudulent creation of a document.

(15) The Tribunal were particularly concerned with the lack of objectivity demonstrated in the statement of case, which was in large parts used as argument rather than setting out the elements of the offence and conduct as it should, without additional commentary or pejorative terminology.

(16) It is unacceptable and concerning to read a statement of case prepared by a professional organisation in which the following is added as a 'warning': "*We would like to state at this point, as the A's representative, that should R repeat any unfounded allegation of benefit fraud and or drug use in a public hearing then we will advise her on the legal means to correct such serious and potentially damaging accusations*."

(17) That warning was included in a statement dated 20 May 2022 and therefore precedes the Respondent's statement of case. Furthermore, it referred to the Respondent's bundle dated 27 June 2022. The statement was therefore either wrongly dated or had been amended or added to at a later date.

(18) From the statement, it was plain that the Applicant's representatives knew that drug use would be put into issue by the Respondent to support her case on tenant behaviour, and that this would be based on documented complaints from the Building's managing agent by way of its concierge. It was also known that two tenancy agreements existed (albeit that the Applicant did not exhibit them both), and that accordingly the identity of the tenant and why there were two agreements and not one were matters that would need to be decided by the Tribunal. The Tribunal expects transparency and full disclosure from the parties. The inclusion of the warning in the statement is incompatible with that requirement.

(19) The Tribunal also had serious questions, once the unredacted bank statements were supplied, about the foundational basis of the Applicant's witness statement at 31 and 32, and inclusion in the Applicant's bundle of material from

the Citizens' Advice Bureau setting out statistics about the loss of income for renters due to the pandemic and unmanageable debt. A professional representative should present their client's case neutrally and based in the facts. They should not present a case that is not supported by the evidence. Their client's witness statement is, of course, their own; but if their client wishes to maintain an unsupportable line, it may be that it is inappropriate for the representative to continue to act for them if there is a resulting risk that presenting the evidence as the client wishes may lead the representative into misleading the Tribunal. It is certainly not acceptable to include statistical material to support a narrative that is not sustained by the evidence.

(20) It may well be that Ms Sentance herself was unaware until she provided the unredacted accounts of quite how starkly different the reality was from the narrative in respect of Ms Smith's financial position. The additional submission certainly appears to have been provided in that context. However, in preparing a case of this nature (both generally, and especially where fraud is alleged), it is essential that the representative has the original unredacted documents in front of them, both to prepare properly and to avoid professional embarrassment

(21) Organisations that represent parties, and that are paid on a contingency fee basis for that service, are reminded that they have a duty to the Tribunal that overrides their duty to the client. Although not regulated by an independent body, they are nevertheless obliged to maintain an objective view over the proceedings and not to mislead the Tribunal or to present a narrative not supported by evidence from their client.

The Issues

(22) It was admitted by the Respondent that the property ought to be licensed but was not so licensed under Part 3 of the 2004 Act, as evidenced in **[A123-128]**. As agreed with the parties at the outset of the hearing, the particular issues in respect of which we are to make a decision are as follows:

(a) Who was or were the tenant(s), and was one of the tenancy agreements falsified?
(b) Did the Respondent have a reasonable excuse for failing to license the property, whether initially or once she became aware of the requirements?
(c) If the Respondent did not have a reasonable excuse, what is the appropriate amount of rent that should be repaid taking into account all of the circumstances and in particular the factors in section 44(4) of the 2016 Act?

(23) In respect of conduct in particular, the Applicant sought decisions on the conduct of the Respondent in respect of (i) alleged unlawful eviction; (ii) failure to provide a fire blanket; (iii) failure to provide gas safety/electrical installations certificates and the How to Rent Guide; (iv) failure to protect the deposit.

(24) For her part, the Respondent sought decisions on conduct in respect of (i) the condition of the property when it was vacated; (ii) the delay, causing loss, that caused to the incoming tenant's occupation; (iii) drug use and antisocial conduct at the property; (iv) the continuing existence of arrears of rent; (v) unpaid heating and cooling charges; and (vi) whether any rent repayment order

should be reduced by the sums charged as 'fines' by the freeholder's managing agents for the alleged breaches of lease committed by the Applicant.

(25) A further matter that the parties agreed fell to be considered by the Tribunal in light of the Court of Appeal decision in *Kowalek* was whether, the deposit having been used by agreement between the parties to pay two months' rent arrears after the property was vacated, those sums fell due to be repaid at all.

The Law

(26) Part 3 of the 2004 Act permits a Local Housing Authority to designate that areas of its district require selective licensing, providing that the exercising of that power is consistent with the Local Housing Authority's overall housing strategy. If a Local Housing Authority has made such a designation, section 85 of the 2004 Act requires every house that meets the definitions in section 79(2) is required to be licensed, subject to exceptions for exempt tenancies as set out in section 79(3) of the 2004 Act, and subject to provisos set out in section 85(1)(a) – (c).

(27) Section 95(1) of the 2004 Act sets out that a person commits an offence if he is a person having control or management of a house which is required to be licensed under Part 3 but is not so licensed. Various defences are set out, the material of which for the present proceedings is whether the person having control or management has, on the balance of probabilities, a 'reasonable excuse' for doing so while the property is not licensed (section 95(4)(a)).

(28) Pursuant to section 43(1), the Tribunal may make a rent repayment order ('RRO') if it is satisfied beyond reasonable doubt that the section 95(1) offence in the 2004 Act has been committed, commission of the section 95(1) offence being identified in the table in section 40(3) of the 2016 Act.

(29) The amount that the landlord may be required to pay for a section 95(1) offence must relate to the rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence (section 44(2) of the 2016 Act). The sum must not exceed the rent paid in respect of that period, less any award of universal credit paid in respect of rent under the tenancy during that period.

(30) In determining the amount, section 44(4) sets out that 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.

(31) There has been much recent authority on the subject of RROs, as can be seen from the Applicant's bundle of authorities. Most recently, the Upper Tribunal (Judge Elizabeth Cooke) in *Acheampong,* as confirmed in *Dowd*, set out that

when considering an award for an RRO, the Tribunal must take the following steps:

a. Ascertain the whole of the rent for the relevant period;

b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access.

c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:

d. Consider whether any deduction from, or addition to, that figure should be made in light of the other factors set out in section 44(4).

Evidence

(32) We heard evidence from Ms Smith. She relied on her witness statements **[A14 – 19] [A58]** and gave additional oral evidence. We heard from Mr Sivanantham who also relied on his witness statement at **[A21-22]**, which addressed nothing more than the question of whether he lived with Ms Smith. He also gave additional evidence. We next heard from Mrs Tyagi, who assisted us to understand her evidence in addition to her witness statement at **[R10 – 13]**. Finally we heard evidence from Mr Nur Islam, who also relied on his witness statement at **[R14 – 18]**.

(33) For reasons that will become apparent throughout this decision, we found that Ms Smith, Mr Sivanantham and Mr Islam were all unreliable witnesses. We were particularly troubled by Mr Islam's apparent unwillingness to explain the otherwise inexplicable, and general attitude to property management as a property professional apparently managing around 80 properties. Mrs Tyagi we found to be honest, if naïve. We suspect that this experience will be a salutary one for her.

Issue 1: Who was/were the tenant(s)?

(34) The property was as represented in the Respondent's photos **[R37 – 54]**. Everything on that inventory had been there. She had left the property on 1 August 2020. She said that her start date had been delayed because the previous tenants had not moved out. It had not affected the rent.

(35) She first learned that the property had not been licensed as she had opened the post after having her baby, and accidentally opened a letter addressed to the Landlord. She had not passed that letter on – her mother had told her just to put it to one side. She had been kicked out of her mother's house and was homeless prior to starting the tenancy. Enfield would not help her as she did

not qualify for homeless assistance. Her mother had refused to write a supporting statement of the reasons that she had moved out. Enfield told her she had to find somewhere to rent privately rent.

(36) Ms Smith's evidence was that she and Mr Sivanantham, her boyfriend and the baby's father, viewed the property on 11 August 2020 with Mr Islam. They were not moving in together – the property wasn't big enough, and they didn't know each other that well. Mr Islam had told her afterwards that she wouldn't be accepted as the tenant on her own because of her age, but if Mr Sivanantham also went on the application the Landlord would accept them because she'd be able to see that there was an older person. When they had attended the office they were told to sign one agreement for the Landlord and one agreement for universal credit so it wouldn't be affected. She had lived at the property alone and paid the rent herself.

(37) In terms of the rent, she was unaware of the cap on universal credit. Mr Islam had assured her that if she rented the property, the council would have to help. All she had to do was send the tenancy agreement and they would have to help with the housing costs. When she completed the credit reference checks she had been working in a warehouse, but by the time she moved into the property she had changed jobs. Her earnings had changed and she had gone into full time work. In the lockdown transitions she was earning under £1,000 but universal credit wouldn't help – she was pregnant but they wouldn't give her that allowance.

(38) She paid rent by herself. Mr Sivanantham helped out by giving her £50, £100 now and then but not chunks of money or lump sums. She tried not to borrow money from him. He did not contribute £750 to the rent each month. When we asked her whether the property had been unaffordable from the start of the tenancy, she stated that it was, but that she had started a full-time job in retail as a store supervisor at Simply Pleasure. She made tips on top of her wages. Friends and family gave her some money here and there, which she hadn't paid back and she wasn't in debt to other people. She said that Mr Islam was aware she wouldn't pass the credit checks by herself when they were done. He acted like he was doing her a favour. She had no idea what to do for private renting.

(39) She admitted leaving the property with rent arrears. She had always paid on time until June when she had the baby. The arrangement to pay them after she left fell apart because she denied causing any damage in the property.

(40) Ms Smith accepted that she had 'faked' a tenancy agreement, but not by creating an agreement. She had signed a different agreement to be sent to the Respondent, as that is what Mr Islam instructed her to do so that the Respondent would accept her as a tenant. He'd said 'you know how it is, she'll just see a young girl by herself.' She didn't know for sure what had really happened, but accepted that the Respondent didn't know about it.

(41) Ms Smith's evidence was that Mr Sivanantham's whatsapp contact with Mr Islam on the move out date asking when "*we*" could drop off the keys **[A99]** did not mean he was the tenant – he was the father of her child which Mr Islam knew. She had been busy trying to move stuff so he had sent a message for her.

She had not brought the original tenancy agreements at **[A29 – 39]** with her to the hearing but had a scan at home.

(42) Mr Sivanantham confirmed he attended at the viewing for the flat. He initially said he didn't think that there were tenants in it when the viewing took place. He then said he hadn't phrased that properly – he just wasn't sure. He did not remember seeing any personal belongings of other tenants and he thought it could have been unoccupied.

(43) He stated that throughout the viewing process, it had been made abundantly clear to Mr Islam that he had his own property. He hadn't wanted to sign the tenancy agreement for the landlord's purposes if it would affect his own property. But Ms Smith had made it clear she needed the property, and it was the only way that Ms Smith was able to pass the checks for the landlord's purposes. He was simply acting out of care for Ms Smith. The tenancy agreement did bear his name but it did not represent his living situation. It was the first time he had dealt with private renting and he did not know the rules.

(44) Mr Sivanantham's evidence was that he and Ms Smith had only been together one month when they found out she was pregnant. He had stayed with her on the first night in the property, and maybe stayed between 1 – 3 times per month after that. They did not live together but he did visit her at the property frequently, at first once every few days and more frequently when they had found out she was pregnant. He had tried to be there as much as possible then. His council property was his home. He had been there 6 years as an assured tenant.

(45) Mr Sivanantham said that he did not contribute to the rent at all. He supported Ms Smith with £50, £100 monthly, maybe even £125 or £150 when they found out about the baby. It wasn't towards the rent. It was because she was in a pickle. He was more focused on the baby. He admitted filling out the credit check link for the property. He said that he had advised Ms Smith about her outgoings but had not directly told her the property was unaffordable. All he could do was give advice as the older partner in the relationship. He couldn't remember what the figure had been that they had worked out. He remembered being 50/50 over whether she would be able to afford the property, and she'd be left with a very low amount. He broke it down for her.

(46) Mr Sivanantham stated that he understood that he was signing a contract when he signed the tenancy agreement, and knew what that bound him to. He had done so because it was a very close thing whether Ms Smith could afford it. They had both undergone credit checks on the basis that they would each pay £750 a month. He had completed his credit check online with the answers on **[R27]**. He didn't remember specifically confirming that he would be paying £750 a month as he didn't remember being asked about his input on rent. He had understood that signing a tenancy agreement would make him liable for rent. He did this as he was told by Mr Islam it was needed for 'landlord purposes'. He wasn't sure he had asked whether it would affect him or his housing situation with Lewisham.

(47) Mr Sivanantham said that they hadn't been ready for Ms Smith to move into his property with him. They had met around February or March 2020. The relationship was fresh and they were only in the building-blocks stage, not the moving in stage. He had not formally offered for her to move in with him when they found out she was pregnant, he had told her he had open arms for her though. She had always been pregnant while in occupation of the property. When she moved out of the property he was willing to let her stay with him, but not to put her on the tenancy. Lewisham Homes had considered letting someone stay as a lodger with him previously.

(48) Mr Sivanantham stated he had only ever had one communication with Mr Islam, which was the whatsapp message on the move-out day.

(49) Mrs Tyagi's evidence was that, in no uncertain terms, she did not know about the tenancy agreement with Ms Smith as an individual. She had been told, and at all times had believed, that Ms Smith and Mr Sivanantham were joint tenants for the property. That is what Mr Islam had told her. He had sent to her the credit checks for the two individuals and the joint tenancy agreement. Whether Mr Sivanantham also had a home elsewhere was irrelevant – people can have more than one home. Completion of the credit checks and tenancy agreement should be proof enough he was a tenant.

(50) She accepted that it was possible that Mr Islam did exactly as Ms Smith said, but she didn't understand what his motivation for doing so would be. She was paying him a lot of money and had been using him since 2015 without any issues. She had no written agreement with Mr Islam. He did everything regarding the property. She accepted that put her in a position whereby she did not really know what was happening, but it had always been ok before. She did not accept that she was responsible for anything Mr Islam did as her agent that she did not ask him to do – for example the second tenancy agreement.

(51) Mrs Tyagi agreed that Mr Islam only got paid if and when a tenant was signed up for the property, and that the first rent instalment was always taken as agency fees, and that Mr Islam invoiced for check-in and check-out reports in addition. She agreed that her address did not appear on the tenancy agreement as everything went through Mr Islam. Even bills and correspondence with the Freeholder's managing agent went straight to Mr Islam, who passed them on to her.

(52) Mr Islam denied agreeing to create a tenancy agreement behind Mrs Tyagi's back. He denied that the whatsapp messages at **[A92 – 93]** meant what they said. There had been errors on the first (joint) tenancy agreement and it was for that reason a second agreement was needed. He had not kept the one with errors. He suggested the error was that it wasn't dated properly. He had no idea why Ms Smith would be suggesting that she needed an agreement with just her name on it.

(53) He offered no explanation why, if he disagreed with the request for a tenancy in her sole name, he did not reply to Ms Smith's messages at 13:20:15 on 2 September 2020 asking him when he would like her to come to the office to sign "*the separate tenancy agreement*" and on 6 September 2020 at 18:08:17

enquiring "*P.S. when roughly could I get my tennancy* [sic] *agreement with just my name on it so I can start the process with universal credit at the end of next week*" to ask Ms Smith what she was talking about, or to correct her that what he was going to give her was a tenancy agreement in the joint names with corrections of errors on it (as was his evidence), but rather said at 22:00:42 "*I can give it to you next week. Let me know when you can come and pick it up*." Ms Smith maintained that the only 'second' agreement was a corrected one.

(54) Mr Islam was adamant that Ms Smith had forged the tenancy agreement in her sole name to defraud universal credit. He 'categorically confirmed' that Mr Sivanantham lived at the property, because he had signed the agreement and he had spoken to him on the phone. He did not visit the property very often. He did not need to talk to Mr Sivanantham all the time, he should leave them in peace. He alleged that the signature on **[A39]** was not his. When asked to compare the office stamps at the end of **[A39]** and **[R88]**, which we pointed out were endorsed on the agreement at different angles over the lines so appeared at least to show that they were stamped on different days, and accompanied by different witness signatures, Mr Islam was adamant that it was easy to buy a stamp online.

(55) Mr Islam denied that, despite his payment being contingent on there being tenants in the property, it was in his interests to ensure that the property was turned over as quickly as possible between tenancies. He said that the previous tenants at the property had moved out on 25 or 26 September 2020.

(56) Mr Islam initially said he was a member of ARMA, then said it was UKALA. He said it appeared on his letterheads, of which there were none in the bundle. He was a member of SafeAgent. He had a degree in business studies. He didn't take universal credit tenants as landlords wouldn't accept them. He did not know that Ms Smith was looking towards universal credit to help pay the rent; both Ms Smith and Mr Sivanantham were working and had the means to pay the rent. He had not checked their bank statements. He had not charged them for credit checks, but had charged it to Mrs Tyagi or rather it fell to be paid as part of his percentage. He had no written agreement with Mrs Tyagi, they operated on an 'understanding' of what the agreement entailed. It was common knowledge what he would do, and letting and managing property was not that difficult (or at least hadn't been up to now). He kept Mrs Tyagi informed of everything that was going on.

(57) Ms Smith's unredacted bank statements were provided after the hearing. They show (quite literally) hundreds of transactions between Ms Smith and Mr Sivanantham during the period of the rent repayment order sought. They demonstrate that there are indeed a large number of small transactions (some as low as 17p), but there are also some very large lump sums. In almost every month, the sum far exceeds £50 to £100, even Mr Sivanantham's higher £125. There are also very large sums coming from, and going to, other sources, but because the transaction is made on a mobile app it cannot be seen to or from whom. The monthly incoming and outgoing from and too Mr Sivanantham ('TS' below), and the amounts of money in Ms Smith's accounts generally, are set out in the table below, in which we identify any single transactions from Mr

Sivanantham larger than £500. In bold are highlighted those months in which Ms Smith sent more money to Mr Sivanantham than he transferred to her:

	From TS	To TS	Month end total in current account	Month end total in savings account	Total money into current account	Total money out of current account	Date rent paid
29.08.2020 – 30.09. 2020	£3,445 (large transfers: £1,300 09.09.20, £1,360 17.09.20)	£268	£302.46	£814.08	£6,029.26	£5,813.07	
1.10.20 – 30.10.20	£647	£352	£1,885.08	£15.00	£4,200.54	£4,488.00	**17.09.20**
31.10.20 – 30.11.20	£2,531.83 (large transfer: £1,200 09.11.20)	£151.67	£85.36	£1,576.67	£7,949.10	£7,878.74	02.11.20
01.12.20 – 31.12.20	£3,296.01 (large transfer: £2,000 31.12.20)	£155.15	£273.37	£2,205.74	£7,108.11	£6,920.10	03.12.20
01.01.21 – 29.01.21	£458.65	£279.11	£10.67	£1,157.62	£5,244.59	£5,507.29	**07.01.21**
30.01.21 – 26.02.21	£182.76	**£278.30**	£108	£2,220.00	£7,279.61	£7,182.28	**08.02.21**
27.02.21 – 31.03.21	£1,163.34 (large transfer: £642 17.03.21)	**£1,931.63**	£0.26	£308.22	£11,304.61	£11,412.35	05.03.21
01.04.21 – 30.04.21	£1,319.55 (large transfer:	£422.93	£0.00	£960.75	£4,468.10	£4,468.36	**Part payment £750 26.03.21**

	£500.17 09.04.21						**(Part payment £750 on 02.06.21)**
01.05.21 – 28.05.21	£189.36	**£492.75**	£10.96	£1,063.14	£3,690.72	£3,679.76	**02.06.21**
29.05.21 – 30.06.21	£2,489,75 (large transfer: £2,070 02.06.21	£686.41	£0.11	£1,794.68	£7,802.30	£7,813.15	**PAID BY USING DEPOSIT AFTER VACATED**
01.07.21 – 31.07.21	BANK STATEMENT NOT PROVIDED						**ADMITS UNPAID**

Decision: was the tenancy agreement in Ms Smith's sole name falsified?

(58) Allegations of fraud require cogent evidence, and are not to be made lightly.

(59) We find that the tenancy agreement in Ms Smith's sole name was not forged. We do not believe Mr Islam's account that there was a third tenancy agreement with mistakes on it and that that was the document he required Ms Smith to come into the office to sign on 9 September 2020. The whatsapp conversations at **[A92 – 93]** make is plain that Ms Smith was asking for a tenancy agreement in her sole name, for universal credit purposes, and that Mr Islam agreed to provide one.

(60) Albeit that the original document was not provided, it is clear even on the digital copy that firstly, the witness signatures are different. Secondly, the Docklands Residential stamp applied to the document is at a different angle on each of the signature pages at **[A39]** and **[R88]**, which would be difficult to forge digitally. We do not accept that there is any foundation for Mr Islam's allegation that Ms Smith obtained an exact copy of this company stamp on the internet. Not only does he have no evidence for saying so, but it is not as easy as he suggested to identify the correct font, correct kerning, correct size and ratio of such a stamp to ensure that what is being ordered is identical in every aspect.

(61) When questioned, Mr Islam refused to engage in the wording of the messages, and instead sought to suggest that Ms Smith had fraudulently created the document to defraud universal credit. We do not accept that is the case. We consider that Mr Islam refused to answer the question regarding the precise wording as it reveals exactly what had happened, but what he did not tell the Respondent about, and had deliberately concealed from her. The very fact that Ms Smith states she wants the tenancy in her own name specifically for universal credit, and Mr Islam's reaction is 'Ok' and not (as he says is his general

position) 'the landlord does not accept tenants on universal credit', or 'no I won't as the tenancy is in both your names' supports our conclusion that he was party to the decision to create, and did create, a tenancy agreement in Ms Smith's sole name.

(62) We therefore find that the tenancy agreement in Ms Smith's sole name was created with Mr Islam's knowledge and consent.

Decision: who was/were the tenant(s)?

(63) Just because the second agreement was created with Mr Islam's knowledge and consent does not however answer the question whether only Ms Smith, or both Ms Smith and Mr Sivanantham were the tenants.

(64) We derive no assistance from Mr Islam's evidence. In oral evidence he claimed he just left Ms Smith and Mr Sivanantham in peace, and so was not aware whether it was just Ms Smith or both of them at the property. In his written evidence **[R17]** paragraph 4.9 he stated he could "*categorically confirm that her boyfriend Mr Thiliksan was staying in the property*", which is of course the direct opposite of his oral evidence. He could not explain this when challenged.

(65) All of the whatsapp messages appear to be between Mr Islam and Ms Smith, though we are satisfied that those messages do not comprise the whole of the communication between the parties. For example, Ms Smith communicated by email on occasion **[R66]**, and it is clear that there were phone calls in which some things were discussed (e.g. **A92** on 2 September 2020 at 13:20:15).

(66) Looking at the bank account disclosed, it is clear that rent payments were coming from Ms Smith's account. It is also clear that Mr Sivanantham was providing Ms Smith with large amounts of money, not just the "£50, £100, maybe even £125" per month he said he was. The accounts also demonstrate that Ms Smith was sending sums of money to Mr Sivanantham, and in the months of February, March and May she sent him more than he sent her. The couples' financial situation was far more entwined than they would have had us believe in their evidence.

(67) However, the accounts do not demonstrate a regular monthly payment of £750 from Mr Sivanantham to Ms Smith for rent, albeit that in some months the large transfers made by Mr Sivanantham corresponded approximately to when it was due to be paid.

(68) We have already rejected Mr Islam's evidence that the tenancy in Ms Smith's sole name was falsified by her, for the reasons given. When suggested to him that he must be motivated to turn over the property as quickly as possible as that was the way he would get paid, he rejected that outright. That is a bizarre suggestion to reject – in our experience most property managers would accept the basic proposition that if they only get paid when the property is occupied, they want it occupied as soon as reasonably possible.

(69) We accept Mr Sivanantham's evidence that he was told by Mr Islam that Ms Smith would not pass the credit checks on her own, and that by completing the

credit checks and signing a tenancy agreement Ms Smith would be able to be accepted as the tenant. We note that he has his own local authority housing, and while it is true that a person can have more than one home, we accept that Mr Sivanantham only signed the tenancy agreement out of care for his pregnant girlfriend on the encouragement of Mr Islam. We accept that in the balance of probabilities Ms Smith, Mr Sivanantham and Mr Islam never intended the joint tenancy agreement to be anything other than a vehicle to Mrs Tyagi's acceptance of a tenancy.

(70) We are satisfied from the whatsapp messages that Mr Islam knew that Ms Smith needed a tenancy agreement in her own name for the purposes of universal credit. We are satisfied that he supplied that agreement knowing that she would use it to obtain universal credit. The most generous conclusion we can come to is that he therefore knew that she would be occupying the property on her own as the sole tenant. To conclude otherwise would make him a party to intended fraud against universal credit, which would likely be terminal to his career.

(71) We therefore find on the balance of probabilities that Ms Smith was the only tenant at the property, with Mr Islam's knowledge and consent. The only person who did not know the reality of the situation was Mrs Tyagi, who we believe thought that Ms Smith and Mr Sivanantham were joint tenants as that is what Mr Islam told her and what Mr Islam provided her the credit checks for, and this is the first aspect in which he behaved contrary to her interests as her agent.

Issue 2: Did the Respondent have a reasonable excuse for failing the license the property?

(72) Mrs Tyagi admitted, and we find as a fact, that the property is in an area of selective licensing and therefore required a license, but it was not so licensed. In order to be satisfied beyond reasonable doubt that the offence was committed for the purposes of the 2016 Act, we must consider whether the Respondent has a reasonable excuse for her failure to license the property pursuant to section 95(4)(a) of the 2004 Act.

(73) Ms Smith said that she first learned that the property had not been licensed as she had opened the post after having her baby, and accidentally opened a letter addressed to the Landlord. She had read it but had not passed that letter on – her mother had told her just to put it to one side.

(74) Mrs Tyagi's evidence was that she only found out that the property needed a license in May 2021, when she and her partner received through the post from the Local Housing Authority a letter in respect of the other flat they jointly own in the area. The letter Ms Smith had opened had never been passed on to her. Mr Islam had not made her aware previously. It was only at that point Mr Islam also confirmed the requirement to her. She had genuinely been unaware of the requirement, and didn't know how one would find out without notification from the council or searching for it once you knew about it. In effect, her evidence was she did not know what she did not know. She relied on Mr Islam's advice. She acknowledged that there was no agreement setting out the parameters of Mr Islam's obligations. She liaised with Mr Islam about everything. Everything

he did at the property he sought consent for. Even the managing agents for the freeholder of the property went through Mr Islam. All bills went directly to him, and he forwarded them on and paid them from the rent received.

(75) She had not been able to afford the license fee of £750 when she found out. Ms Smith was already not paying rent, and her finances were tied up in monthly bills. The Managing Agents for the Freeholder of the property had been demanding breach 'fines' for Ms Smith's behaviour in the property. Just because she was a landlord didn't mean she had access to "unlimited funds overnight". She had found it "impossible to source another £750 right away which delayed the application by a couple of months". She had made the calculations with Mr Islam as to when it would be affordable, and decided that would be early November 2021. Mr Islam appeared to have delayed until the end of November 2021. She had been unaware of the possibility of temporary exemption, which was not clear online or in the knowledge of Mr Islam. This, amongst covid, home-schooling, the breach payments being demanded of her, working from home, deaths in the extended family and "everything else at that time" delayed the license application, as did Ms Smith's own behaviour.

(76) She received £1,500 jointly with her partner for the other property they owned in the area. Her disclosure with her Skeleton Argument has been redacted of her partner's transactions leaving only her own, because this property was hers alone and not jointly held. What the bank accounts show is that in the months May – September 2021, Mrs Tyagi had an approximate monthly income into her own account of £5,810, and outgoings from the joint account between May – November 2021 of what she said were her responsibilities of between £6,625.13 at the lowest (June 2021) and £10,497.23 at the highest. In her skeleton Argument she stated her monthly commitments were £5,052.11. Her personal monthly accounts did not show any payment being made from Mr Islam in connection with the property address. Those were shown in **[R155 – 173]** as going into Aria Private Limited's account, of which she is the sole Director. The account had only a nominal balance. The company accounts show a profit of £569 to year end 31 October 2020.

(77) The company accounts show payments in connection with the property, in the following sums on the following days by direct credit:

26 October 2020	£279.58
2 November 2020	£1454.44
8 December 2020	£1,500
14 January 2021	£1,500
February	0
8 March 2021	£429.01
April	0

May	0
2 June 2021	£2,250

(78) In his evidence, Mr Islam stated that he had known about the requirement to license the property since 2018. He had not informed Mrs Tyagi. At first, he said no more than that "was a mistake". When we asked whether he accepted that was fundamental to his property management role, he backtracked and said that the license has to be taken out by the landlord, it was nothing to do with him as an agent.

Decision: reasonable excuse

(79) The Tribunal has found this case difficult. On the one hand, it is clear that Mrs Tyagi relied on Mr Islam as her property agent and thought she had put all property management issues into his hands. If that is the case, he has not done his job and she has a reasonable excuse. However, we have considered the absence of any written agreement setting out Mr Islam's responsibilities as her agent. They proceeded on what Mrs Tyagi called a 'gentleman's agreement'. The Tribunal's experience is that those are rarely worth the paper they would have cost to be written on in property matters. It is for Mrs Tyagi to prove on the balance of possibilities that Mr Islam had without question taken on the responsibility to organising such things as licensing before the Tribunal can contemplate that being a reasonable excuse.

(80) We are not satisfied that on the balance of probabilities Mrs Tyagi has established that. Mr Islam's attitude was, in effect, 'it's none of my business', having first conceded it was a mistake. We have grave misgivings about Mr Islam's conduct, but the precise parameters of his responsibilities were within Mrs Tyagi's gift to define. She failed to do so. Ultimately it was her responsibility to ensure that, if the property needed licensing it should be licensed. Ignorance is no excuse. Becoming a landlord is a responsibility with the onus on the landlord to ensure they comply with the rules and regulations. Ms Tyagi did not do so. She abdicated all management to Mr Islam without ensuring her oversight of what he proposed was within the bounds of the rules, and without ensuring they were both working to the same understanding. Ultimately, therefore, we are not satisfied on the balance of probabilities that Mrs Tyagi had a reasonable excuse for failing to license the property up to the date when she discovered it was licensable, in around May 2021.

(81) Thereafter, Mrs Tyagi puts forward a further argument. She says that it was a reasonable excuse for failing to license that she could not afford the licence.

(82) We have considered carefully the evidence provided. We are not satisfied that Mrs Tyagi was not in a position to afford the £750 required, as she wishes us to accept. On the evidence supplied, it is true that what she says are her outgoings outstrip her income – on occasion by as much as double. We do not accept, however, that the unredacted sums in the joint account were Mrs Tyagi's sole responsibility, for that very reason. It is clear that the joint account was run jointly, for example the Amex charges paying off monthly expenditure for the

household. There is no information about income into the joint account. There is information on the profit of the company up to 31 October 2021, which is less than £200-shy of the required licence fee. We accept that instantaneous access to cash as an individual might have been difficult, but we do not accept that there was no possibility of asking her partner for an interim 'loan', or otherwise raising cash before November 2021, 6 months later. There was, after all, a rent payment in June 2021, and money taken from the deposit after 1 August 2021. There is no explanation for why, rent having been paid in full by Ms Smith for February and March 2021, and in part for April 2021, all of this money was subsumed in the alleged breach 'fines' that totalled £845.

(83) We are therefore not satisfied that Mrs Tyagi's financial position offers a reasonable excuse for failing to license after May 2021.

(84) We therefore find beyond reasonable doubt that the offence of failure to license pursuant to section 95(1) was committed by Mrs Tyagi.

Issue 3: what is the appropriate amount of rent that should be repaid taking into account all of the circumstances and in particular the factors in section 44(4) of the 2016 Act?

a. Ascertain the whole of the rent for the relevant period

(85) The Applicant seeks repayment of the sum of £11,956.47, which is described by Flat Justice as the rent paid during the period 6 October 2020 – 1 August 2021, which it also describes as nine months' rent x £1,500 = £13,500 less the amount paid by universal credit (housing element) in the sum of £1,543.53. The universal credit calculation more than doubled from the initial figures provided in the application. Flat Justice's figures plainly gloss over a number of issues.

(86) The first question is when did the tenancy start? Ms Smith stated first that in fact the start date of the tenancy was 6 October 2020 not 1 October 2020. She had been told by Mr Islam the previous occupants had not moved out, which is why the date changed.

(87) Mr Islam denied this. He said the previous tenants had moved out before the end of September 2020. Ms Smith had rung up to ask to pick up the keys on the 6 October 2020, he could not recall why. There had been no agreement to a later start date. Just because she moved in later did not mean the agreement started later.

(88) The whatsapp conversations **[A93]** show Mr Islam stating this on 7 September 2020 at 17:38:20 "*Hi. Thank you for transfer. I will confirm by 30 September the date to pivk* [sic] *up keys. It should be 6th in the evening or 7th in the mid morning.*" On 29 September 2020 at 12:15:39 Mr Islam followed up with: "*Hi can we meet at 2pm.on* [sic] *6th Oct to hand over the keys?*" Both those messages imply that the property would not be available until Mr Islam said it was.

(89) On the other hand, it is clear from **[A65-66]** that Ms Smith was awarded universal credit for the full period 19 September to 18 October 2020, there being no apparent deduction to the four-week period for the housing element. Given

she stated that she was homeless prior to taking the property, that award can only have been in connection with the property.

(90) In the circumstances, we are satisfied on the balance of probabilities that both parties maintained the start date of the tenancy on 1 October 2020, despite the later move in date. This seems to be further supported by rent payments being made, at least initially, on the 2nd or 3rd of the month as can be seen from the table above.

(91) The second matter we need to consider is whether use of the deposit to pay June's rent is a rent payment that is caught within the definitions of the 2016 Act.

(92) Section 52(2) of the 2016 Act sets out that "an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent." It appears that the parties mutually agreed that the deposit should be used to offset the rent, and that therefore within the terms of section 52(2) the deposit is to be treated as having been paid as rent. However, the question we are posed by this case is *when* the sum is to be treated as having been paid. If the deposit was not used towards the rent account until *after* Ms Smith had vacated the property on 1 August 2021, which all parties accepted that it was, that would appear to us to be a payment that does not fall to be considered as repayable for a rent repayment order as it was not a payment of rent paid in the period "*during which the landlord was committing the offence*." Ms Smith had ceased to be the tenant. As set out in paragraph 26 of *Kowalek v Hassanein Limited* [2022] EWCA Civ 1041: "*the maximum amount of a rent repayment order must be determined without regard to rent which, while it might have discharged indebtedness which arose during the period specified in section 44(2), was not paid in that period*."

(93) Ms Sentance sought to argue that the parties had agreed to the deposit being used as rent long before Ms Smith vacated, and that agreement should dictate the date on which the deposit was allocated as rent.

(94) We disagree. The whatsapp messages on 7 July 2021 **[A98 – 99]** demonstrate that this was an offer contingent on Ms Smith's agreement to mutually terminate the tenancy early. In response, Ms Smith said as follows: "*I understand the landlord's frustration but I would need some more time this cannot happen right now as I have a newborn that I will have to move with we can come to a agreement In Regards to arrears but I need agreement in regard to what day I will have until to vacate the property. In order to come to a mutual understanding*." That was not acceptance of the offer to use the deposit as rent, it was a stipulation that the parties could come to a mutual understanding for termination of the tenancy, though it did not eliminate the option of using the deposit for rent arrears.

(95) Whether the parties did come to a mutual understanding which is not documented is a matter in contention. Ms Smith's principal submission is that she was unlawfully evicted – there was no mutual agreement.

(96) Therefore on balance, the deposit having been taken as rent after termination of the tenancy, and not, on the case put forward on Ms Smith's behalf, taken in

pursuit of a mutual agreement, it could not be said to be paid as rent during the term. We therefore find that the sum of money used as rent from the deposit is not to be included in the rent figure.

(97) The whole of the rent for the term from 1 October 2020 – 1 August 2021 is therefore the 8 months' rent that was paid during the term (£12,000), less the sum of £617.51 paid by universal credit for the housing element for those months. The whole of the rent potentially available for a rent repayment order is therefore £11,382.49.

b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access.

(98) Both of the tenancy agreements include the following term:

9.2 To pay all charges falling due for the following services used during the Tenancy and to pay such a proportion of any standing charge for those services as reflects the period of time that this agreement was in force:

- *Gas*
- *Water (including sewerage and other environmental services)*
- *Electricity*
- *Any other fuel charges*
- *Telecommunications*

(99) Mr Islam claimed that the standing charges for the property were always paid by him and then recouped from the tenant because: "*tenants such as Ms Smith tend not to pay bills*". At **[R108]** are the service charge standing charges for the property, in which there is evidenced a heating and hot water charge between 1 January 2021 – 30 June 2021 of £134.75 and between 1 July 2021 – 31 December 2021 for the same amount. Ms Tyagi seeks a reduction from the available rent of £269 for these charges. That seems to us to be too much – that is the 12-month total for the period, and Ms Smith was in occupation only 10 months. Ms Tyagi accepted she might have pro-rated the amount incorrectly. There is no evidence to suggest that the sum in the previous half (1 July 2020 – 31 December 2020) was considerably higher than those standing charges. The correct pro-rated amount is therefore £224.58.

(100) It should be noted that this sum was only demanded after termination of the tenancy. Ms Smith was unable to pay these charges as she knew nothing about them, Mr Islam having failed to send her any demand for them, and they therefore do not also go to conduct.

(101) We are satisfied that they are sums, however, for Ms Smith's benefit. We therefore find they should be deducted from the sum identified above to ascertain the available sum.

(102) The available sum after deductions is therefore £11,157.91.

c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step.

(103) Clearly the offences in rows 1 and 2 of section 40(3) are considered by the 2016 Act to be so serious that nothing less than the full possible rent should be awarded, as set out in section 44(2) row 1.

(104) The Criminal Law Act 1977 section 6 offence (violence for securing entry) attracts a maximum sentence of 6 months imprisonment or an unlimited fine or both.

(105) The Protection from Eviction Act 1977 offences each attract a maximum sentence of 6 months imprisonment on summary conviction, 2 years imprisonment on indictment, and/or in each case an unlimited fine.

(106) The 2016 Act sets out that the maximum sentence for breach of banning order is 51 weeks imprisonment, a (unlimited) fine, or both. It must be considered therefore that a banning order offence is more serious than the offences in lines 3 – 6, but is not considered as serious as the line 1 and 2 offences as section 44(2) line 1 (automatic maximum) does not apply.

(107) That is unfortunately where the usefulness of comparison with maximum sentences on conviction ends. The remaining offences at lines 3 – 6 of section 40(3) all incur an unlimited fine (only). A single generic guideline in the magistrates' court, brought into place on 1 October 2019, requires starting at the statutory maximum, taking into account decisions of the Court of Appeal (Criminal Division) and any definitive sentencing guidelines for analogous offences, for which "the court will be assisted by the parties in identifying the above." The court must then go on to consider any or all of the following: aggravating and mitigating factors, taking into account any appropriate reduction if the offender has assisted the prosecution, applying a reduction for an early guilty plea, a consideration of dangerousness of the of the offender, consideration of a special custodial sentence for offenders of particular concern, the totality principle, compensation and ancillary orders, reasons, and consideration for time spent on bail (if tagged curfew).

(108) We expect that the Upper Tribunal did not have in mind in *Acheampong* or *Dowd*, the Tribunal having to try to figure out what the relative sentences would be in a magistrates' court in respect of those offences which having nothing to distinguish them sentence-wise. That would not just be a task the Tribunal is not equipped for, but it would be a departure from the approach of Mr Justice Fancourt, then President of the Lands Chamber, in *Williams v Parmar* [2021] UKUT 244(LC), which indicated that there is an evaluative approach to be taken to each case which will include questions of whether the landlord is a first time

offender, a professional landlord, the explanation for the failure to license, and the condition of the property. We expect it was not brought to the Upper Tribunal's attention that, no matter how different the offences in lines 3 – 6, there is no different sentence.

(109) Insofar as the maximum sentences on conviction are of indicative assistance, therefore, they are only useful in establishing that the offences in lines 1, 2 and 7 of section 40(2) are worse than those in lines 3 – 6, and that the offences 1 and 2 are considered worse than 7.

(110) We consider that it is correct to use our own experience of the relative seriousness of those offences in day-to-day Tribunal cases. Those involving failure to comply with an improvement notice and failure to comply with a prohibition order are in principle, and almost invariably in practice, more serious than control/management of an unlicensed HMO or Part 3 house. We consider that speaks for itself, given the nature of those offences.

(111) Of the two, the most serious in our view is the failure to comply with a prohibition order, for the reason that the Local Housing Authority would have had to have found the category one and two hazards in the premises to which it attaches so dangerous that the whole or part of it should not be occupied. Just below that is the offence of failure to comply with an improvement notice, as for the improvement notice to exist there must be category 1 and 2 hazards presenting a risk to health of the occupant in the premises to which it attaches which require rapid remedy.

(112) The hierarchy of severity of the offences in section 40(2), then, on the above analysis, is (highest to lowest): line 1 and 2 offences; line 7 offences, line 4 offence; line 3 offence; and lines 5 and 6 offences at the bottom of the scale. We see no reason to distinguish between the two failure to license offences.

(113) The present offence is therefore at the lowest end of the scale when conducting the comparison between the offences for which a rent repayment order could be sought.

(114) Turning to this offence in particular against other failure to license offences, the offence itself is one that the Tribunal sees on an almost daily basis. To be able to distinguish between it and others, it appears that we must take elements of 'conduct' that go to aggravation or mitigation of the offence (as distinct from other elements of conduct that exist separately from the offence). Otherwise the complete offence is failure to license, and there is nothing to contrast.

(115) There are two factors in this case that we consider should be taken as an 'aggravation' and of the offence itself. Those are the lack of fire blanket provided in the kitchen, and the fact that Mrs Tyagi effectively abdicated all responsibility that a landlord should ordinarily have to a property to Mr Islam, without exercising appropriate supervision or enquiry and without ensuring she had fixed the terms of the agreement between them so that she knew what remained her responsibility.

(116) Again, Mrs Tyagi said she knew nothing about the fire blanket requirement, and it appears to be Mr Islam's advice to her that it does not apply to this property.

We cannot understand on what basis that is Mr Islam's advice, given that the Newham Guidelines **[A139]** make clear that the fire safety measures apply to "*ALL PROPERTY TYPES*". That is clear aggravation of a failure to licence offence, as any pre-licence inspection would have revealed the requirement, for the tenants' safety.

(117) If Mrs Tyagi had informed herself of the requirements of being a landlord, made basic enquiries on the internet, or sought advice from a recognised landlord association, she would quickly and easily have uncovered the full range of regulatory requirements that she, as a landlord, is required to meet. She did not do this. She left it all down to Mr Islam, who she believed purported to offer her a full advice service but clearly, on the evidence, did not do so. We are troubled by the advice he continues to give (see as just one example the fire blanket issue). Mrs Tyagi, however, can see for herself the plain language of the requirements. If she was unsure, she could have checked with Newham. It is not good enough to say 'I relied on my agent's advice' when that advice is contrary to the plain words in front of you.

(118) On the other hand, it is clear that Mrs Tyagi was being extremely poorly served – and indeed lied to - by her agent. She would have no reason to suspect he was acting directly contrary to her interests in obtaining a tenant for the property who ostensibly would not pass the credit checks and lying about it to her. It appears that even now he is not advising her correctly as she believes he is – an example is the calculation of interest on arrears she says the tenancy agreement entitles her to, but which is in fact a prohibited payment under the Tenant Fees Act 2019. In her abdication of responsibility, she was naïve rather than calculating – she tried to remain involved as she was plainly authorising the actions Mr Islam advised her to take.

(119) The property was practically brand new, and in excellent condition on all accounts, and therefore there were no other risks associated with it that might make a failure to license offence worse. Mrs Tyagi is a first-time offender. We find that she is not a 'professional landlord' as Flat Justice would have us believe – we are satisfied that she owns one and a half rental properties, and they are not her main source of income or occupation.

(120) We consider that "*a fair reflection of the seriousness of this offence"* is therefore 30% of the available rent. We find that £3,347.37 is therefore the starting point, and the default penalty in the absence of any other factors but it may be higher or lower in light of the final step.

d. Consider whether any deduction from, or addition to, that figure should be made in light of the other factors set out in section 44(4).

(121) We now turn to the conduct issues that the parties wish us to consider. We start with the conduct alleged against the Respondent.

(i) Alleged unlawful eviction

(122) The application for rent repayment order was not brought under line 2 of section 40(2) of the 2016 Act. Nevertheless, Flat Justice relied on it as conduct.

(123) Ms Smith alleged that she left the property because Mr Islam had intimidated her. What she understood by Mr Islam's whatsapp of 7 July 2021 at 9:42 **[A99]** was that if she didn't agree to move out, she'd have to pay a lot of money she couldn't afford.

(124) She stated she did not remain in the property as Mr Islam had used his key in the door – which was fortunately on the latch – while she was changing the baby. On the same day Mr Islam had told her they should get out in two weeks. If they did it would all go away. That had been earlier - in June. She later told the Tribunal that Mr Islam had helped her in June when she had the baby, plainly contradicting the implication that she had found his contact in June so intimidating she was forced to move out.

(125) By 7 July 2021 she told Mr Islam that she couldn't find a property in time. She couldn't make a one-week-old child homeless (we think she must have meant to say 1 month old – we can see her hospital admission was on 4 June 2021, and if Mr Islam did indeed visit while Ms Tyagi was home in June then we expect that the baby was born on or around that date). She had to wait until she was in a better financial position. Mr Islam said she should sort out a storage unit and she was basically told she had to go now. Mr Islam had said she was very young, he didn't want it to have an effect on her, but it wasn't going to work out. Ms Smith had been unsure of any of it – she had just gone along with it. In terms of Mrs Tyagi's involvement, she accepted that there wasn't any.

(126) Mr Sivanantham stated that they had not agreed to a move-out date and to hand in the keys. There was pressure on them that shouldn't have been there. The communications at **[R104 – 105]** had been made after that pressure. He was not specific about what that pressure was.

(127) Mrs Tyagi stated that she had not instructed Mr Islam to evict the tenants. There would be no point, as the tenancy was up two months later anyway. She had asked whether they could mutually agree to early termination due to all of the complaints that she was receiving - and being charged for – from the managing agents for the freeholder. As far as she was informed and concerned that was what Mr Islam and Ms Smith had agreed. There was no force to move anyone out.

(128) Mr Islam explained his visit to the property. He had repeatedly messaged Ms Smith to ask her about rent payments, and never received a response. She usually responded only if he said he was going to go to the property. In this case she had not responded, and he was concerned whether she was ok as he knew that she was due to give birth. That had in fact been the only time he had visited the property. On all other occasions when he had said he would visit the property as a last resort to get Ms Smith to reply, that had been what prompted her to finally reply and so a visit had been unnecessary.

(129) In respect of non-responsiveness to Mr Islam's messages trying to check whether she was ok, Ms Smith said he had called when she was in hospital. She was busy and stressed out. She always responded with a text, and wasn't avoiding or dodging Mr Islam, but was busy being pregnant. It had been a hard

pregnancy and she had had to be induced. She didn't ignore calls or texts after giving birth, she always texted back.

(130) Mr Islam denied any unlawful eviction took place. He stated that they had come to a mutual agreement that Ms Smith should move out early. He relied on Ms Smith's whatsapp of 7th July 2021 **[A98 – 99]** in which Ms Smith said as follows: "*I understand the landlord's frustration but I would need some more time this cannot happen right now as I have a newborn that I will have to move with we can come to a agreement In Regards to arrears but I need agreement in regard to what day I will have until to vacate the property. In order to come to a mutual understanding*." No one had forced them to go, they had gone on a date that was mutually agreed. Conversations were had over the telephone that were not recorded in the whatsapp messages, and viewings had only started because there had been mutual agreement.

Decision: alleged unlawful eviction

(131) This is another allegation that we found difficult. None of the active participants in these events' evidence was wholly convincing. Ms Smith and Mr Sivanantham sought to play on their naivety of what happened in private housing, but we note that the law is no different for an assured housing association tenant, which Mr Sivanantham has been for six years. We are unconvinced that they are victims of intimidation from Mr Islam. The contemporaneous whatsapp messages do not bear that out. On the other hand, Mr Islam, as a property agent, ought well to know he cannot just go around letting himself into people's properties, and we are unconvinced that he had such a relationship with Ms Smith that he cared about her medical welfare. We are satisfied that his primary concern was the payment of rent, and her failure to respond to messages about it.

(132) Mr Islam denied that the section 21 Notice that had been provided had given the incorrect effective on it. No party in fact provided us with a copy of that notice, even though Flat Justice relied on it, and so we cannot make a decision in that regard. In any event, an incorrectly completed section 21 notice (which the County Court sees many times a day in a possession list) is not evidence of an intention to unlawfully evict a tenant, and so cannot assist us.

(133) We believe and find that the truth is evidenced in the whatsapp messages. Mr Islam used a combination of 'stick' and 'carrot' to see whether Ms Smith would come to a mutual agreement to end the tenancy early. We believe that one of the carrots was he did indeed tell Ms Smith, as she and Mr Sivanantham alleged, not to worry about fixing any terminal damage to the walls from e.g. the television fixings, to leave it "*as if abandoned*" – which explains Mr Islam's reference to 'other fees' in the message on **[A99]** at 9:42;15 on 7 July 2021. Another was use of the deposit as a rent payment. We do not believe his visit was an attempt to intimidate. Ms Smith admitted in her evidence that he had helped her in June. The 'stick' of reference to court fees was not, as Flat Justice suggests, unfounded – if a possession order were made, Ms Smith would usually be ordered to pay the landlord's costs of making the application. We do not doubt he was keen for them to leave, because of the arrears and the continuing letters from the managing agent for the freeholder. We do not find,

on the balance of probabilities, that his behaviour was intended to cause Ms Smith to give up the tenancy unlawfully (after all he had in fact served a section 21 notice, however ineffective it could have been given the circumstances), and we do not believe that the reason Ms Smith gave up the tenancy was because of Mr Islam's behaviour.

(134) Ms Smith's reaction was demonstrably not 'No, I am entitled to stay, please, I have nowhere to go.' It was that they could come to a "*mutual understanding*", she just needed time. We believe Mr Islam when he says that sometime between the message exchange and the arrangement of viewings, there was a conversation in which the terms on which the mutual termination of the tenancy agreement would be acceptable. We note that must be the conversation (or conversations) in which Mr Islam told them not to worry about repairing the terminal damage. We also believe, as she said in her evidence, that she was sick of the allegations of antisocial behaviour – she alleged that she was being victimised and her neighbours were racist.

(135) In the circumstances we find that there was an agreement to terminate the tenancy on mutual terms, of which both parties take the benefit. Mrs Tyagi got the property back early to rent to less difficult tenants (for the reasons set out below). Ms Smith got to leave without having to carry out her obligation to remedy any of the issues that remained in the property when she moved out or to pay for them or 'other fees associated with vacating you'. The mere fact this happened quickly does not prove that it was under undue pressure. We note that Mr Sivanantham confirmed that Ms Smith could have gone to stay with him albeit that he was unwilling to put her on the tenancy agreement, and therefore while Flat Justice's submission that she was 'homeless' by moving out of the property which made it more likely there was an unlawful eviction, that was in a technical sense in accordance with the law, rather than having no place to rest her head.

(136) We therefore find that there is no 'conduct' on the part of the Respondent to take into account under this head.

(ii) Fire blanket

(137) The lack of fire blanket has been dealt with above in aggravating factors of the offence, and so we do not take it into account in 'conduct' as to do so would double-count it.

(iii) Failure to provide gas safety/electrical installations certificates, EPC and the How to Rent Guide

(138) Ms Smith said she was provided with none of these at the commencement of the tenancy.

(139) Flat Justice asserted in the statement of case that the gas safety certificate was not provided and that this was a conduct issue. Ms Smith and Mr Sivanantham each gave evidence that they don't remember seeing a gas boiler or meter in the property and do not know whether there was a gas installation. Mrs Tyagi said she did not know as she had not been to the property since she bought it. Mr

Islam said that there was a boiler room, but that it was an electric boiler. There was no gas at the property.

(140) We confess we do not know what Mr Islam means by an electric boiler. Since it is the Applicant's own case that she does not remember there being gas at the property, we take the view that this is a matter included by Flat Justice as a conduct issue without evidence to support it. It should go without saying that there is no obligation on a landlord to provide a gas safety certificate when there is no gas installation that could be made subject to an inspection.

(141) Mr Islam said he did provide the How to Rent Guide and EPC at the start of the tenancy.

(142) Mr Islam says that the electrical installation inspection had been arranged at the start of the tenancy, but that the contractor had cancelled 'because of covid' and he had forgotten to rearrange it. No independent evidence of a booking or cancellation was provided.

(143) We are satisfied on the balance of probabilities that the EPC and How to Rent Guide were not provided at the start of the tenancy. If they had been, there would be no reason for Mr Islam to purportedly serve another copy of them on 26 June 2021 **[A98]**.

(144) Even if the electrical safety inspection was booked as Mr Islam says – and to be clear, we are not satisfied on the balance of probabilities it was – the plain fact is that it did not take place. The inspection certificate is a mandatory document. If property management is really "*not that difficult*" (in Mr Islam's own words), it ought not to have been difficult for him to comply.

Decision: gas safety/electrical installations certificates and the How to Rent Guide

(145) We are not satisfied on the balance of probabilities that a gas safety certificate should have been supplied.

(146) Failure to supply the Electrical Installation certificate and How to Rent Guide are relevant conduct that should be taken into account in the final award.

(iv) Failure to protect the deposit

(147) Mr Islam admitted that the deposit was not protected. He usually does so – proof was provided at **[R152 – 150]** – but because of covid had forgotten. Mr Islam did not elaborate on what 'because of covid' meant, and when asked by us said simply that he "*forgot*" because he was "*not in the office*".

Decision: failure to protect deposit

(148) There is no doubt that working from home changed a number of people's practices – the Tribunal's included – over the period of the worst part of the ongoing covid pandemic. However, by October 2020, Mr Islam had had 7 months in which to set in place processes. Covid is not a catch all excuse – there must be a demonstrable effect that has resulted in the error. We are not satisfied

that covid had anything to do with the failure to protect the deposit, as we have no evidence from Mr Islam how it had any influence on him 'forgetting'. If, as he says, property management is not that difficult, he has even less excuse.

(149) We are satisfied failure to protect the deposit should be taken into account in the final award.

(150) We now turn to the conduct alleged against the Applicant.

(i) the condition of the property when it was vacated

(151) Mrs Tyagi's information came from Mr Islam. He had provided an exit report to her on 30 September 2020 and had taken pictures of the property when Ms Smith had left **[R130 – 137]**. As far as she was aware, there was staining to the headboard, a large scratch to the floorboards in one of the rooms, the dining table was missing its legs, the carpet was damaged, there were holes in the walls where TVs had been mounted, pictures had not been hung back on the walls, and the place needed to be cleaned. The bed's mattress was missing.

(152) Ms Smith states that she had a video of the property when she left but it had not been provided with her evidence. Ms Sentance said it was 'not available when she put together the bundle'. Ms Smith said there was nothing missing – she had checked the dining table. The stand was there – it screwed into a central mount under the glass tabletop. She said that there were holes in the wall caused by the wall fixtures for the TVs she had put up, which Mr Islam had agreed to. He had told them not to fix them – to leave it as it was. It was unreasonable to charge just to rehang pictures on the wall. She agreed she had scratched the floorboards as shown in **[R134]**. She wouldn't pay for what she had not done. She was shattered to see the pictures.

(153) Ms Smith said that the pictures of the property she had provided **[A112-119]** were early in the tenancy, except for the one on **[A119]** of her holding the keys which was the day she was moving out, and the picture of the bed headboard at **[A117]** which was from June but not of the whole headboard. They showed that she looked after the property.

(154) She suggested that the Respondent's picture showing staining of the headboard at **[R135]** might just be that the suede was rubbed the wrong way. She denied any damage or dirt to the carpet, which she said she had stored in a cupboard throughout her occupation and never used.

(155) She accepted that the property had needed to be cleaned.

(156) She did not know what items were said to be missing, except the mattress which Mr Islam had not told her to store. She'd got rid of the old one. No-one had told her she had to leave the new one she had bought. She denied that the screw in the pole for the glass-topped dining table was missing.

(157) Mr Sivanantham agreed that the holes in the wall from putting up the TVs existed when they moved Ms Smith out. He did not agree that the floor was scratched to his knowledge – they had taken a video when they moved out including the floors. The headboard had been perfect, there was no way it was

damaged or stained. It was just the material knapping. They had done a brief courtesy clean before leaving.

(158) In respect of any involvement from Mrs Tyagi, all Ms Smith heard was that the property was in a state after she left. Ms Smith had been told by Mr Islam to leave it like that. Mr Sivanantham was adamant that Mr Islam had told them to leave the property as if it was "*abandoned*".

(159) Mr Islam denied this. He denied telling them not to fill the holes in the walls. He maintained the carpet was damaged, but it was not clear in what way. He said the screw for the table stand was missing.

(160) In respect of the mattress, Ms Smith stated that she had got rid of it by agreement with Mr Islam. She was finding the old one uncomfortable and asked his permission to replace the mattress. He had not told her she had to keep and store the old mattress – there was no-where to do so. He had only mentioned the bed base.

(161) Mr Islam denied this. He referred to the whatsapp conversation of 10 April 2021 **[A95 – 96]**. He says that showed that there had been agreement to replace the mattress, and that the old one could be stored in the (on his account, internal to the flat) "*boiler room*". He claims to have had a conversation about it outside of the whatapp chat agreeing that the mattress had to be kept.

(162) We do not believe him. According to the whatsapp chat, he asked Mrs Tyagi at around 15:37:13 whether Ms Smith could replace the bed, informed Ms Smith that Mrs Tyagi was fine with it at 15:40:59, Ms Smith asked whether there was somewhere the old bed could be stored at 15:43:41 and at 15:44:20 Mr Islam said "*No sorry. If you want you can need* [sic] *the frame in the boiler room*".

(163) The next message is not until 18 days later, and is about breach of lease.

Decision: condition of the property when it was vacated

(164) We are satisfied that Mr Islam did not tell Ms Smith to store the old mattress (he refers only to the bed frame), told her there was nowhere to store it, but did not tell her she had to keep it. We are not persuaded that any other conversation about the mattress happened outside of this communication. It was not unreasonable of Ms Smith to infer from the messages that she should not keep the mattress, only the bed frame.

(165) We are not satisfied that the dining table legs were "*missing*" as Mrs Tyagi appears to have been told. We have no proof other than Mr Islam's evidence that the screw for the tabletop was missing (which is of course quite different from what he presented to Mrs Tyagi). We are not satisfied that there was anything else missing, or that it would be reasonable to charge for hanging pictures back on hooks. We are not satisfied that the carpet was damaged – we have no evidence other than what Mr Islam says. We believe Ms Smith when she says she did not use the landlord's carpet, as we can see from her photos that her carpet is different from that pictured in the inventory.

(166) We are satisfied that the property was left with holes on the walls from mounting TVs, a scratch to the floorboards, and it is clear from the photographs that the headboard is stained (not just rubbed the wrong way as Ms Smith and Mr Sivanantham ask us to believe).

(167) We refuse to take this into account as conduct. We believe Ms Smith and Mr Sivanantham when they say they were told to leave the property "*as if abandoned*". This, in our view, was part of the mutual agreement between the parties to terminate Ms Smith's tenancy quickly and without 'other fees' associated with terminating the tenancy. It would be wrong to allow Mrs Tyagi to resile from that position; Mr Islam was her agent, with ostensible authority to agree terms of a mutual agreement to terminate the tenancy early, and that, we find, is exactly what he did. Mrs Tyagi would not be entitled to rely on these items as a consequence.

(ii) the delay, causing loss, that caused to the incoming tenant's occupation.

(168) This is inextricably linked to our finding above. Any 'delay' to the incoming tenant was not caused by Ms Smith; it was caused by Mr Islam's failure to leave enough time between the day she left and the day the other tenant was due to take up the new tenancy to accommodate any necessary repairs, cleaning etc caused by his own instruction to Ms Smith to leave the property "*as if abandoned*". We refuse to consider this as a tenant conduct issue.

(iii) drug use and antisocial conduct at the property

(169) In respect of antisocial behaviour, Ms Smith said she had apologised for what happened on 9 November 2020, by the end of November. She had had a "*small*" gathering for her birthday party. She accepted that was when covid restrictions were in complete 'lockdown', prohibiting social meetups indoors and out. The party had got out of hand and some people had had too many drinks. A neighbour had complained to the concierge, who had initially reminded them of lockdown rules. Later, there was a further noise complaint and she had tried to remove "*a person*" from the household and got hurt. That was why the police had been called. The police had never been called again.

(170) She had not received any further complaints of noise or breach of covid rules. She didn't remember when she received the first complaint about use of weed. It had been from Mr Islam, not directly from another resident. It had happened two or three times. She admitted that there could have been three complaints about weed use by 29 December 2020 **[R62]**. She did not remember the concierge knocking on the door after smelling weed and telling them not to smoke weed in the property **[R63]** but accepted it could have happened. She denied that there was any evidence of it being them and denied being caught by the concierge and residents as set out at **[R64]**; it could have been someone standing outside with a cigarette.

(171) She had written the response at **[A111]** on 29 April 2021 as she was tired of all the complaints. She was pregnant. She did not smoke weed. She thought that because of the party previously and the neighbours seeing her with her friends in the garden she was being victimised. She was tired of getting emails, so she set it all out. She couldn't understand where they were coming from as no

neighbours were knocking on the door. Mr Sivanantham would stand in the garden and smoke cigarettes. She said that the allegations of smoking weed were ridiculous. No one had smoked weed in the flat. Mr Sivanantham smoked cigarettes. She had spoken to the concierge, and he had said she was being picked on. She alleged that she was the victim of discrimination and racism on the part of one or a number of residents of the building, and that it was all lies.

(172) Mr Sivanantham's evidence about what happened on 9 November 2020 was that there were maybe 10, maybe 20 people at the birthday party. He could not remember because he was, quite frankly, black-out blind drunk. His father had been on his deathbed, and he has lost control. The argument at the property with Ms Smith was with him, but he had "*only*" been arrested for assaulting a police officer not for assaulting Ms Smith, despite the concierge recording in his account that she was hurt.

(173) He had been at the property on one day over Christmas 2020. He was unsure if he was at the property when the concierge knocked on the door according to **[R63]**. He smokes roll-ups, and has never smoked weed inside or outside of the property.

(174) Mrs Tyagi relied on the letters and emails that Mr Islam had received from the managing agent for the freeholder at **[R57 – 66]**.

Decision on drug use and antisocial conduct at the property

(175) Ms Smith admits that she held a birthday party, in a full lockdown, at which noise levels were enough to disturb other locked-down residents who were unable to use the garden, and there were between 10 – 20 people in attendance. Mr Sivanantham lost control of himself because he was blind drunk. The concierge report appears to indicate that Ms Smith was hurt as a result of trying to remove him from the property after the second complaint from other residents through the concierge, though he says he was "only" arrested for assaulting a police officer. This was in a time where right-thinking people were deeply worried about the impact of covid and were obeying all of the rules. This is clearly inappropriate conduct in a shared living space in those particular circumstances, and is conduct to be taken into account.

(176) The letters and emails from the freeholders' managing agents demonstrate that there were at least 4 complaints about drug use at the property. We do not believe either Ms Smith or Mr Sivanantham when they say they 'don't remember' the concierge coming to the door of the property, notifying them of the complaint, witnessing them still smoking, and "*they don.t listen to me still they smoke weed in this flat*." We believe Mr Sivanantham was present due to the use of 'they' in the account. There was no reason for the concierge to make this story up, if, as Ms Smith said in evidence, they were on friendly terms, and he was not the one she felt bullied by.

(177) We also do not believe Ms Smith's account as set out in Flat Justice's argument that because this was the lobby the 'smell' could not be identified as coming from the property. The property had its own lobby with an additional door going into the communal area. It was the only flat on the grounds floor.

(178) We can see from the messages on **[R65]** that Mr Islam passed on Ms Smith's allegation that it was the people in the flat above her smoking weed. She did not maintain this before us; she thought people were confused with the smell of cigarette smoke coming from the property's garden.

(179) Even the Tribunal can distinguish the smell of weed from cigarette smoke. We do not accept that people were confused as alleged. We are satisfied on the balance of probabilities that the concierge caught them red-handed. It does not matter whether it was Ms Smith or Mr Sivanantham smoking; the fact that Ms Smith permitted someone else to smoke weed in the property would also be poor conduct on her part, in light of her obligations under the tenancy agreement.

(180) We are satisfied that therefore there are at least four incidents of antisocial conduct based on the above matters. That should be reflected in the level of the repayment order.

(iv) Arrears of rent

(181) Ms Smith admitted leaving the property with rent arrears. She had always paid on time until June when she had the baby. Her income had dropped because she wasn't able to maintain her working hours, so she wasn't able to afford the rent. It took time for universal credit to make up the difference.

(182) She had made an arrangement to pay the arears after she left. It fell apart because she denied causing any damage in the property.

(183) Flat Justice included in the Applicant's bundle the Citizens Advice report on the effect of the pandemic on private renters. They included in their statement of case at paragraph 6.15.20 reference to it in context of the explanation for the arrears of rent they say led to Ms Smith's unlawful eviction.

(184) That was not Ms Smith's evidence to us, or indeed in her witness statement – her evidence was that she was in a position that she could not pay because of her working hours/benefit payments due to her new baby. It should be obvious to say those are quite different things, and this appears to us another example of an allegation made, or narrative pursued, by Flat Justice without supporting evidence. In the same way as 'covid' is not a general excuse for Mr Islam, it is not a general excuse for Ms Smith.

(185) Mrs Tyagi said that Ms Smith was constantly late with the rent. She did not appear to understand that Mrs Tyagi's ability to pay her bills depended on rent being received on time and in the amount due.

Decision on arrears of rent

(186) Ms Smith said that she had always paid on time until June when she gave birth. That is not true, as can be seen from the table of her income/outgoings and rent payments earlier in this decision. However, it is true to say that up until April 2020 the rent was only a few days late, in one case up to a week late. What is reflected in the second table of Mr Islam's payments to Mrs Tyagi is that his payments were often delayed (or indeed absent) for a further period. That may

well have been by agreement between them, but that cannot be laid at the door of Ms Smith.

(187) After April rent was very late, and for the months of June and July entirely unpaid. This did not correspond to Ms Smith's drop in income from her job – in the universal credit statements for the period of the two months between 18 March - 18 May, the reported earnings from Ms Smith's job were £1,181.38 and £1,080.11 respectively. In the following month (19 May - 18 June 2021), Ms Smith's income from her job was reported as £1,105.94, and universal credit paid her an increased sum of £1,399. Rather than falling, therefore, her income from the sources she told us about *increased*. No statement for universal credit was include in the bundle after that, but we note from the first table above Ms Smith seemed to have more money going into her account in June 2021 – around £7,800. Net of her payments to him, £1,803.34 of that came from Mr Sivanantham. No bank statement for July has been supplied.

(188) We have been careful to note that we do not have any evidence where the rest of the sums of money going into Ms Smith's account were going. She has not had the opportunity to answer questions on the account, as it was only provided unredacted after the hearing. There might be a reasonable explanation for sums as large as £11,000 moving into, and back out of, her account. We did, however, hear evidence from both Ms Smith and Mr Sivanantham that was clearly a lie when viewed against those accounts; that is that he only sent to her "£50, £100, maybe £150" per month. Over the period of the tenancy to the end of June 2021 (bearing in mind no July accounts have been provided) he sent to her (net of what she returned to him) £10,705.30. This alone would have been enough to pay all but £2,794.70 of the rent over that period.

(189) We were not provided with Ms Smith's associated savings account. As we have said, it is impossible to identify from the accounts provided what the majority of payments out, and in, were being made for. We do note that May is a month when Ms Smith had the lowest sum of money moving through her account (around £3,690). It is also a month in which she made total new payments to Mr Sivanantham, of nearly £480. May was also the month in which Ms Smith appears to have received a Social Fund payment of £500 from the DWP.

(190) In light of the evidence, we are not prepared to accept Ms Smith was unable to afford the rent. We are satisfied that she failed to pay rent for other reasons, but was able to afford to pay it. She failed to prioritise the rent. This is material conduct for the purposes of the amount of the rent repayment order.

(v) Fines for breach of tenancy

(191) Mrs Tyagi asked us to deduct from the sum to be awarded the 'fines' she says were imposed by the freeholder's managing agent for the breaches of lease set out.

(192) Firstly, we should identify that these do not appear to be 'fines', they appear to be administration charges in connection with the managing agent writing to Mrs Tyagi regarding the alleged breaches. If that is right, they would be susceptible to a Tribunal application of their own.

(193) Secondly, we have not been provided with a copy of the lease between Mrs Tyagi that sets out her liability to pay these charges as demanded by the letters from Prime Property Management. It is only by establishing she has that liability that she can seek to pass it on. She has not done so.

(194) Thirdly, this appears to us to be an aspect of the antisocial conduct we have already stated we will consider in the amount of the final award.

(195) Finally, these charges were known at the date Mr Islam and Ms Smith agreed mutual terms for early termination of the tenancy, and we take the view that they are part of the "other fees" Mr Islam on his part, acting for Mrs Tyagi, agreed to forgo in consideration for early termination of the tenancy.

Other section 44(4) factors

(196) There is no relevant conviction that we must take into account pursuant to section 44(4)(c) of the 2016 Act.

(197) For the reasons as set out above, we are not satisfied that there are any other financial circumstances of the landlord that we should take into account pursuant to section 44(4)(b).

Conclusion on amount of award

(198) We have identified above the conduct that we agree should be taken into account in the amount of the award.

(199) We are troubled by Mr Islam's failure to complete basic steps on the signing up of a new tenant. We are also troubled that something as basic as important as registration of the deposit with a relevant scheme, for both parties' protection. As we have said earlier, Mrs Tyagi takes responsibility for the actions (or inaction) of her agent, over whom she has exercised insufficient supervision to ensure he was doing basic tasks, and whose judgement and advice she appears not to question even in the face of requirements written in black and white.

(200) On the other hand, we are satisfied that Ms Smith caused at least four complaints by her or her friends' or Mr Sivanantham's conduct at the property, during a particularly difficult period in which covid in its more virulent strain was keeping other people locked in their homes, and sought to pass off the blame to others rather than to adapt her behaviour or control her visitors. We are also satisfied that Ms Smith failed to prioritise rent, but could in fact have paid it.

(201) Standing back and looking, we consider that the conduct as identified effectively cancels each-the-other out. We therefore consider that the reasonable sum for a rent repayment order, and the sum we direct Mrs Tyagi to pay, is £3347.37

Costs of the Application

(202) As a consequence of making a successful application for a rent repayment order, we consider that the Applicant is entitled to the costs she has incurred in bringing the application. Those amount to £300 (£100 application fee and

£200 hearing fee). We considered whether the application had been exaggerated; however we concluded that the faults we identified were those of Flat Justice and not those of the Applicant, and that therefore there should be no reduction in the costs to be awarded to her.

Name: Judge N Carr **Date:** 24 October 2022

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).