FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HP/HMF/2022/0018
Property	:	131 Dorchester Road, Poole, Dorset, BH15 3RY
Applicant	:	Jakob Brugmans Katalin Laho Varlami Tukuadze
Representative	:	Cameron Neilsen Justice For Tenants
Respondents	:	Trojan Developments (Bournemouth) Limited (Co no- 06325981) (1) Location BH Ltd (Co No-11182682) (2)
Representatives	:	------------
Type of Application	:	Application for a rent repayment order by Tenant Sections 40, 41, 42, 43 & 45 of the Housing and Planning Act 2016
Tribunal Members	:	Judge J Dobson Mrs A Clist MRICS Mr E Shaylor MCIEH
Date of Hearing	:	18th April 2023
Date of Decision	:	26th June 2023

DECISION

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Summary of the decision

1. **The Tribunal is unable to make a rent repayment order against the First Respondent irrespective of whether the First Respondent has committed an offence, the First Respondent company having been dissolved.**

2. **The Tribunal is satisfied beyond reasonable doubt that the Second Respondent committed an offence under section 72(1) of the Housing Act 2004 between 4th January 2021 and 3rd January 2022.**

3. **The Tribunal is satisfied that the Second Respondent was a landlord of the Property within the meaning of section 40 of the Housing and Planning Act 2016**

4. **The Tribunal has determined that it is appropriate to make a rent repayment order in favour of the Applicants against the Second Respondent.**

5. **The Tribunal makes a rent repayment order against the Second Respondent in favour of the individual Applicants in the following sums:**

   Jakob Brugmans £3, 779.13

   Katalin Laho and Varlami Tukuadze (jointly) £3,894.41.

6. **Payment is to be made by the Second Respondent within 14 days of service of this order.**

7. **The Tribunal determines that the Second Respondent pay the Applicants £300 as reimbursement of Tribunal fees, such payment to also be paid within 14 days.**

Application and background

8. By an application dated 6th July 2022[49-59], the Applicants applied for a rent repayment order in respect of rent paid during a period of 4th January 2021 to 3rd January 2022 against the First and Second Respondents. The amount claimed was £5,786.00 in respect of the First Applicant and £6,360.00 in respect of the Second and Third Applicants jointly. Various supporting documents were provided.

9. The application was brought on the ground that the Respondents had committed an offence of having control or management of an unlicensed House in Multiple Occupation ("HMO"), namely 131 Dorchester Road, Poole, Dorset, BH15 3RY ("the Property") (an offence under section 72(1)

of the Housing Act 2004 ("the 2004 Act")) and one or other or both was the Applicant's landlord of the Property.

10. The property is a detached house with a communal kitchen, with a conservatory in which there was a dining table, and two other rooms to the ground floor used as double bedrooms (Rooms 1 and 2 as termed) plus a small WC. In addition, there are a further two double bedrooms (Rooms 3 and 4 as termed) and a bathroom to the first floor.

11. The First Respondent is the Freeholder of the property [189-191], although the letting, and management at least insofar as receipt of rent payments, of the property was attended to on behalf of the First Respondent by the Second Respondent, which in its statement of case describes itself as variously the First Respondent's tenant and agent.

12. The First Applicant's case is that a tenancy was entered into in relation to a room at the Property on 6th October 2020. The tenancy was an oral one. No fixed term was agreed and hence the tenancy was periodic from the outset.

13. The Second and Third Applicant's case is that a tenancy was also entered into in relation to a room at the Property by them on 6th October 2020. The same point applies as above in respect of the nature of the tenancy. Their case is presented on the basis that their tenancy was a joint one and that the room was occupied by both living together as a couple in a relationship.

The law and jurisdiction in relation to Rent Repayment Orders

14. Rent repayment orders are one of a number of measures introduced with the aim of discouraging rogue landlords and agents and to assist with achieving and maintaining acceptable standards in the rented property market. The relevant provisions relating to rent repayment orders are set out in sections 40 -46 Housing and Planning Act 2016 ("the 2016 Act"), not all of which relate the circumstances of this case.

15. Section 40 gives the Tribunal power to make a rent repayment order where a landlord has committed a relevant offence. Section 40 (2) explains that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant (or where relevant to pay a sum to a local authority). Whilst reference is made to "the landlord" in that provision, all other references are to "a landlord" save for section 40(3) which refers to "a landlord" and then to "that landlord", being the "a landlord" just mentioned.

16. Section 41 permits a tenant to apply to the First-tier Tribunal for a rent repayment order against a person who has committed a specified offence, including the offence mentioned at paragraph 8 above, if the offence relates to housing rented by the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made.

17. Under section 43, the Tribunal may only make a rent repayment order if satisfied, beyond reasonable doubt in relation to matters of fact, that the landlord has committed a specified offence (whether or not the landlord has been convicted). Where reference is made below to the Tribunal being satisfied of a given matter in relation to the commission of the offence, the Tribunal is satisfied beyond reasonable doubt, whether stated specifically or not.

18. It has been confirmed by established case authorities that a lack of reasonable doubt, which may be expressed as the Tribunal being sure, does not mean proof beyond any doubt whatsoever. Neither does it preclude the Tribunal drawing appropriate inferences from evidence received and accepted. The standard of proof relates to matters of fact. The Tribunal will separately determine the relevant law in the usual manner. The standard of proof for matters found by the Tribunal other than in respect of the offence asserted to have been committed by the landlord is the balance of probabilities.

19. Where the application is made by a tenant, and the landlord has not been convicted of a relevant offence, section 44 applies in relation to the amount of a rent repayment order, setting out the maximum amount that may be ordered and matters to be considered –discussed further below.

The history of the case

20. Directions were first given on 20th October 2022 and amended on 1st November 2022 [27 onward], providing for the parties to provide details of their cases and the preparation of a hearing bundle. The Applicants sought clarification of the nature of the relationship between the Respondents when applying to the Tribunal and the Directions included a requirement for the Respondents to address that, but no response was received.

21. The First Respondent did not reply to the application. The Second Respondent submitted only a single page response dated 8th November 2022 from one Aneta Plec comprising five short paragraphs and with no witness statements or documents. It was denied that the Property was required to be licensed.

22. A bundle was prepared on behalf of the Applicants comprising 247 pages and including written witness statements from the Applicants [47-48 (First) and 43-44 (Second)] and from others described as former tenants of the Property. The order of the bundle was unsatisfactory, which did not assist the Tribunal as much as ought to have occurred.

23. The hearing was listed on 3rd January 2023 and started on that date. Very regrettably, only on that day was it identified on behalf of the Applicants that the Second and Third Applicants would be unable to sufficiently understand the proceedings and be able to give evidence because their understanding and speaking of English was not sufficient and hence interpreters were required. It was said that the Applicant's representative had previously communicated with the Applicants by email- and implicitly

had never spoken to them at any point in the case- such that the extent of the Second and Third Applicants' limited understanding or oral English was not known to it.

24. The Tribunal flagged up its considerable concern at the written evidence in English and the statement of case similarly in English and including legal propositions, such documents bearing statements of truth. The inference was that there had been an inadequate explanation of the significance of those matters and of the importance of them being properly understood and perhaps most obviously there had been inadequate checking of those matters. It was said by Mr Neilsen on that occasion that the witness statements had been prepared by the Applicant's themselves based on a pro-forma, which was a partial explanation but did not address issues with the statement of case.

25. The Tribunal was thereby compelled to adjourn the final hearing to a later date on which interpreters could be arranged and when the Tribunal could again find capacity to hear the case. Inevitably, that produced something of a delay.

26. The Tribunal noted then and repeats now its considerable disappointment that such a significant matter was not addressed prior to the day of the hearing itself. Significant cost was incurred and inconvenience occasioned, the hearing day effectively being wasted.

The Hearing

27. The adjourned hearing proceeded in person at Havant Justice Centre on 18th April 2023. The Applicants were again represented at the hearing by Mr Cameron Neilsen of Justice for Tenants. The Applicants were in attendance. The Respondents were not in attendance.

28. Mr Neilsen produced a Skeleton Argument of thirteen pages, more akin to a written submission and largely re-iterating matters in the Applicants' statement of case. That referred to a number of case authorities, although those were not separately provided.

29. It was identified by the Tribunal on the morning of the hearing by checking the on-line records of Companies House that the First Respondent had been dissolved on 28th February 2023 and so was no longer in existence, which the Tribunal considered precluded it from making any rent repayment order against the First Respondent in the event that it would otherwise be appropriate to do so. It was also identified that the accounts for the Second Respondent for 2021 were overdue. The Property itself was identified as having been sold by the First Respondent in January 2022.

30. Oral evidence was given by the First and Second Applicant. That of Ms Laho was given with the assistance of an interpreter Ms Broderick, who interpreted the questions and answers, together with the remainder of the proceedings, to and from Hungarian. In respect of Mr Tukuadze, he did not give evidence but also received the assistance of another interpreter Dr Atherton in respect of the translating the proceedings. Dr Atherton

interpreted to and from Russian. The two interpreters kindly explained their role to the Applicants following request by the Tribunal that they do so.

31. It was identified by Dr Atherton when she commenced interpretation that Mr Tukuadze's understanding and speaking of Russian was imperfect. Mr Tukuadze's first language is Georgian, but no Georgian interpreter had been found. It had been understood that Mr Tukuadze could deal with matters in Russian.

32. Dr Atherton explored the extent to which the Third Applicant could understand and deal with matters. It was indicated in the hearing that Mr Tukuadze had not used Russian for several years. However, in the event, with the assistance of Dr Atherton and Mr Tukuadze indicating if he did not understand the translation, he was able to understand matters in Russian to a level that he and Dr Atherton were content with, and the Tribunal similarly.

33. The First Applicant gave evidence prior to the other Applicants. The Second Applicant then gave evidence. She and the Third Applicant shared a witness statement in addition to being a couple and sharing a room. There was no need for additional evidence from the Third Applicant. The Tribunal was content that it had been able to gain all of the evidence that it required.

34. Prior to hearing in relation to the case more generally, the Tribunal also further explored with Mr Neilsen the detailed statement of case and other documents in English and signed by the Applicants given the need for the Second and Third Applicants to have interpreters. That was accepting, as the Tribunal does, that an ability to read and understand a language in writing and the ability to speak it and understand the language spoken, in particular in the context of a formal hearing, are somewhat different.

35. It was submitted by Mr Neilsen that the understanding of the Second and Third Applicants of written English was much better than spoken English. The Tribunal arranged for the Applicants to have written copies of documents rather than relying on the electronic documents they held on their mobile telephones. Ms Laho also explained that the Second and Third Applicants had used a translation programme to convert their words into English from Hungarian. Even that raised the question of how the Third Applicant would understand, to which the answer given was that the Second and Third Applicants communicated matters as they ordinarily did, indicated to be in a mixture of languages, including English. The Tribunal was prepared to accept the explanation.

36. Those matters satisfied the Tribunal in respect of witness statements. They did not in respect of the detailed, apparently largely pro-forma and very technical statement of case placed at the start of the bundle [2-17], a full understanding of which ahead of signing it may be difficult even for persons whose first language was English, not least in the absence of the

various documents and the sources of the statistics which are both quoted. The Tribunal does not dwell on that in this instance.

37. The Tribunal explained to Mr Neilsen the matters mentioned in paragraph 29 above. He advised that the Applicants had objected to the First Respondent being struck off the Register of Companies but without success. He accepted that the Tribunal could not make an order against the First Respondent and hence the hearing would proceed considering the question of a rent repayment order against the Second Respondent only. The striking off had not been highlighted to the Tribunal by the Applicants' representatives in the Skeleton Argument of Mr Neilsen or otherwise notwithstanding the apparent knowledge of it.

38. Hence the Tribunal would have proceeded on the premise that the First Respondent remained a party against which a rent repayment order could be made taking the Applicants' case as presented on the papers had it not made its own enquiry. The Tribunal would thereby have been misled. To refer to that as unsatisfactory would be a marked understatement. It is to be expected that the Applicants' representative will ensure that any matters relevant to the making of an order are specifically brought to the attention of the Tribunal in any future cases. Only by doing so will it and its advocates fulfil their respective obligations.

39. No attempt to have the First Applicant restored to the Register of Companies was mentioned, from which the Tribunal surmises that there was no such attempt for the purpose of pursuing this application against the First Respondent.

40. Given the, entirely inevitable, delay arising from the need for all matters to be interpreted by two interpreters for the Second and Third Applicants, and the very slow start because of other issues identified above, the hearing took all day notwithstanding the lack of attendance by the Respondents and the lack of challenge to the evidence and submissions.

41. The Tribunal accepts the oral and written evidence given by and on behalf of the Applicants in the main. That evidence was unchallenged by the Respondents.

42. The Tribunal placed very little weight on the written witness statements of witnesses who did not attend the hearing. The lack of attendance necessarily meant that the witnesses could not be questioned. No reason was given for that lack of attendance with inevitable impact on the weight which could be given to those statements, that being significantly less than the weight placed on the evidence of the Applicants who attended. There were also assertions in such statements as to the condition of the Property which were not supported by the Applicants, which the Tribunal did not therefore accept.

43. Following completion of the oral evidence, closing submissions were made by Mr Neilsen.

44. The Tribunal is grateful to all the above for their assistance with this case.

45. The Tribunal sincerely apologises for the delay in the provision of this Decision since the hearing.

46. Whilst the Tribunal makes it clear that it has read the bundles in full, much of the documentation is not referred to in detail, or in many instances at all, in this Decision [for example approximately 100 pages of bank records of payments], it being unnecessary to so refer. Where the Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that they have been ignored or left out of account. Insofar as reference is made to any specific pages from the bundle in this Decision, that is done by numbers in square brackets [ ], as occurs in the preceding paragraphs where appropriate, and with reference to PDF bundle page- numbering.

47. This Decision also seeks to focus on the key issues and does not cover every last factual detail. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. A number of the various matters mentioned in the bundle or at the hearing do not require any finding to be made for the purpose of deciding the relevant issues in the case. Findings have not been made about matters irrelevant to any of the determinations required.

Was a relevant offence committed and during what period?

48. An offence under Part 2 section 72(1) of the 2004 Act is committed by a person (or company) having control of or managing where a property is required to be licensed as a house in multiple occupation and is not so licensed. Section 61(1) requires that every such house to which Part 2 applies must be licensed unless limited exceptions apply, not relevant to this application.

49. The meaning of having control and of managing is explained in the lengthy section 263 of the 2004 Act. It is perhaps something of an oddity that the person managing a property for the purpose of the 2004 Act is the landlord. That is notwithstanding that the landlord may not be managing the property at all in the manner the term managing would ordinarily be understood. It might be thought that the managing agent, where there is one, manages the given property. In contrast, it might at first blush appear logical that the person whose property it is has control of the property. Instead, by way of receiving the rack- rent, even if only to pass it or most of it to the landlord, if there is an agent it is the agent which is the person in control pursuant to the 2004 Act. Of course, if the rent is paid to the landlord and not to agent, the landlord is the person in control, as defined, in addition to being the person managing.

50. By article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 an HMO is of a prescribed description for the purpose of section 55(2)(a) of the 2004 Act if it is occupied by five or more persons living in two or more separate households as their only or main residence sharing at least one basic amenity with rent being paid and

where their occupation of the property constituted the only use of that accommodation. If those circumstances exist, it is mandatory for a property to be licensed by the local authority. Properties may also require a licence in other situations but none that are relevant to this case.

51. The Applicant's written case was that at all relevant times, the Property was occupied by five or more persons who were not part of the same household and that the other requirements were met. The unchallenged written and oral evidence of the Applicants explained about the occupiers of the Property from time to time during the relevant period. The written statements indicated that the Property was the only or main residence of those occupiers.

52. The oral evidence of the First Applicant, was that there were between five and seven occupiers at most times, including himself. However, as clarified by the First Applicant, there were four occupiers after 1st June 2021. Room 1 was stated to have been occupied at the start of the relevant period by a Polish couple called Daniel and Angelika aged in their mid- 20s (whose written statements are in the bundle [35-42 and again a second time]). However, they later left on 1st June 2021 it was indicated and there was a gap of approximately one month or so before someone called Kris moved into room 1. The written case of the Applicants in fact identified that moving in date as 8th July 2021, so one month and one week later.

53. Prior to Kris moving in, a tenant called Peter (or as per the Statement of Case, Petere) occupied room 2, the Second and Third Applicants occupied room 3 and the First Applicant occupied room 4. Upon Kris moving in, there were five occupants. However, for the period prior to that there were four. Hence for that period of one month and one week, the Property was not required to be licensed. There would have been six occupiers until Daniel and Angelika moved out. There had been seven until late 2021 the statement of case said but that was prior to the relevant period.

54. The First Applicant also stated that Kris moved out in November 2021 and another tenant called Michael moved in on 1st December 2021. The First Applicant could not be clear in oral evidence for how long there was a gap. However, the written statement of case put Kris's leaving date as being 1st November 2021 so exactly one month before Michael moved in. There were only four occupiers during the intervening month.

55. The statement of case thereby demonstrated that there were not five occupiers at all times, contrary to the statement in the document that there were. That indicated a lack of adequate care in its preparation. It did not lead to the rejection of the oral evidence.

56. The oral evidence of the Second Applicant suggested that the Second and Third Applicants moved from their initial room to another room, although the written statement of case states that they occupied room 3 throughout. Nothing turns on that in any event.

57. The First Applicant was additionally clear that all the occupants lived at the Property all of the time whilst in occupation, as opposed to having any other home elsewhere. In light of that evidence, the Tribunal was satisfied to the required standard that part of the requirements was made out. The Tribunal was similarly satisfied from the written and oral evidence and the supporting documentation that rent was paid, that there was more than one household and that amenities were shared.

58. The Tribunal accordingly found that the requirements for the Property to be licensed were proved beyond reasonable doubt from 4th January 2021 until the 1st June 2021, from 8th July 2021 until 1st November 2021 and then from 1st December 2021 until 3rd January 2022. The Tribunal perceives, although it was not explicitly stated, that on 4th January 2022 there were again fewer than five occupants.

59. Mr Neilsen referred in oral closing to a case authority of *Irvine v Metcalfe* [2021] UKUT 60 (LC) as authority that the relevant period of twelve months need not be a single continuous period and that there could be gaps. He did not seek to extend the period forward or backward. The Tribunal accepted the principle held in *Irvine,* being aware of the authority, although it was another authority which had not been provided to the Tribunal in this case.

60. The Tribunal was satisfied to the required standard from the contents of the bundle and the oral evidence, combined with the lack of any assertion to the contrary, that the Property was not licensed.

61. Indeed, the Tribunal noted that it was implicit from the response of the Second Respondent that the Property was not licensed. That response asserted that there was no need for a licence because there were two bedrooms upstairs and two reception rooms and that any property with four rooms or less as well as four households or less is "Non licensable". For the avoidance of doubt, the Tribunal unhesitatingly determines that assertion as to licensing requirements to be entirely wrong.

62. The local council stated that there has never been an application for a licence in an email to the Applicants' representatives [192].

63. Nevertheless, and for the avoidance of doubt, the Tribunal notes that intention to fail to licence, or lack of it, is not relevant to the commission of an offence, there being strict liability in the absence of a licence.

64. The Tribunal therefore determines that a failure to license offence under section 72(1) of the 2004 Act was committed by such persons as were either managing or in control and that the relevant period in which the offence was committed was the periods above, totalling nine months and twenty- four days (July less seven days), being periods in which all the Applicants were tenants.

65. There was no reasonable excuse advanced for the commission of the offence by either Respondent.

66. The Tribunal is required to consider whether there is a reasonable excuse where a respondent refers to matters which may amount to one, irrespective of whether a defence of there being a reasonable excuse is advanced specifically by the given respondent. The determination is made on the balance of probabilities. However, the Tribunal is not required to guess whether there may be a reasonable excuse where a respondent has advanced nothing which could even potentially amount to one.

67. In this case, the First Respondent plainly has not raised anything which could amount to a reasonable excuse, having not raised anything at all, but in any event that is no longer relevant. The Second Respondent in its brief document also raises nothing which could amount to a reasonable excuse. The contents of Mr Neilsen's Skeleton Argument in respect of reasonable excuse and the caselaw to which he referred do not require reference in the circumstances.

68. The Tribunal determines that there is no reasonable excuse in relation to either Respondent, more relevant the Second Respondent, for the commission of the offence if one or other was a person managing or in control.

By which Respondent, if any, was an offence committed?

First Respondent

69. It was identified that if the Second Respondent was acting as agent for the First Respondent in granting tenancies to any of the Applicants and the First Respondent was the landlord, the First Respondent would be the person managing the Property. That is because the First Respondent is the freehold owner of the subject property and on the basis that payments of rent were made to the Second Respondent pursuant to an arrangement made with the First Respondent which meant the Second Respondent was entitled to receive the rents - per section 263(3)(b). The First Respondent would therefore commit the licensing offence as being a person managing.

70. In contrast and as identified in *Cabo*, an owner of property who does not collect the rent is not a person in control in the sense described in section 263(a) of the 2004 Act) and so does not by that specific means commit the licensing offence.

71. If the Second Respondent was a lessee, the First Respondent would then be a superior landlord. However, it may still commit an offence as a person managing if in receipt of rent or payments, which need not be a rack- rent (the questions of commission of an offence and of being a person against whom a rent repayment order can be made being different ones).

72. However, it matters not whether there was an offence committed by the First Respondent because the Applicants are not assisted by that, given the striking off and dissolution of the First Respondent prevents any action being taken against it and in particular prevents a rent repayment order

being made against it, irrespective of whether it is the landlord against which such a rent repayment order can be made.

Second Respondent

73. The Second Respondent committed the offence as being in control of an unlicensed house in multiple occupation pursuant to section 263(3)(b) of the 2004 Act.

74. A person is in control if rack-rent is received or their own account or as agent for another. The Upper Tribunal in *Cabo v Dezotti* [2022] UKUT 240 (LC), put it this way:

"In short, the person having control is the rent collector, whether they are collecting on their own account or on behalf of someone else."

75. The person in control may be an owner or lessee which has the rent paid to it. However, there is nothing in the 2004 Act, as the Upper Tribunal also noted, which requires that the person in control needs to have any interest in the property itself.

76. The Second Respondent received the rent payments from the Applicants the Tribunal finds. It is clear from the unchallenged evidence of the Applicants from the rent payments were made. The Tribunal finds that the rent was the market rent for the Property, being the rent that the Applicants were prepared to pay and with no suggestion that it was discounted in any way. Accordingly, it was rack- rent for these purposes.

77. The Tribunal noted from the bundle that rent was paid by certain tenants, including most notably the Second Applicant, to an account identified as belonging to, or otherwise being in the name of, Eric Olivia Limited but noted from information available from Companies House that Ms Aneta Plec, the Director of the Second Respondent had previously been a director of Eric Olivia Limited and that Eric Olivia Limited no longer existed. The Tribunal also noted that there was no suggestion in the response of the Second Respondent or in any other document in the bundle that the required rent had not been paid and so that payment to the account held in the name of Eric Olivia Limited had not been acceptable.

78. The Tribunal determined on the evidence that the particular bank account had been established in the name of Eric Olivia Limited and inferred that the name of the account had not been altered when that company ceased operating, as the information clearly indicated it to have done. Instead, the Second Respondent became the vehicle for acting as agent for the First Respondent and any other clients and/ or became the tenant of any given property from which it then granted sub- tenancies. For the avoidance of doubt, no part of the rent was found to actually have been paid to Eric Olivia Limited.

79. The oral evidence received was that all rent was paid to the Second Respondent as instructed. It was said by the First Applicant for example

that the Second Respondent would send a text asking for rent to be paid and he would pay it. The Tribunal does not find the name of the particular account to detract from the Applicants having paid rent to the Second Respondent in its relevant capacity.

80. Having found that the Second Respondent received rent, irrespective of whether that rent was received for the Second Respondent itself or on behalf of the First Respondent, the Second Respondent was a person in control for the purposes of the 2004 Act, hence the commission of the offence.

The decision in respect of making a rent repayment order in principle

81. Given that the Tribunal is satisfied, beyond reasonable doubt, that at least the Second Respondent committed an offence under section 72(1) of the 2004 Act, during the periods identified, a ground for the making of a rent repayment order has been made out.

82. Pursuant to the 2016 Act, a rent repayment order "may" be made if the Tribunal finds that a relevant offence was committed. Whilst the Tribunal could determine that a ground for a rent repayment order is made out but not make such an order, Judge McGrath, President of this Tribunal, said whilst sitting in the Upper Tribunal in *The London Brough of Newham v John Francis Harris* [2017] UKUT 264 (LC) as follows, albeit under previous provisions but with the same purpose:

> "I should add that it will be a rare case where a Tribunal does exercise its discretion not to make an order. If a person has committed a criminal offence and the consequences of doing so are prescribed by legislation to include an obligation to repay rent or housing benefit then the Tribunal should be reluctant to refuse an application for a rent repayment order."

83. The very clear purpose of the 2016 Act is that the imposition of a rent repayment order is penal, to discourage landlords from breaking the law, and not to compensate a tenant- who may or may not have other rights to compensation. That must, the Tribunal considers, weigh especially heavily in favour of an order being made if a ground for one is made out.

84. The Tribunal is given a wide discretion and considers that it is entitled to look at all of the circumstances in order to decide whether or not its discretion should be exercised in favour of making a rent repayment order. That is a different exercise to any determination of the amount of a rent repayment order in the event that the Tribunal exercises its discretion and makes such an order, albeit that there may be an overlap in factors relevant.

85. The fact that the Second Respondent responded in brief and unclear terms (and the First Respondent failed to respond to the application at all), does not alter the need for the discretion to be properly exercised. It necessarily follows from there being a discretion to make a rent repayment order, as

opposed to such an order following as a matter of course, that there will be occasions on which it may considered not appropriate to make an order notwithstanding that a relevant offence has been found to have been committed, albeit such occasions are likely to be rare.

86. Having considered the circumstances and the purpose of the 2004 Act, the Tribunal exercised its discretion to make a rent repayment order in favour of the Applicants in this case, subject to there being a party against which an order can be made and being mindful of the inability to make such an order against the First Respondent which no longer exists. Hence, subject to the Second Respondent being a landlord for the purposes of the Act.

Can a rent repayment order be made against the Second Respondent?

87. The Upper Tribunal in Cabo v Dezotti [2022] UKUT 240 (LC), rent repayment orders are provided for by Chapter 4 of Part 2 to the Housing and Planning Act 2016, which begins with the statement in section 40(1) that:

> "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."

88. There is consequently a further matter to consider beyond the commission of the licensing offence which has been determined, namely that the offence has to have been committed by a landlord.

89. Mr Neilsen recognised in his Skeleton Argument that the Tribunal only has jurisdiction to make a rent repayment order against a respondent landlord which is the Applicants' immediate landlord, in light of the judgment of the Supreme Court in *Rakusen v Jepsen* [2023] UKSC 9. Immediate in that context means rather than a superior landlord. That much is now simple enough.

90. The situation is complicated by the statement of case of the Second Respondent stating the following:

> "The 2nd respondent was in fact the agent and then the tenant of the 1st respondent at various times during the letting of the property. This arrangement was under a verbal trust only with no formal written agreement"

91. That refers to the Second Respondent being the agent and the tenant at one time or another but without explaining any period of time of either of those and so without relating either in any way to the time period relevant for the sake of the Applicants' applications, namely 4th January 2021 to 3rd January 2022 inclusive. Whilst it could be taken that the comments reads as the Second Respondent starting off as the agent and later becoming the tenant, the reference to "various times" suggests a fluid picture which changes more than once.

92. The Tribunal does not consider that the comment can be treated as reliable and finds that it does not assist with determining the actual status of the Second Respondent.

Second Respondent as lessee?

93. The proposition advanced was that the Second Respondent was the First Respondent's tenant and granted sub- tenancies to the Applicants in that capacity and hence the Second Respondent was the immediate landlord of the Applicants (and the First Respondent would not then be liable pursuant to *Rakusen*).

94. Mr Neilsen referred in his oral submissions to the case of *Bruton v London Quadrant* (also referred to in the Reply, giving case reference [2000] 1 AC 406), which he submitted held that provided a tenant had exclusive possession (and implicitly enough other necessary features to be a tenancy) the landlord did not need to have a proprietary interest in the property. The Upper Tribunal in *Cabo* had recorded one specific question for determination by it to be "Could a company with no proprietary interest in the property be a landlord?" and had unsurprisingly found that it could, referring to that case. The Upper Tribunal more particularly explained that "a company (or other person) with no proprietary interest in land can grant a tenancy of that land and can be a landlord".

95. The Tribunal accepts it as established law expressed in a now long-standing judgment of the House of Lords in *Street v Mountford* [1985] AC 809 that a tenancy is a contractual binding agreement by which a party grants another party the right to exclusive possession of land for a fixed or renewable period or periods of time. It was also irrelevant, Lord Hoffmann explained in *Street*, whether the landlord held a legal estate.

96. Mr Neilsen invited the Tribunal to draw an inference, from the evidence presented, that the Second Respondent was the Applicants' immediate landlord and, the Tribunal understands, for the entirety of the relevant period. He submitted that inference could properly be drawn because the Second Respondent was the point of contact, received the rent and was described as the tenant (the Tribunal understands he meant in the Second Respondent's brief response). The reference to drawing an inference is, the Tribunal considers, a tacit admission that it is extremely difficult to place any construction on the oral contract which enables identification of the contracting parties other than the Applicants. It is an obvious consequence of an oral tenancy that there is no written contract to consider.

97. The first difficulty with that proposition, the Tribunal considers, is that the response refers to the Second Respondent as having two capacities- tenant and agent- and with no hint of when either applied- whereas being the point of contact and receiving rent is entirely consistent with being a managing agent and adds nothing in favour of the Second Respondent being the landlord. The second difficulty is that, at least in respect of the Second Applicant, the Second Respondent had, the later evidence of the Second Applicant stated, said that it was not the landlord and someone

else- Bartek- was. It was noted by the Tribunal that Bartek appears to have had an email account at the Second Respondent and at first blush appeared to work for the Second Respondent [64]. Given that and the title held by the First Respondent, the Tribunal does not find the Property to have been Bartek's to any extent beyond perhaps being one for which he was the lead agent. However, the Tribunal does not consider that assists the Applicants on this very specific point of establishing the Second Respondent to be the actual landlord.

98. The Tribunal finds on the scant evidence presented that the Second Respondent was not identified as the landlord pursuant to the oral contract. The Tribunal finds that if the Second Respondent had said to the Applicants that it was the landlord or had said that there was no other party which was the landlord, the Applicants would have known that the Second Respondent was the landlord, whereas the First Applicant's rather general belief and the Second Applicant's later evidence of being aware of there being a landlord who was said to be another party is only consistent with the landlord not having been, at least clearly, represented to be the Second Respondent.

99. There is no positive evidence of the Second Respondent having a tenancy with the First Respondent during the relevant period. The only specific matter to support the Second Respondent having a tenancy from which it could grant sub-tenancies is a particular phrase used in the Second Respondent's response, which was not a document signed with a statement of truth, the Tribunal repeats it does not treat as reliable, and is of very little evidential value. Even then, as to whether the tenancy was for some or all of the relevant period, or indeed none at all but rather some other period, is not stated.

100. The Tribunal is unable to determine on balance that the Second Respondent was the lessee of the Property and so the person managing (as well as in control) for that reason. Rather, the balance of the evidence supports the Second Respondent being the First Respondent's agent.

Identity of landlord undisclosed and Second Respondent as landlord

101. The alternative proposition advanced was that, in effect even if the Second Respondent was not an actual landlord, it could be treated in law as one and so be the subject of a rent repayment order because the identity of the freeholder, the actual person managing, had not been disclosed to the Applicants, who only knew the name of the agent.

102. The Upper Tribunal explained the relationship between agent and principal in *Cabo* as follows:

> "72. An agent is a person engaged to do any act for another or to represent another in dealings with third parties. The person for whom such acts are done is known as the principal. The essence of the relationship is that the agent is given power, within prescribed limits, to affect the principal's legal relations with third parties. The relationship of agent and principal is usually

created by a written contract and the responsibilities of the agent are defined by the contract. But the relationship may be defined partly in writing and partly by oral agreement or by conduct."

103. In respect of evidence about the First Respondent being an undisclosed principal, evidence was received as follows.

104. The First Applicant first explained that he was not aware of the landlord and did not hear anything about the landlord until reference was made to the landlord selling, although he knew there was a landlord. The Second Applicant first said that she was only told who was, suggested to be, the landlord at the very end of her tenancy.

105. Mr Neilsen was given the opportunity in the hearing to seek to clarify the evidence, in light of the argument that the Second Respondent was the landlord and much as the clarification did not help with that particular assertion. He did seek to do so, calling further evidence from the First Applicant for that purpose. On the one hand, the First Applicant said that the First Respondent was not specifically referred to as being the landlord and he could not remember much else because of passage of time. He said that he only really heard about the landlord when there were house viewings for the purpose of sale of the Property, from which the Tribunal understand the time to be late 2021. The final evidence from the First Applicant was that he believed the Second Respondent was letting the Property to him when he moved in, although the basis of that belief was not identified and it is not clear whether he perceived "letting" to mean as landlord, so the Tribunal places little weight on that evidence one way or the other.

106. The Second Applicant was much clearer when clarifying her evidence. She had been renting from the Second Respondent in respect of another property. She was told, she stated, that a room in Bartek's house was free. She said that she went to the offices of the Second Respondent and met Bartek and two others, who are thought to be employees of the Second Respondent. The Second Respondent also said that there had been a written contract for the previous property rented which had a name on the contract for the landlord, being the Second Respondent, although that was a separate property to this one and so does not directly assist. The fact of a written contract, and with a name for the landlord, is an obvious contrast with the situation in this case.

107. One of the difficulties with the evidence is that the earlier and later evidence of the Second Applicant is on the face of things contradictory. The later evidence states that the Second Applicant was informed who the landlord was at the outset (Bartek)- albeit it is not apparent that was correct, given the Property was owned by the First Respondent and the involvement of the person himself is unclear at best- and the earlier evidence states that she was not aware until much later. The Tribunal is mindful that an initial understanding of the landlord and then later other information in respect of the landlord being received may be consistent with the Second Applicant's evidence and that questions and answers

required translation such that there may be some subtlety lost, even with the best efforts of Ms Broderick.

108. Nevertheless, the evidence is sufficiently clear both that there was no positive assertion by the Second Respondent itself of being the landlord of this Property at the time of the Applicants entering into their tenancies and that insofar as any other landlord was suggested, that landlord was not the First Respondent. Therefore, as a matter of fact, the Tribunal finds that the identity of the landlord was undisclosed. The Tribunal also observes, albeit not directly relevant to the point, that the First Respondent had little direct involvement (at the very least until the end of the relevant period).

109. That simply means the factual basis on the which the arguments about effects of an undisclosed principal is established. The legal question next falls to be determined.

110. Mr Neilsen referred in his Skeleton Argument, as the Applicants' Reply to Respondent Statement of Case ("Reply") [29-34] did, to the Upper Tribunal judgment in *Cabo* as support for the Applicants' case. He submitted that it was held that in the presence of an agreement involving an undisclosed principal, both parties can be sued under the contract and are thereby both landlords under the contract although he then rather leapt from the ability to be sued to there thereby being a contractual landlord and tenant relationship and he relied on the comment of Martin Roger KC described as equivocal below. Mr Neilsen also cited an authority of *Siu Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207, referred to in *Cabo*.

111. The circumstances of *Cabo* were quite particular and there are differences with these ones. Ms Cabo was the freeholder and entered into a written agreement with Top Holdings Limited to manage the relevant property, which stated that no landlord and tenant relationship was created, although in her response to an information request, she asserted Top Holdings to be a lessee. The application for rent repayment order in that case was made against Ms Cabo alone and not against the party a broadly equivalent position to the Second Respondent.

112. The Upper Tribunal considered at some length, and the Tribunal considers it merits quoting at some length, the relationship between Ms Cabo and Top Holdings and the legal position as follows:

> " 73. In this case, the Management Agreement specifically ruled out the existence of a relationship of landlord and tenant between Ms Cabo and Top Holdings (clause 2). Instead it required the company to manage the property "exclusively for the benefit of the First Party [Ms Cabo]" (clause 3). The company was specifically permitted to let the Property (clause 7)..The company had express authority to manage the Property exclusively for Ms Cabo's benefit, and to let it, and it dealt with the income from the lettings as it and Ms Cabo agreed or as she directed; whichever was the case, the result was that Ms Cabo had the benefit of at least part of the rent and was, as the FTT put it, "entitled to receive a rack rent".

74. Ms Cabo was what is known as an "undisclosed principal". Usually, when someone is acting as an agent that fact is made clear to the person with whom they are dealing, in which case the principal is said to be "disclosed" ………………… In such cases it is obvious that the agreement is being made between the principal (Top Holdings) and the third party (the occupant). Sometimes, however, the existence of the principal is not disclosed to the third party. The agent contracts with the third party as they would if they were contracting on their own behalf, without informing the third party that they are in fact doing so on behalf of someone else.

75. In this case Top Holdings let the Property using agreements which identified it as the "Licensor" and which did not mention Ms Cabo at all; her existence, and the fact that Top Holdings was acting on her behalf, were undisclosed. Ms Dezotti only found out about Ms Cabo by carrying out a Land Registry search which disclosed that she was the owner of the freehold and had granted no registerable lease.

76. The legal consequences of an agent entering into a contract with a third party in its own name, without disclosing that it is acting on behalf of someone else (the undisclosed principal), were explained by Lord Lloyd of Berwick, delivering the judgment of the Privy Council, in *Siu Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 207:

> "For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."

77. The FTT's rejection of the evidence of Ms Cabo and Mr Grosso about the financial arrangements between them is important in this regard. If they had genuinely agreed that the income from letting the Property was to be retained by the company "with no recourse or accountability" to Ms Cabo, then it might have been said that Top Holdings was acting on its own behalf, and not as agent for Ms Cabo when it entered into the permitted lettings. In that case the second and fifth of Lord Lloyd's propositions (that the agent must intend to act on the principal's behalf, and that the circumstances may show that the agent is the true and only principal) might have been engaged. But ……………………………leaving the "no accountability" clause out of the picture, nothing remains to contradict the express statement in the Management Agreement that Top Holdings was to "manage the Property on behalf of the First Party".

78. The general rule is therefore that an undisclosed principal may sue or be sued on any contract made on her behalf by her agent acting within the scope of its authority. Where an agent enters into a contract in its own name, evidence is admissible to show who is the real principal in order to enforce the contract against her (Bowstead & Reynolds on Agency, 22nd Ed, Article 76, 8-068).

79. The same rules apply where the contract creates the relationship of landlord and tenant. An agent with sufficient authority may bind its principal by granting a lease in the principal's name (Woodfall: Law of Landlord and Tenant, 2.190). Where an agent executes a lease or agreement in the name of its principal the principal will be liable on the terms of the lease. If an agent executes a lease or agreement in its own name only, the agent will be personally liable. If in such a case the agent does not disclose on the face of the agreement that it is acting as agent, evidence will nevertheless be admissible to demonstrate that the relationship of agent and principal existed between it and the real owner of the property. Proof of that relationship will then enable the principal to sue or be sued on the agreement (Woodfall, 2-194).

80. The modern authority cited by Woodfall in support of the right of a tenant to sue an undisclosed principal as landlord on a tenancy agreement entered into by an agent purporting to act on its own behalf is *Epps v Rothnie* [1945] KB 562. The question in that case was whether the claimant could recover possession of a house so that he could live in it himself. That depended on whether he was the landlord and could take advantage of provisions of the Rent Acts which allowed a landlord to recover possession for his own occupation. Scott LJ explained that in the original tenancy agreement the landlord was stated to be the plaintiff's brother, and not the plaintiff himself. The tenant argued that because the brother was named as landlord in the tenancy agreement, the plaintiff was not his landlord and could not recover possession for his own occupation. Scott LJ gave two answers to that argument. The first was that the original fixed term tenancy had expired and been replaced by a periodic tenancy between the plaintiff and the tenant. He went on:

> "The second answer to the contention is that the agreement was an ordinary agreement in writing and even if the plaintiff was compelled to rely on it, evidence would have been admissible on ordinary principles applicable to any contract in writing, to prove that the person signing it as a contracting party, was acting for an undisclosed principal."

Scott LJ therefore considered that the plaintiff could establish that he was the landlord by proving that his brother had let the property as his agent, even though the tenancy agreement had been made between the tenant and the brother and had named the brother as landlord.

81. The position in this case is the same. The evidence shows that although the company let the Property in its own name, it did so on behalf of Ms Cabo as her agent; it thereby created the relationship of landlord and tenant between Ms Cabo and Ms Dezotti. Unlike Top Holdings, which had no proprietary interest, Ms Cabo was the owner of the freehold legal estate and a tenancy granted by an agent acting on her behalf would be good against the world.

82. When the true relationship between the company and Ms Cabo was revealed, Ms Dezotti was therefore entitled to make her claim for a rent repayment order against Ms Cabo, as her landlord. I think it likely that she could additionally have made a claim against the company itself, because the

contractual relationship of landlord and tenant also existed between them, but in this case she chose not to do so and it is not necessary to decide that point."

113. The Tribunal is mindful that as the Upper Tribunal was not determining whether an order should be made against the agent of the undisclosed principal, *Cabo* does not provide any actual precedent which this Tribunal must follow. Indeed, this Tribunal acknowledges that the phrase used by Martin Rodger KC that "I think it likely that she could additionally have made a claim against the company itself" is somewhat equivocal, which is perhaps to be expected where the point did not require determination in that case.

114. The Tribunal having determined that the Property was let by the Second Respondent as agent for the First Respondent that created the relationship of landlord and tenant between the First Respondent and the Applicant which has been referred to above, including as not assisting the Applicants given the striking off of the First Respondent. Further, the finding that the principal was undisclosed produces the result that the Second Respondent could sue and be sued on the oral tenancy agreements.

115. The key question remaining, which the Upper Tribunal did not need to address in *Cabo* and so did not address save by the short comment quoted above, is whether the fact that the Second Respondent could sue and be sued on the oral tenancy agreements makes it a landlord for the purpose of the 2016 Act or the Second Respondent is otherwise a landlord for the purpose of the 2016 Act.

116. The 2016 Act itself provides at section 56 for the interpretation of Part 2. It does not include a definition of "landlord" specifically. It does include a definition of "residential landlord" but simply defines that as "a landlord of housing", which does not take matters anywhere and in any event appears to be a phrase only used in section 30 regarding banning orders and not at all regarding rent repayment orders.

117. The purpose of Part 2 of the 2016 Act is very clearly to tackle "Rogue Landlords and Property Agents in England". It seeks to penalise bad practice by way of the various orders which it introduced. The Tribunal considers that agents being able to fail to disclose details of their principals, who potentially not therefore be the subject of a rent repayment order, and being able to avoid such orders against themselves would fly in the face of the purpose of Part 2.

118. The Tribunal determines that where there is a tenancy created and where the only contracting party is the agent because the principal is undisclosed, the landlord for the purpose of the 2016 Act is the agent of the undisclosed principal.

119. It was, the Tribunal determines, the Second Respondent which in practical terms granted the right to exclusive possession and with which the Applicants enjoyed any relationship. Whilst the Second Respondent was not the actual landlord of the Applicants, for practical purposes it was

the de facto landlord where the actual landlord was unknown. It is plainly not a superior landlord and so the nature of it being a landlord can only be regarded as being as immediate landlord.

120. The Tribunal determines that the Second Respondent is consequently the landlord for the purpose of the 2016 Act and so a party against which a rent repayment order can be made.

121. The Tribunal has considered whether the above determination of "landlord" may have any unintended consequences in relation to the 2004 and/ or 2016 Acts but considers that it will be relevant in only a very narrow class of cases, requiring as it does a tenancy to have been given without the tenant being informed of the identity of the landlord by an agent. Indeed, a narrow class of cases which ought not to arise at all.

122. The Tribunal is also mindful that knowledge of the identity of the landlord is a basic protection. By way of example, it is required in respect of payments of rent being due. Hence if a party grants a tenancy on behalf of another without revealing the identity of that other, important protections for the tenants are removed. The Tribunal considers it entirely appropriate that the party in the position of the Second Respondent should be treated as being in the position of the principal and as the landlord for the purposes of the 2016 Act and bear the consequences of that.

Answer

123. The Tribunal determines that as the Second Respondent was in control of the Property and as the relationship of landlord and tenant existed between the Applicants and the Second Respondent, the latter being a landlord for the purpose of the 2016 Act, a rent repayment order can and should be made against the Second Respondent.

The manner of determining the amount of rent to be repaid

124. Having exercised its discretion to make a rent repayment order and having determined the period for which the order should be made and against whom the order should be made, the next decision was how much should the Tribunal order.

125. In the absence of a conviction, the relevant provision is section 44(3) of the 2016 Act, which states in respect of the offence found to have been committed by this Respondent that the amount ordered to be repaid must "relate to" rent paid during the period identified as relevant in the table in section 44(2), being:

> 'a period, not exceeding 12 months, during which the landlord was committing the offence'.

126. That twelve months need not necessarily be the last twelve months prior to the date of the application, although in this instance the application is made in respect of those last twelve months.

127. Section 44(3) explains that the Tribunal must not order more to be repaid than was actually paid out by the Applicants to the (Second) Respondent during that period. The section explains that:

> "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."

128. The Tribunal has a discretion as to the amount to be ordered, such that it can and should order such amount as it considers appropriate in light of case law and the relevant facts of the case.

Relevant caselaw

129. The Tribunal is mindful of the several decisions of the Upper Tribunal within the last approximately three years in relation to rent repayment order cases.

130. Section 44 of the 2016 Act does not when referring to the amount include the word "reasonable" in the way that the previous provisions in the 2004 Act did. Judge Cooke stated clearly in her judgement in *Vadamalayan v Stewart and others* (2020) UKUT 0183 (LC) that there is no longer a requirement of reasonableness. Judge Cooke noted (paragraph 19) that the rent repayment regime was intended to be harsh on landlords and to operate as a fierce deterrent.

131. The judgment held in clear terms, and perhaps most significantly, that the Tribunal must consider the actual rent paid- and not simply any profit element which the landlord derives from the property, to which no reference is made in the 2016 Act. The Upper Tribunal additionally made it clear that the benefit obtained by the tenant in having had the accommodation is not a material consideration in relation to the amount of the repayment to order. However, the Tribunal could take account of the fact of the rent being inclusive of the utilities where it was so. In those instances, the rent should be adjusted for that reason.

132. In *Vadamalayan*, there were also comments about how much rent should be awarded and some confusion later arose, although the undoubted difficulties with the approach taken to the amount of an award should not detract from other elements of the judgment as referred to above.

133. Given the apparent misunderstanding of the judgment in that case, on 6th October 2021 the judgment of The President of the Upper Tribunal (Lands Chamber), Fancourt J, in *Williams v Parmar* [2021] UKUT 0244 (LC) was handed down. The other Upper Tribunal decisions between *Vadlamayan and Williams* retain relevance in respect of specific matters arising in those cases but not as to the amount of rent to be awarded.

134. *Williams* has been applied in more recent decisions of the Upper Tribunal, as well as repeatedly by this Tribunal. The judgment explains at paragraph 25 that:

"the amount of the RRO must always "relate to" the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary "starting point" for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given."

135. In terms of the consequent award, it is stated in paragraph 50 that:

"A tribunal should address specifically what proportion of the maximum amount of rent paid in the relevant period, or reduction from that amount, or a combination of both, is appropriate in all the circumstances, bearing in mind the purpose of the legislative provisions."

136. Secondly, the award should be that which the Tribunal considers appropriate applying the provisions of section 44(4). There are matters which the Tribunal "must, in particular take into account". In *Williams*, they are described as "the main factors that may be expected to be relevant in the majority of cases". Fancourt J in *Williams* says this:

"A tribunal must have particular regard to the conduct of both parties (including the seriousness of the offences committed), the financial circumstances of the landlord and whether the landlord has been convicted of a relevant offence."

137. However, the President then adds:

"The Tribunal should also take into account any other factors that appear to be relevant."

Given that the legislation lists factors to be taken into account but does not state that those are exhaustive, the appropriateness of taking account of other relevant factors, if any, is unsurprising.

138. Since the decision in *Williams*, further applications in relation to which the Tribunal had made awards prior to that decision have been the subject of hearings before the Upper Tribunal.

139. Two judgments were handed down in 2022 by Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber) in the cases of *Hallett v Parker and Others* [2022] UKUT 165 (LC) and *Simpson House 3 Limited v Osserman and Others* [2022] UKUT 164 (LC).

140. The outcome of those cases in terms of the amount of the rent repayment order made and the percentage of the rent to which that was equivalent differed considerably. That demonstrated that the amount of the award is very much a matter to be assessed on the particular facts of the given case. The consistent factor was the importance of the conduct of the parties. The judgments referred to paragraph 41 of the judgment in *Williams* in which reference was made to the seriousness of the offence, but more detail was provided in applying that to the facts of the two cases.

141. In *Hallett*, the landlord had failed to obtain a licence for a licensable house in multiple occupation (HMO). The Tribunal found that the Respondent had instructed a managing agent but on an ad hoc basis and had not fully delegated management responsibilities. Whilst that had been insufficient to amount to a defence of reasonable excuse to the potential offence of failing to license, it was relevant to conduct. Smaller landlords were encouraged to seek the assistance of professional agent (paragraph 32). The property was "in fairly good condition". The tenants received an award of a sum roughly equivalent to 25% of the rent paid during the period in which the offence had been committed.

142. In marked contrast, in *Simpson House*, the landlord was described as "a large property investment company" with sufficient resources, although it also appointed a letting and managing agent. There was again insufficient to amount to a defence of reasonable excuse for failing to license, including with lower weight to be given to the appointment of an agent by a large company. There were certain other failings of management identified. There were some allegations of problems with the property itself, but the First Tier Tribunal had found that complaints of disrepair were dealt with appropriately and in a timely manner, although there was also a defective smoke detector, as identified by a housing officer from the local authority, but which in that instance carried no weight. Other potentially serious allegations were held not made out. However, the Respondent was found to have responded to issues by "vindictively terminating the tenants' right of occupation", which was taken into account. The tenants were awarded a sum equivalent to a little under 80% of the rent for a twelve- month period.

143. The Deputy President said, at paragraph 51 as follows:

> "The policy underlying the rent repayment regime is directed towards the maintenance of good housing standards. It is consistent with that policy that a landlord who lets a property in good condition and who complies with its repairing obligations should be treated differently from one who lets property in a hazardous or insanitary condition."

144. It was also said in paragraph 53:

> "Proper compliance with a landlord's duties in relation to fire precautions is of the utmost importance."

145. The two judgments of Martin Rodger QC apply *Williams* to the facts of those cases. However, the facts of both are somewhat different from this instant application.

146. More recently, Judge Cooke has considered the approach to the amount of awards further in the case of *Acheampong v Roman* [2022] UKUT 239 (LC), which suggested a four- stage approach to assessment of the amount of an award. Mr Neilsen also referred to *Acheampong* as the leading authority on the amount. The Tribunal does not agree and considers the leading authority to be *Williams*, no disrespect thereby being intended to the decision in *Acheampong*.

147. The approach suggested in *Acheampong* is "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. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal is expected to make an informed estimate where appropriate; 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 percentage of the total amount applied for 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 and then 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)."

148. The 2016 Act does not refer to such approach and in particular any division of suggested stages c and d. Indeed, the Act makes no reference to the seriousness of the offence at all. The Tribunal, whilst accepting the matters identified in *Acheampong* to be ones which the Tribunal should address, considers that the seriousness of the particular offence is essentially ascertained in addressing the conduct of the relevant respondent, which necessarily involves considering the offence and other relevant circumstances, and further that it is not necessary to work in sequence through each stage separately and answer each question specifically, in particular c. and d.

The relevant factors and the appropriate award

149. The Applicants originally sought repayment of £5,786.00 in respect of the First Applicant and £6,360.00 in respect of the Second and Third Applicants jointly, being the equivalent of the, full, rent paid during the period 4th January 2021 to 3rd January 2022.

150. Those are the relevant sums for consideration, subject to reduction for the lesser period of time for which the offence has been determined to be committed and repayment of rent is claimed. There was no information about the amount paid by the Second Respondent in respect of utilities (pursuant to an authority of *Hancher v David & Others* [2022] UKUT 277

(LC) quoted by Mr Neilsen) and so there was no basis for reducing the amount of rent paid to take account of any such utilities. The Tribunal has determined above those payments to the bank account in the name of Eric Olivia Limited were payments of rent for these purposes. The evidence of payments made was not limited to the Applicants or the relevant period. Some of the payments were monthly sums and others were weekly sums. However, the Tribunal found that payments of the relevant sums during the period in question had been demonstrated.

151. The Tribunal therefore turns to the factors relevant in this application and the outcome of weighing those factors.

Conduct

152. This factor effectively incorporates matter relevant to the seriousness of the offence as noted above. That seriousness reflects the relevant respondent, the actions and inactions and the effects of them, notably on the Applicants.

153. The Respondents did not assert any relevant poor conduct on the part of the Applicants, from which the Tribunal proceeds on the footing that there was none.

154. There was relevant conduct on the part of one or other of the Respondents', although in the circumstances it is only that of the Second Respondent which is relevant to the amount of the rent repayment order.

155. One key element of that conduct is that an offence was committed, in this instance a licensing offence.

Condition of the Property

156. The condition of the Property was not indicated by the Applicants to cause more than minor concern. That concern was that rear decking was in poor condition. Otherwise, the First Applicant described that, "In general, it seemed quite safe, a decent place to live."

157. However, he also explained that he thought there was a smoke alarm in the kitchen but not otherwise and on further enquiry, it was established that kitchen did not have a fire door fitted but instead there was an old partially glass door with no spring closing and neither did the bedrooms. The Second Applicant added that there was a smoke detector above the stairs, although she did not think that worked. (The Tribunal uses the terms smoke detector and smoke alarm interchangeably and accepting there to be some uncertainty as to the exact nature of the equipment and whether in any instance any other term is more appropriate.) She also said that one time there had been an attendance to check the smoke alarms and that the battery of the one in the kitchen had run out, so the man took the one out of the alarm above the stairs, saying that the one above the stairs did not matter. It was also said that the one in the kitchen flashed and the

one on the stairs did not, although it was not clear whether that was before or after the battery was moved.

158. Ms Laho also said that the smoke alarm in the kitchen was switched off when Kris moved in because he smoked in the kitchen and in his room, the door to which was only two metres away from the kitchen door. She suggested that when Kris had opened his door the alarm in the kitchen might have picked up the smoke. However, insofar as that created a risk it was caused by a tenant and apparently acquiesced in by the others. Whilst the Tribunal does not treat it as relevant conduct against the Applicants, no assertion of that having been made, there is no evidence that the Respondents were involved for it to be negative conduct of them. Indeed, Ms Laho explained that the Second Respondent took that matters seriously and that as soon as it was aware of the kitchen alarm being switched off, it had the alarm switched back on again.

159. The Second Applicant added two other items, firstly being that a tap in the kitchen was constantly flowing for the last approximately two months of the tenancy, not mentioned by the First Applicant. Secondly, it was said that the Third Applicant had left his key inside their room, the Tribunal understood thereby preventing access to the room, and that the Second Respondent had sent someone round who had essentially kicked open the door, which was not repaired for the last two weeks of the Second and Third Applicants occupying the Property so that their room was unlockable. The Second Applicant said that she contacted the Second Respondent, speaking to Raul, but was told that the Second Respondent would have to speak to Bartek as he was the owner of the Property. That stated ownership reflected what the Second Applicant had said about her understanding when she moved in, although with no identifiable legal basis for it being correct. Raul was the manager or similar at the Second Respondent.

160. The Tribunal nevertheless noted that the suggestion of the above evidence was that the Second Respondent did not make the decisions, or at least all of the decisions about the Property. That does create uncertainty as to whether all conduct was conduct of the Second Respondent, which ought to be taken into account, or conduct of the First Respondent, the apparent principal of the Second Respondent. That has more bearing below.

161. The upshot of the matters related to the condition of the Property is that the Tribunal finds that there were significant fire safety issues and consequently, the Tribunal finds it to be considerably less safe than the First Applicant perceived. The Tribunal finds that the door to each room let to the Applicants or another tenant ought to have been a fire door. Each room also ought to have been equipped with a smoke alarm. The kitchen door ought to have been a fire door. The kitchen ought to have been equipped with a heat alarm- although it may have done and reference to a smoke alarm was incorrect, so that the Tribunal gives no weight to the particular matter in the absence of being clear. All alarms ought to have been linked.

162. There are well recognised and obvious risks arising from fire. The identified greater risks of fire in houses in multiple occupation are a reason why licensing requirements include appropriate fire safety measures. The lack of those measures is therefore a significant rather than minor matter.

163. To a rather lesser extent, the Tribunal considers that whilst a single bathroom would have been sufficient for five occupiers, it would not have been for more than that. However, the Tribunal leaves that point to one side in the absence of any submissions being received as to potential relevance.

164. Those issues go to the seriousness of the offence of failure to hold a licence. They take matters a distance beyond a property which is in entirely suitable condition but simply is not, for whatever reason, licensed. Rather, the Tribunal finds that various works would have been required to be carried out to the Property in order for a license to be obtained for it and works of an important safety nature, necessarily involving expense which had been avoided.

165. Whilst the Second Respondent is entitled to an element of credit for at least arranging for someone to check the smoke alarms and for ensuring that the alarm to the kitchen was switched back on when it became aware of that being switched off, in the wider context of the fire safety matters with which the Second Respondent did not identifiably concern itself and attend to or arrange for the First Applicant to attend to, that credit is very modest and has no impact on the overall outcome.

166. The minor problem about a tap, sufficiently minor for the First Applicant not to mention it, would not have affected the ability to license the Property and does not in the context of the other significant features of the situation weight such as to affect the Tribunal's determination as to the appropriate level of repayment.

167. The situation in relation to the door to the Second and Third Applicants' room does weigh to an extent to increase the award appropriate to the Second and Third Applicants, whilst not impacting on the award to the First Applicant. The Tribunal accepts that the Second and Third Applicants will have been concerned as to security, not least where there was a history of access to the Property as a whole without notice- see below.

Threats and harassment/ other attempted unlawful eviction

168. The Applicants explained that on 4th January 2022 they were given ten days' notice to leave by 14th January 2022, the Tribunal understands from the evidence that was by the Second Respondent. The Second and Third Applicants left fairly swiftly after that, on 10th January 2022 according to the statement of case.

169. There was no evidence given to the Tribunal as to what the Second and Third Respondents felt about that notice, or indeed what the First Respondent thought. That may reflect their lack of understanding of the correct process for obtaining possession of a property and their relative vulnerability, or it may just be that those matters were not brought out.

170. Nevertheless, the Tribunal considers that it can properly infer that the Applicants were shaken by the notice and incorrectly perceived that they did need to leave in consequence of it, given that none of them actually needed to leave but in contrast all of them took steps to do so as swiftly as they were able to. Any eviction following on from the notice would have been unlawful. In any event, the Tribunal considers it likely that that an offence was committed pursuant to section 3A of the Protection from Eviction Act 1977.

171. The Tribunal does not however make a determination. It was not asked to do so, the Applicants case not having been presented on that basis, and the elements of the offence not therefore having been given full consideration. The weight given by the Tribunal to this aspect combined with the other considerations therefore reflects the fact of the notice and effect it more generally and not commission of a further offence in particular.

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172. The First Applicant appeared to say that he was then the only occupier of the Property, although the list of occupancy dates in the statement of case suggests that not to be correct, assuming the statement of case to be accurate. He gave oral evidence that he stated that he would not leave, not being from the local area and implicitly that he would need some time to find another property. He started looking immediately. The First Applicant said that he was told by the Second Respondent that he was disrupting the First Respondent's plans to sell the Property and that although the Second Respondent said it would try to help him, he does not believe that it did. The bundle included an exchange of messages [66] on 12th January 2022 about the First Applicant vacating and him replying that he was awaiting a date, potentially 24th January 2022. The Tribunal observes that the messages include reference to the Second Respondent handing the Property back, although that was not referred to above in discussing whether the Second Respondent was the sub-landlord as equally capable of being read either way.

173. He stated that on or about that date of 12th January 2022 someone came round to the Property and threatened him. He did not know the identity of the man who threatened him. The First Applicant described being very worried, being the only person, he said, in a property with no gas or electricity and where others clearly had a key for the house, and he was concerned potentially to each room. (The Tribunal notes that the written evidence of other former occupiers is clear that the agents had keys for each room). He therefore barricaded himself into this room each night before going to sleep, worried that someone might enter and attack him. The First Applicant gave oral evidence that he left approximately five days later.

174. The First Applicant added that in addition, the following day according to his written statement, the gas to the Property was turned off and then the electricity- it was not clear whether that was later the same day or subsequent one. He pointed out that was in January, so it was very cold and there was no heating. The Tribunal infers that situation remained until the First Applicant moved out.

175. That is plainly a situation which ought not to happen. Turning off gas and electric amounts to attempted unlawful eviction and would have facilitated an application pursuant to the Protection from Eviction Act 1977. The Tribunal particularly condemns the behaviour of whoever instigated the threat, which was both harassment and a further attempted unlawful eviction. It says much about whichever Respondent instigated such actions and their approach to tenancies that such matters arose and none of that at all good.

176. The difficulty faced by the First Applicant is that he does not know whether the Second Respondent instigated the threat or was otherwise involved in it, nor whether it caused the gas and electric to be turned off. Neither does the Tribunal. It is far from implausible in light of the other evidence that the Second Respondent could have been involved in arranging for the threat to be made. However, there is no specific evidence that it was. The First Respondent was apparently selling the Property and so had an interest in the Property being vacated, at first blush more so than the Second Respondent did, although the reference in the messages referred to above to the Second Respondent needing to hand the Property back also gives it an interest in the Property being vacated. Evidence of the extent of link between the Respondents was unclear, such that the Tribunal would be venturing into supposition in expressing a view as to that.

177. The Tribunal finds itself unable to find on the evidence on the balance of probabilities that the Second Respondent instigated or was otherwise involved in the threat. The Tribunal also finds itself unable to draw any proper inference that is the more likely scenario from the limited information available. Consequently, albeit with some regret, the Tribunal considers that it cannot properly take account of the matter in the event. The treatment of the Second Respondent as the landlord for the purpose of the 2016 on the basis explained above is

178. For the avoidance of doubt, those matters did not in any way affect the Second and Third Respondents, who had left the Property.

179. To a lesser extent in terms of seriousness but nevertheless a breach of express or implied covenants in respect of quiet enjoyment, the oral evidence of the Applicants was that persons from the Second Respondent went round to the Property “quite a lot” and let themselves in. That is conduct specifically involving the Second Respondent.

180. Rather more seriously, the First Applicant described how halfway through the second month and where that been some confusion as to

whether rent was payable weekly or monthly, one of the agents from the Second Respondent, whose first name was said to be Marius, banged on his door asking him to pay rent. The First Applicant said that the agent was quite intimidating in his approach and drove him to a cashpoint for the First Applicant to withdraw the money.

181. That is unacceptable behaviour and relevant conduct specifically of the Second Respondent and goes to increase the level of award appropriate in respect of the First Applicant beyond that appropriate for the Second and Third Applicants to the extent it is appropriate for that incident to sound.

182. In the event, the Tribunal determines the impact of that incident over and above the other matters affecting all Applicants is nevertheless modest. The incident was a one-off early in the First Applicant's tenancy and which there was no suggestion impacted on his occupation of or enjoyment of the Property for the remainder of his tenancy.

Financial circumstances and conviction for an offence

183. In terms of the financial circumstances of the Second Respondent, the Tribunal was not in possession of any relevant information in relation to either of them. The Tribunal therefore did not alter the level of order otherwise considered appropriate, having no reason to do so.

184. In a similar vein, there was no evidence before the Tribunal as to whether the Second Respondent had ever been convicted of a relevant housing offence. That was no reason to reduce the level of awards otherwise appropriate, but neither was it a reason for any increase which might otherwise have been appropriate.

Circumstances other than as specifically listed in the 2016 Act

185. In respect of the licensing offence, there was no suggestion made by the Respondents that there was ever an intention to license the Property or that there was an interest in licensing the Property. The First Respondent did not respond, as variously noted above, and the Second Respondent in its response entirely failed to engage with the actual requirements for licensing, asserting a wholly incorrect position that bore no relation to the correct law.

186. The Second Respondent was in the business of letting and managing properties and so either must have been aware of the need for such a property to be licensed and deliberately failed to do anything about it being licensed, then providing a response to the application on a premise it knew full well to be incorrect, or alternatively was somehow unaware. That would be despite having gone into the business of letting and managing properties and continued in that business and thereby doing so without taking even the most basic steps to ascertain relevant obligations. Such a failure would be more than simply negligence and the Tribunal considers can only be categorised as significantly reckless. That lack of awareness would, on the position presented by the Second Respondent in its

response, have been combined with an understanding that licensing requirements were completely different to that which they actually are.

187. Whether the failure was deliberate or reckless, it is a long way from the position a landlord with perhaps one or two properties which, however, much it ought to have checked, genuinely did not realise that there was a need to license and had much less involvement in letting and managing property than an agent in that very business. Nevertheless, and for the sake of clarity, the Tribunal determines that the Second Respondent was not reckless but rather knew the licensing requirements for the Property.

188. The level of culpability in respect of the failure to license is at the upper end of the scale.

189. The Tribunal also considers it to be relevant that occupiers of the Property as indicated in the Applicants' evidence, for example the Second and Third Applicants, did not speak English as their first language and appear to have had no understanding of the rights of landlords or tenants, accepting that the second of those points applies to many tenants, not least of houses in multiple occupation.

190. The Tribunal did not identify any other relevant circumstances of this case on the evidence presented. Considerations of deterrence and punishment and similar are relevant as always in these cases, the award being a penalty and not a compensation award.

Award

191. The Tribunal has carefully weighed the conduct of the Second Respondent and such other circumstance as identified, including matters relevant to the seriousness of the offence, and considered the appropriate percentage of the relevant rent paid which reflects that. The Tribunal notes that it was argued that the award ought to be 85% of the rent paid but considers that to be a little too high.

192. This case is plainly within the upper not lower end in terms of the lack of licence itself, exacerbated by the fact that although there was no identified disrepair as such nevertheless there was work required for the Property to be suitable to be licensed. There is further specific exacerbation by the instances of harassment and/or attempted unlawful eviction.

193. Weighing the circumstances of the offence and the other matters relevant to the level of the rent repayment order set out above, the Tribunal awards the First Applicant a sum equivalent to 80% of the rent paid and the Second and Third Applicant jointly a sum equivalent to 75% of the rent paid in respect of the period in which the offence of controlling a property requiring a licence was committed.

194. The Tribunal awarded a higher percentage than it otherwise would have for matters related to the licensing and condition of the Property because of, on the one hand, the First Applicant being taken to a cashpoint

to withdraw money to pay rent and, on the other hand, the lack of security for the Second and Third Applicants room; the notice requiring the Applicants to leave in 10 days' time and, to the First Applicant, to reflect the electricity and gas being turned off in an attempt to force the First Applicant to leave the Property. The Tribunal considered that neither of the cashpoint matter or the lack of security added more weight to an award than the other, taking matters in the round and in light of the other features of the case common to the Applicants. However, the gas and electric being turned off and experienced by the First Applicant also does merit an additional element of award. The Tribunal would have awarded an additional percentage to the First Applicant if there had been evidence of involvement by the Second Respondent in the threat and related behaviour, although reflecting the addition to the totality of the relevant matters.

195. On the basis of a relevant period of nine months and twenty- four days (298 days) of rent at £5,786.00 for the full twelve months in relation to the First Applicant, the award to him is therefore 80% of £4,723.91, namely £3,779.13.

196. On the basis of a relevant period of nine months and twenty- four days (298 days) of rent at £6,360.00 for the full twelve months in relation to the second and Third Applicants jointly, the award to them is therefore 75% of £5,192.55 namely £3,894.41.

The amount of the rent repayment order

197. The First Applicant is therefore awarded by way of rent repayment order £3,542.93. The Second and Third Applicants are therefore awarded by way of rent repayment order £3,894.41.

Application for refund of fees

198. The Applicants asked the Tribunal to award the fees paid in respect of the application should they be successful, namely reimbursement of the £100 issue fee and the £200 hearing fee.

199. An application fee having needed to be paid in order to bring the claim, a hearing fee being required for the hearing and the Applicants having been successful in the proceedings, the Tribunal considered that the fees should be paid by the Second Respondent. The Respondents had not argued otherwise, and the Tribunal determined that there was no sufficient reason why the Applicants ought not to recover the fees for the application from such of the Respondents as against which the Applicants were successful, in the event the Second Respondent. Whilst this Decision identifies a number of issues with the conduct of this case by the Applicants' representative, individually of concern and cumulatively rather troubling, and opened the door firmly to a refusal of the fees or reduction in their recovery, on balance the Tribunal decided that course not to be appropriate in the other circumstances of this case.

200. The Tribunal does order the Second Respondent to pay all the fees paid by the Applicant and so the sum of £300.

Rights of appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28- day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.