FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/HMF/2023/0106**
Property	**:**	**266 Ashmore Road, London W9 3DD**
Applicant	**:**	**Pawel Konowrocki** **Adam Niedzielski** **Aleksandra Dyczka**
Representative	**:**	**Pawel Konowrocki**
Respondent	**:**	**Anand R. Daryanani** **Jasu R. Daryanani**
Representative	**:**	**Anand R. Daryanani**
Type of application	**:**	**Tenants' application for a Rent Repayment Order under ss. 40, 41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal members	**:**	**Tribunal Judge M Jones** **Mr S Mason FRICS**
Date and venue of hearing	**:**	**8 March 2024, 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**13 March 2024**

DECISION

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Decisions of the tribunal

(1) The Tribunal orders the Respondents to repay to the Applicants the sum of £15,444 by way of rent repayment.

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

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

Introduction

1. By application dated 24 April 2023, the Applicants have applied for a rent repayment order against the Respondents under sections 40-44 of the Housing and Planning Act 2016 ("***the 2016 Act***").

2. The basis for the application is that the Respondents 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 Applicants seek a rent repayment order in the sum of £25,740 in respect of rent paid for the months December 2021 to November 2022 inclusive.

4. The Respondents served a detailed narrative statement of case in response to the application.

5. The parties each filed bundles in advance of the hearing. The Applicants' bundle numbered some 42 pages, and the Respondents' some 87 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.

Hearing

8. This was a remote video hearing which was consented to by the parties. The hearing proceeded by use of the Video Hearings Service. A face-to-face hearing was not held by the agreement of the parties, where all issues could be determined in a remote hearing.

9. The Landlord and the Tenants each represented themselves at the hearing, Mr Anand Daryanani appearing for the former and Mr Konowrocki for the latter, albeit that Mr Niedzielski, Ms Dyczka and Mr Dziecol (who, while he had been an additional tenant from around 27 September 2020, was not an Applicant) each gave evidence. The Tribunal is grateful to each of them.

The Property

10. The Property is a 2 storey, semi-detached house, comprising a dining room, living room, kitchen, under-stairs lavatory and double bedroom on the ground floor, and a double bedroom, a single bedroom and a bathroom on the first floor.

11. The Property was situated within an additional licensing area as designated by the City of Westminster under s.56 of the 2004 Act, which came into force on 30 August 2021, and which will cease to be effective on 30 August 2026.

12. 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.

13. It was agreed between the parties that during the relevant period of 1 December 2021 to 30 November 2022 the Property was occupied by at least three persons living in two or more separate households, and occupying it as their main residence.

Applicants' Case

14. In written submissions, the Applicants state that the Property did not have a licence, but required one, for the entirety of the period 1 December 2021 to 30 November 2022. The hearing bundles contain emails confirming that to be the case; this is not disputed by the Respondents.

15. The hearing bundles contain a copy of the Applicants' tenancy agreement dated 9 July 2019, with the Second Respondent Mrs Jasu R Daryanani named as the landlord. Although the bundles did not contain a copy of the HM Land Registry title register, Mr Anand Daryanani confirmed that he was Mrs Daryani's son, that he managed the Property on her behalf, and that she was the owner. It is not disputed that Mrs Daryanani was the Applicants' landlord for the period under consideration.

16. The Applicants' bundle also contains copy bank statements showing the payment of rent to the Respondents for the period in issue, being 12 months' rent at £2,145 per month.

17. The Applicants complain regarding the Second Respondent's discharge of her duties as landlord, and the First Respondent's discharge of his duties as manager of the Property, relating to water leaks penetrating through the ceiling of the dining room at the Property in or around June 2021. These were the subject of a temporary repair, but led to dampness in the dining room and living room, leaving them more or less unusable for more than a year, before the condition of the roof deteriorated to the extent that there was serious flooding in those rooms in or around November 2022, causing damage to their possessions including electrical devices, records and furniture.

The Applicants' Oral Evidence

18. In his evidence at the hearing, Mr Konowrocki provided further details of the water leaks, and of their effects upon himself and his fellow tenants. He confirmed that Mr Daryanani had responded swiftly to the first leaks in June 2021, arranging a temporary fix by the application of felt and tar roofing products to cover the previously transparent polycarbonate sheet roof of the dining room, substantially affecting the illumination of that room. What was initially explained as a temporary fix was not however the subject of any further repairs until after the far more serious ingresses of water in November 2022, in effect rendering the dining room and living room unusable for a protracted period, suffering from serious dampness and mould on the walls.

19. Building works had then been commenced seeking to resolve matters, but finishing and decorative repairs had not been completed when notice seeking possession under s.21 Housing Act 1988 was served on 25 February 2023. Mr Konowrocki made the point that the Tenants had continued to pay the full rent without deduction during this period, despite the reduction in the amenities of the Property. This evidence was all uncontested.

20. In response to questions from the Tribunal, Mr Konowrocki confirmed that the Tenants had been responsible for paying for the supply of utilities to the Property. He also confirmed that he had not been in

receipt of benefits, including Universal Credit, during the relevant period.

21. Mr Niedzielski similarly confirmed that he had not been in receipt of benefits, including Universal Credit, during the relevant period: while he had received that benefit for a period between 2020 to 2021 it had certainly ceased by December 2021.

22. Ms Dykcza explained that she had broken her arm in August 2020 and had consequently been unable to work, and had spent around 5 months in receipt of Universal Credit, having resumed work in December 2020. She stated that she had been in receipt of Universal Credit for around a month, in October 2022 whilst she was between jobs, but was not certain of the amount: she said it could have been around £800, or £840, but she could not provide any further detail, nor of any sums that were to be treated as payment towards her rental expenses.

23. Mr Dziecol also gave evidence. He was cross-examined as to the provision of a signed addendum to the tenancy agreement at the time he commenced occupation of the Property and essentially stated that he had certainly signed the document and believed it had been returned to Mr Daryanani, who in cross examination disputed that he had received the document.

The Respondents' Case

24. Mr Daryanani is an experienced landlord, accredited by various schemes and an active member of the National Residential Landlords Association. He provided a comprehensive bundle of evidence demonstrating that he manages a series of properties for what he described as his family's portfolio, and does indeed manage HMOs in other London boroughs, including Brent and Camden, now possessing both mandatory and additional HMO licences across those boroughs, and (now) in Westminster, totalling 5 properties as so designated.

25. As to the HMO designation of the Property, Mr Daryanani explained and exhibited a series of emails to demonstrate that that he applied online to Westminster for an HMO licence in respect of the Property on 15 March 2021, this process generating a message to the effect that the Property might not need an HMO licence, and requesting that he contact the Residential Services Team via an email address res@westminster.gov.uk for further information. He sought guidance as advised by email sent that day, and having received no response, sent a chase email on 15 April 2021.

26. That prompted an email response from a Mr Maddocks, Senior Practitioner in Westminster's Regulatory Standards, Public Protection and Licensing Department, dated 16 April 2021. In that email Mr

Maddocks confirmed, firstly, that the res@westminster.gov.uk address to which Mr Daryanani had been directed by Westminster's own website was not routinely monitored, and provided two alternative email addresses for future correspondence. He continued as follows:

"Providing there are less then 5 persons, the property will not require a licence. Please note however that the council recently consulted on an additional licensing scheme. Should the scheme be approved, then this will likely be implemented towards then end of August. This would then mean that smaller HMO with 3 or more persons will require a licence. Information will be published on the councils website well in advance.

If you register your interest a the below link (sic)*, you will be kept up to date on any changes.*

https://www.westminster.gov.uk/register-landlord-forms"

27. That was followed by a further email dated 28 April 2021 from a Ms Ampofo of Westminster, confirming that it had recently approved the Additional Licensing Scheme for HMOs for smaller properties with 3 or more persons. She continued:

"This means that such properties across Westminster would now require a licence however the scheme has not yet been implemented but you can apply for it now.

I have copied this email to Mr Maddocks who will contact you to provide you with further information and/or details as to processes. Mr Maddocks is away from the office returning next week when he will be able to respond to your request."

28. The Respondents' evidence then demonstrates that Mr Daryanani applied for an HMO licence in respect of the Property on 12 December 2022.

29. The Respondents in particular highlight the fact that the Applicants were in significant arrears of rent which arose in late 2020 and early 2021, totalling some £10,688 before interest is added. This situation persisted throughout the relevant period, and the arrears remain unpaid to date, the Applicants and Mr Dziecol having vacated the Property in April 2023. The existence of the arrears was not disputed by the Applicants, whose case (in summary) was that these had arisen at a time of employment difficulties and consequential financial hardship during the initial stages of the Covid-19 pandemic.

30. The Respondents' evidence also contained details, corroborated by correspondence and invoices, of the works done to the leaking roof, and

other works at the Property when necessary, including installation of a new boiler in 2020 and attendance by an electrician to address an electrical fault in December 2022.

The Respondents' Oral Evidence

31. Mr Daryanani gave evidence clearly and, the Tribunal finds, credibly (as did all witnesses). He candidly accepted that after the email exchanges of April 2021 he waited for Mr Maddocks to get back to him, but did not chase it up when Mr Maddocks did not, in fact, get in touch. In hindsight, he agreed that he should have made further inquiries as to the licensing requirements during 2021, and by way of explanation referred to licence renewals that he was dealing with in respect of properties in Camden and Brent, addressing no fewer than 105 issues affecting other properties within the portfolio he managed, alongside moving house in May 2022.

32. As to the condition of the Property, Mr Daryanani stated that once Westminster had inspected, the HMO licence conditions required just 2 matters to be addressed, viz. the addition to the existing integrated fire detection system of a smoke detector/alarm to the ground floor living room and a heat detector/alarm in the kitchen. This is corroborated by the written licence conditions, which the Tribunal note additionally required a fire blanket to be provided for the kitchen. All these matters were attended to promptly.

33. As to the disrepair, Mr Daryanani disputed little of the Applicants' account, providing further detail of the construction of the dining room, being akin to a form of conservatory with a translucent polycarbonate sheet roof. He explained the difficulties he had experienced being let down by successive builders, complaints from neighbours about the works, and additional water penetration caused by defects in the flat roof and party wall of the adjacent commercial premises which, it transpired, also formed part of the portfolio he managed on behalf of his family. He stated that he had been unable to discern evidence of mould growth on the pictures the tenants had sent to him (which were not before the Tribunal), but he conceded that there had been residual dampness in the structures of the Property, that had caused him to provide a dehumidifier to the tenants.

34. Ultimately, Mr Daryanani stated that he tried to be a good landlord. He was experienced, and whenever issues arose he sought to address them as soon as he could. Ultimately, he stated that he did his best, even in relation to the issue of the roof repairs.

35. Mr Daryanani, finally, gave evidence as to his and his family's financial circumstances in response to questions from the Tribunal.

Relevant statutory provisions

36. 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 ...

<u>Tribunal's analysis</u>

37. The Applicants' 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.

38. It is also clear that the Second 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 the evidence of the First Respondent, her son and manager of the Property, was that she was the registered proprietor of the Property. Again, this was undisputed.

39. The next question is whether the Respondents were each 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 Respondents jointly. Neither Respondent has sought to argue that either 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 the Second Respondent was the owner and that she together with the First Respondent received rent from the Applicants. The First Respondent was in any event at the relevant time at the very least a person managing the Property.

<u>The defence of "reasonable excuse"</u>

40. 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.

41. In this case, the Respondents have not quite couched their submissions as a complete defence, but it is still open to the Tribunal to consider whether the explanation as to the circumstances of the failure to license the Property would amount to a reasonable excuse defence.

42. Mr Daryanani has described the circumstances in which he failed to license the Property, in particular where he anticipated a response from Mr Maddocks, or someone else on the part of Westminster, and stated that he had registered via the link provided in the 16 April 2021 email, either at that time or perhaps previously, but received no such correspondence. The failure of any party on behalf of the local authority to contact Mr Daryanani after 28 April 2021 is regrettable. The Tribunal also takes account of Mr Daryanani's busy property management commitments, and we accept that his explanation is credible.

43. Nevertheless, it was the Respondents' responsibility to obtain a licence, and the Tribunal particularly takes note of the following:

    (i) In the email from Mr Maddocks of 16 April 2021, he specifically mentioned that *if* the additional licensing scheme were approved, it would be likely to take effect in August of that year.

    (ii) In the email of 28 April 2021 from Ms Ampofo, she advised both that the additional licensing scheme had been approved, and that (although it had not at that time been implemented), application could be made immediately.

    (iii) On his own admission, Mr Daryanani did not chase the matter up and did not make any further inquiries.

    (iv) Ultimately, it was a little more than 19 months after the April 2021 correspondence, and 16 months after the inception of the additional licensing scheme before Mr Daryanani made an application for the licence.

44. We find that there is nothing in the Respondents' 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 their control, or that Mr Daryanani in particular was wholly reliant on somebody else to take appropriate steps in circumstances where it was reasonable to do so. Again, while Westminster's failure to respond further is regrettable, a reasonable response would have been to chase the matter up and/or make further inquiries after a reasonable period had elapsed. 16 or 19 months is not such a reasonable period.

45. 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.

46. Ultimately, the Respondents simply failed to make all such enquiries as were reasonable as to what their legal responsibilities were, cognisant of the approval of the additional licensing scheme which was likely to be implemented by the end of August 2021. In such circumstances, ignorance or mistake as to the nature and extent of those obligations does not constitute a reasonable excuse.

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

The offence

48. 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.

49. 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 Respondents were each 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.

50. 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 Applicants' uncontested evidence on these points we are satisfied beyond reasonable doubt that the Property was let to the Applicants 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 their application was made.

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

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

52. 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 tenants 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.

53. In this case, the Applicants' claim relates to a period not exceeding 12 months: it is in fact limited to precisely 12 months, from 1 December 2021 to 30 November 2022.

54. The Tribunal is unable to make any finding regarding any adjustment contingent upon Ms Dyczka's (albeit uncontested) evidence regarding receipt of Universal Credit during the month of October 2022, and the deduction of an appropriate proportion of the same from the Applicants' claim. While we found her an honest and credible witness, her evidence on the point was too vague to permit of any firm conclusion on a balance of probabilities either as to the sum received, or what proportion of that sum may have related to housing, as opposed to other expenses.

55. Subject to their evidence as to earlier arrears, the Respondents have not disputed that the rental amounts claimed were in fact paid by the Applicants.

56. We are satisfied on the basis of the uncontested evidence that the Applicants were in occupation for the whole of the period to which this 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 £25,740, this being the amount paid by the Applicants by way of rent in respect of the period of claim.

57. 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.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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).

63. 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.

64. 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.

65. 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.

66. 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).

67. Adopting the *Acheampong* approach, the whole of the rent in this case means the whole of the rent paid by the Applicants out of their own resources, which (where we have been unable to discern any relevant components of Universal Credit) is £25,740.

Utilities

68. Clause B4 of the tenancy agreement provides that all utilities are the tenants' responsibility.

69. Mr Konowrocki confirmed that the tenants had indeed met these liabilities.

70. There is, accordingly, nothing to be deducted under this head.

Seriousness

71. 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?"*

72. 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 Applicants did not suffer direct loss through the Respondents' 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.

73. 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.*"

74. 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."

75. While the Second Respondent is described as being retired, the First Respondent derives his living from managing his family's extensive property portfolio, and his experience is summarised at §24 of this Decision.

76. As to the condition of the Property, we consider that there is one main issue bearing on the seriousness of the offence, being the disrepair to the dining room roof and consequent water penetration, particularly in June 2021, and then in November 2022 when the temporary repair failed, leading to very significant water ingress, and dampness in the dining room and living room.

77. 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 oral submissions, a theme of the Applicants' evidence was to suggest that the Respondent had been an unresponsive landlord, failing to address concerns raised and otherwise not acting as a responsible landlord should. Insofar as may be necessary, save in respect of the roof issue we reject those suggestions, finding that the Respondents were, generally, reasonably responsive to requests made by their tenants, including the Applicants.

78. 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

79. In relation to the failure to license the Property, whilst the Respondents' explanation of the circumstances does not amount to a complete defence, such circumstances may be considered in relation to the question of relevant mitigation.

80. In this case, we find no such mitigation: Mr Daryanani makes his living managing his family's property portfolio: his evidence was that this is the sole source of his income. While we accept that he doubtless had a host of issues to attend to during the relevant period, undertaking property management as he does presupposes an obligation to inform oneself of the relevant licensing regulations, however busy one may otherwise be.

81. 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

82. The Respondents' key point as to the Applicants' conduct related to the substantial (and undisputed) rent arrears of £10,688.

83. While the Tribunal appreciates that difficulties may have been encountered by the Applicants in 2020-1, it notes that only minor payments have been made against the arrears that accrued, in the two years that followed prior to the Applicants vacating the Property and (now) three years to the date of this Decision.

84. As the matter was put in *Kowalek v Hassenein Ltd* [2022] EWCA Civ 1041:

"[t]he payment of rent is the paramount duty of a tenant and in this case the applicant is in clear breach of that duty".

85. Upper Tribunal Judge Elizabeth Cooke, in *Awad v Hooley [2021] UKUT 0055 (LC)* held:

"...conduct within the landlord and tenant relationship is relevant; it would offend any sense of justice for a tenant to be in persistent arrears of rent over an extended period and then to choose the one period where she did make some regular payments – albeit never actually clearing the arrears – and be awarded a repayment of all or most of what she paid in that period."

86. It was confirmed by the Court of Appeal in *Kowalek* that this Tribunal is (plainly) entitled to have regard to the arrears when considering what the rent repayment order should be.

87. As for the Respondents' conduct, the most important issue has been addressed above. To bring it into consideration again in relation to 'conduct' would be to 'double count' the matters raised in relation to the seriousness of the offence as conduct issues. No additional conduct allegations of any significance can be discerned: there are no other, or no other credible, complaints about the Respondents' conduct.

88. We consider that the clear breach of the Applicants' tenancy needs to be recognised in the amount of the rent repayment order, and that the percentage payable should be subject to a reduction from 70% to 60%.

Financial Circumstances of the Landlord

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

90. There was no documentary evidence before the Tribunal of the Respondents' financial circumstances, but Mr Daryanani answered questions put to him by the Tribunal in this regard. Mr Konowrocki did not seek to cross-examine him further on that evidence.

91. The Respondents provided no cogent evidence of financial hardship, or any other circumstances that would lead the Tribunal to conclude that either 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 the financial circumstances of either that would require any adjustment to the appropriate percentage.

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

92. The Respondents have 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

93. 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

94. The four-stage approach recommended in *Acheampong* has been set out above. The amount arrived at by considering the first stage is £25,740.

95. Stage (b) warrants no deduction.

96. Considering the further matters required by stages (c) and (d), the Tribunal's conclusion is that the appropriate amount is reduced to 60% of that sum, and there is nothing further to add or subtract for any of the other s.44(4) factors.

97. Accordingly, taking all of the factors together , the rent repayment order should be for 60% of the maximum amount of rent payable, with no deductions for utilities and services. The amount of rent repayable is, therefore, £25,740 x 60% = £15,444.

Reimbursement of Tribunal Fees

98. The Applicants have applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for an

order that the Respondents reimburse their application fee of £100.00 and the hearing fee of £200.00.

99. As the Applicants' 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 Respondents to reimburse these fees.

Name: Judge M Jones **Date:** 13 March 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).