FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	**(1) LON/00AZ/HMF/2021/0297** **(2) LON/00AZ/HMF/2021/0282**
Property	**:**	**316 Devonshire Road, London SE23 3TH**
Applicants	**:**	**(1) Malina Albustin and Jeremiah-Johnson Tayler** **(2) Hayley Whitehorn**
Respondent	**:**	**Paul Fashade**
Tribunal members	**:**	**Judge Amran Vance** **Ms S Coughlin MCIEH**
Date of Hearing	**:**	**8 November 2023**
Date of decision	**:**	**7 December 2023**

DECISION

Decision

1. The Tribunal makes a Rent Repayment Order, and orders Mr Fashade to pay the following sums to the Applicants:

   (a) **£3,570** jointly to Mr Tayler and Ms Albustin; and

   (b) **£2,100** to Ms Whitehorn

2. We also order Mr Fashade to reimburse the Applicants for the tribunal fees paid, namely:

   (a) the £100 application fee paid by Mr Tayler and Ms Albustin;

   (b) the £100 application fee paid by Ms Whitehorn; and

   (c) the £200 hearing fee paid by Ms Whitehorn.

Background

3. On 4 May 2022, this Tribunal ("the FTT") made a rent repayment order ("RRO") against the respondent, Mr Fashade, under section 44 Housing and Planning Act 2016, requiring him to repay £8,350.39 to Ms Albustin and Mr Tayler (jointly) and a further £2,880.55 to Ms Whitehorn. The order was made in respect of the Applicants' occupation of 316 Devonshire Rd Lewisham London SE 23 3TH ("the Property"), for which Mr Fashade has been the freehold owner since 5 July 2001 **[59]**.

4. The Property is a six-bedroomed house. At para. 3 of its decision, the original FTT recorded that it was not in dispute that for the period relevant to this application, the Property was let by Mr Fashade to five or more persons, who formed more than one household, and that those tenants shared toilet, bathroom and kitchen facilities. It also recorded that, as such, it was not in dispute that during the entire period of the Applicants' occupation the Property was a House in Multiple Occupation ("HMO") and subject to the statutory licensing regime. The regime in question is the mandatory HMO licensing regime provided for in Part 2 Housing Act 2004 ("the 2004 Act").

5. The FTT made the RRO because it was satisfied, to the criminal standard of proof, that Mr Fashade had committed a licensing offence under the 2004 Act, by being a person in control or management of a HMO that was required to be licensed under the 2004 Act, but was not so licensed. The relevant offence is that specified in s.72(1) of the 2004 Act. Section 72(5) of that Act provides a separate defence where the person having control of or managing an unlicensed HMO had a reasonable excuse for doing so.

6. Mr Fashade appealed the FTT's decision to the Upper Tribunal. By decision dated 7 February 2023, the Upper Tribunal (Martin Rodger KC, Deputy Chamber President) allowed the appeal, and the case was remitted to the FTT for redetermination by a differently constituted FTT panel.

7. In his decision, the Deputy President took the view that even accepting Mr Fashade's own evidence at face value, it was too imprecise to support a defence of reasonable excuse in relation to any part of the period to which the RRO's relate (para. 46). However, he considered evidence from Mr Goodsell, Mr Fashade's former letting agent of the Property, did not suffer from the same lack of precision. He had given evidence of a failed attempt to renew the licence over the telephone, and a second failed attempt to renew it online on the same date. The Deputy President also said that it was apparent from Mr Goodsell's evidence that it was the attendance at the Property of a Council representative which galvanised him into making an application for a HMO licence. The Deputy President said that the FTT made no finding about when that application was made and failed to make any connection between the licence eventually granted and Mr Goodsell's efforts. Applying the civil standard of proof, the Deputy President concluded that it should have been sufficient to satisfy the FTT that the licensing application had been made by 9 September 2021 at the latest, which was enough to provide a defence from that date (para. 47). On the evidence provided to the FTT it was therefore wrong for it to conclude that Mr Fashade had committed the offence of being in control of or managing the HMO after 9 September 2021 (para.49).

8. The Deputy President also found that the FTT's approach to the quantum of the award was wrong for two reasons. First, because it should have made specific findings about the efforts Mr Fashade and Mr Goodsell both claimed to have made to obtain a licence, which was capable of being relevant conduct to be taken into account when deciding the amount of the RRO, whether or not it provided a complete defence to the licensing offence. Secondly, the FTT's approach took no account of the seriousness of the offence and assumed a starting tariff equal to the full amount paid (paras. 53-56).

9. At para. 59, the Deputy President said that material which the parties wanted to put in evidence in the appeal but which the Upper Tribunal had refused to take into account, may be made available to the FTT which heard the remitted case. That is why, when Judge Vance issued directions to the parties on 3 March 2023, he directed that any further submissions each party wished to make in respect of the application, together with any other documents, or witness statements on which they intended to rely should be included in new PDF hearing bundles which were to replace the bundles previously provided to the FTT. He also directed that the PDF bundles should contain any documents included in the previous hearing bundle if still relied upon.

10. The Applicants complied with that direction, providing a replacement hearing bundle on or about 24 March 2023. Mr Fashade's replacement bundle was due on 14 April 2023, but was not provided. No replacement bundle had been received from him by the date of our determination.

11. Before the original FTT, Mr Fashade was represented by Mr Goodsell. However, by letter dated 10 May 2023, Mr Fashade notified the tribunal that he had instructed Landlords Defence Limited ("LDL") to represent him in these proceedings. On 29 June 2023, LDL sent a letter to the tribunal providing a copy of a Notice dated 28 July 2021 from London Borough of Lewisham ("the Council") in which it gave notice of its intention to issue a HMO licence to Mr Fashade in respect of the Property. This referred to a HMO licence application having been received on 16 July 2021.

12. The application was listed for a hearing to take place by video conferencing on 30 June 2023. The Applicants attended that hearing, as did Mr Desmond Tayler from LDL. Mr Fashade attempted to join but had technical difficulties, being unable to see or hear the tribunal members. The hearing was therefore postponed, and on 11 July 2023, was relisted for a hybrid hearing on 4 October 2023. Unfortunately, it was postponed again, this time because Mr Fashade informed the tribunal on 25 September 2023, that he had contracted Covid-19.

13. On 26 September 2023, LDL notified the tribunal that it was no longer representing Mr Fashade in this application.

14. The hearing was relisted for 8 November 2023, and took place by way of video hearing (FVH). In attendance were each of the Applicants, Mr Fashade, and his McKenzie friend, Ms Diane Takpi. We have redetermined this application afresh, on the evidence available to us at that date. The Applicants replacement PDF bundle comprised 415 pages and numbers in bold and in square brackets below refer to pages in that bundle. It was very regrettable

that Mr Fashade had failed to provide us with a replacement bundle because during the course of the hearing he referred us to documents contained in the original FTT hearing bundle, as well as to documents he submitted in a separate bundle to the Upper Tribunal entitled "Statement of Appeal" (5 pages) with a separate PDF document entitled "Appendices Upper TT – Final" (95 pages). This was exactly the situation Judge Vance wished to avoid when he issued his directions of 3 March 2023. Nor had Mr Fashade availed himself of the opportunity offered to him in those directions to provide any further written submissions or witness evidence. Numbers in bold, and in square brackets below, prefixed by "R" refer to pages in the Respondent's original FTT bundle. Those prefixed by "Appendices" refer to the 95-page bundle relied upon by the Respondent in the Upper Tribunal.

15. Once again, Mr Fashade had problems connecting to the video hearing on 8 November. His video connection worked well, but he had a microphone issue. That was resolved by him dialling into the hearing using his mobile telephone. Although, on a few occasions and for reasons unknown, he was disconnected from the hearing on his computer, his telephone connection remained constant, and he was readmitted to the video hearing a few seconds later. We are satisfied that no procedural unfairness resulted.

16. We were also conscious that Ms Whitehorn has a hearing difficulty and asked that the other parties speak clearly and slowly, and not over each other to assist her in following the proceedings. We had to repeat that request on several occasions because Mr Fashade and, on occasions Mr Tayler interrupted evidence or submissions given by another person.

17. At the start of the hearing on 8 November, we drew the parties attention to a letter that the tribunal had received from Mr Goodsell dated 27 June 2023, in which he said that he wished to "withdraw any statements that were made by myself" and that he "did not authorise" the use of any of his statements by Mr Fashade. Mr Goodsell had informed the tribunal's case officer that he had not sent a copy of that letter to the Applicants as he did not know their email addresses. We informed the parties that whilst Mr Goodsell could have sought to correct his previous witness statement dated 25 February 2022 **[R15]**, it was not open to him to unilaterally "withdraw" it or to prevent Mr Fashade from relying upon it. However, given that Mr Goodsell had not attended the hearing, and was therefore unavailable to be cross-examined, we said we would give his evidence such evidential weight as we considered appropriate.

18. We also clarified the date on which Mr Fashade's previous HMO licence had expired. He agreed this was on 13 August 2020, as shown in the copy licence at **[Appendices 15]**. The Applicants agreed that the Notice of Intention to grant a licence issued by the Council. **[Appendices 17]** evidenced that a license application had been received on 16 July 2021.

19. There was no dispute between the parties as to the dates on which the Applicants occupied the Property. The Applicants' tenancy agreements were entered into with the involvement of Mr Fashade's letting agent, Mr Bond Blake. Mr Tayler and Ms Albustin's Assured Shorthold Tenancy ("AST") **[52]** commenced on 16 December 2020, and expired on 15 December 2021. They were in occupation throughout that period and left at the end of their

contractual tenancy. Their AST named Mr Fashade as their landlord. The rent payable was £775 per month, which included £50 per month in respect of utility bills. The following is stated in the agreement in respect of a tenancy deposit, "N/A – used as last month's rent".

20. Ms Whitehorn's contractual AST **[44]** commenced on 28 December 2020, and expired on 27 December 2021. Mr Fashade was named as her landlord in her AST and the rent payable was £575 per month. Her rent did not include a payment towards utility bills. The wording regarding the tenancy deposit was identical to that used in Mr Tayler's and Ms Albustin's tenancy agreement. Ms Whitehorn operated a break clause in her tenancy agreement and, with the consent of Mr Fashade, ceased to occupy the Property on 28 May 2021 **[R40]**.

21. There was no dispute between that parties that following a complaint received from Ms Whitehorn on 8 June 2021 **[408]**, Mr Peter Boyle, a Private Sector Housing Fraud and Intelligence Officer at the Council's Private Sector Housing Team, visited the Property on 30 June 2021. Mr Boyle provided a witness statement **[228]** in which he gave brief details of that visit, which was then followed by receipt of an email from Mr Goodsell dated 1 July 2021 **[414]**, and a full inspection of the Property on 7 July 2021 with Mr Goodsell present, and at which Mr Boyle noted down various issues at the Property that needed to be addressed. Mr Boyle did not attend the hearing.

The Law

22. Section 72(1) of the 2004 Act provides as follows:

> "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 (see section 61(1) and is not so licensed."

23. Section 263 provides the following definitions of persons having control of, or managing, premises:

> "(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
>
> (2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.
>
> (3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—
>
> (a) receives (whether directly or through an agent or trustee) rents or other payments from—

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises …

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

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

24. Section 77 defines an "HMO" as a house in multiple occupation as defined by sections 254 to 257. Section 254 provides:

"(1) For the purposes of this Act a building or a part of a building is a " house in multiple occupation" if–

(a) it meets the conditions in subsection (2) ("the standard test");

(b) – (e) .....

(2) A building or a part of a building meets the standard test if—

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

25. Not all HMOs have to be licensed, but only those to which Parts 2 or 3 of the 2004 Act applies. Section 55(2) provides that Part 2 of the 2004 Act applies to the following HMOs:

"any HMO in the authority's district which falls within any prescribed description of HMO, and

(a) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation.

(b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation."

26. The Licensing of Houses in Multiple Occupation Order 2018 makes it mandatory for a certain HMOs to be licensed. It will apply, in the case of the Property, if it was occupied by five or more persons, occupied by persons living in two or more separate households; and if the standard test in section 254(2) of the Act was met.

27. Section 72(4)(b) of the 2004 Act provides that it is a defence to the s.72(1) offence that, at the material time an application for a licence had been duly made, and that the application was still effective. Section 72(5) provides that it is a defence to that offence that the person had a reasonable excuse for having control of or managing the house.

28. Section 40 Housing and Planning Act 2016 ("the 2016 Act") states as follows:

"(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, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy."

29. Among the relevant offences is the s.72(1) HMO licencing offence.

30. Section 43 provides that this tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt that the offence has been committed, and that where the application is made by a tenant the amount is to be determined in accordance with section 44 which, in respect of the s.72(1) offence limits the amount of the award to the rent paid during a period "not exceeding 12 months, during which the landlord was committing the offence."

31. Section 43(4) says as follows:

(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

(b) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

32. Guidance on how this tribunal should approach quantification of the amount of a RRO has been provided by the Upper Tribunal in *Williams v Parmar* [2021] UKUT 244 (LC) and, more recently, in *Acheampong v Roman* [2022] UKUT 239. We refer to that guidance below when deciding how much to order by way of a RRO.

The Applicants' Case

33. The Applicants evidence was that throughout the period of their occupation the Property was occupied by at least five persons. Mr Tayler's oral evidence to us was that when he and Malina first moved in, Olu and Natalie occupied the top floor room, Patrick occupied a room on the first floor, whilst rooms on the ground floor were occupied by Sylvan and Aria. That makes a total of seven persons.

34. In summary, Ms Albustin and Mr Tayler's evidence was that:

(a) when they were first shown the Property, they pointed out problems to Mr Blake, such as poor cleaning, and cupboards coming off hinges. The agent told them to make a note of any repairs needed, and that these would be fixed in a timely fashion **[30]**. However, soon after they moved in, Mr Goodsell replaced Mr Blake as Mr Fashade's letting agent, and he failed to properly address problems drawn to his attention. This included mould present in the shower due to poor ventilation, rotten wooden door frames, poor sealant around the sink, a defective WC cistern, DIY-waste left in the front and back garden areas **[31],** and defective decking in the garden **[40]**;

(b) although Mr Goodsell was initially friendly and appeared to want to establish a rapport with the tenants, the relationship between them deteriorated quite quickly. A WhatsApp group was created for the Property and was used by the Applicants and Mr Goodsell. WhatsApp messages covering the period 16 December 2020 and 21 October 2021 evidence that deteriorating relationship **[89-127]**;

(c) they were particularly concerned by Mr Goodsell's habit of turning up at the Property unexpectedly, without giving them reasonable notice, on one occasion accompanied by his wife and child **[30, 40]**;

(d) They say that their requests that the handyman engaged by Mr Fashade, Igor Prykhoda ("Igor"), give 24 hours' notice before attending the

Property were also ignored **[31,40]**. They say this problem was exacerbated after Igor started occupying a room in the Property in early October 2021, allegedly as a paying tenant **[124]** which meant it was easier for him to carry out works without giving them advance notice;

(e) they did not receive a copy of a gas safety certificate for the Property at the start of their tenancy, nor a copy of an Energy Performance Certificate ("EPC") **[50]**; and

(f) their deposit was not protected in a tenancy deposit scheme until July 2021 **[31]**.

35. Ms Whitehorn's evidence, in summary, was that:

(a) in June 2021, she identified that the Property was an unlicensed HMO and contacted the Council who recommended that she apply for a RRO **[32]**;

(b) she also pointed out problems with the condition of the Property to Mr Blake, and was told, incorrectly, that these would be remedied after her tenancy commenced;

(c) she too was unhappy about Mr Goodsell and Igor attending the Property without giving at least 24 hours' notice **[32]**. A table setting out dates on which she states inadequate notice was given appears at **[34-35];**

(d) she agreed with Mr Tayler and Ms Albustin that Mr Goodsell failed to respond appropriately to complaints about a faulty washing machine, faulty WC, mould in the shower due to poor grouting and sealant, and DIY-waste and old appliances left in the garden. She set out details in a table at **[36-38]**;

(e) on 21 April 2021 Mr Fashade left four abusive voice notes on her mobile telephone which contained repeated swearing and insults. A transcript of those voice notes appears at **[379]**;

(f) she did not receive a copy of the How to Rent guide at the start of her tenancy, nor a copy of the gas safety certificate for the Property not a copy of a EPC **[44]**;

(g) the reason why she operated the break clause in her tenancy agreement after three months occupancy was because she was unhappy about the repeated interference with her quiet enjoyment of the Property, the condition of the Property, and failure to carry out repairs; and

(h) her deposit was not protected in a tenancy deposit scheme for the full duration of her occupation **[211]**.

36. Mr Tayler prepared a witness statement addressing an incident that took place at the Property on the afternoon of Sunday 29 August 2021 **[41]**. He

also gave oral evidence about the incident at the hearing. His evidence was that:

(a) another tenant, Patrick Ambrose was in the garden lighting a barbecue for an intended gathering later that afternoon. Shortly after the barbecue was lit, he saw Igor unexpectedly arrive at the Property to work on revarnishing the decking at the back of the garden. After Patrick asked Igor to stop, Igor made a telephone call which Mr Tayler presumes was to Mr Fashade, because he arrived about 15 minutes later. In cross-examination, Mr Tayler said that he believed Igor left the Property before Mr Fashade arrived;

(b) by this point Mr Tayler had returned to his bedroom. He then heard Patrick and Mr Fashade arguing and shouting in the kitchen. Mr Fashade, who appeared to be goading Patrick into starting a fight, knocked Patrick's hat off his head, whilst Patrick pushed Mr Fashade away from him.

(c) after he threatened to call the police, Mr Fashade began shouting abuse at him, from no less than a couple of inches from his face. At one point Mr Taylor quotes Mr Fashade as saying:

> "You don't care. You're trying to make problems for me, but I can make problems for you. When you leave this house, and I'll make sure that you do, I'm going to follow you and I'm going to fuck you. If you try to take action, see what happens, because I've got more money, and I can pay to make things difficult for you and afford to make trouble for you."

(d) he went back to his room and telephoned the police. An officer attended and took a statement from him and then spoke to Mr Fashade. The officer advised Mr Tayler to let Mr Fashade remain in the Property and to let Igor carry out the works in the garden. After Patrick then returned to the garden Mr Fashade threw some concrete slabs in Patrick's general direction. Patrick returned to his room and Mr Goodsell arrived and joined Mr Fashade and Igor in the garden.

(e) he had tried to obtain an incident report from the police, but his request was refused, with the police saying they had received a separate complaint about the incident, with a conflicting version of events. He suspects that Mr Fashade had encouraged Mr Goodsell to telephone the police to allege, falsely, that that he and Patrick were causing trouble.

37. Patrick Ambrose provided a witness statement **[87]** but did not attend the hearing and could not, therefore, be cross-examined on his evidence. He confirmed Mr Tayler's account of the 29 August 2021 incident. He said that he has known Mr Fashade for years, that he owns a few other properties, and that in two of those he had been treating tenants in the same was as he has treated the Applicants.

38. It was the Applicants case that Mr Goodsell was slow to carry out repairs and that it was only in January 2022, after the Council notified Mr Fashade of works that he was required to undertake before a HMO license was granted that those repairs were completed **[366]**.

39. The Applicants position is that as well as committing the offence of being in control or management of an unlicensed HMO, he had, by his actions also:

    (a) committed an offence under section 6(1)1 Criminal Law Act 1977, violence for securing entry; and

    (b) committed an offence under sections 1(2), (3), or 3(A) Protection from Eviction Act 1977 – unlawful eviction or harassment of occupiers.

Mr Fashade's Case

40. When we asked, Mr Fashade accepted that for the period relevant to this application, the Property was required to be licensed as a HMO, but was not so licensed until 3 August 2021. He contended that he had attempted to renew the licence on several occasions before that, starting in March 2020, but his attempts were unsuccessful because of technical problems with the Council's website, and because the Council had not responded to his emails. He also asserted that he was unable to reach the relevant team at the Council because they were not answering their telephone. He therefore argued that he could avail himself of the s.72(5) defence, on grounds that he had a reasonable excuse for being in control of or managing an unlicensed HMO. He also disputed that he is liable for any of the other offences alleged by the Applicants.

41. Despite acknowledging that the Property was required to be licensed as a HMO at the start of the hearing, in his oral submissions Mr Fashade then proceeded to argue that during the Covid-19 lockdowns the Property was only occupied by four persons and therefore did not need a HMO license. We address his evidence on this point below.

42. The remainder of Mr Fashade's evidence, as set out in his witness statement dated 25 February 2022 **[R12]** and in his oral evidence was that:

    (a) he had initially instructed Mr Adam Aboi to manage his property portfolio, which included the Property. He terminated his services after becoming aware that he had been stealing funds and instead instructed Mr Blake, who was, in turn, replaced by Mr Goodsell. When asked by the Tribunal at the hearing how many properties he owned Mr Fashade hesitated, before finally saying that he owns about eight other properties, some jointly. He said that about three of these are HMOs;

    (b) in March 2020, after his previous HMO licence had expired, he attempted to "initiate the licence renewal online" but this was unsuccessful due to technical faults. Attempts to contact the relevant team at the Council failed because its telephone was not answered;

(c) he twice emailed the Council for assistance on how to renew the licence and received two emails in response. This appears to be a reference to auto-response emails from the Council confirming receipt of an email from Mr Fashade. Given the impact the Covid-19 pandemic was having on both organisations and individuals he then decided to wait to hear back from the Council;

(d) he is a responsible landlord who makes every attempt to ensure repairs are carried out quickly. The Applicants were, however, very demanding, expected repairs to be carried out within an unreasonably short timescale, blocked works, and carried out damage to the Property;

43. Mr Fashade also contended that the pandemic had interfered with the Council's ability to provide housing services. He appeared to be arguing that this included its ability to accept and/or process licensing applications. He included three Council documents with his submissions to the Upper Tribunal:

(a) a report to its Executive Director for Housing, Regeneration and Environment dated 14 April 2020 **[295 – 308]** which he suggested evidences the suspension of all activities from March 2020, in particular public facing activities regarding its additional licensing scheme (para 2.3);

(b) a report to its Housing Select Committee entitled "The Impact of COVID-19 on Housing" dated 15 September 2020 **[309-322]** which he suggested evidences the Council delaying the implementation of a borough-wide licensing scheme and halting routine licensing inspections (para 9.11);

(c) a report to its Overview and Scrutiny Business Panel dated 26 January 2021 **[323 – 336]** which he suggested is evidence that the Council was diverting its resources to critical services (para. 5), and that the government had published advice suggesting that new licensing schemes in development should be paused (para 9.11).

44. Mr Fashade's hearing bundle before the original FTT included only one email said to have been sent by him to the Council's licensing team. This was exhibited to Mr Goodsell's witness statement as "CG01" and bears a timestamp of 20 March 2020 at 17:01:34 GMT **[R49].** It has a subject line of *"Urgent please: 45 Lewisham park se13 6QZ. Additional Hmo rooms for usage on the premises for family member and partners staying for a while as guests for two weeks might also need isolating if unwell presently"*. In that email he refers to 45 Lewisham Park having a HMO license allowing six rooms to be occupied. He requests that that the Council consider granting permission for two other rooms to be occupied. There is no reference at all to the subject Property in this email. We will refer to this email as "**Email 1**".

45. Included amongst the documents Mr Fashade submitted to the Upper Tribunal were several other emails purportedly sent by him to the Council. It is notable that these are not copies of original emails sent by him to the

Council. What was provided were copies of emails said to have been sent by Mr Fashade to Mr Goodsell on 11 May 2022, each of which forwarded on an email chain purportedly passing between Mr Fashade and the Council. These comprise:

(a) an email from Mr Fashade to the Council bearing exactly the same timestamp as **Email 1**, namely 20 March 2020 at 17:01:34 GMT **[269],** but with a different subject line of "Urgent please: 45 Lewisham park se13 6QZ. And additional Hmo houses pending renewal presently. We will refer to this email as "**Email 2**".It has the following contents, which are entirely different from that of **Email 1**:

> *"To whom it may concern please, Can you please help with another situation. Awkward as it may seem is there anyway we can renew 316 Devonshire road's HMO license as well as 45 Lewisham park additional rooms request upgrade/Hmo usage. And the last property is 42 Evelyn Street as they are all on the same timeline on their renewals. Your speedy reply and action will be genuinely appreciated."*

(b) an automated response from the Council bearing a timestamp of 20 March 2020 at 21:14:14 GMT **[270]** and with the subject line of *"Thank you for emailing Lewisham Council PSHE"*, acknowledging receipt of an email;

(c) an email from Mr Fashade to the Council dated 17 May 2020 with no subject line **[271]** asking for an update on an email below, namely an email from him dated 20 March 2020, with a timestamp of 21:12:09 GMT, and with the same subject line as **Email 2**, in which he said, "Contents Modified please use/reply to this email not the previous thank you and appreciated." We will refer to this third purported email sent on 20 March 2020 email as "**Email 3**".

(d) an automated response from the Council dated 11 May 2020 **[272]**. However, that email chain does not include an email from Mr Fashade to the Council dated 11 May 2020, and nor is there a copy elsewhere in the documents provided by Mr Fashade;

(e) an email from Mr Fashade to the Council dated 10 August 2020 at 10:02 **[273]** asking for a response to **Email 2**;

(f) an automated response from the Council dated 10 August 2020 at 10:04 **[274]**;

(g) an email from Mr Fashade to the Council dated 7 January 2021 at 09:03 **[275]** asking for a response to **Email 2**;

(h) an automated response from the Council dated 7 January 2021 at 09:04 **[276];**

(i) an email from Mr Fashade to the Council dated 8 April 2021 at 11:17 **[277]** asking for a response to **Email 2**;

(j) an automated response from the Council dated 8 April 2021 at 11:18 **[276];**

46. In the original proceedings before the FTT Mr Goodsell had provided a witness statement on behalf of Mr Fashade dated 25 February 2022 **[R15]**. In it, he confirmed that was appointed by Mr Fashade on 13th December 2020 to manage his properties but that he was unable to visit the Property until 23 January 2021 because of a pandemic lockdown, and because several of the tenants had been in isolation because they contracted Covid-19. He said that after that visit he decided to attend only to emergency matters and that non-urgent items would be fixed when restrictions had eased.

47. Mr Goodsell said that he did not consider he needed to provide the tenants with advance notice when attending the Property to visit the communal areas or vacant rooms, but that he would give advance notice when access to their rooms was required.

48. He stated that he was surprised to find out that the Property was not a licensed HMO and that he worked with the Council to complete the works that it said were needed before a license would be issued. Exhibited to his witness statement were a list of those works **[R63]** and his plan to complete them **[R65]**.

49. Mr Goodsell stated that he had attempted to renew the HMO licence online on 1 July 2021 but experienced technical difficulties. He did not explain the nature of those difficulties, but this can be ascertained from the contents of emails from him to Mr Boyle dated 1 and 2 July 2021 exhibited to Mr Boyle's witness statement **[404-415]**. In those emails he told Mr Boyle that he was experiencing difficulties in proceeding with the online application because it was not linked to his account, and that it may be linked to account of the former property manager, Adam Aboi.

50. Witness statements were also provided by Mr Blake **[R18]** and Igor **[R20]**. Where necessary, we address the contents of those statements below.

Reasons for Decision

Did Mr Fashade commit the s.72(1) offence?

51. We find that during the relevant period all the requirements of the standard test in s.254(2) were met, and that the Property therefore fell within the definition of a HMO in s.77. The standard test was met because the Property consisted of six rooms, occupied by persons who did not form a single household. There was no suggestion that occupants did not occupy the Property as their only or main residence, or that their occupation of the living accommodation was not the only use of that accommodation. They paid rent to Mr Fashade, and had the shared use of bathroom, WC, and shower facilities.

52. We are also satisfied, beyond reasonable doubt, that the Property was a HMO that was required to be licensed by reason of Section 55(2) and the 2018 Order, as it was occupied by five or more persons, living in two or more separate households, and because the standard test in section 254(2) of the Act was met. We find Mr Tayler's evidence regarding the number of persons living in the Property compelling. Mr Fashade's evidence, in contrast, was confused, hesitant and thoroughly unpersuasive. He said that with the introduction of the first Covid-19 lockdown, the Property only had four occupants, and only increased to five or more when Mr Tayler and Ms Albustin moved in on 16 December 2020. However, he could not remember the names of all of the four occupants or how long they had lived there.

53. This application for a RRO only concerns the period after Mr Tayler and Ms Albustin moved into the Property, later to be joined by Ms Whitehorn. On Mr Fashade's own evidence, the Property was therefore occupied by at least five persons on and after 16 December 2020. His challenge to the number of occupants did not appear in his witness statement and does not appear to have been advanced before the FTT or the Upper Tribunal where he accepted that the Property was, at all material times, required to be licensed as HMO. We do not find his oral evidence to us to be credible.

54. We are further satisfied that Mr Fashade was a person having control of the Property for the purposes of s.263(1) because he received the rack-rent, which was paid by the Applicants directly into his bank account **[61-83]**. In addition, he was a person managing the Property for the purposes of s.263(3) because he is the owner of the Property who received rent from the Applicants, who all occupied rooms in a HMO.

55. The burden of proving a reasonable excuse defence under s.72(5) is on Mr Fashade, as the person controlling or managing the HMO. On the balance of probabilities, we are not persuaded that he has established that defence. His evidence was that on unspecified dates in March 2020 he made attempts to renew the HMO license for the Property using the Council's online portal, but its website was experiencing technical difficulties, returning an error 404 code **[Statement of Appeal, para 15].**

56. We do not consider Mr Fashade's evidence in this respect to be reliable. 404 error codes are generated when a user attempts to access a webpage that does not exist, has been moved, or has a dead or broken link. His HMO license was not due to expire until 13 August 2020. He has not provided us with dates as to when he allegedly tried to access the Council's websites and received these error 404 codes (other than to say he did so in March 2020). We do not consider it credible that the Council's website was inaccessible throughout the period March 2020 – 16 July 2021, when a HMO license application was finally made.

57. Evidence in support of that conclusion has been provided by the Applicants in the form of Internet Archive snapshots of the Council's website pages for HMO applications dated 23 April 2020 **[374]** and 1 October 2020 **[371]**. These show active webpages, with no 404 codes present. In addition, the Applicants have searched the Council's Private Sector Housing Agency ("PSHA") Public Register and obtained a spreadsheet of HMO's in the

Council's area that were licenced in 2021 **[154]**. This shows the active grant of a large number of HMO licences with commencement periods running throughout the period March 2020 – April 2021 **[165-168]**. We therefore find that the HMO licensing section of the Council's website was operational throughout the period March 2020 – 16 July 2021, and that it would have been possible for Mr Fashade to apply for a license through that online portal.

58. We do not accept as true Mr Fashade's evidence that he attempted to do so in March 2020, and in fact his evidence in that respect contradicts what he said at para 15 of his Statement of Appeal, namely that the Council's online service was not launched until October 2020. Clearly, that is not correct.

59. Even if we were to accept that Mr Fashade attempted to renew his HMO licence in March 2020, and received an error 404 code, we find it inconceivable that this problem persisted all the way through to July 2021 when the licence application was made. In addition, even if he experienced technical problems in accessing the Council's website, this would not, in our view, amount to reasonable excuse for continuing to be in control of management of the Property as an unlicensed HMO. Instead of committing that offence, Mr Fashade could have elected to reduce the number of occupants in the Property to below five persons. He did not do so, but instead elected to enter into ASTs with the Applicants, knowing (on his own evidence) that the Property was unlicensed after 13 August 2020.

60. It was Mr Fashade's oral evidence to us that he told Mr Goodsell in December 2020, when he appointed him to manage the Property, that the HMO license needed to be renewed. That is contradicted by Mr Goodsell's evidence in his witness statement, para. 6 **[R16],** where he states that he was surprised to learn from Mr Boyle that the Property was not licensed as a HMO. That this was the case is also evidenced in Mr Goodsell's email to Mr Boyle of 1 July 2021 **[414]** in which he states that he was surprised by Mr Boyle's visit to the Property and the fact that the HMO licence had expired. Again, we do not find Mr Fashade's evidence to be credible. If, as he asserts, he was experiencing problems in renewing the HMO license from March 2020 onwards, then it begs the question of why there is no mention of those difficulties in Mr Blake's witness statement of 26 February 2022 **[R18]**, given that he was Mr Fashade's letting agent at the time.

61. Nor do we not consider the three Council documents relied upon by Mr Fashade substantiate his assertion that the Covid-19 pandemic had interfered with the Council's ability to provide housing services to such an extent that it impacted adversely on its ability to accept or process licensing applications. The report to the Executive Director for Housing, Regeneration and Environment dated 14 April 2020 **[295 – 308]** refers to the suspension of activities from March 2020 in relation to the proposed implementation of an additional licensing scheme. It has nothing to do with the mandatory HMO licensing regime. Similarly, the reference in para. 6.1 to the Council stopping non-essential work, including new licensing activity must, in our view, also be a reference to the implementation of a new borough-wide additional or selective licensing scheme and not mandatory HMO licensing. Paragraph 9.11 of the report to its Housing Select Committee **[309-322]** concerns the delay of the implementation of a new borough-wide licensing scheme and halting

routine licensing inspections. This too, is clearly a reference to the proposed additional licensing scheme, and not mandatory HMO licensing. The same is true of the report to the Overview and Scrutiny Business Panel **[323 – 336]** as is evident to the reference to government advice suggesting that new licensing schemes in development should be paused.

62. We do not accept as credible Mr Fashade's evidence that he was at no point able to contact the Council's licensing team by telephone because they were not answering the telephone as a result of the impact of the Covid-19 pandemic. At para. 12 of the 14 April 2020 report **[308]** it is stated that although, as part of temporary Covid-19 measures, the Council was pausing routine licensing inspections, and only inspecting high-risk properties, it was still providing telephone and email advice and support to landlords. At para 1 of the 15 September 2020 report it is recorded that housing services adapted quickly and effectively following the outbreak of Covid-19, with advice services quickly moving from face to face to remote, and all staff instructed to work from home where possible. Mr Fashade has provided no details of the dates on which he says he attempted to contact the Council by telephone. We find that the licensing team were working remotely during the periods of national lockdown and that it would have been possible for him to make contact with that team by telephone.

63. As to the emails Mr Fashade asserted he sent the Council, we again find his evidence fundamentally unreliable. There is a clear conflict between his evidence and that contained in the witness statement of Ms Korne, a Licensing and Housing Enforcement Coordinator at the Council, dated 23 March 2023 **[390]**. In her statement, Ms Korne stated that her duties include monitoring the general email inbox through which the public can contact the PSHA. The Council's policy is, she said, that emails should not be deleted from the inbox.

64. She stated that on 3 March 2022 she searched the inbox for any emails received from Mr Fashade (searching by his email address) and located two emails, both sent on 20 March 2020, one sent at 17:01:34 and another at 17:02. She exhibited copies of both emails to her statement. Her evidence is that these two emails are the only emails from Mr Fashade that she located in the inbox. However, it is clear from Exhibit AK1 to her statement that the Council also received a third email from Mr Fashade on 20 March 2020, sent at 21.12 (this has the same contents as **Email 3**, as described above**)**.

65. Ms Korne stated that she also searched by Mr Fashade's name, and found an email received from Mr Goodsell which revealed a further two email addresses for Mr Fashade. She searched the inbox against both those email addresses and found two other emails from Mr Goodsell into which Mr Fashade had been copied. One, dated 15 September 2021, concerned a dispute between adjoining HMO managers at 40 and 42 Evelyn Street 2021 **[398]**. The other was an email from Mr Goodsell dated 20 November 2021 in which he stated that Mr Fashade wished to appeal a Civil Penalty Notice issued by the Council in respect of the Property **[405]**. Copies of these emails were also exhibited to her statement.

66. On Ms Korne's evidence, there is no trace of the Council receiving the chaser emails Mr Fashade says that he sent the Council on 10 August 2020, 7 January 2021, and 8 April 2021 (see para. 45 above).

67. In addition, there is a major disparity between the contents of the email that Ms Korne stated the Council received from Mr Fashade on 20 March 2020, sent at 17:01:34 **[392]**, and the email exhibited to Mr Goodsell's witness statement **(Email 1)**. The version of **Email 1** attached exhibited to Mr Goodsell's witness statement **[R49]** includes the following passage:

> "Please can we also get guidelines on the other propeties we have HMO licenses with you on as well please so it all gets sorted with your guidiance much needed in theis more complex covid times, as I am not sure how to go about it with this property and the rest in this hard times." [*sic*]

68. However that passage is conspicuously absent from the version of **Email 1** that Ms Korne states was received by the Council from Mr Fashade (sent at 17:01:34 on 20 March 2020) and which was exhibited to her witness statement **[392].**

69. We are conscious that we did not have the benefit of oral evidence from Ms Korne, and that Mr Fashade did not have the opportunity to cross-examine her. We nevertheless attach substantial weight to her evidence. Ms Korne is an employee of the Council and in our view the contents of her statement evidence that she carried out a thorough and careful search of the Council's inbox. We see no reason to doubt her impartiality and integrity, nor her evidence that emails are not deleted from the inbox, and that the only emails received from Mr Fashade were the two emails of 20 March 2020 exhibited to her statement. In light of the serious doubts we have as to the credibility of Mr Fashade's evidence to us in general, as identified in this decision, we prefer her evidence to that of Mr Fashade's.

70. We find that the only emails sent by Mr Fashade to the Council on 20 March 2020 were those exhibited to Ms Korne's witness statement. We find that the version of **Email 1** exhibited to Mr Goodsell's witness statement **[R49]** has been manipulated to make reference to the desire to obtain HMO licences for other (unspecified) properties in addition to 45 Lewisham Park. We find that it was manipulated by Mr Fashade before forwarding it to Mr Goodsell, who then exhibited it to his witness statement.

71. We also find that it is simply not credible that **Email 2 [269]** could have been sent at exactly the same time, down to the precise hundredth of a second as **Email 1**, namely on 20 March 2020 at 17:01:34 GMT. We find that **Email 2**, which Ms Korne did not locate in the inbox, was not sent by Mr Fashade to the Council. Again, we find that Mr Fashade has manipulated the contents of the email before forwarding it on to Mr Goodsell on 11 May 2022. We find the email of 20 March 2020, which was referred to in **Email 3 [271]** as having modified contents was the version of **Email 1** exhibited to Ms Korne's witness statement, as opposed to the modified version of **Email 1** exhibited to Mr Goodsell's witness statement **[R49]**

72. Given these findings, and given Ms Korne's evidence of non-receipt, we have no confidence at all that the subsequent chaser emails relied upon by Mr Fashade were actually sent by him. We find that these chaser emails have also been manipulated by Mr Fashade before sending them to Mr Goodsell on 11 May 2022.

73. It is therefore our conclusion, on the evidence before us, that Mr Fashade did not attempt to renew his HMO licence for the Property online in March 2020, nor at any time before Mr Goodsell made an online application on 16 July 2021. Further, we conclude that Mr Fashade did not contact the Council by email seeking assistance in obtaining a licence. We also find that he has manipulated the contents of emails he then forwarded to Mr Goodsell and which were included in his representations to this Tribunal and the Upper Tribunal.

74. Moreover, we stress that even if we are wrong in reaching these conclusions, and Mr Fashade did in fact send the emails he asserts he sent to the Council, it would still not give rise to a reasonable excuse defence under s.72(5) because, as stated above, Mr Fashade elected to let the Property to the Applicants in the knowledge, on his own account, that it was unlicensed. Applying the civil standard of proof, his reasonable excuse defence is dismissed.

75. We are satisfied, beyond reasonable doubt, that Mr Fashade committed the s.72(1) offence throughout the period of 16 December 2020 up until 15 July 2021. The offence ceased upon Mr Goodsell duly making the HMO licence application on Mr Fashade's behalf, which gives rise to the 72(4)(b) defence.

Did Mr Fashade commit the other offences suggested by the Applicants?

76. The offence under section 6(1)1 Criminal Law Act 1977, concerns the use or threat of violence, without lawful authority, for the purpose of securing entry into a premises. On the facts, there is no question of this offence arising. Nothing in the Applicants evidence concerns the use or threat of violence for the purpose of gaining entry to the Property.

77. As to the Protection from Eviction Act 1977, s. 1(2) is not relevant because it concerns the unlawful deprivation of a residential occupier from premises, or any part of the premises. There is no suggestion by the Applicants that Mr Fashade did so, or attempted to deprive them of their accommodation.

78. Section (3) provides that it is an offence for any person, with intent to cause a residential occupier to: (a) either give up occupation of residential premises, or any part of it; or (b) refrain from exercising any right or pursuing any remedy in respect of the premises, or part of it, to do acts likely to interfere with the peace or comfort of the residential occupier or members of their household, or to persistently withdraw or withhold services reasonably required for the occupation of the premises.

79. Subsection (3)A provides that a landlord is guilty of an offence if they (a) do acts likely to interfere with the peace or comfort of a residential occupier or members of his household, or (b) persistently withdraws or withholds services

reasonably required for the occupation of the premises in question as a residence, and (in either case) he knows, or has reasonable cause to believe, that that conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises. Subsection 3B provides that it is a defence to the offence under subsection (3A) if the landlord proves that they had reasonable grounds for doing the acts or withdrawing or withholding the services in question.

80. There is no suggestion of Mr Fashade withholding services, so the questions we have to determine are:

    (a) whether Mr Fashade, or his agent, committed acts that interfered with the peace or comfort of the Applicants; and

    (b) if so, whether this was done with the intent to cause any of them to either give up occupation of their accommodation, or refrain from exercising any right or pursuing any remedy in respect of it (the s.3 offence); or

    (c) if so, whether Mr Fashade, or his agent knew, or had reasonable cause to believe, that that such conduct was likely to cause any of the Applicants to give up their accommodation or to refrain from exercising any right or pursuing any remedy in respect of it (the s.3A offence).

81. Both of the offences under s.3 and s.3A have to be proved to the criminal standard of proof, beyond all reasonable doubt.

82. We do not consider the delay in carrying out repair and maintenance issues identified by the Applicants to amount to significant acts of interference with the peace or comfort of the Applicants for the purposes of this offence. The mischief that s.3 and 3A is intended to address is identifiable from the title to that part of the 1977 Act, namely the unlawful eviction and harassment of residential occupiers.

83. Nor do we regard Mr Goodsell's apparent habit of attending at the Property unexpectedly, without providing reasonable notice, to constitute acts of harassment. He was clearly of the view that he was entitled to access the communal parts of the Property, without giving notice, because it was a HMO. However, the ASTs entered into by the Applicants were not for the letting of individual rooms. They were expressed to be lettings of the whole Property. The Applicants therefore each had exclusive possession over the whole Property and not just their individual rooms. In addition, clause 2.10 of their tenancy agreements stated that except in an emergency, the landlord or their agent was to give 24-hours' notice before entering the Property in order to inspect, repair, repair or maintain it. As such, Mr Goodsell and Igor should have given the Applicants at least 24 hours' notice before attending the Property for those purposes.

84. Whilst the obvious and repeated failure to do so constituted breaches of the terms of their tenancy agreements, nothing in the evidence suggests that this

was done with the intent to cause any of them to either give up their occupation, or refrain from exercising any right or pursuing any remedy in respect of it. Instead, the evidence suggests that the visits were to carry out management functions such carrying out inspections and arranging for repairs to be carried out, rather than to harass the Applicants.

85. We accept as true, Ms Whitehorn's evidence that she operated the break clause in her tenancy agreement in part because she was unhappy about repeated interference with her quiet enjoyment of the Property. However, that was not the only reason. She was also unhappy about the condition of the Property and failure to carry out repairs. We are not satisfied, beyond reasonable doubt, that Mr Fashade, or Mr Goodall knew, or had reasonable cause to believe, that the unannounced visits to the Property by Mr Goodall or Igor would cause Ms Whitehorn to give up her accommodation.

86. We also agree that Ms Whitehorn was the subject of a tirade of verbal abuse from Mr Fashade in the form of the four voice notes on her mobile telephone the transcript of those voice notes **[379]** makes for unpleasant reading. To quote from one of them, Mr Fashade said as follows:

> "That doesn't work with me. You can't, you cannot get on with me, I will not deal with that shit. You understand? You have a conversation with me, [unintelligible]. You DON'T, DON'T [unintelligible] contract, you can move the FUCK out when you wanna move out. And we're gonna do… Okay that's it, you gonna harass me or what? You gonna [unintelligible] change my mind or something. What planet are you on. You don't own the right to shout at someone"

87. At the hearing, we asked Mr Fashade whether he accepted that the transcript was an accurate record of the voice notes. He initially denied that they were, but after we asked Ms Whitehorn to play the voice notes from her mobile phone, he confirmed that the recordings were of him speaking. Having listened to the recordings, in which Mr Fashade was shouting very aggressively, we are satisfied that the transcripts are highly accurate, with just a few minor inaccuracies.

88. We have no hesitation in finding that these voice notes were hostile and abusive and must have been upsetting for Ms Whitehorn to receive. We accept that we do not know what communications from Ms Whitehorn Mr Fashade was responding to, but even if he was provoked it was entirely inappropriate for him to respond in the manner that he did. In our view such conduct clearly interfered with Ms Whitehorn's peace or comfort. However, there is no suggestion in the messages that Mr Fashade left these voice notes with the intention of causing Ms Whitehorn to give up her accommodation. In fact, he referred to Ms Whitehorn moving out at the end of May as had been agreed, so it appears that she had already decided to operate the break clause and leave before these voice notes were left.

89. We turn now to the incident of 29 August 2021. We found Mr Tayler's witness evidence regarding that incident to be persuasive. In cross-examination he answered thoughtfully and calmly. His evidence was also consistent with that in his witness statement. Mr Fashade did not address the incident at all in his

witness statement. Mr Goodsell referred to it at para.13 of his witness statement **[R15]**. Some of what Mr Goodsell said concerned matters of which he had no direct knowledge as they concerned events prior to his arrival at the Property. He stated that when Mr Fashade telephoned him he heard Patrick shouting at and verbally insulting Mr Fashade, and that he then heard Mr Fashade telling Patrick to take his hands off him. In his witness statement dated 25 February 2022 **[R20]** Igor stated that Patrick took his tools and physically escorted him out of the house, saying he could not carry out any work there. He then telephoned Paul for assistance. He said that after Paul arrived, Patrick put his hand on Mr Fashade and was told by Mr Fashade not to touch him. An argument then ensued.

90. There was clearly an altercation between Patrick and Mr Fashade on 29 August. We question whether Mr Tayler, who had recently returned to his bedroom from the garden was in a position to properly identify who started that altercation and whether it was Patrick who initiated the physical aspect of that confrontation by putting his hands on Mr Fashade, or whether it was Mr Fashade by knocking Patrick's hat off his head. As Patrick did not attend for cross-examination and as Mr Fashade had not addressed the matter in witness evidence, it is difficult for us to reach a conclusion on that question. In our assessment, the evidence suggests that both Patrick and Mr Fashade were culpable and that both were aggressive.

91. We accept as true, Mr Tayler's evidence regarding Mr Fashade's threats to him after he said he was going to call the police, In our view, in saying to Mr Tayler that he was going to make sure that he left the Property, Mr Fashade came close to committing the s.3 offence of harassment. There is no doubt that his threats interfered with Mr Tayler's peace and comfort but we are not satisfied to the criminal standard of proof that the threats were made with the intent to cause him to either give up occupation of the Property, or to refrain from exercising any right or pursuing any remedy in respect of it, including the pursuit of this RRO application. Mr Fashade might have been referring to obtaining possession following service of a s.21 notice, which is what he eventually did, rather than threatening to unlawfully evict him.

92. For the above reasons, we conclude Mr Fashade did not commit either the s.3 or the s.3A offence of harassment.

Should the tribunal make a RRO?

93. Section 43(1) of the 2016 Act provides that the tribunal may make a RRO if satisfied, beyond reasonable doubt, that a landlord has committed a prescribed offence, including the s.72(1) offence, whether or not the landlord has been convicted of that offence. Given Mr Fashade's failure to comply with the important obligation to ensure that the Property was licensed we are satisfied in the circumstances, that an RRO should be made.

The amount of the RRO

94. In *Williams v Parmar* the Chamber President said [50] that when quantifying the amount of a RRO:

" 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. A tribunal must have particular regard to the conduct of both parties (which includes the seriousness of the offence committed), the financial circumstances of the landlord and whether the landlord has at any time been convicted of a relevant offence. The tribunal should also take into account any other factors that appear to be relevant."

95. In *Acheampong v Roman* Judge Cooke said [15] as follows:

"*Williams v Parmar* did not say in so many words that the maximum amount will be ordered only when the offence is the most serious of its kind that could be imagined; but it is an obvious inference both from the President's general observations and from the outcome of the appeal that an order in the maximum possible amount would be made only in the most serious cases or where some other compelling and unusual factor justified it. It is beyond question that the seriousness of the offence is a relevant factor – as one would expect from the express statutory provision that the conduct of the landlord is to be taken into consideration. If the tribunal takes as a starting point the proposition that the order will be for the maximum amount unless the section 44(4) factors indicate that a deduction can be made, the FTT will be unable to adjust for the seriousness of the offence (because the commission of an offence is bad conduct and cannot justify a deduction). It will in effect have fettered its discretion. Instead the FTT must look at the conduct of the parties, good and bad, very bad and less bad, and arrive at an order for repayment of an appropriate proportion of the rent."

96. She then said at [20] that the following approach would ensure consistency with previous legal authorities:

" 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 will be able to make an informed estimate.

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

the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:

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

97. Those two decisions are binding on this tribunal and we bear both in mind when calculating the amount of the RROs to be made in this case. In respect of the s.72(1) licensing offence committed by the Mr Fashade, the amount that this Tribunal can order is limited to the amount of rent paid during a period "not exceeding 12 months, during which the landlord was committing the offence." In this case, the period of the offence was 16 December 2020 to 15 July 2021 The rent paid by the Applicants for that period was:

Mr Tayler and Ms Albustin 16.12.20 – 15.07.21 7 months@£775 = £5,425

Ms Whitehorn 28.12.20 – 28.05.21 5 months@£575 = £2,875

98. From those sums we deduct any element of the payments which were to meet the cost of services provided by the landlord, exclusively for the benefit of the tenants, such as the cost of utilities. Mr Fashade has supplied copies of Council Tax bills for the Property for the years 2020/21 **[Appendices 81]** and 2021/22 **[R35]**. For the year ending 31 March 2022 the sum payable was £2,131.09. Dividing that sum by six, for the six letting rooms, results in a figure of approximately £336 per annum, or £28 per month for each letting.

99. He has also provided a copy of a Thames Water bill for the Property in the sum of £991.27 **[R38]** which covers the period 2 November 2020 – 31 March 2022. For that 17 month period this equates to £58.31 per month, and £9.72 per month for each letting room.

100. Mr Fashade also paid the electricity bills, but has not provided a copy electricity bill. Applying our own expertise as a specialist tribunal and bearing in mind this is a six bedroom property, we estimate the sum of £13 per month for each letting room.

101. This is an approximate exercise. We deduct the sum of £50 per month for Council Tax and utilities from the rent paid by Mr Tayler and Ms Albustin, and £50 from the rent paid by Ms Whitehorn. This results in figures of:

Mr Tayler and Ms Albustin £5,425 - £350 = £5,075

Ms Whitehorn £2,875 - £250 = £2,625

102. However, Mr Tayler received Universal Credit of £613.34 towards his housing costs for the period 16.12.20 – 15.07.21 **[84]** and this has to be deducted before calculating the amount of a RRO. The total sum for which a RRO can be made for his and Ms Albustin's tenancy is therefore £4,461.66.

103. Mr Fashade has provided details of his monthly mortgage payments for the Property **[339 -348]** as well as copies of invoices for repairs carried out at the Property **[351 – 356]** and a HomeCare boiler policy **[359]**. However,

unlike utilities, no reduction can be made from a RRO for these payment as these were made for his own benefit and to enhance his own property, rather than being for the exclusive benefit of the tenants.

104. We then turn to the seriousness of the offence, both compared to other types of offence in respect of which a RRO can be made, and compared to other examples of the same type of offence. In our view, the offence of being in control or management of an unlicensed HMO under s.72(1) is considerably more serious than the s.95(1) offence of being in control or management of an unlicensed house that was required to be licensed under the selective licensing regime. This is because of the emphasis given in the HMO licensing regime of improving housing standards for vulnerable people in our society who often occupy properties that were not built for multiple occupation, and where the risk of overcrowding and fire can be greater than with other types of accommodation. However, we consider it to be less serious than some of the other offences identified in s.40(3) such as using violence for securing entry, eviction or harassment of occupiers, and failing to comply with a prohibition order.

105. We have had regard to the fact that the Property was unlicensed for a considerable period (13 August 2020 – 16 July 2021) and that the Council considered significant repairs were necessary before it would grant a HMO licence. A list of 36 items of work appears at **[R63]** which included the need to replace unsuitable locks on the rear door which rendered it unsuitable as a fire escape, and the need to replace a badly fitted door to Room 1 which constituted a fire safety risk.

106. Also relevant when assessing the seriousness of the offence is the fact that Mr Fashade acknowledged that he owned eight other properties, with about three them being HMOs. He was clearly aware of the need for the Property to have an HMO licence given that his evidence (which we have rejected) was that he attempted to obtain one in March 2020. Despite knowing that no licence was in place he, through his agent, Mr Blake, nevertheless proceeded to enter into ASTs with the Applicants. Moreover, on his own evidence, at least from the date when Ms Whitehorn moved in he knowingly allowed the property to be occupied by more than the number for which it had previously been licensed (six persons).

107. In our view, the seriousness of Mr Fashade's offence warrants the making of RROs of 70% of the rent paid for the relevant period, subject to the remaining s.44(4) factors. We have rejected Mr Fashade's reasonable excuse defence above, and do not consider any aspects of the asserted defence mitigate the seriousness of his offence.

108. Turning to those factors, we consider the following aspects of Mr Fashade's landlord's conduct to be relevant:

    (a) his failure to ensure that the Applicants deposits were properly protected in a tenancy deposit scheme. We accept their evidence as true, namely that Ms Albustin and Mr Tayler's deposit was not placed into a scheme until July 2021 and that Ms Whitehorn's was not protected at any point before she left the Property. Mr Fashade

admitted to us that he did not know whether the deposits were placed into a scheme and he also acknowledged that the reference in the tenancy agreements to the deposit being used as the last month's rent was an attempt to avoid the need to place the deposit in such a scheme;. He said that he rectified this in July 2021 when he was better informed.

(b) his failure to ensure that copies of the 'How to rent' guide, gas safety certificate, and EPC were given to the Applicants. Again, we accept their evidence as true, given that we found them credible witnesses, and because Mr Fashade's evidence to us was that he had no idea what documents the agents gave to the tenants. Whilst Mr Fashade was entitled to delegate that task to his agent, as landlord it remained his responsibility to ensure it was discharged. In his witness statement **[R18]**, Mr Blake said that when tenants signed tenancy agreements, they would have been provided with copies of EPC and Gas Safety Certificates and that their tenancy agreements it would have included a link to the government's how to rent guide for them to download. We attach no weight to this evidence. It is generic rather than addressing how and when he gave the Applicants the documents in question. Further, it is clearly incorrect as there is no such link in the Applicants' ASTs. Finally, Mr Blake did not attend the hearing and so could not be cross-examined on his evidence;

(c) his agent, Mr Goodsell's, habit of attending the Property without giving the Applicants the 24-hours' notice required under the terms of their tenancy agreements, as evidenced by the WhatsApp messages reproduced and the Applicants' evidence. Again, although this concerned Mr Goodsell's conduct, it was Mr Fashade's responsibility, as landlord, to ensure compliance with his obligations under the tenancy agreements; and

(d) his abusive and offensive threats to Mr Tayler on 29 August 2021, and the abusive voice notes left for Ms Whitehorn, which contributed towards her decision to leave the Property.

109. As to the remaining s.44 factors, there is no suggestion that Mr Fashade has been convicted of a relevant offence. Nor has he provided any evidence as to his personal financial circumstances.

110. We do not consider there to be any relevant issues of conduct by the Applicants to be taken into account. Mr Goodsell produced a timeline of events that Mr Fashade asserted shows poor conduct on behalf of the Applicants **[43-48]**. This includes allegations of letting friends stay over on multiple nights and being argumentative. We are not satisfied that these evidence unreasonable tenant conduct given that Mr Goodsell did not attend the hearing to be cross-examined and that he had written to the tribunal asking for his witness statements to stand 'withdrawn'. Further, letting friends stay over on multiple nights would not, in itself, breach the terms of their ASTs. Mr Fashade suggested at para. 15 of his witness statement that the tenants had caused damage to the property but he provides no details of the

alleged damage and no photographic or other substantive evidence. We reject the suggestion that the Applicants damaged the Property.

111. Taking all these matters into account, we determine that the appropriate order in this case is for the repayment of 80% of the rent paid. We therefore make RROs in following sums (rounded up to the nearest pound):

Mr Tayler and Ms Albustin	**£3,570**	(£4,461.66 @ 80%); and
Ms Whitehorn	**£2,100**	(£2,625 @ 80%)

112. We also order Mr Fashade to reimburse the Applicants for the tribunal fees they paid, namely:

    (a) the £100 application fee paid by Mr Tayler and Ms Albustin;

    (b) the £100 application fee paid by Ms Whitehorn; and

    (c) the £200 hearing fee paid by Ms Whitehorn.

113. If payment is not made, the Applicants are entitled to pursue debt enforcement action in the County Court.

Amran Vance

7 December 2023

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

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

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.