FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AE/HMF/2022/0068**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**First Floor Flat, 43 Prout Grove, London, NW10 1PU**
Applicants	**:**	**Hassan Mohamud and Qamar Siryad**
Representative	**:**	**Cameron Neilson of Justice for Tenants**
Respondent	**:**	**Akhtar Khan**
Representative	**:**	**Not represented or present**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge P Korn** **Ms S Coughlin MCIEH**
Date of Hearing	**:**	**11 November 2022**
Date of Decision	**:**	**9 December 2022**

DECISION

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Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in electronic bundles, the contents of which we have noted. The decisions made are set out below under the heading "Decisions of the tribunal".

Decisions of the tribunal

(1) The tribunal orders the Respondent to repay to the Applicants jointly by way of rent repayment the sum of £4,193.69.

(2) The tribunal also orders the Respondent to reimburse to the Applicants the application fee of £100.00 and the hearing fee of £200.00 paid by them.

(3) The above sums must be paid by the Respondent to the Applicants within 21 days after the date of this determination.

Introduction

1. The Applicants have applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("**the 2016 Act**").

2. The basis for the application is that the Respondent was controlling and/or managing a house which was required under Part 3 of the Housing Act 2004 ("**the 2004 Act**") to be licensed at a time when it was let to the Applicants but was not so licensed and that the Respondent was therefore committing an offence under section 95(1) of the 2004 Act.

3. The Applicants' claim is for repayment of rent paid during the period from 1 April 2020 to 31 March 2021 in the amount of £6,118.84.

Applicants' case

4. In written submissions, the Applicants state that the Respondent rented the Property to both of them as husband and wife (albeit that Ms Siryad was not a party to the written tenancy agreement) for the whole of the period of the claim. For the whole of that period the Property was required to be licensed under Part 3 of the 2004 Act but the Respondent failed to apply for the required licence. He finally applied for a licence on 17 May 2021.

5. The Property was situated within a selective licensing area designated by the London Borough of Brent. The selective licensing scheme came into force on 1 June 2018 and will cease to exist on 30 April 2023. The selective licensing scheme has been implemented in the electoral wards of Dudden Hill, Kensal Green, Kilburn, Mapsebury and Queens Park. The wards of Harlesden, Wembley Central and Willesden Green within the London Borough of Brent had already previously jointly been designated as an area of selective licensing. The Property met all the criteria to be licensed under the said designation.

6. The Respondent is believed by the Applicants to be an appropriate Respondent for this application because the Respondent is named as the landlord in the tenancy agreement and is the beneficial owner of the Property as shown by the land registry title deed. The Respondent is, therefore, a "person having control" of the Property for the purposes of section 263 of the 2004 Act as he is the person who received or would have received the rack-rent if the Property was let at a rack-rent. The Respondent also received or would have received rent from tenants in an HMO and is therefore also a "person managing" the Property for the purposes of section 263 of the 2004 Act.

7. The details of the rent repayment amounts being applied for by the Applicants are set out in a spreadsheet, and the Applicants have provided proof of these payments in the form of bank statements and banking screenshots. The Applicants state that under section 44 of the 2016 Act they are entitled to recover any rent paid in any 12-month period during which the offence was being committed, and they are seeking to recover the sum of £6,118.84 for the rent paid for the period between 1 April 2020 and 31 March 2021. They state that this figure is arrived at after deducting the amount of rent covered by housing benefit.

8. As regards the parties' respective conduct, the Applicants state that they have conducted themselves well and paid the rent due. The Respondent, by contrast, has broken a number of laws, with serious consequences for potential risks to the occupiers and their quality of life.

9. More specifically, the Respondent has failed to comply with the legal obligation prescribed by Schedule 4 to the 2004 Act requiring a smoke alarm in proper working order to be installed on each storey of the Property. A smoke alarm has only been installed this year after the Applicants have lived in the Property for 7 years. The Respondent also did not comply with the legal duty of a landlord in section 36 of The Gas Safety (Installation and Use) Regulations 1998 to ensure that a gas safety certificate was in place throughout the tenancy and provided to the occupiers. Furthermore, there was an issue with the gas cooker when the Respondent personally changed the pipes. He installed the wrong pipe, placing the Applicants and their family at great risk and the

cooker was eventually condemned as not safe for use after a visit from a qualified gas engineer.

10. The Respondent failed to comply with the legal duties of a landlord in section 3 of The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 to ensure that an electrical safety certificate was in place throughout the tenancy and provided to the occupiers. The Respondent also failed to comply with the legal duties of a landlord in section 6 of The Energy Performance of Buildings (England and Wales) Regulations 2012 requiring the landlord to provide a copy of their EPC to their tenant.

11. There was also significant mould and damp throughout the bedrooms, where the Applicants resided with their young children. Among a baby crib and toddler bed, mould covered the walls from floor to ceiling. Walls throughout were crumbling due to high levels of dampness. Upon request from the Applicants, the Council conducted an inspection of the Property which called attention to the level of disrepair. The Applicants have had written notice of the outcome of the investigation on 19 March 2021 whereby the Respondent was given 21 days to carry out the Council's requirements. The Council discovered a Category 1 hazard and multiple Category 2 hazards, including a hazard to the Applicants' children due to lack of restrictors to windows, lack of a smoke detector in the flat, excessive cold and a missing part of a floor-board and protruding nails from the first floor landing.

12. The Council also imposed its own selective licence conditions which the Respondent failed to meet. These included a failure to provide a gas safety certificate and to ensure that the gas installations and appliances were tested annually by an approved gas safety engineer, a failure to maintain the safety of electrical appliances, a failure to comply with the due process of repairs including failure to comply with the authority's investigation requirements and a failure to ensure that the work ordered by the Council was carried out within a specified time and to a prescribed standard.

13. In addition, the Applicants submit that the Respondent has failed to take reasonable or any steps to keep abreast of licensing obligations as is to be expected of a professional landlord.

14. The Applicants have supplied copy documentation in support of their submissions.

Respondent's case

15. The Respondent did not attend the hearing and was not represented at the hearing. He wrote to the tribunal nearly a week after the hearing stating that he had been unable to attend as he had previously had eye

surgery and his vision was impaired. It is unclear, though, why he was unable to notify the tribunal prior to the hearing.

16. In written submissions the Respondent refers to *"exceptional circumstances resulting in totally unintentional terms was the case for the selective license not being present"*. He also states *"furthermore, as not all properties were included by Brent Council (for the selective license) it is only right that they notify the owners"*.

17. The Respondent states that the COVID-19 pandemic meant that obtaining certification, such as the gas safety annual checks, was impossible due to factors totally out of his control. He also blames his failure to obtain a licence on COVID-19.

18. The Respondent goes on to state that the Applicants threatened to destroy the Property and then did so. Regarding the problems with the gas cooker, he states that the gas supply was shut off as a result of a gas leak but not for any other reason, that any new regulations were complied with, and that the Applicants have damaged two gas hobs since 2018.

19. The Respondent also refers to certain court actions to recover rent arrears from the Applicants and has provided certain copy documents in support. He also states that Mr Mohamud was asked to vacate the flat in 2018 but *"forced his way into staying in the flat"*.

Mr Mohamud's witness evidence

20. The tribunal tried to cross-examine Mr Mohamud (one of the Applicants) on his witness evidence at the hearing. However, it became apparent early on that his English was simply not good enough for him fully to understand the questions being asked. Whilst the tribunal is concerned that this problem was not identified at an earlier stage to enable an interpreter to be present, the fact remains that Mr Mohamud's grasp of English was sufficiently weak that nothing could usefully be learned, and no inferences (whether positive or negative) could be drawn, from his replies.

Other submissions at hearing

21. Mr Neilson for the Applicants said that the Respondent's excuse for not having a licence was simply one of ignorance, and it was clear from various decisions of the Upper Tribunal that mere ignorance was rarely a sufficient defence to this offence. Furthermore, the Respondent's ignorance was not reasonable as he had no processes in place to alert him to his legal obligations. Also, a licensing scheme in respect of adjacent areas had been in place since 2014 and a licensing scheme for

the area in which the Property was situated had been in place since 2018, and so he had ample opportunity to find out the position.

22. As regards the Respondent's suggestion that he was unable to obtain a gas certificate, he had not offered any proper evidence to support this point.

23. In relation to utilities, these had all been paid for by the Applicants, as required by the terms of the tenancy agreement. In relation to previous convictions, the Applicants accepted that there was no evidence that the Respondent had any. In relation to the Respondent's financial circumstances, the Applicants did not have any evidence on these.

24. Regarding the Respondent's claim that the Applicants had been in rent arrears, Mr Neilson said that the Applicants accepted that they had been in arrears for a brief period during July/August 2022 but that this was during a time when there were problems with hot water and cooking which had caused them extra expenses, and they could not afford the rent as well. It was also accepted that there had been an earlier period when rent had not been paid in full for a few months, but the arrears were connected to non-repayment of a rent deposit.

Relevant statutory provisions

25. Housing and Planning Act 2016

Section 40

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to – (a) repay an amount of rent paid by a tenant …

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

	Act	***section***	***general description of offence***
1	Criminal Law Act 1977	section 6(1)	violence for

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

Section 41

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if – (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and (b) the offence was committed in the period of 12 months ending with the day on which the application is made.

Section 43

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

(2) A rent repayment order under this section may be made only on an application under 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with – (a) section 44 (where the application is made by a tenant) …

Section 44

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

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

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

(3) The amount that the landlord may be required to repay in respect of a period must not exceed – (a) the rent paid in respect of that period, less (b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

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

Housing Act 2004

Section 95

(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part … but is not so licensed.

(4) In proceedings against a person for an offence under subsection (1) … it is a defence that he had a reasonable excuse … for having control of or managing the house in the circumstances mentioned in subsection (1) … .

Section 263

(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—
(a)receives (whether directly or through an agent or trustee) rents or other payments from—
(i)in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
(ii)in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or
(b)would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

Tribunal's analysis

26. The Respondent has effectively accepted that the Property was not licensed at any point during the period of the claim and that it was required to be licensed. He also does not deny that he was the landlord

for the purposes of the 2016 Act, nor that he was a "person having control" of the Property and/or a "person managing" the Property, in each case within the meaning of section 263 of the 2004 Act.

27. We are satisfied based on the evidence before us, including the supporting documentary evidence, that the Property required a licence under the local housing authority's selective licensing scheme throughout the period of the claim. We are also satisfied on the evidence that the Respondent had control of and/or was managing the Property throughout the relevant period and that the Respondent was "a landlord" during this period for the purposes of section 43(1) of the 2016 Act.

The defence of "reasonable excuse"

28. Under section 95(4) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a house which is licensable under Part 3 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.

29. In written submissions the Respondent appears to suggest that he had a reasonable excuse for failing to obtain a licence, referring to *"exceptional circumstances resulting in totally unintentional terms was the case for the selective license not being present"*, and adding *"as not all properties were included by Brent Council (for the selective license) it is only right that they notify the owners"*.

30. In the case of *Aytan v Moore and others [2022] UKUT 027 (LC)*, the Upper Tribunal considered the defence of "reasonable excuse" in circumstances where the landlord's excuse was not merely that they did not know that a licence was required but also that they had been relying on their agent to inform them about licensing requirements. In that case the Upper Tribunal concluded that there was no evidence before it to demonstrate that a reasonable landlord could safely have relied on the agent in those circumstances.

31. In the present case the Respondent is not even claiming that he was relying on an agent to advise him; his argument seems to be simply that he did not know that the Property needed a licence and that the Council should have told him. On the first point, mere ignorance of the position, if the Respondent was indeed ignorant, does not amount to a reasonable excuse. The failure to obtain a licence where one is required is a criminal offence, and it was incumbent upon the Respondent to take reasonable steps to satisfy himself as to the legal requirements relating to the letting of the Property. There is no evidence before us that he took any steps whatsoever to do so or that he joined any forums or had any other system for keeping up to date with the law.

32. As for his second argument, it is true that the local housing authority has a responsibility to advertise the introduction of a new licensing scheme in general terms. However, he has not argued that it failed to do so and appears instead simply to be implying that a landlord is not liable for this offence unless the local housing authority has informed him personally of the current licensing requirements. This is not the case.

33. In conclusion, we do not accept that the Respondent had a reasonable excuse for the purposes of section 95(4).

The offence

34. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. The offence of control or management of an unlicensed HMO under section 95(1) of the 2004 Act is one of the offences listed in that table.

35. Under section 41(2), a tenant may apply for a rent repayment order only if the offence relates to housing that, at the time of the offence, was let to the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made. Having determined that the Respondent did not have a reasonable excuse for failing to license the Property, we are satisfied beyond reasonable doubt that an offence has been committed under section 95(1), that the Property was let to the Applicants at the time of commission of the offence and that the offence was committed in the period of 12 months ending with the day on which the application was made.

Process for ascertaining the amount of rent to be ordered to be repaid

36. Based on the above findings, we have the power to make a rent repayment order against the Respondent.

37. The amount of rent to be ordered to be repaid is governed by section 44 of the 2016 Act. Under sub-section 44(2), the amount must relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. Under sub-section 44(3), the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of housing benefit or universal credit paid in respect of rent under the tenancy during that period.

38. In this case, the claim does relate to a period not exceeding 12 months. The Applicants accept that part of the rent was covered by the payment of housing benefit. According to the Applicants' initial written

submissions, the amount of rent paid was £18,000.00 and the amount covered by housing benefit was £11,881.16. This is the basis of the Applicants' suggested starting point of £6,118.84.

39. At the hearing, the tribunal asked the Applicants' representative to arrange for the tribunal to be sent evidence of the amount of housing benefit paid during the relevant period, so that it could check the figures, which he duly did. The tribunal then considered the evidence provided and added up the figures for the period from 1 April 2020 to 31 March 2021 by ignoring the sums wholly outside that period and apportioning those partially inside that period. This exercise gave a total figure for housing benefit during the relevant period of £13,340.35, not £11,881.16. Therefore, the maximum sum that can be awarded by way of rent repayment is £18,000.00 less £13,340.35, namely £4,659.65.

40. On the basis of the Applicants' evidence, which in this respect is not disputed by the Respondent, we are satisfied that the Applicants were in occupation for the whole of the period to which the rent repayment application relates and that the Property required a licence for the whole of that period. There is also no dispute between the parties as regards the amount of rent paid by the Applicants in respect of this period. There is, though, the question of whether there are any separate periods in respect of which there were any rent arrears. It is not being argued that any such rent arrears were never paid; rather it is stated by the Respondent that there were two separate periods during which rent arrears built up temporarily. Any such temporary arrears are not relevant to the starting point for the calculation of any rent repayment order, but they may be relevant to conduct and therefore to the question of whether any deductions should be made to reflect any poor conduct on the part of the Applicants. This point will be dealt with further below.

41. Under sub-section 44(4), in determining the amount of any rent repayment order 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 the relevant part of the 2016 Act applies.

42. The Upper Tribunal decision in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* is one of the authorities on how a tribunal should approach the question of the amount that it should order to be repaid under a rent repayment order if satisfied that an order should be made. Importantly, it was decided after the coming into force of the 2016 Act and takes into account the different approach envisaged by the 2016 Act.

43. In her analysis in *Vadamalayan*, Judge Cooke states that the rent (i.e. the maximum amount of rent recoverable) is the obvious starting point, and she effectively states that having established the starting point one should then work out what sums if any should be deducted. She departs from the approach of the Upper Tribunal in *Parker v Waller (2012) UKUT 301*, in part because of the different approach envisaged by the 2016 Act, *Parker v Waller* having been decided in the context of the 2004 Act. Judge Cooke notes that the 2016 Act contains no requirement that a payment in favour of a tenant should be reasonable. More specifically, she does not consider it appropriate to deduct everything that the landlord has spent on the property during the relevant period, not least because much of that expenditure will have repaired or enhanced the landlord's own property and/or been incurred in meeting the landlord's obligations under the tenancy agreement. There is a possible case for deducting utilities, but otherwise in her view the practice of deducting all of the landlord's costs in calculating the amount of the rent repayment should cease.

44. In Judge Cooke's judgment, the only basis for deduction is section 44 of the 2016 Act itself, and she goes on to state that there will be cases where the landlord's good conduct or financial hardship will justify an order less than the maximum.

45. Since the decision in *Vadamalayan*, there have been other Upper Tribunal decisions in this area, notably those in *Ficcara and others v James* (2021) UKUT 0038 (LC) and *Awad v Hooley (2021) UKUT 0055 (LC)*. In *Ficcara v James*, in making his decision Martin Rodger QC stressed that whilst the maximum amount of rent was indeed the starting point the First-tier Tribunal (FTT) still had discretion to make deductions to reflect the various factors referred to in section 44(4) of the 2016 Act. In addition, he stated that neither party was represented in *Vadamalayan*, that the Upper Tribunal's focus in that case was on the relevance of the amount of the landlord's profit to the amount of rent repayment and that *Vadamalayan* should not be treated as the last word on the exercise of discretion required by section 44.

46. In *Awad v Hooley*, Judge Cooke agreed with the analysis in *Ficcara v James* and said that it will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4).

47. In *Williams v Parmar & Ors [2021] UKUT 244 (LC)*, Mr Justice Fancourt stated that the FTT had in that case taken too narrow a view of its powers under section 44 to fix the amount of the rent repayment order. There is no presumption in favour of the maximum amount of rent paid during the relevant period, and the factors that may be taken into account are not limited to those mentioned in section 44(4), although the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

48. Mr Justice Fancourt went on to state in *Williams* that the FTT should not have concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord", and so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment if what a landlord did or failed to do in committing the offence was relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise.

49. In *Wilson v Arrow and others [2022] UKUT 027 (LC)*, which was heard by the Upper Tribunal together with *Aytan v Moore and others*, the Upper Tribunal concluded that the compelling factor was the absence of important fire safety features, in particular fire doors and alarms, which gave rise to a dangerous situation for the tenants throughout the time they lived at the property until the problems were finally remedied. The Upper Tribunal regarded this as a very serious matter and made only a 10% deduction from the rent to be repaid.

50. In *Hallett v Parker and others [2022] UKUT 165 (LC)*, the Upper Tribunal did not accept a submission that the fact that the local authority has decided not to prosecute the landlord should be treated as a "credit factor" which should significantly reduce the amount to be repaid.

51. In its decision in *Acheampong v Roman and others [2022] UKUT 239 (LC)*, the Upper Tribunal recommended a four-stage approach to determining the amount to be repaid, which is paraphrased below:-

(a) ascertain the whole of the rent for the relevant period;
(b) subtract any element of that sum that represents payment by the landlord for utilities that only benefited the tenant;
(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 compared to other examples of the same type of offence; and
(d) consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

52. Adopting the *Acheampong* approach, the whole of the rent in this case means the whole of the rent paid by the Applicants out of their own resources, i.e. in this case not including rent funded by housing benefit. This gives a starting point of £4,659.65. There is no evidence of the Respondent having paid any utilities and so there is nothing to subtract in this regard.

53. As regards the seriousness of the offence, whilst it could be argued based on the maximum criminal penalty available that there are offences covered by section 40(3) of the 2016 Act which can give rise to

a greater criminal sanction, a failure to license is still a serious offence. Failure to license leads to significant health and safety risks for often vulnerable tenants, and sanctions for failure to license have an important deterrent effect on future offending as well as encouraging law-abiding landlords to continue to take the licensing system seriously and to inspire general public confidence in the licensing system. As for the seriousness of this offence compared to others of the same type, in our view it was a particularly serious example. On this point, it seems inevitable that there is a large degree of overlap between (a) the seriousness of the offence compared to other similar offences and (b) how good or poor the landlord's conduct was. The landlord's conduct is referred to in more detail below, but we mention it here as well because the length of the period of non-compliance coupled with the nature of and range of the Respondent's other failings referred to elsewhere in this determination make the offence in this case, in our view, one that should attract a high penalty, subject to any other relevant factors.

54. As regards the specific matters listed in section 44, the tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence. We will take these in turn.

Conduct of the parties

55. The Applicants' conduct has been characterised as poor by the Respondent. However, there are reasons to treat the Respondent's evidence with extreme caution. First of all, he neither attended an earlier case management hearing nor the final hearing itself. It is unclear why he failed to attend the case management hearing, as he offered no explanation or apology in advance. As regards the final hearing, no explanation for his non-attendance was received until nearly a week after the hearing took place. His stated reason was that he had previously had eye surgery and his vision was impaired. However, as noted above, it is unclear why he was unable to notify the tribunal prior to the hearing. In addition, his general non-compliance with the tribunal's directions led to him being issued with an 'Unless Order' at one point.

56. Secondly, his written submissions contain a series of assertions which are mostly not substantiated. Where he has provided copy documentation he has often provided (for example) mere extracts from court orders, and it is noteworthy that he has at no point made himself available to be cross-examined on his evidence. In view of his lack of proper engagement with this process coupled with the clear evidence of his poor conduct as a landlord and the fact that he committed a criminal offence under section 95(1) of the 2004 Act for a considerable period, we do not consider him to be a reliable witness. And whilst our task has been made harder by Mr Mohamud's poor grasp of English

and therefore his inability to offer meaningful answers to oral questions, it remains the case in our judgment that the Respondent's own assertions should carry very little weight in the absence of proper independent evidence to corroborate those assertions.

57. Applying the above to the issue of rent arrears, the Applicants accept that they were in arrears for a brief period during July/August 2022 but state that this was during a time when there were problems with hot water and cooking which caused them extra expenses and they could not afford the rent as well. In the absence of any proper engagement with this process by the Respondent, we accept the Applicants' explanation. This is not completely to excuse the fact of the rent arrears; merely to accept that these arrears were for a short period and that there was a reason why the Applicants were struggling to pay which arguably had some connection with the Respondent's own conduct. In relation to the earlier period in respect of which it was stated by the Respondent that rent had not been paid in full for a few months, the Applicants also accept that this was the case but state that the arrears were connected to non-repayment of a rent deposit. In relation to those earlier arrears, in our view neither party has provided a clear or compelling explanation as to the circumstances of these arrears. Whilst it is possible that the Respondent could have persuaded us that his version of events was accurate if he had engaged properly with the tribunal and with this process, the fact remains that he has not done so and it would not in our view be appropriate simply to assume that his analysis is the more accurate, particularly in the light of his poor conduct generally. In conclusion, therefore, there is evidence of there having been some rent arrears but insufficient evidence of the Applicants' conduct in this regard having been poor other than perhaps to a very minor degree.

58. In relation to the other assertions on the part of the Respondent, they have not been supported by any real evidence and are not in our view remotely credible.

59. The evidence of the Respondent's poor conduct, on the other hand, is much more compelling. Based on the documentation that we have seen, coupled with a lack of credible response or (in relation to certain issues) no response at all, we are satisfied that that there are a number of aggravating factors in this case. First of all, the selective licensing scheme came into force on 1 June 2018 and yet the Respondent did not apply for a licence until 17 May 2021. Secondly, a smoke alarm was only installed this year for the first time after the Applicants had been living in the Property for 7 years. Thirdly, the Respondent did not ensure that gas or electrical safety certificates were in place throughout the tenancy and provided to the occupiers. Fourthly, there was an issue with the gas cooker when the Respondent personally tried to change the pipes despite having no relevant qualifications and then installed the wrong pipe, thereby placing the Applicants and their family at great risk

until the cooker was eventually condemned as not safe for use after a visit from a qualified gas engineer.

60. Fifthly, there is evidence of significant mould and damp throughout the bedrooms where the Applicants lived with their young children. Among a baby crib and toddler bed, mould covered the walls from floor to ceiling, and walls throughout were crumbling due to high levels of dampness. Sixthly, upon request from the Applicants, the Council conducted an inspection of the Property and discovered a Category 1 hazard and multiple Category 2 hazards, including a hazard to the Applicants' children due to lack of restrictors to windows.

Financial circumstances of the landlord

61. There is no evidence before us regarding the Respondent's financial circumstances.

Whether the landlord has at any time been convicted of a relevant offence

62. The Respondent has not been convicted of a relevant offence.

Other factors

63. It is clear from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal "must, in particular, take into account" the specified factors. One factor identified by the Upper Tribunal in *Vadamalayan* as being something to take into account in all but the most serious cases is the inclusion within the rent of the cost of utility services, and this point has been reiterated in *Acheampong*. As noted above, in the present case the Respondent is not arguing that any deductions need to be made for utility costs and the Applicants have provided evidence that they paid for utilities.

64. We are not persuaded that there are any other specific factors which should be taken into account in determining the amount of rent to be ordered to be repaid.

Amount to be repaid

65. One point worth emphasising is that a criminal offence has been committed. There has been much publicity about licensing of privately rented property, and no mitigating factors are before us which adequately explain the failure to obtain a licence. The Respondent claims ignorance of the position, but this is not a sufficient excuse; it is incumbent on those who let out properties to acquaint themselves with

the relevant legislation, the purpose of which is to guarantee tenants certain minimum standards of safety and comfort.

66. We are also aware of the argument that good landlords who apply for and obtain a licence promptly may feel that those who fail to obtain a licence gain an unfair benefit thereby and therefore need to be heavily incentivised not to let out licensable properties without first obtaining a licence. In addition, even if it could be argued that the Applicants did not suffer direct loss through the Respondent's failure to obtain a licence, it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If landlords can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show that they have suffered actual loss, this will significantly undermine the deterrence value of the legislation.

67. The four-stage approach recommended in *Acheampong* has already been set out above. The amount arrived at by going through the first two of those stages is £4,659.65 (see paragraph 52 above). As for the third stage, this is covered by paragraph 53 above.

68. Returning to the specific factors to be taken into account under section 44(4) of the 2016 Act, the fourth stage of *Acheampong*, there is no persuasive evidence before us that the Applicants' conduct has been anything other than good, with the slight exception that there have been some rent arrears for which it is arguable that the Applicants may bear some small degree of culpability, but no more than that.

69. As regards the Respondent's conduct, for the reasons outlined above his conduct has been very poor. The Property remained unlicensed for a very long period, there were serious deficiencies in the Property and the Respondent did not properly engage with the tribunal process.

70. In *Wilson v Arrow*, heard by the Upper Tribunal together with *Aytan v Moore*, it was held that the absence of important fire safety features was a compelling factor and was a very serious matter. In the current case, the significant mould and damp, the absence of a smoke alarm for such a long period, the absence of gas and electrical certificates, the reckless approach to the fixing of the gas cooker, the various hazards found by the Council and all the other matters referred to above amount in aggregate to a very serious catalogue of failings for which the Respondent appears to show no remorse.

71. The Respondent has not at any time been convicted of a relevant offence, but it is clear from the Upper Tribunal decision in *Hallett v Parker* that this by itself should not be treated as a significant credit factor. We have no evidence regarding the Respondent's financial circumstances. There is also no evidence that the Respondent has a large property portfolio.

72. Taking all of the factors together, in particular the serious nature of the Respondent's failings in relation to the Property, coupled with his lack of remorse or even acknowledgement as to their gravity, in our view this is a case in which the rent repayment should be close to 100% of the total amount claimed. We accept that there may be a very minor degree of culpability on the part of the Applicants in relation to rent arrears, and we also note that the Respondent has not at any time been convicted of a relevant offence and that there is no evidence that the Respondent has a large property portfolio. However, in our view it would only be appropriate to make a 10% deduction for these slight mitigating factors. To deduct any more in these circumstances would in our view serve to downplay the seriousness of the offence and weaken the deterrence value of the legislation.

73. As the amount claimed is £4,659.65, a 10% deduction would reduce this to £4,193.69. Accordingly, we order the Respondent to repay to the Applicants jointly the total sum of £4,193.69.

Cost applications

74. The Applicants have applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for an order that the Respondent reimburse the application fee of £100.00 and the hearing fee of £200.00.

75. As the Applicants have been successful in their claim, albeit that there has been a small deduction from the maximum payable, we are satisfied that it is appropriate in the circumstances to order the Respondent to reimburse these fees.

Name: Judge P Korn **Date:** 9 December 2022

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason

for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.