FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AT/HMF/2022/0274**
Property	**:**	**67 Harewood Road, Isleworth, Middlesex TW7 5HN**
Applicant	**:**	**Marc Hendrickx**
Representative	**:**	**Cameron Neilson of Justice for Tenants**
Respondent	**:**	**Eleni (aka Helen) Zoumidou**
Representative	**:**	**Jason Mbakwe (a legally qualified friend, but not a property lawyer)**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge P Korn** **Ms R Kershaw**
Date of Hearing	**:**	**19 July 2023**
Date of Decision	**:**	**17 August 2023**

DECISION

Description of hearing

This was a face-to-face hearing.

Decisions of the tribunal

(1) The tribunal orders the Respondent to repay to the Applicant the sum of £2,691.07 by way of rent repayment.

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

(3) The above sums must be paid by the Respondent to the Applicant within 28 days after the date of this determination.

Introduction

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

2. The basis for the application is that the Respondent committed an offence of having control of and/or managing a house in multiple occupation ("**HMO**") which was required to be licensed but was not licensed, contrary to section 72(1) of the Housing Act 2004 ("**the 2004 Act**").

3. The Applicant seeks a rent repayment order in the sum of £7,485.81 in respect of rent paid for the period 1 December 2020 to 30 November 2021.

Applicant's case

4. In written submissions the Applicant states that the Property was a 2-storey semi-detached house with a shared kitchen and bathrooms. It was occupied by at least 3 people at all points during the period of claim, including the Applicant himself who had been in occupation since 2012. Each tenant occupied their own room on a permanent basis with separate occupation agreements. It was a standard HMO arrangement in that there were communal cooking and toilet and washing facilities with separate unrelated individuals each paying rent and occupying their rooms as their only place to live. No HMO licence was held during the relevant period, the Respondent only applying for a licence on 1 December 2021.

5. The Applicant believes that Eleni and Helen Zoumidou are the same individual and that she is an appropriate Respondent for this application because she is named as the landlord in the Applicant's tenancy agreement. The Respondent is also a "person having control" of the Property within the meaning of section 263 of the 2004 Act as she is the person who received or would receive the rack-rent if the Property was let. The Respondent also received or would so receive rent from tenants in an HMO and was therefore also a "person managing"

the Property within the meaning of section 263 of the 2004 Act. In addition, the Respondent was the beneficial owner of the Property as shown on the Land Registry title document.

6. The Applicant did not receive any housing element of Universal Credit or Housing Benefit rent contributions for the Property.

7. The Applicant states that as a property manager the Respondent had a number of legal duties as detailed in The Management of Houses in Multiple Occupation (England) Regulations 2006 ("**the 2006 Regulations**"). The Respondent failed to ensure that her name, address and telephone contact number were made available to all occupiers contrary to section 3 of the 2006 Regulations. Contrary to section 4 of the 2006 Regulations the Property lacked the correct fire safety measures for a significant period of time during the Applicant's period of occupation, fire doors were not fully installed until July 2021, the fire escape route was obstructed, and the fire alarms were not linked to the main fire alarm panel until July 2021. Contrary to section 5 of the 2006 Regulations, the drainage pipe connected to the kitchen sink often became blocked and attracted flies as a result. Contrary to section 7 of the 2006 Regulations, the porch door was in disrepair and could not be closed properly, and the upstairs bathroom and kitchen sink drainer suffered from mould.

8. The Respondent failed to ensure that the Applicant's deposit was protected within 30 days after receipt in line with section 213 of the 2004 Act. The Respondent also failed to ensure that gas and electrical safety certificates were in place throughout the tenancy and copies provided to the occupants, and the Respondent did not provide a copy of her Energy Performance Certificate to the Applicant.

9. The Applicant's hearing bundle contains a copy of his tenancy agreement and a copy of the Land Registry title register showing the Respondent (under the name Helen Zoumidou) to be the freehold owner of the Property. The bundle also contains copy bank statements and a calculation of the maximum amount of rent believed to be repayable.

Respondent's case

10. In written submissions, the Respondent accepts that during the relevant period she was a person "having control" of the Property as owner and landlord. She also accepts that the Property required an HMO licence during the whole of the relevant period of 1 December 2020 to 30 November 2021, that she was committing an offence during the whole of that period by not holding an HMO licence and that the starting point for a rent repayment award is the amount of rent paid by the Applicant during that period.

11. The Respondent accepts that a rent repayment award is payable in principle and confines her submissions to those she considers relevant to the amount of that award.

12. First of all, the Respondent submits that there should be deducted from the rent repayment amount the Applicant's share of all sums included within the rent for utilities and similar items, namely his share of the (a) £768.54 electricity bill, (b) the £1,254.12 gas bill, (c) the £693.33 water bill, (d) the £316.50 TV licence and (e) the £2430.78 Council Tax bill. As there were 4 occupiers the Respondent proposes that the Applicant's share be treated as having been 25%.

13. As regards mitigating circumstances, the Respondent states that she was unaware that the Property required an HMO licence and that upon being put on notice that one was needed she immediately took steps to apply for one. She also states that the Applicant's written submissions use evocative and inflammatory language such as "unlawful exploitation of those forced to live in these properties" and a reference to "subhuman conditions" and submits that such language is inappropriate to describe the circumstances of the present case. The Applicant enjoyed a 20m² room with an ensuite bathroom and French doors overlooking the garden. The Respondent continually took steps to update and improve the Property, including a major renovation of the Property in in July 2018 and various minor works throughout the years.

14. The Respondent notes the Applicant's assertion that work in the summer of 2021 to install fire doors and update the fire alarms at the Property was done to rectify non-conformity with HMO fire safety standards, but she states that this is simply not true. The Respondent was not aware that the Property required an HMO licence until contacted by the local housing authority in November 2021, and the work done in summer 2021 is instead an example of how the Respondent independently considered her obligations as a landlord to improve the Property for the tenants. A further example is that, at the Applicant's request, the Respondent paid contractors in November 2020 to sound-proof the Applicant's room to improve the Applicant's quality of life and enjoyment of the Property.

15. The Respondent characterises the Applicant's approach to this application as overzealous and suggests that this reflects how, as a tenant, the Applicant was difficult to deal with and complained frequently and argued with other tenants. The Respondent objects to what she describes as the remarkable amount of case-building that the Applicant has undertaken for a significant period and to what she describes as his deliberate decision not to raise any HMO licence concerns with the Respondent whilst at the same time planning a future rent repayment application against the Respondent. She notes that the Applicant describes how the importance of HMO licences was

explained to him, including for the safety and wellbeing of tenants, and yet he did not raise the absence of a licence with the Respondent at any time but instead continued to check whether a licence had been applied for whilst continuing to live in the Property. The Respondent regards it as significant that the Applicant's concerns about fire safety and other issues only appear to arise from June 2021 onwards. She also expresses a concern that some post addressed to her at the Property never reached her and states her suspicion that it was intercepted by the Applicant.

16. The Respondent states that she is not a person of significant means. She is not a professional landlord and has relied on her parents to assist her with managing the Property and has balanced working with being a mother to her two young children. The period of claim also coincided with a time of significant personal difficulty and turmoil for the Respondent as she was going through a very acrimonious divorce, had been signed off work for a significant period and was undergoing treatment for both physical and mental health issues. The Respondent does not seek to trivialise the importance of holding the requisite HMO licence but submits that the various challenges that she faced at the time should have a bearing on the level of award. She notes that in *AA v Rodriguez & Ors [2021] UKUT 269 (LC)* the Upper Tribunal found that the First-Tier Tribunal had not sufficiently considered evidence in relation to mental health conditions.

17. The Respondent adds that she has not been convicted or received any fine in relation to the lack of an HMO licence in respect of the Property. The local housing authority closed its enforcement case less than a month after the Respondent was first contacted, and it is therefore clear that it did not consider the breach to be serious or the Property to be unsafe.

Discussion at hearing

18. At the hearing the Respondent said that she no longer owned her previous marital home and that it was sold in 2020 after her divorce and she received about £300,000 out of the sale proceeds. She still owns the Property and also owns a one-bedroom flat where she currently lives with her two children.

19. The Respondent said that she was aware of the concept of HMO licensing but did not know that her particular property fell into the category of properties requiring an HMO licence. In relation to the gas and electricity safety certificates, the Respondent said that she did provide copies to the Applicant and that copies were in the hallway, although she accepted that the hearing bundle itself contained no evidence of this. With regard to the drainage pipes, the Respondent agreed that it had become blocked periodically but only as a result of occupiers putting food down the sink.

20. The Applicant's representative put it to the Respondent that she had confirmed in writing at one point that the Applicant was a good tenant. She conceded this point and said that she accepted that the Applicant did not commit any breaches of his tenancy agreement.

21. In relation to the water supply, the Respondent agreed that it was unmetered and therefore that the charges were not linked to consumption.

22. Regarding her financial circumstances, the Respondent said that there was a £283,000 mortgage on the Property, with monthly repayments being £1,649, and that her share of the sale proceeds from the matrimonial home was being saved to put towards buying a bigger property for her to live in with her children. As at the date of the hearing there were 4 tenants at the Property paying in aggregate about £2,500 per month. She has what she describes as not a high salary from her job (see the P60 attached to her witness statement) and no investments.

23. The Respondent did not accept the accuracy of the photographs provided by the Applicant which allegedly showed mould in the communal bathroom, but she added that in any event this point was irrelevant as the Applicant had his own ensuite bathroom. As regards her health issues, the Respondent said that she was signed off work for about 9 months with stress/anxiety by her doctor.

24. There was some discussion about a section 21 eviction notice that had served by the Respondent on the Applicant. The Respondent now accepted, having looked into the issue and taken advice, that the notice had been given incorrectly.

Further submissions at hearing

25. Mr Neilson for the Applicant argued that the water charges did not count as utilities as the charges were not linked to consumption. He also argued that Council Tax is not a utility as it has to be paid even if a property is unoccupied and also because it benefits the landlord by being a payment towards local infrastructure. He confirmed, though, that the Applicant agreed with the Respondent's 25% apportionment of utility costs between occupiers.

Relevant statutory provisions

26. Housing and Planning Act 2016

Section 40

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

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

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

	Act	***section***	***general description of offence***
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house

7	This Act	section 21	breach of banning order

Section 41

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

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

Section 43

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

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

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

Section 44

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

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

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence

an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

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

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

Housing Act 2004

Section 72

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

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

Section 263

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

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

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises – (a) receives … rents or other payments from … persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or (b) would so receive those rents or

> other payments but for having entered into an arrangement … with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments …

Tribunal's analysis

27. The Applicant's uncontested evidence is that the Property was an HMO which was required to be licensed but was not licensed at any point during the period of the claim. Having considered that uncontested evidence we are satisfied beyond reasonable doubt that for the whole period of claim the Property required a licence and it was not licensed.

28. It is also clear that the Respondent was the landlord for the purposes of section 43(1) of the 2016 Act, as she was named as landlord in the tenancy agreement and was the registered freehold owner of the Property. Again, she does not dispute this.

29. The next question is whether the Respondent was a "person having control of or managing" the Property within the meaning of section 263 of the 2004 Act. The Respondent accepts that she was, and the evidence supports this as it is common ground that the Respondent received the rent from the Applicant.

The defence of "reasonable excuse"

30. Under section 72(5) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing an HMO which is licensable under Part 2 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.

31. In this case, the Respondent has not couched her submissions as a complete defence, but it is still open to the tribunal to consider whether her explanation as to the circumstances of her failure to license the Property would amount to a reasonable excuse defence.

32. The Respondent has described the circumstances in which she failed to license the Property, and we accept that her explanation is credible. Nevertheless, it was her responsibility to obtain a licence and there is nothing in her explanation which in our view is sufficient to amount to a complete defence. In particular, there is nothing to suggest that the matter was outside her control or that she was relying on somebody else in circumstances where it was reasonable to do so.

33. The purpose of the licensing regime is to try to ensure – insofar as is reasonably possible – that properties which are rented out are safe and of an acceptable standard, and it would frustrate that purpose if

landlords could be excused compliance simply because their personal circumstances caused them to forget to apply for a licence. However, it is clear from the recent decision of the Upper Tribunal in *Fashade v Albustin and others (2023) UKUT 40 (LC)* that where an excuse for failing to license is not strong enough to amount to a complete defence it might still be relevant as mitigation. We will return to this point later.

The offence

34. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. An offence under section 72(1) of the 2004 Act is one of the offences listed in that table. Section 72(1) states that *"A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part … but is not so licensed"*, and for the reasons given above we are satisfied beyond reasonable doubt (a) that the Respondent was a "person having control" of and a "person managing" the Property for the purposes of section 263 of the 2004 Act, (b) that the Property was required to be licensed throughout the period of claim and (c) that it was not licensed at any point during the period of claim.

35. Under section 41(2), a tenant may apply for a rent repayment order only if the offence relates to housing that, at the time of the offence, was let to the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made. On the basis of the Applicant's uncontested evidence on these points we are satisfied beyond reasonable doubt that the Property was let to the Applicant at the time of commission of the offence and that the offence was committed in the period of 12 months ending with the day on which his application was made.

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

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

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

38. In this case, the Applicant's claim relates to a period not exceeding 12 months. The evidence before us indicates that no part of the rent was covered by the payment of housing benefit, and the Respondent has not disputed that the rental amounts claimed were in fact paid by the Applicant.

39. We are satisfied on the basis of his uncontested evidence that the Applicant was in occupation for the whole of the period to which his rent repayment application relates and that the Property required a licence for the whole of that period. Therefore, the maximum sum that can be awarded by way of rent repayment is the sum of £7,485.81, this being the amount paid by the Applicant by way of rent in respect of the period of claim.

40. Under sub-section 44(4), in determining the amount of any rent repayment order the tribunal must, in particular, take into account (a) the conduct of the landlord and the tenant, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of an offence to which the relevant part of the 2016 Act applies.

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

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

43. In Judge Cooke's judgment, the only basis for deduction is section 44 of the 2016 Act itself, and she goes on to state that there will be cases

where the landlord's good conduct or financial hardship will justify an order less than the maximum.

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

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

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

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

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

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

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

50. Adopting the *Acheampong* approach, the whole of the rent means the whole of the rent paid by the Applicant out of his own resources, which is the whole of the rent in this case as no part of the rent was funded by housing benefit.

51. In relation to utilities, the Respondent has listed various items which she paid and which formed part of the rent and which in her submission should be deducted from the rent repayment award. These items are gas charges, electricity charges, water charges, the cost of the TV licence and Council Tax. Of these, the Applicant disagrees that the water charges and the Council Tax should be deducted.

52. We agree that the gas charges and electricity charges should be deducted as these are exactly the sorts of utility charge envisaged by the Upper Tribunal in *Acheampong*. We also accept that the cost of the TV licence should be deducted; whilst this is a cost which may not always be described as a 'utility', it seems to us that it is indistinguishable from charges such as gas and electricity charges for present purposes as it is a charge for something that was wholly for the occupiers' benefit and was 'consumed' by them in effectively the same way as gas or electricity. In relation to the water charges, whilst it is common ground that the water was not metered and therefore that the cost was not directly linked to the amount consumed, this does not seem to us to be the key point. The water charges were charges for the availability and use of water during the relevant period, the water was only for the occupiers' benefit and again it was consumed by them in the same manner as gas or electricity. Therefore, the water charges fall to be deducted from the rent as well. We do, though, agree with the Applicant that Council Tax should not be deducted as it is a tax and is not a consumable item in quite the same way as gas and electricity. It benefits the landlord by helping to fund local infrastructure.

53. In the light of the above conclusions, the gas, electricity and water charges and the cost of the TV licence fall to be deducted from the rent repayment amount. The Applicant has not disputed the Respondent's figures, which we regard as credible, and it is common ground that the Applicant's share was 25%. Therefore, the amounts to be deducted are £313.53 for gas (1,254.12 x 25%), £192.14 for electricity (£768.54 x 25%), £173.33 for water (693.33 x 25%) and £79.13 for the TV licence (£316.50 x 25%). These deductions come to £758.13 in aggregate, and

therefore this reduces the starting point for the rent repayment award from £7,485.81 to £6,727.68.

54. As regards the seriousness of the type of offence, whilst it could be argued based on the maximum criminal penalty available that there are offences covered by section 40(3) of the 2016 Act which can give rise to a greater criminal sanction, a failure to license is still a serious offence. Failure to license leads – or can lead – to significant health and safety risks for often vulnerable tenants, and sanctions for failure to license have an important deterrent effect on future offending as well as encouraging law-abiding landlords to continue to take the licensing system seriously and inspiring general public confidence in the licensing system. In addition, there has been much publicity about licensing of privately rented property, and there is an argument that good landlords who apply for and obtain a licence promptly may feel that those who fail to obtain a licence gain an unfair benefit thereby and therefore need to be heavily incentivised not to let out licensable properties without first obtaining a licence. Furthermore, even if it could be argued that the Applicant did not suffer direct loss through the Respondent's failure to obtain a licence, it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If landlords can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show that they have suffered actual loss, this will significantly undermine the deterrence value of the legislation.

55. In the light of the above factors, we consider that the starting point for this offence should be 70% of the maximum amount of rent payable.

56. As for the seriousness of the offence in this particular case compared to others of the same type, in our view it was at the less serious end of the scale. The Applicant has articulated a number of concerns but has not identified any serious issues in relation to the condition of the Property or in relation to the circumstances of the offence. In relation to the concerns that he has raised, the Respondent has been able to provide credible evidence refuting some of the points made, for example by giving evidence of the quality of the Applicant's ensuite facilities and by taking issue with his evidence on gas and electricity safety certificates and fire safety and drainage issues. In addition, it is noteworthy that the Applicant has seemingly been happy to live at the Property since 2012.

57. In relation to the failure to license the Property, whilst the Respondent's explanation of the circumstances does not amount to a complete defence, we accept that those circumstances constitute relevant mitigation. The evidence indicates that the period of claim coincided with a time of significant personal difficulty and turmoil for the Respondent as she was going through a very acrimonious divorce,

had been signed off work for a significant period and was undergoing treatment for both physical and mental health issues. It also coincided with the COVID-19 pandemic. As already noted, these are not factors which are sufficient to amount to a complete defence but we consider the Respondent's evidence to be credible on these points and they therefore constitute significant mitigation.

58. On the basis of the above mitigating circumstances in this particular case, we consider that the starting point of 70% should be decreased to 40%.

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

Conduct of the parties

60. There is no evidence before us that the Applicant's conduct has been anything other than satisfactory. The Respondent states that the Applicant was difficult to deal with and yet she is on record as having described him as a good tenant. She alleges that he tampered with her post, but there is no real evidence to support her allegation.

61. The Respondent also objects to the Applicant's decision not to point out to her that the Property required an HMO licence. However, whilst it is arguable that it would have been kinder for him to point out the need to remedy the breach, he was within his rights to use the legislation to obtain a rent repayment. As noted by the Upper Tribunal in *Vadamalayan*, the rent repayment provisions under the 2016 Act are harder edged than those under the 2004 Act, with more of an emphasis on penalising landlords for failing to obtain licences regardless of the amount of actual harm suffered by the particular occupiers. We do agree with the Respondent that the Applicant has somewhat overstated the strength of his case, but we do not accept that this should be treated as a significant factor in determining the amount of the award.

62. As for the Respondent's conduct, aside from the failure to obtain a licence her conduct has also been good. However, to make a further reduction to reflect that good conduct risks leading to double-counting, as that good conduct has already broadly been taken into account when considering the seriousness of the offence in this particular case. To the extent that it has not been, it is in any event balanced out by the Applicant's satisfactory conduct and therefore it is not appropriate to make a further adjustment specifically on the basis of the parties' conduct.

Financial circumstances of the landlord

63. The tribunal is required to take the Respondent's financial circumstances into account when making its decision. There is some evidence before us as to the Respondent's financial circumstances. She has £300,000 available to her to put towards the purchase of a property for herself and her children and she owns a one-bedroom flat. There is a £283,000 mortgage on the Property itself, and as at the date of the hearing there were 4 tenants at the Property paying in aggregate about £2,500 per month. She has what she describes as not a high salary from her job and has no investments. Taking her financial circumstances in aggregate, she is not struggling financially in a way that would justify a reduction in the rent repayment award, but neither is she wealthy. In our view, her financial circumstances are in a middling category such that no adjustment to the amount of the award should be made either upwards or downwards to reflect those financial circumstances.

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

64. The Respondent has not been convicted of a relevant offence, but it is clear from the Upper Tribunal decision in *Hallett v Parker* (see above) that this by itself should not be treated as a credit factor.

Other factors

65. It is apparent from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal "must, in particular, take into account" the specified factors. However, in this case we are not aware of any other specific factors which should be taken into account in determining the amount of rent to be ordered to be repaid.

Amount to be repaid

66. The four-stage approach recommended in *Acheampong* has already been set out above. The amount arrived at by going through the first two of those stages is £6,727.68. As for the third stage, namely the seriousness of the offence, this reduces the amount to 40% of that sum, subject to any adjustment for the section 44(4) factors referred to above.

67. As noted above, in part to avoid double-counting, there is nothing to add or subtract for any of the other section 44(4) factors.

68. Therefore, taking all of the factors together, the rent repayment order should be for £6,727.68 x 40% = £2,691.07.

Cost applications

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

70. As the Applicant's claim has been successful, albeit that there has been a deduction from the maximum payable, we are satisfied that it is appropriate in the circumstances to order the Respondent to reimburse these fees. We disagree with the Respondent that the Applicant should bear this cost as this was a legitimate application made as a consequence of the Respondent having committed a criminal offence.

Name: Judge P Korn **Date:** 17 August 2023

RIGHTS OF APPEAL

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

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.