FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/HMF/2023/0252**
Property	:	**Flat 24, Bromfield Court, Jamaica Road, London, SE16 4SG**
Applicant	:	**Petrica Nechita**
Representative	:	**Cameron Neilson, Justice for Tenants**
Respondent	:	**Wenjing Li**
Representative	:	**In person**
Type of application	:	**Tenant's application for a Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal members	:	**Judge M Jones** **Ms R Kershaw BSc**
Date and venue of hearing	:	**14 February 2024, 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**20 February 2024**

DECISION

Decisions of the tribunal

(1) The Tribunal orders the Respondent to repay to the Applicant the sum of £1,482.70 by way of rent repayment.

(2) The Tribunal also orders the Respondent to reimburse the Applicant the application fee of £100 and the hearing fee of £200.

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

Introduction

1. By application dated 15 September 2023, 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, an unlicensed house in multiple occupation ("***HMO***") which was required to be licensed, contrary to Part 2, section 72(1) of the Housing Act 2004 ("***the 2004 Act***"), which is an offence under section 40(3) of the 2016 Act.

3. The Applicant seeks a rent repayment order in the sum of £3,720.39 in respect of rent paid for the period 1 March 2022 to 19 September 2022.

4. The Respondent served a detailed narrative statement of case in response to the application, to which the Applicant then served a detailed statement in response.

5. The parties each filed bundles in advance of the hearing. The Applicant's two bundles numbered some 495 pages, and the Respondent's some 354 pages.

6. Whilst the Tribunal makes it clear that it has read each party's bundles, the Tribunal does not refer to every one of the documents in detail in this Decision, it being impractical and unnecessary to do so. Where the Tribunal does not refer to specific documents in this Decision, it should not be mistakenly assumed that the Tribunal has ignored or left them out of account.

7. This Decision seeks to focus solely on the key issues. The omission to refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Not all of the various matters mentioned in the bundles or at the hearing require any finding to be

made for the purpose of deciding the relevant issues in this application. The Decision is made on the basis of the evidence and arguments the parties presented, as clarified by the Tribunal in the hearing, and is necessarily limited by the matters to which the Tribunal was referred.

The Property

8. The Property is a 4 bedroom, split-level flat with a shared kitchen and bathroom, situated within a purpose-built block, containing flats that are both privately owned and owned by the local authority, LB Southwark, which is the ultimate freeholder.

9. The Property was situated within an additional licensing area as designated by LB Southwark under s.56 of the 2004 Act, which came into force on 1 March 2022, and which will cease to be effective on 1 March 2027.

10. The Property met the criteria to be licensed under the additional licensing scheme as an HMO within the meaning of s.254 of the 2004 Act, and not being subject to any statutory exemption.

11. It was agreed between the parties that during the relevant period of 1 March to 19 September 2022 the Property was occupied by at least three persons living in two or more separate households, and occupying it as their main residence.

Applicant's Case

12. In written submissions, the Applicant states that the Property did not have a licence, but required one, for the entirety of the period 1 March 2022 to 19 September 2022. The hearing bundles contain emails confirming that to be the case; this is not disputed by the Respondent.

13. The hearing bundles contain a copy of the Applicant's tenancy agreement dated 8 June 2020, with the Respondent named as the landlord. There is also a copy of the HM Land Registry title register TGL152692 showing the Respondent as one of two joint proprietors of the long leasehold interest in the Property. The Respondent does not dispute that she was and remains the Applicant's landlord.

14. The Applicant's bundle also contains copy bank statements showing the payment of rent to the Respondent, and a helpful short spreadsheet containing a calculation of the maximum amount of rent asserted to be repayable.

15. The Applicant raises a series of complaints concerning the Respondent's discharge of her duties as landlord, in particular derived

from her role as a property manager as defined by s.263 Housing Act 2004, including:

(i) Failing to ensure that her name, address and telephone contact number were made available to all households in the property, and that they were clearly displayed in a prominent position therein, in breach of the duty imposed by Regulation 3 of the *Management of Houses in Multiple Occupation (England) Regulations 2006* (*"**the 2006 Regulations**"*).

(ii) In breach of her duties under Regulation 4 of the 2006 Regulations, failing to ensure that fire or smoke alarms were installed in the Property until around September or October 2022.

(iii) Failing to ensure, in accordance with LB Southwark's licensing conditions, that the Property met the LACORS Fire Safety Guidance, in that until September or October 2022 it did not have an interlinked mains wired smoke alarm system with battery backup located in the escape route at each level.

(iv) Similarly failing to ensure that fire blankets or extinguishers were present in the shared kitchen premises.

(v) Failing to ensure that the fixed electrical installations in the Property were inspected and tested by a certified engineer at least every 5 years, and to obtain and provide to the Applicant a certificate evidencing the same, in breach of Regulation 6 of the 2006 Regulations. This was only rectified in/around October 2022 when the Respondent sought to evict the Applicant.

(vi) Failing to ensure that an electrical safety certificate was in place, and provided to the Applicant, again only rectified in/around October 2022 when the Respondent sought to evict the Applicant.

(vii) In breach of s.36 of the *Gas Safety (Installation and Use) Regulations 1988,*failing to ensure that a gas safety certificate was in place and provided to the occupants through the duration of the tenancy. This, too, was only rectified in/around October 2022 when the Respondent sought to evict the Applicant.

(viii) Failing to ensure that the Applicant's deposit payments were protected, in accordance with s.213 of the 2004 Act.

(ix) Failing to provide a copy of the *How to Rent* guide at the commencement of the tenancy.

(x) Attempting to evict the Applicant by serving an ineffective notice under s.21 Housing Act 1988.

The Applicant's Oral Evidence

16. In his evidence at the hearing, the Applicant accepted that the Respondent had agreed to arrange for his room to be repainted after he requested this. With what appeared to the Tribunal to be considerable reluctance, he ultimately agreed that when he had raised with the Respondent the issue of a housemate having a girlfriend live with him, she had intervened and arranged for the vacation of the Property by those persons within 16 days.

17. The Applicant accepted that he had been late paying his rent on 18 separate occasions, albeit that in the majority of cases he paid all sums due within 14 days of the due date. He explained that he had been late in paying his rent due to difficult personal circumstances which included losing his employment.

18. The Applicant also accepted that he had used the common areas of the Property for storage of materials relating to his cleaning business, accepting that cleaning products and a cleaning machine shown in photographs considered by the Tribunal were his property, used for that business, as was a suitcase under the breakfast bar in the kitchen and in the boiler cupboard. He stated that the machine was on the landing for perhaps a month, as he was waiting to fix it. He accepted that his business bucket had blocked the use of the gas supply control. He maintained that these issues were not a problem while he was cleaning the Property and another property for the Respondent, for which she paid him, but that her attitude changed once this arrangement was terminated, prior to the period in question in this application.

19. The Applicant accepted that he had on occasions used radiators and banisters in the common parts of the Property to dry his laundry.

20. One issue post-dating the period in question to which a not inconsiderable quantity of evidence was directed concerned an episode in January 2023, when the Respondent had been present at the Property with a decorator. She had turned off the heating because she felt hot. She then sent a text message to the Applicant after she left advising him of this, which he acknowledged with thanks. The following day, however, he sent a long complaint to the Respondent by text, to the effect that he had been unable to turn the heating back on and had spent a cold night. The Tribunal found his evidence concerning this issue to be unsatisfactory, in that he failed to provide a satisfactory explanation for why, if he was unable to turn the heating on, he did not communicate with the Respondent and seek her assistance, particularly against a good deal of other evidence both of heating being regularly adjusted in the Property, and of the Applicant's general willingness to contact the Respondent.

The Respondent's Case

21. In her written evidence the Respondent stated that she had taken the Applicant as a tenant for an initial period of 3 months when he was homeless following a prior eviction, and in sympathy with his difficulties accepted his deposit in 3 successive payments. The contractual monthly rent was £550 inclusive of all bills, including council tax, water, gas, broadband and electricity. This ultimately rose to £580 in May 2022, which is reflected in the Applicant's rent calculation spreadsheet.

22. The Respondent provided evidence of other litigation in which the Applicant had been involved. She stated that he was repeatedly late in paying his rent. The Respondent alleged the Applicant to have been using the Property for business use, in breach of the terms of the tenancy, blocking the common parts with the paraphernalia of his cleaning business.

23. The Respondent also provided evidence of numerous complaints about the Applicant's conduct from his flatmates, including disturbing them by talking loudly for hours in the kitchen, repeated and constant use of the washing machine, leaving clothes in the washing machine, running the heating in the Property at high temperatures in August to dry his laundry, causing arguments and so on.

24. As to the HMO designation of the Property, the Respondent explained that she contacted LB Southwark on 8 September 2022 as she was confused regarding whether she needed a licence with 4 tenants in the Property. Upon it being clarified that she did, she took prompt steps seeking to remove the occupiers, and on 20 September 2022 applied for the Temporary Exemption Notice. This application forms the cut-off date of the Applicant's claim. The Notice itself was granted on 2 October 2022. She then arranged for service of a s.21 notice on the Applicant, seeking possession of the Property, which ultimately transpired to be ineffective, albeit that at this time copies of the various gas and electrical certificates and the how to rent guide were provided. This led, in turn, to correspondence with LB Southwark after the Applicant contacted the council seeking advice.

25. The Respondent's statement contains further detail of interactions with the Applicant regarding such matters as request for decoration of his room, her initial retention of his services for cleaning the Property, her employment of a cleaner both prior to and after that retention to which the Tribunal has had regard.

The Respondent's Oral Evidence

26. The Respondent gave evidence clearly and, the Tribunal finds, credibly. She stated that she had rented out the Property from around 2014 or 2015, to shifting populations of 3 or 4 people, usually as an HMO. She stated that she first became aware of LB Southwark's new regulation in early September 2022, believing licensing previously to have been necessary only where 5 people or more were in occupation. She swiftly contacted Southwark, on 8 September to clarify and, upon being told that licensing was now required where 3 or 4 persons were in occupation, sought to take immediate steps to require her tenants to leave. She repeated what was said in her written statement about her application for, and the grant of, the temporary exemption notice.

27. Asked about steps taken to satisfy herself of the relevant regulations from time to time, the Respondent conceded that she had never checked the council's website, nor had she sought the advice of a third party, and indeed had not been a member of any landlord's association or subscription service. She explained that her attention had to a considerable degree been diverted by her own history of serious ill health, coupled with the death of her father-in-law and subsequent ill health of her mother-in-law, with whom she resides, between 2019 to date.

28. The Respondent conceded that the Property had lacked a linked smoke alarm system until she made arrangements for one to be installed in September or October 2022, but denied that there was no smoke alarm, stating that a battery powered one had been provided for tenants' use. She accepted that there had been no fire blanket or extinguisher in the Property. She agreed that her name and contact details were not displayed in a prominent position, but pointed out that these were set out in the tenancy agreement.

29. The Respondent gave evidence that she had returned the Applicant's deposit in full in September 2022. She conceded that it had not been protected in a regulated scheme, stating that it simply slipped her mind against the circumstances of it being paid in 3 instalments. As for gas and electrical certificates, they were obtained on a regular basis, but had not been provided to the Applicant where she said she was simply unaware of her obligation to do so.

30. The Respondent, finally, gave evidence as to her and her family's financial circumstances in response to questions from the Tribunal.

Relevant statutory provisions

31. 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	the period of 12 months ending

of the table in section 40(3)	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

32. The Applicant's uncontested evidence is that the Property was a dwelling 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.

33. 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 one of the registered leasehold proprietors of the Property. Again, she does not dispute this.

34. 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 evidence shows that the rent was paid to the Respondent. The Respondent has not sought to argue that she was not a person having control of or managing the Property or that the rent paid was not the *"rack-rent"* as defined in section 263. We are, accordingly, satisfied that she was the owner and that she received rent from the Applicant. She was therefore at the relevant time at the very least a person managing the Property.

The defence of "reasonable excuse"

35. 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 a house which is licensable under Part 3 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.

36. In this case, the Respondent has not quite 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.

37. The Respondent has described the circumstances in which she failed to license the Property, in particular against the bereavement and other serious health difficulties suffered both by her and members of her

close family, 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 wholly outside her control or that she was relying on somebody else to take appropriate steps in circumstances where it was reasonable to do so.

38. 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 neglect 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.

39. Ultimately, the Respondent simply had no proper system in place to enquire as to what her legal responsibilities were. In such circumstances, ignorance or mistake as to the nature and extent of those obligations does not constitute a reasonable excuse.

40. The Tribunal therefore concludes, beyond reasonable doubt, that the Respondent had no reasonable excuse for failing to seek the necessary licence.

The offence

41. 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 a HMO which is required to be licensed under this Part … but is not so licensed"*, and for the reasons given above we are satisfied (a) that the Respondent was 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.

42. 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

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

44. 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.

45. In this case, the Applicant's claim relates to a period not exceeding 12 months: it is in fact limited to 6 months and 19 days, between the inception of LB Southwark's designation on 1 March 2022, and 19 September 2022.

46. The Tribunal accepts the Applicant's uncontested evidence regarding his receipt of Universal Credit, and the deduction of an appropriate proportion of the same from his claim. Subject to her evidence as to late payments, the Respondent has not disputed that the rental amounts claimed were in fact paid by the Applicant.

47. 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 £3,720.39, this being the amount paid by the Applicant by way of rent in respect of the period of claim, less the deduction of the accommodation element of Universal Credit, calculated using the appropriate formula (see Applicant's bundle 1, p.125)

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

53. 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).

54. 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.

55. 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.

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

57. 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).

58. Adopting the *Acheampong* approach, the whole of the rent in this case 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 less the small component of Universal Credit, being £3,720.39.

Utilities

59. The Applicant's written submissions contained argument to the effect that the Tribunal might possess and exercise a discretion not to deduct from the whole of the rent for the relevant period a sum equivalent to payment by the Respondent for utilities that served only to benefit the tenant.

60. Pragmatically, and particularly in light of the very recent decision of the Upper Tribunal (Lands Chamber) in *LDC (Ferry Lane) GP3 Ltd v Garro & others [2024] UKUT 40 (LC)*, to which Mr Neilson commendably drew the Tribunal's attention, that submission was not advanced.

61. In relation to utilities, the tenancy agreement provides at clause 129:

"The landlord is responsible for the payment of the following utilities in relation to the property: electricity, water, internet, natural gas, Council tax, service charge."

62. The Respondent states that she paid these, and the Applicant does not dispute this point. In the helpful table provided at p.313 of her bundle, the Respondent calculates the Applicant's share of the various utility charges there set out as being £754.99 for the period 1 March 2022 to 19 September 2022 inclusive, based upon an aggregation of all sums expended by her (subject to service charges, addressed below) in respect of the items set out, then divided by four to achieve a fair distribution between the four occupiers of the four rooms within the Property. The Tribunal is satisfied that this is a fair and equitable way to divide the relevant costs incurred, and notes that neither the approach nor the quantum was challenged by the Applicant.

63. The listed items include gas, water, electricity and broadband, which are clearly all utilities provided that only benefitted the tenants of the Property.

64. The Tribunal has carefully considered the issue of Council Tax, which is not of itself the provision of a '*utility', per se*, but considers that this is a further *service* paid for by the landlord, from which she herself has derived no benefit, which has again only benefitted the tenant and which would more normally be paid by the tenant, and concludes that this cost also falls to be deducted from the rent paid by the Applicant. Such was the approach to the question of Council Tax in an identical context in the first instance decision of this Tribunal in *Parmar v Williams [2020] LON/00BJ/HMF/2020/0016*, which was not disputed on appeal: *Williams v Parmar & Ors [2021] UKUT 244 (LC)*.

65. The Tribunal similarly considers the costs incurred for provision of regular cleaning of the Property to be such a service for the sole benefit of the tenants, which, while not provided for in the tenancy agreement, was provided following requests by the Applicant. Once more, this is a service paid for by the landlord, from which she herself has derived no benefit.

66. The Tribunal also notes that neither the costs of provision of cleaning nor of payment of council tax were challenged as properly deductible expenses by the Applicant.

67. Not included within her table of expenditure, but raised in oral submissions, was the Respondent's suggestion that service charges paid by her to the freeholder, in the sum of £1,475.62 for the year 1/4/22 to

31/3/23 (or an appropriate proportion thereof) should also be considered as a deduction in accordance with these principles.

68. The Tribunal rejects that submission: contrary to domestic utilities and services provided for the sole benefit of tenants occupying the Property, service charges are of a fundamentally different character, being contractually payable by the Respondent to her lessor as a condition of her lease. While they would doubtless include such matters as lighting of common parts, they will also include repairs and maintenance of the block within which the Property is situated, preserving or enhancing the value of the Respondent's Property. This is far from being payment by the landlord for utilities or services that only benefited the tenant.

69. For these reasons, the Tribunal finds that the appropriate deduction in respect of payment by the Respondent for utilities and services that only benefitted the Applicant, is £754.99.

Seriousness

70. In *Acheampong v Roman* at §20(c), Judge Cooke held that the Tribunal must consider how serious the housing offence forming the basis of the application is, both compared to other types of offences in respect of which a rent repayment order may be made, and compared to other examples of the same offence. As the issue was put in §21 of the judgment, this *"…is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence?"*

71. 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 to inspire 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.

72. Against that expression of policy concerns, it is nevertheless the case that the offence under s.72(1) of the 2004 Act is significantly less serious than those in rows 1, 2 and 7 in the table in section 40 of the 2016 Act, and we take that into account, following the guidance the Upper Tribunal in *Dowd v Martins [2023] HLR 7*, where offences of failing to licence in accordance with section 72(1) of the 2004 Act were expressed as being "*…generally less serious than others for which a rent repayment order can be made.*"

73. The nature of a landlord has been held to be relevant to the seriousness of the offence. In some cases, it has been argued that there is a distinction to be drawn between "professional" and "non-professional" landlords, seriousness being aggravated in the case of the former. The proper approach is as set out by the Deputy President in *Daff v Gyalui [2023] UKUT 134 (LC),* at paragraph 52:

"The circumstances in which a landlord lets property and the scale on which they do so, are relevant considerations when determining the amount of a rent repayment order but the temptation to classify or caricature a landlord as "professional" or "amateur" should be resisted, particularly if that classification is taken to be a threshold to an entirely different level of penalty. … The penalty appropriate to a particular offence must take account of all of the relevant circumstances."

74. As summarised above, the Respondent's evidence was that she had started to let the Property from around 2014 or 2015, to a shifting population of 3 or 4 people. She also had a second property that she let more sporadically, as it was used for half of each year for occupation by family members when they visited the UK from overseas.

75. As to the condition of the Property, we consider that there is one main issue bearing on the seriousness of the offence, relating to fire safety. The Applicant's case was that the Property lacked smoke or fire alarms altogether, until September/October 2022. The Tribunal finds this not to be the case, accepting the Respondent's evidence that there was one portable, battery-operated smoke alarm within the Property, that was sometimes kept in the hallway, and sometimes in the kitchen.

76. The licensing standards applied by LB Southwark for two-storey HMOs would, however, require an inter-linked, mains-wired smoke alarm with battery back-up located in the escape routes at each floor level (here, the landing and hallway), together with provision of a fire blanket in the shared kitchen. Each was absent for the period under consideration, being then rectified in September or October 2022.

77. The Applicant then complains that the Respondent failed to obtain and to provide gas safety, electrical safety and energy performance certificates. The Tribunal has, however, seen gas safety certificates

dated 14/05/20, 1/8/21, 21/9/22 and 23/9/23 confirming satisfactory condition of the gas installations at the Property. An electrical condition installation report dated 21/9/22 has been provided, confirming satisfactory electrical installations as at that date, and an energy performance certificate of the same date has also been produced.

78. Insofar as the complaint that the Respondent failed to obtain gas certificates prior to September 2022 is contradicted by the existence of valid certificates, this is rejected. As to an electrical certificate for the period prior to September 2022, the Tribunal accepts the Respondent's evidence that she had obtained such a certificate, noting in particular her regular commissioning of gas safety reports as corroborative evidence of her efforts at compliance with her obligations in regard to obtaining the necessary safety certificates.

79. The Tribunal therefore finds that gas safety and electrical safety certificates were in place at all material times; the appropriate certificates were provided to the Applicant in late September or early October 2022, the Respondent having failed in her duty to provide the same previously.

80. The Respondent concedes that she failed to protect the Applicant's deposit of £400 by placing the same in an authorised scheme, in accordance with section 213 of the 2004 Act. This was against the background of her agreeing to accept payment of the deposit in three instalments, paid between 8 June and 1 August 2020, as a gesture of kindness to the Applicant who was at the commencement of his tenancy homeless and in financially straitened circumstances. Her evidence, which the Tribunal accepts, was that this was an oversight and was not a deliberate breach of her obligations, and upon becoming aware of her error she did not seek to retain the deposit but paid it back in full on or about 21 September 2022, albeit that that payment was linked to her intention to serve a s.21 notice. The Tribunal concludes that this failure falls at the very lowest end of the scale for breaches of this nature.

81. The Applicant made a series of other complaints. We deal with those comparatively briefly, as of less significance than the issues relating to fire safety, obtaining and provision of certificates and deposit protection, considered above.

82. First, the Applicant contended that the How to Rent Guide was not provided to him at the commencement of his tenancy. This was not disputed, and appears to the Tribunal that this may have been one of the factors leading to the invalidity of the Respondent's s.21 notice in 2022. However, the Tribunal discerns no detriment caused to the Applicant by this omission, which was in the event remedied once the Respondent was reminded of her obligation.

83. Second, the Applicant contends that the Respondent's name and contact details were not displayed prominently in the Property, which is again not disputed. However, the Tribunal notes that these details were clearly set out at the head of the Applicant's tenancy agreement, and the substantial quantity of communications exchanged between the parties amply demonstrates that the Applicant was well able to contact the Respondent as and when he wished.

84. Third, the Applicant complains that the Respondent served him with an invalid s.21 notice, seeking possession of the Property. The Tribunal does not find that that has any bearing on the seriousness of the offence, being merely an attempt at a necessary preparatory step to seeking possession, by means prescribed by statute.

85. Fourth, we consider one further issue under stage (c) (but note the close proximity between stages (c) and (d), where this issue could be categorised as allegations concerning the landlord's conduct under stage (d)). While not addressed in written submissions or in Mr Neilson's closing address, a theme of the Applicant's evidence was to suggest that the Respondent had been an unresponsive landlord, failing to address concerns raised by him and otherwise not acting as a responsible landlord should. Insofar as may be necessary, we reject those suggestions, finding that the Applicant was extremely responsive to requests made by her tenants, including the Applicant.

86. In relation to the three main areas where this evidence was explored, we find (a) that the Respondent acted decisively and swiftly when the Applicant complained of another tenant having moved his girlfriend into the Property, (b) that the Respondent repeatedly tried to gain access to the Applicant's room with a decorator in response to his request for it to be repainted, but it was the Applicant that repeatedly denied access over a period of over three months, and (c) that in relation to the issue of the heating being turned off in January 2023, in the event the Applicant was genuinely unable to turn on the boiler there was no coherent explanation for why he failed to request immediate assistance, and the Tribunal finds that upon being made aware of the asserted difficulty the Respondent attended and promptly rectified the situation.

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

Mitigation

88. 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 significant relevant mitigation. Albeit that she had not taken steps to keep herself informed of her legal responsibilities, she had not been

required to obtain a license prior to Southwark's designation coming into force on 1 March 2022. Upon becoming aware of the requirement, she almost immediately took appropriate steps to rectify matters and comply with her obligations. The Tribunal considers that this was not a deliberate attempt to evade her responsibilities altogether. In addition, insofar as the licensing offence is concerned, we accept that this was not a case of someone recklessly disregarding the law but one in which the stress caused by her family's continuing experiences of bereavement and significant ill health appears to have caused her to lose focus.

89. Taking account of the above mitigating circumstances in this particular case, we consider that the starting point of 70% should be decreased to 55%.

90. 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 consider each in turn.

Conduct of the Parties

91. The Respondent produced a substantial quantity of evidence to demonstrate that the Applicant's flatmates had made a series of complaints about his conduct, summarised as (a) having loud, protracted telephone conversations in the shared kitchen, causing annoyance, (b) unreasonable use of the washing machine for hours at a time, (c) unreasonably turning up heating, apparently to dry quantities of laundry, (d) drying his laundry inappropriately on radiators and banisters, and (e) substantially filling storage cupboards and blocking or impeding common parts with the various paraphernalia of his cleaning business.

92. The Tribunal considers that while clearly causing annoyance to his flatmates, issues (a) to (d) as characterised in the preceding paragraph are little more than part of the rattle and hum to be expected when unrelated persons live together in close proximity.

93. As to (e), as his evidence is summarised in §18 of this Decision, the Applicant admitted the use of the Property for storing his business equipment and materials for protracted periods, and the correspondence from his flatmates clearly demonstrates that this was a nuisance to them. The common areas of the Property were not particularly spacious, and possessed limited storage space, the substantial majority of which was taken over by the Applicant's business materials.

94. The Tribunal finds on a balance of probabilities that this was a breach of clause 2 of the tenancy agreement, prohibiting use of any part of the Property by the Applicant for the purposes of carrying on any business or trade, or for the purpose other than as a private residence. The Tribunal also finds that the presence of a large machine used for the purposes of the cleaning business upon the landing for, as the Applicant admitted, at least a month constituted a breach of clause 42 of the tenancy agreement, requiring hallways, passages and stairs to be kept clear.

95. As for the Respondent's conduct, in his closing submissions on behalf of the Applicant Mr Neilson stated that he did not invite the Tribunal to 'double count' the various matters raised in relation to the seriousness of the offence, so that issues the Applicant had raised concerning commission of the offence should not be re-counted as conduct issues. He confirmed that he sought no additional conduct allegations to be considered.

96. Insofar as there may be some elision between the tests at (c) and (d), the analysis addressed in §§85-6, above, is repeated. The Tribunal repeats the finding that the Respondent was responsive in relation to problems raised by her tenants. There are also no other, or no other credible, complaints about the Respondent's conduct.

97. We consider that the Respondent's relatively good conduct, as against the Applicant's admitted breaches of his tenancy needs to be recognised in the amount of the rent repayment order and that the percentage payable should be subject to a further small reduction from 55% to 50%.

Financial Circumstances of the Landlord

98. We are also required to consider the financial circumstances of the landlord under section 44(4).

99. There was no documentary evidence before the Tribunal of the Respondent's financial circumstances, but she answered questions put to her by the Tribunal in this regard. Mr Neilson did not seek to cross-examine her further on that evidence.

100. The Respondent provided no evidence of financial hardship, or any other circumstances that would lead the Tribunal to conclude that she would or might find it difficult to meet any financial order that this Tribunal might make. Therefore, there is nothing to take into account in relation to her financial circumstances that would require any adjustment to the appropriate percentage.

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

101. 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

102. 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

103. The four-stage approach recommended in *Acheampong* has been set out above. The amount arrived at by considering the first stage is £3,720.39.

104. Deducting the sums required by stage (b) provides the calculation £3,720.39 - £754.99 = £2,965.40.

105. Considering the further matters required by stages (c) and (d), the Tribunal's conclusion is that the appropriate amount is reduced to 50% of that sum, and there is nothing further to add or subtract for any of the other s.44(4) factors.

106. Accordingly, taking all of the factors together , the rent repayment order should be for 50% of the maximum amount of rent payable, less deductions for utilities and services. The amount of rent repayable is, therefore, £2,965.40 x 50% = £1,482.70.

Reimbursement of Tribunal Fees

107. 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.

108. 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.

Name: Judge M Jones **Date:** 20 February 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

(A) If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been 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 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.

(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.

(E) If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).