FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/ 00MR/HMK/2022/0001
Property	**:**	Flat 7, Challis Court, 15 Western Parade, Southsea, PO5 3JF
Applicant	**:**	Adam Mounter (1) Duniya Mohamud (2) Louisa Thomas (3) Orson Hopper (4) Sam Burden (5)
Representative	**:**	Orson Hopper
Respondents	**:**	Nicholas Tweddell (1) Vanessa Tweddell (2)
Representative	**:**	----------
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 Ms C. Barton MRICS Ms T. Wong
Date of Hearing	**:**	4th May 2023
Date of Decision	**:**	14th July 2023

DECISION

Summary of the decision

1. **The Tribunal is satisfied beyond reasonable doubt that the 1st Respondent committed an offence under section 72(1) of the Housing Act 2004 between 7th September 2021 and 6th September 2022.**

2. **The Tribunal has determined that it is appropriate to make a rent repayment order in favour of each of the Applicants against the 1st Respondent as a landlord of the Property.**

3. **The Tribunal makes a rent repayment order against the 1st Respondent in favour of the individual Applicants in the following sums:**

Adam Mounter (1)	**£2194.39**
Duniya Mohamud (2)	**£1949.19**
Louisa Thomas (3)	**£2398.50**
Orson Hopper (4)	**£1972.00**
Sam Burden (5)	**£2330.00**

4. **Payment is to be made by the 1st Respondent within 28 days of service of this order.**

5. **The Tribunal determines that the 1st Respondent shall pay the Applicants £300 as reimbursement of Tribunal fees, such payment to also be paid within 28 days.**

Application and background

6. By an application dated 6th September 2022 [3- 12], the Applicants applied for a rent repayment order in respect of rent paid during a period of 12 months against the Respondents. The amount claimed was £6879.97 in respect of the First Applicant, £8220.30 in respect of the Second Applicant, £6270 in respect of the Third Applicant, £6653.23 in respect of the Fourth Applicant and £7081.32 in respect of the Fifth Applicant. Various supporting documents were provided.

7. 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 Flat 7, Challis Court, 15 Western Parade, Southsea, PO5 3JF ("the Property") (an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act")).

8. The Property is a 5- bedroom flat within a converted house which contains 7 flats in total. The Property is located on the 3rd and 4th floors. There is a kitchen/ diner, a communal bathroom and an ensuite to one bedroom (that occupied by the 2nd Applicant). The rent paid included utility bills.

9. The tenancy agreement entered into by each Applicant was a written one and a sample tenancy agreement for Mr Hopper was provided [20- 30] with the rent stated as £565 per month and payable on the 1st of the given month. Each room was indicated to be described by way of a room number and a location, for example in the case of Mr Hopper, 'Room Number 2c (The bedroom on the lower floor, East side)'. The Tribunal adds that the agreement refers to "a licensed tenancy agreement" but the agreements were, the Tribunal determines, ones which produced assured shorthold tenancies.

10. The sample tenancy agreement is dated 20th August 2021, although signed 22nd August 2021, for the period 4th September 2021, running until 1st September 2024. It was not suggested that there was any or any substantive difference between the sample and the other tenancy agreements, save for the rent and presumably potentially the signature date- although see further below regarding dates for the 2nd Applicant.

11. The 1st Respondent is the owner of the Property [144] and listed as the landlord on the tenancy agreement, in addition to rent being paid to him. However, it was also asserted that the Second Respondent could also be the subject of a rent repayment order on the basis that rent was paid to her by the 5th Applicant.

The law and jurisdiction in relation to Rent Repayment Orders

12. 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.

13. 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.

14. 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 above, if the offence relates to housing rented by the tenant and where the offence was committed in a period of 12 months ending with the day on which the application was made.

15. 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.

16. 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.

17. 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

18. Directions were given on 14th December 2022 [13-19], providing for the parties to provide details of their cases and the preparation of a hearing bundle.

19. The Applicants' very detailed statement of case [31- 41] was provided dated 19th March 2023 and did not alter the amounts claimed by the First and the Third to Fifth Applicants but did clarify the dates. Both the amount claimed and the period were altered in respect of the Second Applicant. The relevant period in respect of the Second Applicant, Duniya Mohamud was said to be 15th August 2021 to 6th August 2022 with the relevant sum increased by £5.00 to £8225.30. In respect of the other Applicants, the periods were amended in each case to 4th September 2021 to 27th August 2022.

20. The Respondents responded to the case with further documents and the Applicants provided a reply to that.

21. A bundle was prepared on behalf of the Applicants comprising 273 pages.

22. Whilst the Tribunals make it clear that they have read the bundles in full, much of the documentation is not referred to in detail, or in many instances at all, in this Decision as it is unnecessary to do so. An example is much of the approximately 100 pages of bank statements. 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 within this Decision to any specific pages from the bundle, it is done by numbers in square brackets [ ], as occurs in the preceding paragraphs where appropriate, and with reference to PDF bundle page- numbering.

23. 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.

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

The Hearing

25. The hearing proceeded in person at Havant Justice Centre on 4th May 2023. The Applicants were represented at the hearing by Mr Hopper. The rest of the Applicants were also in attendance. The Respondents were principally represented by Mr Tweddell. They were also in attendance.

26. There was, however, a point raised by Mrs Tweddell that she is a separate Respondent and had not signed for her husband to act on her behalf but had not been sent any papers- they had all been sent to her husband. There were, it was identified, some emails to both Respondents but Mrs Tweddell said with an incorrect email address for her. The Tribunal accepted that the position was not satisfactory and that communication should have been with both Respondents unless and until instructed to do otherwise.

27. Nevertheless, it was established that the 2nd Respondent had prepared the Respondents' statement of case responding to the Applicant's case. Whilst Mrs Tweddell said she was not as prepared as she felt she should be, the Tribunal did not consider that she had been unable to prepare and was content that it was entirely appropriate for her to ask questions of the Applicants' witnesses and make submissions as she wished to in the course of the hearing. Further, the Tribunal stated that she could give evidence if relevant and despite the lack of a written statement, varying requirements to strike the best available balance in the circumstances.

28. Oral evidence was given by Duniya Mohamud and Louisa Thomas on behalf of the Applicants and principally by Nicholas Tweddell on behalf of the Respondents, supplemented lastly by Vanessa Tweddell. The evidence was given in respect of each relevant issue in turn. The Tribunal also received written evidence from Louisa Thomas [69- 70] and Duniya Mohamud [71- 72] and from Mr Tweddell [75- 82].

29. Following completion of the oral evidence, closing submissions were made by the representatives.

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

Was a relevant offence committed and, if so, during what period?

31. 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.

32. 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, if there is an agent receiving the rack- rent, even if only to pass it or most of it to the landlord, then it is the agent which is the person in "control" pursuant to the 2004 Act. If the rent is paid directly to the landlord, the landlord is the person in control, as defined, in addition to being the person managing.

33. As identified by the Applicants, there is no mental element of commission of the section 72(1) offence as explained in *Mohamed v London Borough of Waltham Forest* [2020] EWHC 1083. It is not necessary to have intended to commit the offence or to have been reckless about it or similar. The only question is whether there was or was not a licence, subject to the question of a reasonable excuse- see below.

34. 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.

35. The Applicants' 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 written statements indicated that the Property was the only or main residence of those occupiers. None of those matters were disputed by the Respondents.

For what period was the Property required to be licensed?

36. The Tribunal found that the requirements for the Property to be licensed were proved beyond reasonable doubt from 4th September 2021 to 6th August 2022.

37. The reason for that period in particular is as follows. Repayment of rent was sought from 15th August 2021 to 21st August 2022 for the 2nd Applicant, Duniya Mohamud, and 4th September 2021 to 27th August 2022 for the other 4 Applicants. The period in respect of the 2nd Applicant is plainly more than 12 months.

38. The Tribunal perceives but does not know in the absence of her tenancy agreement, that the 2nd Applicant's tenancy commenced earlier than that of the other Applicants, hence the date of 15th August 2021 rather than 4th September 2021. However, the requirement for a property to be licensed is on the basis of there being 5 occupiers. At any point prior to there being 5 occupiers, there was no licensing offence committed. The Tribunal infers that as necessarily not being prior to up to 4 of the occupiers' tenancies commencing on 4th September 2021 at which time they were entitled to occupy. Even if all other Applicants had tenancy agreements starting prior to the sample one, the threshold of 5 occupiers could not be met until that date when the term within the sample agreement commenced.

39. The 1st Respondent sent the 3rd Applicant an email dated 7th September 2021 referring to a check- in meeting on 5th September 2021[128], from which the Tribunal infers the 3rd Applicant in fact occupied the Property from that date 5th September 2021. Hence, that is the earliest date for an offence in fact (although nothing turns on 4th September as against 5th September).

40. If the Tribunal is wrong in respect of any specific aspect of the above, in any event the Tribunal is not satisfied to the applicable criminal standard on the evidence presented that there were 5 occupiers and a licensing offence was able to be committed prior to 5th September 2021.

41. With regard to the end date, it is identified in the written case that the 2nd Applicant moved out on 6th August 2022. It was not made clear from the written case whether a further 5th occupier then moved in and if so, when that was.

42. During cross- examination of the 2nd Applicant there was reference to someone else called Isobel moving in after the 2nd Applicant. It is unclear whether that followed immediately. It was indicated that she had brought various possessions to the Property prior to moving and stored them on the landing. The matters arose as very much a side issue in the course of questions to the 2nd Applicant on the subject of Conduct- as addressed below.

43. Ms Thomas agreed in evidence that she gave notice on 4th August, ending 3rd September 2021 and moved out early, although the date of that move was not made clear.

44. The Applicants did not on the evidence produced prove their case such that the Tribunal can be sure that there was any licensing offence committed on any specific date after 6th August 2022. The Tribunal found it likely that at

some unclear point before the other Applicants left, "Isobel" did move into the room formerly occupied by the 2nd Applicant. To what extent that occurred before the 3rd Applicant, or indeed any of the others left was not demonstrated. The Tribunal is not able to the required standard to identify any relevant dates, which the Applicants failed to demonstrate adequately.

Was the Property licensed during that period?

45. The Tribunal was also satisfied to the required standard that the Property was not licensed.

46. The Applicants provided correspondence from Portsmouth City Council stating that the Property did not have an HMO licence [67- 68]. In any event, the lack of a licence during the relevant period was accepted by the Respondents.

Was there an offence and committed by whom?

47. 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.

48. There is no serious question that Mr Tweddell, the 1st Respondent was managing or in control. He is the named landlord. As such he is managing if he does not receive the rent and also in control if he does receive the rent. In respect of the first 4 Applicants, there was no dispute that they paid rent to the named landlord directly. Mr Tweddell was therefore both managing and in control in respect of them and so would commit the offence for that reason.

49. In respect of payments by the 5th Applicant, it was asserted by the Respondents that some of those were paid to the 2nd Respondent, although on behalf of her husband as named landlord. There was no suggestion that she had any independent entitlement to the payments and indeed it was said in the hearing that the approach taken was in effect a way to earmark funds to be used for or by the Respondents' daughter at university.

50. On that basis, the 1st Respondent would be the person managing in relation to the 5th Applicant. The reason is that the 1st Respondent is the owner of the subject property and payments of rent were made to the 2nd Respondent pursuant to an arrangement made with the 1st Respondent which meant the 2nd Respondent was entitled to receive the rents for that reason - per section 263(3)(b) of the 2004 Act. The 1st Respondent thereby committed the licensing offence.

51. As explained above, insofar as rent was paid to the 2nd Respondent on the above basis, she was a person in control- not a person managing as the Applicants contended. However, the Tribunal does not find it useful to explore that potential line further, for the reasons explained below.

Was there a reasonable excuse?

52. The question of whether the Respondents had any reasonable excuse was the first matter about which the Tribunal heard evidence, given by Mr Tweddell.

53. 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.

54. The Respondent set out [75- 78] in a detailed chronology (which the Tribunal does not need to repeat in detail), that the Property had previously been licensed for 4 persons. At the time, licensing was required for 4 persons under an Additional Licensing Scheme. A previous licence granted to the 1st Respondent was included in the hearing bundle [87-90] dated 8th September 2017. It was asserted in the Respondent's statement of case that all additional licenses issued around the time of that issued to the Respondents were limited to 27 August 2018 pending a forthcoming review and reassessment by the Council. It was said that at the end of the period, the council would let them know whether or not the scheme would continue beyond August 2018.

55. However, there ceased to be a need for licensing for four persons as explained in the letter from the council. The Additional Licensing Scheme in force until 27th August 2018 ended. The Respondents' expressed belief that there was no need for them to licence after that was correct, provided that there remained 4 occupiers.

56. The Respondents asserted a belief that the licence they had obtained lasted for 5 years. Mr Tweddell expressed that in oral evidence as up to 5 years, which is not quite the same. In any event the Tribunal finds that the licence very clearly did not last 5 years. In any event, the Licence never facilitated 5 occupiers. The licence clearly stated that it was a licence for 4 occupiers.

57. Mr Tweddell summarised the Respondents' case in closing as being that they believed that they were on the Portsmouth City Council system, that they had complied, but the law had changed. He suggested that was because of a requirement by the council for the licensing of dwellings with 5 occupiers in more than 1 household. He said that they had been remiss in not applying for a licence.

58. The Tribunal considered that the above comment about being remiss was not a bad summary of the position but rather underplays the expectations the law places on landlords. The Respondents had failed to identify the need to apply and had failed to apply. However, the law had not changed in October 2018 in any relevant way. There had been a need to licence a property occupied by 5 occupiers in two or more households as their only or main residence previously and that continued. The additional licensing requirement of the particular council for properties with 4 occupiers ceased but in any event was not relevant. A cursory look at the licence or

other checking of the relevant requirements would have revealed the position.

59. The Tribunal is aware of a case in which a council was found to have specifically promised a landlord that it would inform it when the particular property came within licensing requirements. However, no such contact took place. The Upper Tribunal upheld determined that there was a reasonable excuse. However, the Tribunal considers that the very specific circumstances of that case provides no support for a reasonable excuse in this instance. Mr Tweddell said that in respect of the Respondents' other HMOs in Worcester, the council wrote to remind when licences were due for renewal. The Tribunal does not consider that places an obligation on councils generally to do so. Additionally, the last that Portsmouth City Council knew was that the Property was let to 4 persons, and so did not require a licence.

60. If the Respondent had let the Property to 4 of the Applicants but not the 5th, there would have been no requirement for a licence. The Property could have been identical, simply with one fewer occupier. Hence, the failing is not having checked requirements prior to letting to 5 persons. Upon deciding to let to 5 occupiers the Respondents did not check whether any licensing or other requirements applied. Mr Tweddell accepted in oral evidence not doing so. The Tribunal found the Respondents perfectly capable of doing so. The 1st Respondent- having accepted in oral evidence that requirements change- asserted doing his best to keep up. However, the Tribunal cannot accept that where there is no evidence of any checking of requirements and such checking would have revealed the clear answer. The Tribunal noted that Mr Tweddell said simply that he did not do anything different to previously- except of course the key thing of having an extra tenant in the Property.

61. It was also drawn out in oral evidence that the Respondents have joined the NRLA and have then attended seminars. However, that has only occurred since the licensing offence, so a sensible step has been taken but taken too late. The 1st Respondent said that he had looked at their site before but hadn't considered joining and had not thought to take advice.

62. Plainly the letting to 5 occupiers was a change to the position from when the previous licence had been obtained and would increase the Respondents' income significantly, to the tune of an extra room's rent. The Tribunal determines that the Respondents were able to check, ought to have checked and failed to check whether any requirements applied. The information would have been easily available.

63. The Tribunal notes that a new licence was applied for in December 2022 [91 onward] after the Respondents became aware of the need for one and was approved. There is no evidence that the Respondents inappropriately delayed in applying or otherwise sought to avoid the licensing regime. The Applicants sought to point to a delay between 17th October 2022 when the Respondents became aware of the Applicants' application and the lodging of the application on 1st December 2022. However, the Tribunal regards

that as a modest delay, allows for the Respondents checking the need for licensing and completing an application and more generally does not consider any modest delay to be of note. The Tribunal accepts that the layout of the Property was the same as it had been in 2017 and that the Property has been licensed for up to 6 occupiers. However, none of that provides a reasonable excuse for not licensing earlier, much as it has relevance to conduct more generally.

64. Whilst the Tribunal does not doubt the genuine nature of what was said by the Respondents, nevertheless the Tribunal determines that there is no reasonable excuse for the commission of the offence by such of the Respondents as was a person managing or in control.

Were either of the Respondents a landlord?

65. For the avoidance of doubt, given that in order for a rent repayment order to be made against one or other of the Respondents, they must also be a landlord for the purpose of the 2016 Act, the Tribunal also considered whether each Respondents was such a landlord.

66. There was no specific dispute about that raised by the Respondents, although the Tribunal perceived that reflected a lack of complete understanding of what are not simple provisions, and the Tribunal makes it clear that it means no criticism by that statement. Nevertheless, there was no other identifiable basis on which the Tribunal considered there to be any doubt that the First Respondent was a landlord of the Property. The Tribunal unhesitatingly finds that the 1st Respondent was a landlord and committed the offence in that capacity.

67. In respect of the 2nd Respondent, and the reason why the Tribunal did not find it useful to consider the question of potential commission of an offence by the 2nd Respondent further, is that the Tribunal determined that it was not satisfied that the 2nd Respondent was a landlord against whom a rent repayment order can be made. Whilst there had been some receipt of rent the Applicants asserted, the Tribunal found nothing to support that being as a landlord as opposed to as being an agent.

68. To re- iterate for clarity, the Tribunal determines that the 1st Respondent committed a licensing offence from 4th September 2021 to 6th August 2022 inclusive as a landlord of the Property.

The decision in respect of making a rent repayment order

69. Given that the Tribunal is satisfied, beyond reasonable doubt, that at least the 1st 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.

70. 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 rent repayment order."

71. 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.

72. 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.

73. 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.

74. 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 against the 1st Respondent, being a landlord for the purposes of the Act.

75. For completeness, even if the Tribunal had determined the 2nd Respondent to be a landlord for the purposes of the 2016 Act, the Tribunal does not consider that it would have exercised its discretion such as to make an order against her.

The manner of determining the amount of rent to be repaid

76. 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.

77. 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'.

78. That twelve months need not necessarily be the last twelve months prior to the date of the application.

79. 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."

80. 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

81. 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.

82. 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.

83. 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.

84. 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.

85. 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.

86. *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."

87. 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."

88. 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."

89. 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.

90. 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.

91. 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).

92. 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.

93. 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.

94. 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.

95. 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."

96. It was also said in paragraph 53:

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

97. 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.

98. 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.

99. 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)."

100. 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 accepts the matters identified in *Acheampong* to be ones which the Tribunal should address but 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.

101. The Tribunal adds that the Applicants referred to all of the above cases and others which the Tribunal does not find of additional assistance.

102. In terms of the 12- month period, it was explained in *Kowalek v Hassanein* [2021] UKUT 143 (LC) by the Deputy President in the Upper Tribunal as follows:

"29. .....section 44(2) limits the amount of rent which may be the subject of a rent repayment order in two quite different respects. The first limitation focusses on when the payment was made: "the amount must relate to rent paid during the period mentioned in the table". The second limitation is provided by the requirement in the table heading that "the amount must relate to rent paid by the tenant in respect of" the appropriate period. This focusses on the period in respect of which the payment was made - what the payment was for, not when it was made. Both conditions must be satisfied before a sum paid as rent can be the subject of a rent repayment order.

30. ..... The first limitation therefore means that, to be capable of being the subject of a rent repayment order, a sum must have been paid during the period, not exceeding 12 months, when the landlord was committing the offence. In the language of section 44(2), the amount to be repaid must "relate to rent paid during" that period. Rent paid before or after that period is therefore ineligible for consideration.....

31. The second limitation ..... is additional to the first and different from it. To be capable of being the subject of a rent repayment order, a sum must also "relate to rent paid by the tenant in respect of" the period, not exceeding 12 months, during which the landlord was committing the offence". It is implicit in this formulation that an instalment of rent may need to be apportioned between periods before and after the landlord was committing the offence .....

32. Properly understood, there is no contradiction between the different parts of section 44(2), and no need to give priority to one over the other. The consequences ....."

103. So, rent has to be both paid during the relevant period and relate to rent due for that period.

The relevant factors and the appropriate award

Relevant rent payments

104. The Applicants originally sought repayment of rent in the following sums:

Adam Mounter- £6879.97
Duniya Mohamud- £8225.30
Louisa Thomas- £6270
Orson Hopper- £6653.03
Sam Burden- £7081.32

being in each case the equivalent of the, full, rent said to have been paid during the relevant period. However, as identified above, that is not the relevant question. Rather the question is how much rent was paid by the Applicants during the period in which the 1st Respondent committed the licensing offence as landlord and which related to the period in which that offence was committed. That involves various of the Applicants not being able to recover varying amounts of the full payments, which is the unavoidable consequence of the operation of the legal principles.

105. The Applicants also sought repayment of the deposit paid by each of them. However, as that was not rent and therefore not relevant for the purpose of a rent repayment order, those additional sums are not relevant.

106. The 1st Applicant paid £570 each month except for August 2022, when he paid £505.97, although the full rent of £570.00 will have been payable on 1st August 2022. The point about full monthly payments is addressed further below in respect of the 3rd Applicant and is not added to in respect of the 1st Applicant, nothing having been said about it by the parties. Similarly, it is not apparent that initial rent payments were made on 1st of the month or quite how the payments related to rent but as there has been no issue taken with the figure above- and indeed Mr Tweddell said in evidence no issue was taken with rent at all- the Tribunal treats the payments to rent as correct. However, the early payments are not relevant in any event. They were not made within the relevant period 5th September 2021 onward. The relevant figure for payments by Adam Mounter is £6205.97.

107. In a similar vein, the 2nd Applicant made payments prior to the relevant period on 1st, 3rd and 6th August 2021 and on 31st August 2021 which were not therefore made within the relevant period. The 31st August 2021 payment was within the period asserted as relevant for the 2nd Applicant but prior to the tenancy dates demonstrated for at least one of the other Applicants, the relevance of which is explained above. Consequently, the first payment by the 2nd Applicant during the relevant period was that on 1st October 2021. The relevant figures for payments by Duniya Mohamud during the relevant period is £7217.30.

108. With regard to the Third Applicant, the same points apply in terms of the period within which rent payments made are relevant, such that the first relevant payment was made on 1st October 2021. 10 payments are shown from then on, the last of which was made on 2nd August 2022. There is no evidence of a payment for April 2022- the bank statements jump from the period 22nd February to 21st March 2022 until 22nd April 2022 to 21st May 2022. The Tribunal therefore carefully considered inferring that no payment was made on or about 1st April or that payment has not been proved. However, given the pattern of other payments and that no issue has been raised by the Respondents as to the lack of the payment, the Tribunal has concluded on balance that the wider evidence supports the balance being in favour of that payment having been made. The relevant figure is therefore 11 payments of £550, so £6050.00. Whilst the 3rd Applicant paid the full month for August 2022 and left before the end of the month, the full month was due on that date.

109. In relation to the 4th Applicant, there are 10 payments shown of £565.00 from 1st October 2021 to 1st July 2022 inclusive, there having been an apparent failure to pay anything on 1st August 2022 despite an apparent contractual obligation to do so. The relevant figure is therefore £5650.00.

110. Finally, regarding the 5th Applicant, there are 11 payments shown of £595 during the relevant period and so £6545.00 in total. There is another

payment shown as money out on 9th September 2021 but that refers to university fees and says nothing about rent on the electronic record. There is a paper statement which is annotated, although the annotation is difficult to read by that entry. Something seems to be said about rent. There is also an entry on 6th September referring to rent but which appears to relate to money in and not money out. It is also difficult to understand because if the amount of the payments were to be added to the sum calculated just above, that would exceed the award sought and not equate to any identifiable amount of additional rent payable for any part month and where it appears that no part of the sum was a deposit, there being a separate entry for that. There was no witness evidence from the 5th Applicant. The Tribunal is not persuaded that the unclear annotation demonstrates that additional rent was paid in any discernible amount and hence on balance the Tribunal treats it as not relevant for these purposes, there being a lack of sufficient evidence that it is.

111. Those above figures are the relevant sums for consideration, paid during the relevant 12- month period and subject to reduction for the fact that they include utilities. For ease of reference, the figures of relevant rent paid during the period and in respect of the period are therefore summarised as follows:

Adam Mounter- £6205.97
Duniya Mohamud- £7217.30
Louisa Thomas- £6050.00
Orson Hopper- £5650.00
Sam Burden- £6545.00

112. The Tribunal turns to matters affecting the appropriate level of rent repayment order on the basis of those relevant payments.

Utilities

113. The information about the amount paid by the 1st Respondent in respect of utilities was set out in a spreadsheet recording costs [83]. As the Applicants emphasised, there was no evidence in the form of bills or payment receipts provided.

114. Pursuant to *Hancher v David & Others* [2022] UKUT 277 (LC), which the Applicants relied on in respect of calculation of awards more generally, there was no basis for reducing the amount of rent paid to take account of any such utilities in the absence of evidence of such payments. The Tribunal also notes that the Directions were very clear that the Respondents must send, amongst other evidence "Evidence of financial circumstances including any outgoings, such as utility bills, paid by the landlord for the let property during the period".

115. The spreadsheet is of course evidence. There are figures provided and Mr Tweddell maintained those to be correct, further evidence. Plainly there will have been utilities and other matters paid out for- it is inconceivable that figures were nil. The Tribunal is satisfied that there is evidence of

utilities being paid, although somewhat imperfect. The difficulty for the Respondents is that the spreadsheet is not good evidence of the specific amounts involved, such that it is difficult for the Tribunal to accept those as stated, not least where documentary evidence of exact sums could have been provided.

116. The spreadsheet indicated expenditure monthly of £142.00/ £146.00 for Council Tax, £27.69/ £26.57 for waste and sewage, £11.99/ £12.76 for water, £13.37 for television licence, and also sums for electric and internet, the first of which is indicated to have risen from £64.00 to £347.00 (although for an uncertain period) and the latter from £37.47 to £72.00.

117. Mr Tweddell said in evidence that the Respondents have bank statements which show the payments made and that he sent them to the Applicant's representative who said that they had not been received. It was not explained whether anything was done by the Respondents because of that but nevertheless the evidence was not before the Tribunal.

118. The Tribunal is satisfied on balance that Council Tax was paid of at least £100.00 per month and that overall utilities will have cost the 1st Respondent at least £300.00 per month. However, that £300.00 per month, inclusive of Council Tax, is the most that the Tribunal considers the rent can be reduced by on the evidence presented by the Respondents, taking what must be a cautious approach to the costs in the absence of better evidence.

119. The sum is therefore £60.00 per month per Applicant where each Applicant occupied the Property for some of the 12th month on the evidence provided. The Tribunal does not consider it appropriate to seek to apportion the sum for the 12th month in the overall circumstances of this case, of which the reduction already applied to the figures stated by the Respondents is one, although only one, consideration.

120. For the avoidance of doubt, the Tribunal has excluded the mortgage payments listed from the above figures.

Conduct

1st, 4th and 5th Applicants

121. This factor effectively incorporates matters relevant to the seriousness of the offence as noted above and applying the approach identified in *Williams*. That seriousness reflects, in respect of a respondent, on the nature of the relevant respondent, the actions and inactions and the effects of them, notably on the Applicants.

122. It was asserted in one sentence in the Applicant's statement of case that the Applicants were not provided with a "How to Rent Guide". Nothing at all was added to that in the Applicants' case, nothing was put to the Respondents about it and no submission mentioned it. The Tribunal concludes that even if the Applicants are correct, they considered the point

of very little weight and the Tribunal considers rightly so in the context of this case. The Tribunal concludes that any weight would have no overall impact and so no finding about the allegation is needed.

123. Equally and in contrast, the reply by the Applicants to the Respondent's case [73] indicates that they "had reason to believe an offence was being committed" and contacted the council. The Tribunal draws the obvious inference that they did not inform the Respondents such that any action could be taken by the Respondents at that stage. The Tribunal considers that is conduct which could weigh to reduce the level of an award. The assertion made by the Applicants that it is not for them to inform the Respondents of their obligations is correct in itself but is not the end of the matters where the Applicant seek from that to be awarded repayment of rent. However, in the instance the Tribunal lacks information that the Applicants became aware and delayed in making the council aware- indeed they suggest not- and hence the Respondents becoming aware from the council and so the Tribunal does not give the matter weight beyond cancelling out any lingering weight which may have been applicable in respect of the Guide referred to immediately above.

124. There was very little specific conduct alleged of the 1st Respondent in relation to the male Applicants. The statement of case suggested that there were unfair terms in the tenancy agreements, including in respect of tenant fees but detailed reference was only otherwise made to that point in respect of the female Applicants. In respect of the 1st and 4th Applicants, it was said that their agreements referred to gross rent but the point was not developed. In respect of the 5th Applicant, it was said that the section was crossed out and so at first blush the point would not have obviously arisen in any event- the Tribunal had no agreement in that form but the submission of that made by Mr Tweddell was not directly challenged and the Tribunal no reason to disbelieve him. The Applicant's reply had suggested there to be relevant fees but firstly as if they were built into the rent but nothing was explained which identified fees and which the Tribunal could determine relevant as conduct. Secondly, the reply made passing reference to there being another fee but did not explain for the Tribunal to be able to take account of it. Hence, no terms were sufficiently pointed to in respect of the male Applicants and impact explained. Therefore, the Tribunal makes no finding of unfair terms in respect of the male Applicants in the absence of evidence or argument sufficient to be able to do so.

125. The Tribunal leaves aside any query about rent payment dates or shortfalls in payments mentioned above as not raised by any party.

<u>2nd Applicant</u>

126. In respect of the 2nd Applicant, Duniya Mohamud, in particular an assertion was made about a breach of the Tenant Fees Act 2019 and an assertion that the 1st Respondent went into her room without permission, taking pictures, which she described as nuisance. In addition, it was asserted that there were unfair deductions from the deposit paid.

127. In respect of the Tenants Fees Act 2019 point, it was accepted by the 1st Respondent that the 2nd (and 3rd) Applicant(s)) were given tenancy agreements providing for a net rent and a gross rent, where the difference was fees sought to be charged for "check in" and "check out". In respect of the 2nd Applicant the "check out" fee was identified as £200 (the "check in" fee was not clear). In relation to the 3rd Applicant, there was said to be £600 attempted to be charged for the two fees in combination (of which an email by the 3rd Applicant states £220 to be the check- in fee [129], although the 1st Respondent refers to check-out fees of £150 [130]), although resisted by the 3rd Respondent.

128. The Respondents' written case [80] accepted an attempt to charge fees to the 2nd Applicant and [81] the 3rd Applicant, apparently untroubled by the Tenant Fees Act preventing such. The Tribunal made clear in the hearing that the approach taken by the Respondents fell foul of the Tenants Fees Act 2019 and the payment options were irrelevant.

129. The 1st Respondent observed that there are tasks still required and those in effect incur a cost, such that the effect of not being able to charge as fees is that the rent itself is increased to absorb that cost. The Tribunal has little reason to doubt that occurs in some instances, and that there is an increase in rent in effect although not identifiable or strictly a fee, although that is not directly of consequence in this instance.

130. The Tribunal notes the 1st Respondent's apology in respect of any inappropriate approach to fees but identifies that there will, quite rightly, be likely to be claims or other action about those by other tenants if any continue to be sought to be charged.

131. The key point for current purposes is not the exact amounts, about which the Tribunal therefore makes no finding, but rather the fact of fees in itself, which the Tribunal does determine to be conduct which merits weighing and goes to increase any award in respect of the 2nd and 3rd Applicants.

132. It was common ground that the 1st Respondent was in the Property and went into Ms Mohamud's room on 5th August 2022, the day before she vacated, but it was apparent in the hearing that there was a dispute about whether or not he had permission from her to do so. The 1st Respondent said that he went in to show the 2nd Applicant how to remove mould from sealant, although Ms Mohamud did not indicate acceptance of that and as he also referred to the room door being left open, implying that he was outside it, the Tribunal did not entirely understand the circumstance the Respondent alleged as justification being in the room, if any.

133. It was agreed that Ms Mohamud went downstairs to make a drink. The 1st Respondent took the opportunity to take photographs [106 in particular] and there had been no discussion of and agreement to that. The 3rd Applicant was only made aware when a dispute arose about the return of her deposit. If there had not been agreement to the 1st Respondent going

into the room, the Tribunal regards going into the room as of modest importance in the particular circumstances described above in this specific instance and particularly in the context of the matters below, much as it might be rather more significant in other circumstances. In any event, the Tribunal was unable to make a finding about lack of agreement, the evidence on both sides being equally poor and so either possibility being equally likely to be correct or not correct. In any event that there was no discussion about taking photographs but the Tribunal considers that weighs very lightly in the overall context of the case.

134. The 1st Respondent said that it was apparent that the 2nd Applicant had taped up the radio-linked smoke detector within the room. The 1st Respondent's case continued that smoking in a bedroom is contrary to the Property health and safety plan, the fire risk assessment and clause 16 in the tenancy agreement. He said that each room in the property is fitted with a radio- linked smoke detector and alarm, such that in the event of a detector being triggered then all the smoke. alarms in the property will be activated. The 1st Respondent asserted that Ms Mohamud taping up the smoke detector was a deliberate act to avoid setting off the alarms whilst she smoked in her room and compromised the safety of the Property, the Applicants and potentially put the whole building at risk. Additionally, that in e-mail correspondence by Ms Mohamud in August and September 2022 prior to sight of the photographs, she denied taping-up the smoke detector. Mr Tweddell also said that he could smell smoke when he entered the room.

135. He also said, which was not challenged, that after the 2nd Applicant came back upstairs, she allowed the 1st Respondent to go into the en- suite bathroom to take photographs and when he came back out, the taping had been removed and the ashtray and pizza boxes were not visible.

136. The Tribunal accepted the 1st Respondent's evidence about what he saw and smelled and his evidence that the photographs showed the condition of Ms Mohamud's room as at 5th August 2021. It is clear that the smoke detector was taped up, the photograph showing black tape around the detector.

137. The Tribunal rejected the oral evidence of Ms Mohamud that she had only taped up the smoke detector, very recently. She said that she was concerned that in the course of cleaning she might have put her hand on the smoke alarm. Implicitly, she was stating that the tape was to stop that setting the alarm off. She maintained the account in response to clarification sought by the Tribunal.

138. The Tribunal could not accept that evidence of the 2nd Applicant as correct.

139. It was added in the Respondent's case that the photographs show an ash tray [108] on the bedside table full of smoker's ash and a singed bedside table which Ms Mohamud admitted causing but said was caused by incense burning sticks. In the email referred to above, the 2nd Applicant

denied she had been smoking in her room. That was of course prior to sight of the photographs.

140. The 2nd Applicant accepted that she had been wrong to say to the 1st Respondent that she had never had an ashtray before sight of the photographs taken by the 1st Respondent showing that she did. However, she is not entitled credit for that- unavoidably accepting something having been found out to have been untruthful previously is scarcely a positive.

141. The 2nd Applicant also denied that any smoking had been in her room, stating that it had been on the balcony and the amount of ash reflected that other people had been over and had also smoked on the balcony. The Tribunal did not accept the evidence of Miss Mohamud about that either. The other available evidence made it far more likely, the Tribunal considered, that at least some of the smoking by her- irrespective of whether also by others which was not relevant- had been in the room itself.

142. Tellingly, when Mr Tweddell put to her as his last point that the incense candles said to have been used- which the Tribunal should make it clear it accepts but in addition to smoking- would themselves have set the alarm off, if not taped up, the 2nd Applicant had no answer. The Tribunal rejected her subsequent evidence that she had burned incense candles without the detector taped up and without ever setting it off.

143. The 2nd Applicant's credibility was undermined by the manner in which the evidence was given and the other available evidence. The Tribunal noted the inconsistency of the account Ms Mohamud had previously given in emails, in which she can been content to state that she had not taped up the smoke detector at all until the photographs had revealed that to be untrue and about the ashtray. The Tribunal considered that Ms Mohamud had stated things to avoid accepting doing anything she should not and to avoid taking responsibility without concern for the honesty of what she said until demonstrated to be untrue and then had adapted her account, without reverting to truth unless compelled to.

144. The Tribunal found on the balance of probabilities that smoking in the room and the taping up of the smoke detector were not recent developments and indeed that the 2nd Applicant had continued in the same manner for at least a large part of her tenancy.

145. The Tribunal further agreed that by smoking in her room, Ms Mohamud breached the terms of her tenancy agreement which, quite reasonably the Tribunal found, did not permit such smoking. In addition, and of particular importance, whilst thankfully no acute problem occurred in the event, in taping up the smoke alarm the Tribunal found that Ms Mohamud endangered the other Applicants and all of the other occupiers of the house in which the Property was situated. Even if she had been burning incense sticks rather than smoking, the prevention of the smoke detector operating as it should would have been thereabouts just as bad, merely the cause of the smoke would have differed.

146. The Respondents had, the Tribunal noted, put entirely appropriate fire safety provision in place- the bundle included fire detection and alarm system certificates and other information to tenants- which the Second Respondent had emasculated by her actions in taping up the smoke detector. As is well recognised, inadequate fire safety can be a significant concern in HMOs and fire risk is all the greater an issue. As the Applicants asserted, risk to occupants is a reason why HMO licensing was introduced, and they quoted a comment by Nourse LJ in *Rogers v Islington London Borough Council* 32 HLR 138 that the chances of being killed or injured in a fire are 28 times greater in a HMO than other dwellings.

147. However, a fair part of that relates to lack of appropriate safety measures. Landlords are both criticised and subject to penalties and proceedings for causing or permitting fire hazards, and rightly so. Given that there is no suggestion that Respondents failed to put in place any appropriate measures, they face no criticism for a fire hazard created by the 2nd Applicant of which they were unaware.

148. Fire risks created by tenants are no lesser a cause of concern and danger and there is no reason to disregard them in considering relevant conduct, indeed quite the opposite. The statistic quoted indicates the seriousness of the 2nd Applicant's behaviour, conduct which deserves to be given significant weight.

149. Ms Mohamud was asked by the 1st Respondent whether she understood the risk of taping up the smoke detector in a linked system. However, her reply focused on risk to her if the alarm did not go off in her room. Despite the point being made, she failed to identify the obvious risk to others.

150. Whilst it was not regarded as relevant conduct for the purpose of a rent repayment order and was not taken account of by the Tribunal in relation to the findings made or the level of award, the Tribunal found Ms Mohamud to be a poor witness generally and to have been obstructive and difficult in giving evidence. The lack of honesty in the giving of evidence is another matter. The Tribunal is entitled to take account of lack of honesty in evidence as relevant conduct compounding the conduct issues in respect of the tenancy itself.

151. It necessarily follows that the assertion there was no relevant conduct by any Applicant is rejected, at least in respect of the 2nd Applicant- and to a rather lesser extent the 3rd Applicant, as addressed below. Insofar as the Applicants' reply also sought to suggest that the term in question was unfair, the Tribunal unequivocally rejects that without considering it necessary to say more.

152. In relation to the deposit, the effect of the smoking was said to be a reason why the 1st Respondent did not return the 2nd Applicant's deposit and a dispute arose. It was asserted that various costs were caused, including damage to the carpet and bedside table- although the Respondents also sought the "check- in" and "check-out" fees referred to above- there is therefore an overlap between the point about fees and this

one. Mr Tweddell reminded the Tribunal in closing that clause 16 of the tenancy agreement precludes smoking in a tenants' room, for which it provides he or she will be liable for full decoration of the room and otherwise a breach as set out above.

153. The other point raised on behalf of the 2nd Applicant was that the adjudicator dealing with the tenancy deposit considered that the photographic evidence did not show damage to the room and so it was argued seeking to deduct from the deposit for that reason was relevant conduct for the purpose of this case. The Tribunal did not agree. The provision in the tenancy agreement about smoking was not considered by the Tribunal to be unusual or unreasonable and indeed the Tribunal considered it very likely that a non- smoking tenant would find lingering smell and discolouration unsatisfactory. It is entirely common for a landlord to wish to fully redecorate, and the Tribunal considers understandably so. In addition, the check- in and check- out photographs showed damage which the Tribunal considers at least arguably went beyond fair wear and tear.

154. The Tribunal noted other damage to be alleged but also there to be reference to pizza boxes and eating in the room, the latter being a minor matter if indeed any matter at all and suggesting the Respondents may be over- zealous and may usefully reflect on that. Ms Mohamud accepted eating in her room but with little option given the evidence of her doing so. The Tribunal makes no finding as to an appropriate sum to deduct from the deposit, which is outside the jurisdiction of the Tribunal, but did not find that deductions more generally were inappropriate and did not find the approach of the 1st Respondent to amount to relevant bad conduct.

155. Before moving on, the Tribunal notes that there was also mention of a rent increase for the 2nd Applicant, although it was less than clear whether that related to the fees referred to above or was another increase. The information provided was very limited and no separate mention to the fees was made in the hearing, such that the Tribunal was unable to find that to be additional conduct, if indeed that was alleged.

<u>3rd Applicant</u>

156. In respect of the 3rd Applicant, Louisa Thomas, the conduct alleged of the 1st Respondent firstly again related to fees and the Tenant Fees Act 2019 and secondly that he sought to keep her deposit. In addition, it was said that the 1st Respondent made her cry on the telephone and that he kept tools in eaves storage to her room. It was finally said that the 3rd Applicant had overpaid rent and that had not been returned.

157. The Tribunal agreed with the first, fees, point. That has been addressed above and the Tribunal considers that there is nothing which need be added to explain how that weighs in the case in relation to the 3rd Applicant, which is by no means intended to minimise in respect of this Applicant but simply to avoid repetition.

158. In respect of the telephone call, the Tribunal accepts as a fact that the 3rd Applicant did cry. She was believable about that and there was no challenge to it. She said that she rang having been asked to by the 1st Respondent in response to a text message about notice. Other than suggesting that the 1st Respondent was argumentative, it was not clear exactly what the 1st Respondent did. It was not demonstrated that there was relevant conduct, not least in the overall context of the case and even if proved would most likely have been of little weight in the mix of considerations of the appropriate level of award.

159. The Tribunal noted that the tools had been kept in the eaves storage with the agreement of Ms Thomas. The Tribunal found such storage was not relevant conduct weighing in the amount of a rent repayment order.

160. In respect of the deposit and deductions, the Tribunal considers that the 1st Respondent may have overdone the deductions claimed but that did not find that it was inappropriate to make at least some deduction.

161. Contrary to the Applicants' case, there was something more than fair wear and tear. The 3rd Applicant accepted the clear` damage to the walls when sticky- hooks were removed [photographs on 167 and 168] but suggested that filling and painting over would suffice. The Tribunal accepts the Respondents' case that was not sufficient and also notes that the room had been freshly decorated prior to Ms Thomas's tenancy as contemporaneous email correspondence states. The Tribunal is unable on the evidence to reach a determination one way or the other as to whether the carpet required cleaning beyond fair wear and tear. The Tribunal could not identify from the photographs provided that any other deterioration clearly went beyond fair wear and tear.

162. However, the Tribunal is not determining whether any deduction proposed by the 1st Respondent was at the correct level, nor making any other specific findings about matters which fall to be resolved in another forum, if required- the Tribunal notes in that regard that there as not a referral to the deposit scheme adjudication in time by the 3rd Applicant. The question is whether there was anything which amounts to relevant bad conduct.

163. The Tribunal is not persuaded on the balance that a determination of bad conduct on the part of the 1st Respondent is appropriate on the evidence provided.

164. The Tribunal found in respect of the last matter, that there had not been overpaid rent. The rent was, as touched on above, payable on the 1st of a month. The rent was due on the agreed payment date. The fact that a tenant does not then remain for the entirety of the month is not relevant. There is no entitlement to the return of any part of that payment. Whilst it was said that the 3rd Applicant leaving early was agreed, there was no assertion, still less agreement, that it was agreed that any part of the rent for the month would be refunded.

165. Rather what is emphasised is underpayment by any of the Applicants who did not pay the full sum on the payment date, unless agreed otherwise, much as the Tribunal has said it will leave that aside in the absence of the point being taken. Nevertheless, there can be no bad conduct on the part of the 1st Respondent in not making any repayment or rent which was properly payable and not agreed to be refunded.

166. The Tribunal also observes in respect of the Tenant Fees Act 2019/ net rent point that the Tribunal treats all of the sums paid, save for any deposits, as rent and so as all relevant for the purposes of calculating the amount of the appropriate rent repayment order.

167. The Tribunal notes than in cross-examination of Ms Thomas it was said that she had candles in her room, which she accepted. Whilst there were no more specific allegations, there may have been relevant to the level of award in the manner of the relevance for the 2nd Applicant albeit without the issues as to evidence. However, the matter was touched on so briefly- and not referred to before or after- that the Tribunal had so little information that it can make no relevant finding or weigh the matter in assessing conduct. None of that would detract from potential risk in the manner set out above, much as there is no merit in repeating that.

Licensing more generally

168. One key element of conduct is of course that an offence was committed, in this instance a licensing offence. The level of seriousness in respect of the failure to license alone is at the lower end of the scale of offences for which a rent repayment order can be made and most commonly the conduct involved will be rather less significant than for offences involving violence, harassment and unlawful eviction, although necessarily the circumstances of each offence are different and hence the need to consider the particular conduct in each case. Licensing offences can include conduct amounting to harassment and similar and can involve considerable failings in the properties themselves such that the property is dangerous and/ or otherwise not capable of being licensed.

169. The conduct in this case was far from the worst even in cases where the only offence is a failure to licence.

170. The Tribunal was satisfied that if the Respondents had applied for a licence the council at any time during the Applicants' tenancy would have granted one. The Tribunal was satisfied that there was nothing about the condition of the Property which would have prevented a licence or was otherwise of concern or impact on the occupation and enjoyment of the Property by the Applicants. The Tribunal noted the various certificates produced by the Respondents, including in respect of the fire detection and alarm system, within the Respondents documents [variously within 170-273]. In addition, the Tribunal noted that it was not disputed that the Respondents let to 4 occupiers after the Applicants left until the new licence had been applied for.

171. That weighed in favour of reducing the level of award.

172. However, the evidence provided by the Respondents was that the 1st Respondent or the Respondents together own at least 3 HMOs which are let with at least 24 lettable bedrooms. The 1st Respondent said that letting property is not his main work, although he also referred to being semi-retired- and that the properties are a pension pot. He said the Respondents are not professional landlords.

173. The Tribunal determined that the Respondents are professional landlords. The Tribunal considers that the properties produce a significant source of income and has no doubt that the description of the Respondents, or at least the 1st Respondent, as professional landlords is correct.

174. Therefore, there was as stronger imperative on the 1st Respondent to keep on top of legislative requirements and ensure compliance. Whilst the 1st Respondent was not in the same position as the landlord in *Simpson House*, he was a distance from the position of the landlord in *Hallett*.

175. The Tribunal accepted the evidence of Mrs Tweddell that the Respondents were genuinely sorry for not having licensed the Property.

Condition of the Property

176. The condition of the Property was not indicated by the Applicants to cause concern. The council letter referring to its inspection records nothing of concern.

177. The 1st Respondent noted in closing that the Applicant had identified that 4 out of 10 HMOs are in unfit condition but said this Property has accommodation to a high standard. The Tribunal accepted that the standard of accommodation was at least good- the limited evidence prevents the Tribunal being able to say more than that- and that there is certainly nothing which might have served to potentially increase any award.

178. As noted above and subject to the impact of the actions of Ms Mohamud, appropriate fire safety provision was in place.

Financial circumstances and conviction for an offence

179. In terms of the financial circumstances of the 1st Respondent, the Tribunal noted what was said by the Respondents. In essence that was that they were struggling financially. The Respondents said that both of their children are at university and that the Respondents support them at a cost of £7,500.00 per year each.

180. The Respondents provided no tangible evidence. Equally, the Tribunal noted the evidence that the 1st Respondent or the Respondents together

own at least 3 HMOs which are let with at least 24 lettable bedrooms, even leaving aside the Respondent's home.

181. The Tribunal could not accept in light of the property portfolio indicated above, even if that were the total of it, that the Respondents had demonstrated themselves to be struggling financially by any realistic measure. The Tribunal could have increased the award had it concluded the value of assets and level of profit to merit that. However, the Tribunal lacked evidence of those matters and certainly that the financial position of the Respondents was so strong that weight should be given to it.

182. In addition, the Tribunal noted that Portsmouth City Council had, the Respondents said, served a notice proposing to levy a civil financial penalty of £20,000.00 on the 1st Respondent because of the Property not having an HMO licence. Whilst it was apparent that the Respondents were unaware of whether anything could be done about that and/ or the level of it, the Tribunal is mindful that the service of such a notice is not necessarily the end of the matter. It was impossible for the Tribunal to guess what the Respondents might seek to do and what the outcome would be. It of course also entirely inappropriate for the Tribunal to attempt to guess. The net effect was that the Tribunal considered that it could not give weight to a matter the outcome of which was unknown.

183. Whilst the 2nd Respondent said in evidence that an effect of receipt of the civil penalty notice was that one of their daughters had come off her university course- which the Tribunal regards as very regrettable- that was not obviously a necessary consequence and is an effect on someone other than the Respondents, leaving aside the notice and consequently the figure in the notice not being the end of the matter. The Tribunal therefore did not reduce the level of order otherwise considered appropriate, although neither did the Tribunal consider it should be increased from the level otherwise appropriate.

184. In a similar vein, there was no evidence before the Tribunal that the Respondents 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.

Circumstances other than as specifically listed in the 2016 Act

185. The Tribunal did not identify any other relevant circumstances of this specific case which require additional weight to be given on the evidence presented. The fact of the notice of a civil financial penalty but the unknown outcome of that has been referred to above and there is nothing which can usefully be added to those matters in this instance.

186. It is apparent from the failure not only to ensure licensing but also compliance with the Tenant Fees Act- and to a lesser extent it was indicated the need for a How To Rent Guide- that the Respondents had failed to get to grips with and to stay up to date with important requirements imposed on landlords, particularly but not solely with regard

to houses in multiple occupation, which is very unsatisfactory. However, the Tribunal considers the key aspects have been amply addressed above and that it ought not to be weighed again, which would amount to double-counting.

187. Considerations of deterrence and punishment and similar are relevant as always in these cases, the award being a penalty and not a compensation award. The Tribunal carefully bore that in mind, given the findings above provide little which would merit a payment by way of compensation.

188. The 1st Respondent referred in correspondence to the Applicants [84] in the course of the case to medical problems of the 1st Respondent and the 2nd Respondent's parents. However, the Tribunal does not consider that those are matters which appropriately weigh in respect of the level of award in this case.

Award

189. The Tribunal has carefully weighed the conduct of the 1st 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 with the conduct identified of the Applicants above.

190. Weighing the circumstances of the offence and the other matters relevant to the level of the rent repayment order set out above, the Tribunal determines that the appropriate level of award is 40% in respect of the 1st, 4th and 5th Applicants. The Tribunal determined that a little extra was appropriate in respect of the 3rd Applicant in light of the conduct of the 1st Respondent as found above.

191. In respect of the 2nd Applicant, her adverse conduct reduced the level of rent repayment order considered to be appropriate by the Tribunal from the percentage awarded to the 3rd Applicant or thereabouts down to 30%. The Tribunal took account of the factors leading to the level of the award to the male Applicants, added a little for the 1st Respondent's conduct towards the 2nd Applicant but then reduced significantly for the 2nd Applicant's conduct. The Tribunal considered it very arguable that a lower figure should be awarded but on balance determined 30% to be the correct level.

192. Each of those are percentages of the rent paid in respect of the period in which the offence of controlling a property requiring a licence was committed, rent in that regard being rent adjusted to take account of utilities to the extent identified above.

<u>The amount of the rent repayment order</u>

193. The Applicants are therefore awarded rent repayment orders as follows:

First Applicant £6205.97 less £720.00= £5485.97 x 0.4 = **£2194.39**

Second Applicant £7217.30 less £720.00= £6497.30 x 0.3 = **£1949.19**
Third Applicant £6050.00 less £720.00= £5330.00 x 0.45 = **£2398.50**
Fourth Applicant £5650.00 less £720.00= £4930.00 x 0.4 = **£1972.00**
Fifth Applicant £6545.00 less £720.00= £5825.00 x 0.4 = **£2330.00**

Application for refund of fees

194. 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.

195. 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 Respondents. The Respondents had not argued otherwise, and the Tribunal determined that there was no reason why the Applicants ought not to recover the fees for the application from the Respondents.

196. The Tribunal does order the Respondents 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.