FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/HMF/2023/0129**
HMCTS code	**:**	**V: CVPREMOTE**
Property	**:**	**52 Elliotts Row, London SE11 4SZ**
Applicant	**:**	**Hermione Jemmett** **Benjamin Hilary** **Sashini Jayasinghe** **Cameron Manson**
Representative	**:**	**Mr. Neilson (Justice for Tenants)**
Respondent	**:**	**(Julliet Kathleen) Natasha Dunbar**
Representative	**:**	**Mr. Saifee (Counsel)**
Type of application	**:**	**Application for a rent repayment order by tenant – sections 40, 41, 43, & 44 Housing and Planning Act 2016**
Tribunal members	**:**	**Judge Sarah McKeown** **Ms. F. Macleod**
Date and Venue of hearing	**:**	**26-27 February 2023 at** **10 Alfred Place, London, WC1E 7LR**
Date of decision	**:**	**11 March 2024**

DECISION

Description of hearing

This has been a remote video hearing. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was originally listed but on the request of the Applicants, it was changed to a remote video hearing on or about 12 January 2024.

Decision of the Tribunal

(1) The Tribunal is satisfied beyond reasonable doubt that the Respondent landlord committed an offence under Section 72(1) of the Housing Act 2004

(2) The Tribunal has determined that it is appropriate to make a rent repayment order.

(3) The Tribunal makes a rent repayment order in favour of the First Applicant against the Respondent, in the sum of £27,091.91, to be paid within 3 months of the date of this decision.

(4) The Tribunal determines that the Respondent shall pay the Applicants an additional £300 as reimbursement of Tribunal fees to be paid within 1 month of the date of this decision.

References are to page numbers in the bundle provided for the hearing.

Introduction

1. This is a decision on an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 ("the 2016 Act").

Application and Background

2. By an application dated 20 April 2023 (A49) and made on 23 May 2023 (R69) the Applicants (through Ms. Jemmett, who leads the application on behalf of all Applicants) applied for a rent repayment order in respect of the rent paid for tenancies during the period 25 June 2021-24 June 2022 (in the sum of £46,061.02) against the Respondent. The application was brought on the ground that the Respondent had committed an offence of having control or management of an unlicensed House in Multiple Occupation ("HMO") for failing to have a HMO licence ("licence") for 52 Elliotts Row, London SE11 4SZ ("the Property"), an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act").

3. The Property is a five-bedroom, four storey terraced house with a kitchen and bathroom.

4. The Respondent is the freeholder proprietor of the Property (A242).

5. The Respondent entered into a tenancy agreement (A61) in respect of the Property with: (a) someone who has played no part in this application; (b) the First Applicant (Ms. Jemmett); (c) another person who has played no part in this application; (d) the Third Applicant (Ms. Jayasinghe); and (e) the Fourth Applicant (Mr. Manson), in respect of the Property, at a rent of £4,801.33 pcm, for the period of 25 July 2020 to 24 July 2022 and thereafter from month to month. There is no dispute that the rent was paid (under the terms of the agreement, it was to be paid either to the Respondent or to her agent (A66)). The Applicants vacated the Property on 24 July 2022.

6. The Second Applicant (Mr. Hilary) "replaced" (the legal position is set out below) one of the tenants who has played no part in this application with effect from 24 July 2021, and he occupied the Property until 24 July 2022 (p.80, p.262).

7. It is therefore said that during the period of 25 July 2020-24 July 2022, the Property was occupied by at least five people living in two or more separate households and occupying the Property as their main residence. The Respondent does not dispute this.

8. The Applicants state that they paid the rent £4,801.33 pcm (A81) and, as stated above, a Rent Repayment Order is sought for the period 25 June 2021-24 June 2022 (in the sum of £46,061.02). As stated above, the First Applicant is applying for the full amount sought of £46,061.02 as the other Applicants state that they transferred their share of the rent to her, and it was she who paid it to the Respondent.

9. On 11 August 2023 the Tribunal issued Directions for the determination of the application (A42), providing for the parties to provide details of their cases and the preparation of a hearing bundle.

Documentation

10. The Applicant has provided a bundle of documents comprising a total of 340 pages (references to which will be prefixed by "A__"). The Respondent has provided a bundle of documents comprising 699 pages ("R__"). The Applicants' bundles includes: Applicants' statement of case (A2); Applicants' Statement of Reasons (A13); witness statement of the First Applicant (A19); witness statement of the Second Applicant (A29); witness statement of the Third Applicant (A34); witness statement of the Fourth Applicant (A38); photographs of the Property (A272). The Respondents' bundle includes: Respondent's Statement of Case (R5); Respondent's witness statement (R18); witness statement of Ms. Y. Campbell (resident of 53 Elliots Row); witness

statement of Ms. D. Campbell (R28); report of GJP Surveying and Building Services Ltd (R98); costs sheets of GJP Surveying and Building Services Ltd (R266); Inventory & Check In report of 25 July 2020 (R272); Check Out report (R408); report provided for deposit dispute (R536); Inventory & Schedule of Condition of 4 October 2022 (R543). The Applicant provided a number of videos, but the Tribunal was not able to view them (the parties were informed of this at the hearing).

11. In addition, the Applicant has provided a "Response to the Respondent's Submission" and a Skeleton Argument.

12. The Tribunal has had regard to these all these documents, but primarily to the documents to which it was referred during the hearing.

The Position of the Parties

13. The Applicant contends, in summary, as follows:

(a) That a licence was not held during the relevant period(s) and such was required.

(b) The Respondent was a person having control or managed the premises (s.263).

(c) The sum of £46,061.02 was paid over the relevant period(s). There was no Housing Benefit/Universal Credit.

(d) The Respondent has broken a number of laws, with "serious consequences for the risk entertained by the occupants, and their quality of life", specifically:

(i) allegations concerning fire safety and breaches of The Management of Houses in Multiple Occupation (England) Regulations 2006;
(ii) allegations concerning cracks to the wall of the Property and an external wall;
(iii) allegations concerning poor water drainage and consequent mould damp;
(iv) allegations concerning the conditions in the Property: mould and damp; leaks to the living room; handmade lampshades that caught fire; crumbling plaster; lights fusing; hole in the ceiling; lack of cleanliness when moving in;
(v) allegations concerning an unjustified attempt to retain deposit;
(vi) allegation concerning an attempt to charge an unlawful fee.

14. The Respondent's position is, in summary, as follows:

(a) The appropriate HMO licence was not held during the relevant period, but a licence was applied for and granted.

(b) The Respondent did manage the property and was the owner, but she was supported by Century 21 and LDN Properties as agent.

(c) The Respondent relied upon her "exemplary conduct and financial situation", she has never been convicted of any relevant offence, her level of expertise and professionalism, and the conduct of both parties, including allegations that the Applicants breached the tenancy agreement, particularly leaving the Property in a state of disrepair (leaving the Respondent to pay £8,000 for works to the Property) and anti-social behaviour.

(d) in response to the allegations made by the Applicant:

(i) All doors were HMO compliant and fire blankets were provided;
(ii) The Property was in a state of repair and good condition and works were carried out when issues arose;
(iii) Works were carried out to the wall in 2017 and when reported;
(iv) Repairs were done to the drainage;
(v) The Respondent attempted to find a solution to the mould and damp;
(vi) The lighting in the living room did not work from the start of the tenancy as the bulbs could not be sourced in the UK;
(vii) There were leaks as a result of a blocked bidet and overuse of the washing machine caused by the Applicants. Repair works were carried out to the balcony which contributed to the leaks, but immediate action was taken;
(viii) A hole in the wall was necessary to remove damp and identify the source;
(ix) The lampshades were in place before the Respondent bought the Property;
(x) An electrician was instructed to remedy the fusing lights;
(xi) The Property was in a good state of cleanliness when it was let;
(xii) The Respondent was entitled to claim in respect of the deposit and MyDeposit determined that part of the deposit should be retained by the Respondent: the Applicants were aware of this and agreed to the basis on which it could be detained;
(xiii) The charge was sought by the agents but was ultimately not charged.

The Applicant's submissions

15. The Applicants submitted that no licence was held during the material tenancies, and it was only after the Applicants vacated the Property that an application for a HMO licence was made. They state that the total rent paid for the material period (13 months) was £46,061.02 and they seek an order in that amount. They assert that they had complied with the terms of their tenancy and paid the rent. They also assert that the Respondent had broken a number of laws, said to have serious consequences for the "risk entertained by the occupants, and their quality of life": no fire doors installed; no fire blankets; cracks in walls of the Property; crumbled wall near the front door; poor water drainage; mould and damp; leaks in the living room; lampshades that caught fire; crumbling plaster in the walls; lights fusing; hole in the ceiling; the Property was not clean when they moved in; there was an unjustified attempt to retain the deposit when they moved out; there was an attempt to charge a professional cleaning fee; there was an attempt to charge fee for change of tenant.

The Respondent's submissions

16. The Respondent accepts that the appropriate HMO licence was not held during the relevant period, but it was said that the Respondent had subsequently successfully applied for a licence. She submits that she has a reasonable excuse for not having a HMO licence: Century 21 and LND Properties supported her in managing the Property and were the main point of contact for the Applicants, she was not aware of the requirement but as soon as she was informed of it, she made the application, and a licence was granted. The Respondent also relies on factors said to mitigate: her exemplary conduct; her financial situation; no conviction for a relevant offence; her low level of expertise compared to a professional business. She also relies on allegations concerning the conduct of the Applicants: breach of cl. 7.2.1, 7.2.2, 7.2.6 of the tenancy agreement and allegations of anti-social. behaviour. She denies the allegations made by the Applicants in respect of her conduct: doors were HMO compliant; the Property was in a state of repair and good condition; works were taken to rectify issues when they arose; repairs were carried out to the drains, in respect of mould and damp, there were no electrical hazards, the leaks were as a result of the conduct of the Applicants, the hole in the wall was necessary as part of works, lampshades were safe, the Property was clean when the original tenancy commenced; the claim in respect of the deposit was not unjust. The Respondent also relies on her financial circumstances: she is retired and reliant on the rental income, she supports her children, the making of a RRO would have a devastating impact. She asserts that she has not been convicted of an offence under s.72(1) Housing Act 2004 and that the seriousness of the offence is minor, taking account of all the circumstances.

The Hearing

17. All of the named Applicants attended the hearing and gave evidence.

18. The First Applicant stated that she had emailed the Respondent's estate agent on 1 May 2021 (A23) stating, among other things, that they would like to stay at the Property for another year, and raising some issues about the Property including: mouldy wall in kitchen (which had been scraped in about October and repainted, the mould had returned in about a month, and the wall was scraped again in about December and they were given a dehumidifier and the wall had been repainted, but she was concerned about the issues returning the following winter). She also emailed the estate agent on 18 June 2021 (A27) stating, among other things that she was pleased the Respondent had come to look at the "issues" and stating that she appreciated that some of the issues (plumbing and balcony roof) would take more time. She said that she had been asking for a long time for issues to be fixed.

19. The First Applicant said that her asthma had deteriorated whilst living at the Property, but admitted she had not mentioned it to the Respondent (she stated she had raised concerns about the Property adversely affecting health) and had no medical evidence. She said that she was now on the highest level of treatment, and the only change had been her time at the Property. She accepted that she had no medical evidence in this regard.

20. The First Applicant said that there had been a leak in the kitchen in October 2020 and that in about October 2020 (R42) the Respondent's contractor had done a number of works, including repairing damage to the kitchen wall. She said that the reference to looking for leaks was a reference to the dryer and not the kitchen wall. She said that there was another problem with damp to the kitchen wall in February 2021 (A49) and that the contractor had come just before Christmas. On 5 February 2022 (R46) the contractor had removed the mould and cleaned the wall, inspected the ponding water and was going to refer to a damp specialist. The next message was in May 2021 (A23) confirming that the wall had been scraped. She said that her concern was that the problem would come back. She said that she wanted the wall painted (A24). She confirmed that the mould was worse in winter and that it probably did improve in April when she sent the email.

21. The Second Applicant said that he was not sure of the dates of the leak and he could not accept or reject the cause.

22. The First Applicant confirmed that the message was the first time that she raised the issue with the leak in the top bedroom.

23. The Second Applicant was asked about the leak to the living room ceiling and he said that it was a plumbing issue rather than an "overflow" from use of the bath. He confirmed that it was first reported in September 2021 (R61) and that on the same day, the Respondent raised the issue with her contractors (R60).

The Third Applicant said that the water was not coming out of the bath, but from the draining port. She accepted that the only record of a complaint was in September 2021 (R61) and that the Respondent raised it on the same day with her contractor (R60).

24. The First Applicant said that the lights in the living room never worked and she did not believe that they had been told that the lights would never work.

25. The Second Applicant said that there was an issue with the front door in that it was possible to reach through the letterbox and unlock the door (R241).

26. The Second Applicant said that the garden wall (A297) broke on 23 August 2021 when he was leaning/sitting on it.

27. In respect of the fire doors, the First Applicant stated that she was not a specialist but someone who had come to look at the fridge had said that s/he was not sure that there were fire doors. The Second Applicant, when asked about them, said that he was not sure where fire doors were or which ones they would be. He said that between his room and the living room, there was a sliding door which was covered by wardrobes.

28. The Second Applicant said that he was unaware of fire extinguishers and fire blankets, but accepted that there were smoke alarms.

29. The First Applicant denied that they had had parties: they had some gatherings but they were not unruly. She did not accept that there had been smoking in the garden, that the kitchen table had been taken outside. She said there had not been any complaints from neighbours. The Second Applicant said that they had some barbeques and gatherings, but he was unsure if they were noisy. He said there were no complaints from neighbours. The Fourth Applicant said that they had a few gatherings, sometimes with other people.

30. The Fourth Applicant said that the Property was not clean when they moved in, they had gone around with a person who noted various issues. She was taken to the inventory at R277 and it was put to her that the Property was clean. She said that she was very surprised to see that given what the clerk had said but acknowledged that that could not be proven.

31. In respect of the condition of the premises when they left, the First Applicant said that the blue sofa (R459) was in the living room and the cupboards (R460) were so weak they were not used. The Third Applicant was taken to the Check-Out Report (R487) and the various issues raised in it. She said that the wall lights in her bedroom were working when she lived there.

32. The Third Applicant said that the amount of deposit claimed was unlawful and was referred to the decision of the adjudicator (A332) and admitted that there was nothing wrong with going to an adjudicator. She acknowledged some

issues caused by the person who had lived in the room before her (curtain hooks missing) but said that wear and tear was to be expected.

33. The Second Applicant was asked about the email he sent referring to the Property as "lovely" (R63 and R79) and stating that he enjoyed living there. He said that the Property could still be nice without requiring improvements.

34. The Respondent also gave evidence. In summary, her evidence was:

35. She owns the Property, the property she currently lives in and a small "AirBnB" in Italy. She had first bought the Property in 1998 and had been renting it out since about 2015-2016. It was previously let to 4 or 5 people. She had not realised that licensing was mandatory, she had looked into licensing in 2017-2018 but it was not mandatory. She had not realised that the position had changed in 2017. She said that she had an estate agent who helped her manage the Property and thought the estate agent would flag up the licensing issue (although she accepted that ultimately she was responsible). She did not pay Century 21 or LDN to keep up to date with licensing requirements. She confirmed there was no reason that she could not have kept herself up to date with the requirements, but said that she did not think it was an issue (and was up to date with gas safety certificates, EPCs etc.). She said that the Property had been renovated in 2000 and 2008 and fire doors were installed, but they were not self-closing. She said that she had bought a fire blanket for the kitchen but could not say that it was there. She said that the garden wall was repaired in 2017 but too much sand had been used in the cement. When she was notified of the collapse, she organised a repair. She said that he not put the parchment light-shades up but accepted that they were a fire safety hazard if a bulb did explode (which she accepted had happened). She accepted that there had been mould in the kitchen, but said that her contractor made efforts to find the cause. She said that there were leaks to the kitchen, in respect of which they could not find the cause for some time. The hole was cut in the ceiling (A292) to dry the Property out as quickly as possible: she said that the Property could be kept warm but closing the doors to the extension. She asserted that the Property was clean when the Applicants moved in, as there had been a professional clean.

36. She told the Tribunal that there were glass sliding doors between the bedroom and the living room. She did not know what kind of fire alarms were in the property, but she believed they were battery. She said that they were tested at the start of the tenancy and at the end.

37. The Property is currently let to one family for £5,500pcm. She is retired and reliant on the rental income. She had not had a valuation of the Property but thought that the valuation (p.16 of the Applicant's response bundle) was a little high. She had had a trust fund for her children's schooling, but they had now left school. She had ISA's worth (the Respondent did inform the Tribunal of the approximate amount but the Tribunal won't set the figure out in the judgment to protect her privacy).

38. Ms. Campbell attended the hearing. She told the Tribunal that her disabled mother-in-law lived in a neighbouring property and when she, Ms. Campbell, would go to look after her, on two occasions she had witnessed parties at the Property. She said that there had been parties on a "handful" of occasions which had disturbed her mother-in-law. She said she had knocked on the door of the Property on one occasion, but no one had come to the door. She had not raised an issue about noise etc at any other times (although she said her mother-in-law had, on a couple of other occasions, but again, no one had come to the door).

Statutory regime

39. The statutory regime is set out in Chapter 4 of Part 2 of the 2016 Act.

40. Rent repayment orders are one of a number of measures introduced with the aim of discouraging rouge landlords and agents and to assist with achieving and maintaining acceptable standards in the rented property market. The relevant provisions relating to rent repayment orders are set out in sections 40-46 Housing and Planning Act 2016 ("the 2016") Act, not all of which relate to the circumstances of this case.

41. Part 2 of the Housing Act 2004 ("the 2004 Act") introduced licensing for certain HMO's. Licensing is mandatory for all HMO's which have three or more storeys and are occupied by five or more persons forming two or more households. "House in Multiple Occupation" is defined by s.254 Housing Act 2004. The Licensing of Houses in Multiple Occupation Order 2006 details the criteria under which HMOs must be licensed. The criteria were adjusted and renewed by the Licensing of Houses in Multiple Occupation Order 2018 which came in force on 1 October 2018 and since 1 October 2018 the requirements that the property must have three or more storeys no longer applies.

42. So far as is relevant to the present application, the Act provides as follows:

40 Introduction and key definitions
(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.
(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to-
(a) repay an amount of rent paid by a tenant, or…
(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
…			

5	Housing Act 2004	Section 72(1)	Control or Management of an unlicensed HMO
…			

43. Section 40 gives the Tribunal power to make a rent repayment order where a landlord has committed a relevant offence. Section 40(2) explains that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant (or where relevant to pay a sum to a local authority).

41 Application for a rent repayment order
(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
…

44. Section 41 permits a tenant to apply to the First-tier Tribunal for a rent repayment order against a person who has committed a specified offence, if the offence relates to housing rented by the tenant(s) and the offence was committed in the period of 12 months ending with the day on which the application is made.

43 Making of rent repayment order
(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 section 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);
…

45. Under section 43, the Tribunal may only make a rent repayment order if satisfied, beyond reasonable doubt in relation to matters of fact, that the landlord has committed a specified offence (whether or not the landlord has been convicted). Where reference is made below to the Tribunal being satisfied of a given matter in relation to the commission of an offence, the Tribunal is satisfied beyond reasonable doubt, whether stated specifically or not.

46. It has been confirmed by case authorities that a lack of reasonable doubt, which may be expressed as the Tribunal being sure, does not mean proof beyond any doubt whatsoever. Neither does it preclude the Tribunal drawing appropriate inferences from evidence received and accepted. The standard of proof relates to matters of fact. The Tribunal will separately determine the relevant law in the usual manner.

47. Where the application is made by a tenant, and the landlord has not been convicted of a relevant offence, s.44 applies in relation to the amount of a rent repayment order, setting out the maximum amount that may be ordered and matters to be considered. If the offence relates to HMO licensing, the amount must relate to rent paid by the Applicants in a period, not exceeding 12 months, during which the Respondents were committing the offence. This aspect is discussed rather more fully below.

44 Amount of order: tenants
(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 repaid by the tenant in respect of
…	
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 repaid 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.

Determination of the Tribunal

48. The Tribunal has considered the application in four stages-

(i) whether the Tribunal was satisfied beyond reasonable doubt that the Respondent had committed an offence under section 72(1) of the 2004 Act in that at the relevant time the Respondent was a person who controlled or managed an HMO that was required to be licensed under Part 2 of the 2004 Act but was not so licensed.
(ii) whether the Applicant was entitled to apply to the Tribunal for a rent repayment order.
(iii) Whether the Tribunal should exercise its discretion to make a rent repayment order.
(iv) Determination of the amount of any order.

Was the Respondent the Applicant's landlord at the time of the alleged offence?

49. It is not disputed, and the Tribunal finds as a fact, that the Respondent was the landlord of the Applicants as follows:

(a) from 25 July 2020-24 July 2022 in respect of the First, Third and Fourth Applicants;
(b) from 25 July 2021-24 July 2022 in respect of the Second Applicant.

50. The premises were originally let to, among others, the First, Third and Fourth Applicants under the tenancy agreement at A61. That tenancy was surrendered, and a tenancy was granted to the four Applicants (plus another) from 25 July 2021 until 24 July 2022 (A80, R262), on the same terms as contained in the agreement at A61.

Was a relevant HMO licensing offence committed during the period 25 July 2020-24 July 2022 and by whom?

51. The Tribunal applies, as it must, the criminal standard of proof (s.43(1)).

52. It is not in dispute that, during the relevant period(s), the Property was a "HMO" (s.254-259) and, pursuant to the Housing Act 2004 ("the 2004 Act") and the regulations made under it, the Property required a licence in order to be occupiable by five or more persons living in two or more separate households. It is also not disputed that the Property was, at the material times, occupied by five people living in more than two separate households.

53. Section 72(1) of the 2004 Act is one of those listed in section 40 of the 2016 Act in respect of which the First-tier Tribunal may make a rent repayment order. The section provides that:

"A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed… but is not so licensed".

54. Section 61(1) states:

"Every HMO to which this Part applies must be licensed under this Part unless-
(a) a temporary exemption notice is in force in relation to it under section 62, or
(b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4".

55. Section 55 states:

"(1) This Part for HMOs to be licensed by local housing authorities where-
(a) HMOs to which this Part applies (see subsection (2)), and
(b) they are required to be licensed under this Part (see section 61(1)).
(2) This Part applies to the following HMOs in the case of each local housing authority-
(a) any HMO in the authority's district which falls within any prescribed description of HMO, and
(b) if an area is for the time being designated by the authority under section 56 as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation".

56. An application for an HMO licence was made on 30 August 2022 (p.248) and the London Borough of Southwark had no record of a licensing application being made (or a licence being issued) before this. A licence was granted on 24 October 2022 (A248, A221).

57. The Respondent accepts that there was no licence in place in the statement of case (R6). Given that admission, the Tribunal had no difficulty in finding that there was no licence, but in any event, on the evidence, the Tribunal would have found (applying the criminal standard) that there was no licence in place during the currency of the tenancies referred to above.

58. Where the Respondent would otherwise have committed an offence under section 72(1) of the 2004 Act, there is a defence if the Tribunal finds that there was a reasonable excuse pursuant to section 72(5). The standard of proof in relation to that is the balance of probabilities. Where the Tribunal makes findings of fact in relation to such an aspect of the case, it does so on the basis of which of the two matters it finds more likely. It does not need to be sure in the manner that it does with facts upon which the asserted commission of an offence is based.

59. The offence is strict liability (unless the Respondent had a reasonable excuse) as held in *Mohamed v London Borough of Waltham Forest* [2020] EWHC 1083. The intention or otherwise of the Respondent to commit the offence is not the question at this stage, albeit there is potential relevance to the amount of any award. The case authority of *Sutton v Norwich City Council* [2020]

UKUT 90 (LC) in relation to reasonable excuse held that the failure of the company, as it was in that case, to inform itself of its responsibilities did not amount to reasonable excuse. The point applies just the same to individuals.

60. The Upper Tribunal gave guidance on what amounts to reasonable excuse defence was given in *Marigold & Ors v Wells* [2023] UKUT 33 (LC), *D'Costa v D'Andrea & Ors* [2021] UKUT 144 (LC) and in *Aytan v Moore* [2022] UKUT 027 (LC):

(a) the Tribunal should consider whether the facts raised could give rise to a reasonable excuse defence, even if the defence has not been specifically raised by the Respondent;
(b) when considering reasonable excuse defences, the offence is managing or being in control of an HMO without a licence;
(c) it is for the Respondent to make out the defence of reasonable excuse to the civil standard of proof;
(d) a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least, the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition, there would generally be a need to show that there was a reason why the landlord could not inform him/herself of the licensing requirements without relying upon an agent (e.g. because the landlord lived abroad).

61. The Tribunal received no evidence that the Respondent intended the Property not to be licensed where it was required to be. The Respondent said that she had not realised that a licence was needed (R13, para. 26-27) and that she was heavily reliant on the agents for advice and guidance. There was no contractual obligation on the estate agent used by the Respondent to keep her informed of licensing requirements; there is to be evidence that the Respondent had a good reason to rely on the competence and experience of the agent; there is no evidence of a reason why the Respondent could not inform herself of the licensing requirements without relying upon an agent. Taking everything into account, there is nothing which the Tribunal found to demonstrate a reasonable excuse.

62. Therefore, the Tribunal determines that the circumstances of the Respondent's failure to hold an HMO licence at the time of the material tenancy do not objectively amount to a reasonable excuse and so do not provide a defence to the HMO licensing offence, which the Tribunal finds beyond reasonable doubt to have been committed.

63. The Tribunal finds that the offence was committed for the entirety of the tenancies, namely 25 July 2020-24 July 2022.

64. The next question is by whom the offence was committed. The Tribunal determined that the offence was committed by the Respondent, being a person within the meaning of s.71(1) Housing Act 2004, being the person who had control or was managing the Property during the material time.

Should the Tribunal make a RRO?

65. Given that the Tribunal is satisfied, beyond reasonable doubt, that the Respondent committed an offence under section 72(1) of the 2004 Act, a ground for making a rent repayment order has been made out.

66. Pursuant to the 2016, a rent repayment order "may" be made if the Tribunal finds that a relevant offence was committed. Whilst the Tribunal could determine that a ground for a rent repayment order is made out but not make such an order, Judge McGrath, President of this Tribunal, said whilst sitting in the Upper Tribunal in the *London Borough of Newham v John Francis Harris* [2017] UKUT 264 (LC) as follows:

"I should add that it will be a rare case where a Tribunal does exercise its discretion not to make an order. If a person has committed a criminal offence and the consequences of doing so are prescribed by legislation to include an obligation to repay rent housing benefit then the Tribunal should be reluctant to refuse an application for rent repayment order".

67. The very clear purpose of the 2016 Act is that the imposition of a rent repayment order is penal, to discourage landlords from breaking the law, and not to compensate a tenant, who may or may not have other rights to compensation. That must, the Tribunal considers, weigh especially heavily in favour of an order being made if a ground for one is made out.

68. The Tribunal is given a wide discretion and considers that it is entitled to look at all of the circumstances in order to decide whether or not its discretion should be exercised in favour of making a rent repayment order. The Tribunal determines that it is entitled to therefore consider the nature and circumstances of the offence and any relevant conduct found of the parties, together with any other matters that the Tribunal finds to properly be relevant in answering the question of how its discretion ought to be exercised.

69. Taking account of all factors, the evidence and submissions of the parties, including the purpose of the 2004 Act, the Tribunal exercises its discretion to make a rent repayment order in favour of the Applicants.

The amount of rent to be repaid

70. Having exercised its discretion to make a rent repayment order, the next decision was how much should the Tribunal order?

71. In *Acheampong v Roman* [2022] UKUT 239 (LC) at [20] the Upper Tribunal established a four-stage approach for the Tribunal to adopt when assessing the amount of any order:

> (a) ascertain the whole of the rent for the relevant period;
> (b) subtract any element that represents payment for utilities;
> (c) consider the seriousness of the offence, 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 type of offence. What proportion of the rent is a fair reflection of the seriousness of this offence? That percentage of the total amount applies for is the starting point; it is the default penalty in the absence of other factors, but it may be higher or lower in light of the final step;
> (d) consider whether any deductions from, or addition to, that figure should be made in light of the other factors set out in section 44(4)".

72. In the absence of a conviction, the relevant provision is section 44(3) of the 2016 Act. Therefore, the amount ordered to be repaid must "relate to" rent paid in the period identified as relevant in section 44(2), the subsection which deals with the period identified as relevant in section 44(2), the subsection which deals with the period of rent repayments relevant. The period is different for two different sets of offences. The first is for offences which may be committed on a one-off occasion, albeit they may also be committed repeatedly. The second is for offences committed over a period of time, such as a licensing offence.

73. At [31] of *Williams v Parmar* [2021] UKUT 244 (LC) it was said:

> "… [the Tribunal] is not required to be satisfied to the criminal standard on the identity of the period specified in s.44(2). Identifying that period is an aspect of quantifying the amount of the RRO, even though the period is defined in relation to certain offences as being the period during which the landlord was committing the offence".

74. The Tribunal is mindful of the various decisions of the Upper Tribunal in relation to rent repayment order cases. Section 44 of the 2016 Act does not when referring to the amount include the word "reasonable" in the way that the previous provisions in the 2004 Act did. Judge Cooke stated clearly in her judgement in *Vadamalayan v Stewart and others* (2020) UKUT 0183 (LC) that there is no longer a requirement of reasonableness. Judge Cooke noted (paragraph 19) that the rent repayment regime was intended to be harsh on landlords and to operate as a fierce deterrent. The judgment held in clear terms, and perhaps most significantly, that the Tribunal must consider the actual rent

paid and not simply any profit element which the landlord derives from the property, to which no reference is made in the 2016 Act. The Upper Tribunal additionally made it clear that the benefit obtained by the tenant in having had the accommodation is not a material consideration in relation to the amount of the repayment to order. However, the Tribunal could take account of the rent including the utilities where it did so. In those instances, the rent should be adjusted for that reason.

75. In *Vadamalayan*, there were also comments about how much rent should be awarded and some confusion later arose. Given the apparent misunderstanding of the judgment in that case, on 6th October 2021, the judgment of The President of the Lands Chamber, Fancourt J, in *Williams v Parmar* [2021] UKUT 0244 (LC) was handed down. *Williams* has been applied in more recent decisions of the Upper Tribunal, as well as repeatedly by this Tribunal. The judgment explains at paragraph 50 that: "A tribunal should address specifically what proportion of the maximum amount of rent paid in the relevant period, or reduction from that amount, or a combination of both, is appropriate in all the circumstances, bearing in mind the purpose of the legislative provisions."

76. The judgment goes on to state that the award should be that which the Tribunal considers appropriate applying the provisions of section 44(4). There are matters which the Tribunal "must, in particular take into account". The Tribunal is compelled to consider those and to refer to them. The phrase "in particular" suggests those factors should be given greater weight than other factors. In *Williams*, they are described as "the main factors that may be expected to be relevant in the majority of cases"- and such other ones as it has determined to be relevant, giving them the weight that it considers each should receive. Fancourt J in *Williams* says this: "A tribunal must have particular regard to the conduct of both parties includes the seriousness of the offences committed), the financial circumstances of the landlord and whether the landlord has been convicted of a relevant offence, The Tribunal should also take into account any other factors that appear to be relevant."

77. The Tribunal must not order more to be repaid than was actually paid out by the Applicants to the Respondent during that period (ignoring for these purposes a provision about universal credit not of relevance here). That is entirely consistent with the order being one for repayment. The provision refers to the rent paid during the period rather than rent for the period.

78. It was said, in *Williams v Parmar*, by Sir Timothy Fancourt [43] that the *Rent Repayment Orders* under the Housing and Planning Act 2016: Guidance for Local Authorities identifies the factors that a local authority should take into account in deciding whether to seek a Rent Repayment Order as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending. It was indicated [51] that the factors identified in the Guidance will generally justify an order for repayment of at least a substantial part of the rent. It was also said that a full award of 100% of the rent should be reserved for the most serious of cases.

79. The Tribunal has carefully considered the amount of the rent for the relevant period of the licencing offence that should be awarded.

Ascertain the whole of the rent for the relevant period

80. The relevant rent to consider is that paid during "a period, not exceeding twelve months, during which the landlord was committing the offence".

81. The parties were asked whether the period of the "relevant period" should be limited to the 12-months leading up to the application being made. The Applicants submitted that the 12-month limitation period in s.41(2) was distinct from the period in s.44 for which a RRO could be made and that the period should not be so limited. They relied upon the case of LON/00AJ/HMF/2018/0053 (34 Sarsfield Road) in which it was said that the amount of a RRO is not limited to 12 months prior to the application to the Tribunal, but to a maximum 12-month period during which the landlord was committing the offence, in accordance with s.44(2). The Respondent accepted the distinction between the "calculation period" and the "limitation period". The Tribunal accepts the submissions of the Applicant and does not limit the maximum period of claim to the 12 months immediately prior to the application.

82. The Applicants seek an order for the maximum rent paid of £46,061.02 from 24 June 2021-24 June 2022, i.e. a period of 13 months. The Applicants rely on the fact that each Applicant only claims for a 12-month period, but the Tribunal limits the maximum period of the claim to the rent paid 24 June 2021-22 May 2022 for the following reasons:

83. The statute states that the relevant rent is that paid during a period not exceeding twelve months and, as said, the Applicants seek a period of 13 months. In this case, particularly, although there are four named Applicants, the Applicants' position is that the rent was paid to the Respondent on behalf of all Applicants each month, and the Applicants' position is that the order should be made in the name of the First Applicant. The schedule at A81 allows deductions for the rent in respect of tenants who are not Applicants and finds that the rent paid during the relevant period was £45,153.18.

Deductions for utilities?

84. The Applicants were liable for all charges in respect of supply and use of utilities, as accepted by the Respondent (R15) and so no deduction for utilities is made.

Seriousness of the offence

85. In *Williams v Parmar* [2021] UKUT 244 (LC) it was said that "the circumstances and seriousness of the offending conduct of the landlord are

comprised in the 'conduct of the landlord', so the First Tier Tribunal 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 is relatively low in the scale of seriousness of mitigating circumstances or otherwise".

86. As the Upper Tribunal has made clear, the conduct of the Respondent also embraces the culpability of the Respondent in relation to the offence that is the pre-condition for the making of the Rent Repayment Order. The offence of controlling or managing an unlicensed HMO is a serious offence, although it is clear from the scheme and detailed provisions of the 2016 Act that it is not regarded as the most serious of the offences listed in section 40(3).

87. In *Daff v Gyalui* [2023] UKUT 134 (LC) it was highlighted that there will be more and less serious examples within the category of offence: [49].

88. The Tribunal determines that the relatively less serious offence committed by the Respondent should be reflected in a deduction from the maximum amount in respect of which a RRO could be made.

89. The Tribunal also notes, however, that there were issue concerning fire safety (the Tribunal using its expert knowledge): when the Property was refurbished in about 2000 and 2008, it should have been fitted with self-closing doors; the parchment lampshades (A272) were clearly a fire hazard (and it is the case that a bulb did blow and explode) and whilst they may not have been put in by the Respondent, the Property was let with them in place; the Respondent did not know what type of smoke alarms were fitted in the Property, but it appeared to the Tribunal that there were two battery-operated smoke alarms and two that ran from the mains (R413-4); there were concerns about their adequacy and they ought to have been regularly tested (the Respondent's evidence was that they were tested at the start of the initial tenancy and again when the Applicants moved out). Ultimately, as the Respondent had chosen to dispense with the services of an agent, it was incumbent on her to have sufficient knowledge of the fire safety systems in the Property and to understand the systems that were in place, and the Respondent did not have this knowledge.

90. The Tribunal also takes into account the fact that there was no licence in place for the duration of the two tenancies referred to above (i.e. the breach lasted at least 2 years).

Conduct

91. The Tribunal takes into account the conduct of the landlord and the tenant, the financial circumstances of the landlord and whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies when considering the amount of such order. Whilst those listed factors must therefore be taken into account, and the Tribunal should have particular regard to them, they are not the entirety of the matters to be considered: other matters

are not excluded from consideration. Any other relevant circumstances should also be considered, requiring the Tribunal to identify whether there are such circumstances and, if so, to give any appropriate weight to them.

92. The Tribunal has to be careful not to "double-count" the allegations in respect of the condition of the Property. The Tribunal has already taken account of the allegations concerning the fire safety systems when assessing the seriousness of the offence and so does not take account of them again when assessing conduct.

93. In terms of the other complaints raised about the condition of the Property, the Tribunal notes that when issues were raised with the Respondent, she did act on them (R90-92, R98, R101, R103-4, R107-8, as set out below and noted at A23):

94. In terms of mould in the kitchen, the Respondent's contractor (Gary) did attend the Property in October 2020 and again in about December 2020 and a dehumidifier was provided (A23, R46, R48-49, R51, R106). No further issue was raised about mould having returned.

95. There was a leak in bathroom to the living room, but again, the Respondent did take action in this respect (R60, R62).

96. The leak to the kitchen took a while to resolve, that was not due to inaction on the part of the Respondent (R41-42, R49, R61-62). The First Applicant acknowledges (A27) that some of the issues raised may take more time and require different contractors.

97. The hole in the ceiling (A292) was in fact at attempt to discover the cause of the leak to the kitchen and to dry out the Property.

98. The garden wall (A293) became an issue when the Fourth Applicant lent/sat on it on about 23 August 2021, but no issue had been raised before and the Respondent said, having viewed the photograph of the wall, that the issue appeared to be that when previous work was done, the contractor used too much sand in the cement. The Respondent arranged for works to be carried out to the wall (R54-57, R101).

99. In respect of the allegation about the lack of cleanliness in the Property at the start of the original tenancy, the Tribunal notes that the Inventory and Check-In report (R272) confirms that the Property was clean.

100. The Respondent also notes Mr. Hilary's comments about the Property (R63 and R79), describing it was "lovely" and wanting to stay on at the Property.

101. The Tribunal notes that no "unlawful" fee was ultimately charged (and that it was a charge that the agent attempted to make) and that, as the Third Applicant acknowledged in her evidence, there was nothing wrong with referring the

deposit issue to the adjudicator, who decided that some deduction from the deposit ought to be made (i.e. retained by the Respondent).

102. The Tribunal also takes into account that a deposit was paid and paid into a rent deposit scheme and the Respondent did provide a copy of the "How to Rent" booklet a gas safety certificate (R241) and/or an Energy performance certificate. Further, that a licence was applied for in August 2022 and was subsequently granted (R221, R235).

103. In terms of the allegations concerning the Applicants' conduct, the Tribunal notes the Respondent's assertion that she had to spend £8,000 on the Property after the Applicants left, and the report prepared for the dispute over the deposit (A315). The Tribunal also notes the Check-Out report (R409). The Tribunal notes the correspondence about the Respondent retaining only £715 of the deposit money (R31) and the decision of the adjudicator (R541) which was that the Respondent should receive £895.25 from the deposit. It is inevitable that there will be some damage from wear and tear over the course of an occupation that lasted 2 years.

104. In respect of the allegations of anti-social behaviour, the Tribunal does not make any adjustment as, taking the evidence at its highest, the Applicants had parties on a "handful" of occasions.

105. In summary, although each party sought to identify additional instances of unreasonable behaviour on the part of the other party, the Tribunal determines that such behaviour cannot be regarded as sufficiently significant to warrant further adjustment of the amount of the Rent Repayment Order.

Whether landlord convicted of an offence

106. Section 44(4)(c) of the 2016 Act requires the Tribunal to take into account whether the Respondent has at any time been convicted of any of the offences listed in section 40(3). The Respondent has no such convictions. The Respondent states (R14) that she has not been convicted of an offence under s.72(1) or any offence relating to licensing and/or housing conditions. The Applicants do not contest this. The Tribunal accepts the Applicants' submission that a material conviction can be an aggravating factor, but lack of such a conviction should not result in a deduction from the starting point amount of the RRO, as this is what is to be expected of a landlord.

Financial circumstances of the Respondent

107. The Respondent states (R14) that she has suffered "significant loss in repairing the subject property", it cost £8,000 to repair, that she is retired and reliant on the rental income and a RRO will have a "devastating effect".

108. In terms of the financial circumstances of the Respondent, the Tribunal noted the following:

(a) rental value of the Property during the material period;
(b) The Property has been rented since 2016-2017;
(c) The Property is currently rented (not as a HMO) for £5,500pcm;
(d) The Respondent owns two other properties, one of which generates something of an income;
(e) The Respondent had ISA's in the approximate sum she gave to the Tribunal.

109. The Tribunal makes no deduction, taking account of the financial circumstances of the Respondent.

The amount of the repayment

110. The Tribunal determines that, in order to reflect the factors discussed in paragraphs 85-90 above, the maximum repayment amount identified in paragraph 83 above should be discounted by 40% (i.e. the fine is 60% of the rent paid in the material period). The Tribunal therefore orders under s.43(1) of the 2016 Act that the Respondent repay to the First Applicant the sum of £27,091.91.

111. It was agreed by the Applicants at the hearing that any order would and should be made in the name of the First Applicant only as, although all four applicants had made the application, she was pursuing it on behalf of them all.

112. The Tribunal has had regard to all the circumstances in setting a time for payment, including the amount of the RRO.

Application for refund of fees

113. The Applicant asked the Tribunal to award the fees paid in respect of the application should they be successful, namely reimbursement of the £100 issue fee and the £200 hearing fee. The Tribunal does order the Respondent to pay all of the fees paid by the Applicant and so the sum of £300.

Judge Sarah McKeown
11 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.

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.

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.

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.

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.

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