FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AL/HMF/2023/0075**
Property	**:**	**13 Wardell House, Welland Street, London SE10 9DN**
Applicant	**:**	**Silvia Santori**
Representative	**:**	**In person**
Respondent	**:**	**Wendy Trollope**
Representative	**:**	**In person**
Type of application	**:**	**Tenant's 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** **Mrs E Flint FRICS**
Date and venue of hearing	**:**	**27 March 2024, 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**23 April 2024**

DECISION

Decisions of the tribunal

(1) The Tribunal orders the Respondent to repay to the Applicant the sum of £495.60 by way of rent repayment.

(2) The Tribunal declines to order the Respondent to reimburse the Applicant the application and hearing fees.

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

Introduction

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

2. Following the ruling on a preliminary issue at a hearing on 18 October 2023, the Tribunal has ruled that the application provided by the Applicant dated 18 March 2022 is the effective application starting the proceedings.

3. The basis for the application is that the Respondent committed an offence of having control of, and/or managing, an unlicensed house in multiple occupation ("***HMO***") which was required to be licensed, contrary to Part 2, section 72(1) of the Housing Act 2004 ("***the 2004 Act***"), which is an offence under section 40(3) of the 2016 Act.

4. The Applicant seeks a rent repayment order in the sum of £4,334 in respect of rent paid for the months August to November 2020, and from February to April 2021 inclusive.

5. The Respondent served a detailed narrative statement of case in response to the application.

6. The parties each filed bundles in advance of the hearing. The Applicant's bundle numbered some 308 pages, and the Respondent's some 203 pages.

7. 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.

8. 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

9. This was a face-to-face hearing.

10. The landlord and the tenant each represented themselves at the hearing, and each gave evidence. Mr Kevin Shortis and Ms Kasia Franczak also gave evidence for the Respondent. We are grateful to all witnesses for their evidence.

The Property

11. The Property is an ex-local authority flat within a purpose-built block, used at the time with which we are concerned as 3 bedrooms, a bathroom, separate wc, living room and kitchen/dining room.

12. We did not inspect the Property, where neither party requested us to do so, and we did not consider it necessary or proportionate to do so to determine the application before us.

13. The Property was situated within an additional licensing area as designated by the Royal Borough of Greenwich (*"**RBG**"*) under s.56 of the 2004 Act, which came into force on 1 October 2017, and remained in force until 30 September 2022.

14. 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.

15. It was agreed between the parties that during the relevant period of 10 August 2020 to 30 November 2020, and then in the months February to April 2021 inclusive, the Property was occupied by at least three persons living in two or more separate households, and occupying it as their main residence.

Applicant's Case

16. In written submissions, the Applicant states that the Property did not have a licence, but required one, for the entirety of the period August 2020 to April 2021. Upon this being queried by the Tribunal, the Applicant confirmed that her claim was in fact limited to the periods summarised in paragraph 15 of this decision, where in the months December 2020 and January 2021 only 2 persons were in residence in the Property, which did not (in those months) require the HMO licence.

17. The Applicant makes further allegations in her application that the Respondent cheated and blackmailed her, did not wish to provide a rental agreement for the room she occupied, that the Respondent harassed her and failed to protect her deposit for 4 months.

18. The hearing bundles contain a copy of the Applicant's tenancy agreement dated 5 August 2020, with herself, Kasia Franczak and Chiara Gramo named as tenants, and the Respondent as landlord It is not disputed that Mrs Trollope was the Applicant's landlord for the period under consideration. The letting was for a term of 6 months from 10 August 2020, at a rent of £1,755 per month.

19. By her application, the Applicant sought a rent repayment order in the total sum of £4,334, calculated as the aggregate of £434 as a pro-rata payment made for part of August 2020, and then £650 per month for the months September to November 2020 inclusive, and February to April 2021, also inclusive. These sums were advanced as the Applicant's share of the total rent of £1,755 per month, for the room she occupied.

20. The Applicant complained that the Respondent failed to provide a legible copy of her tenancy agreement at the outset of the tenancy, and alleged that this was done in deliberate bad faith to conceal from her the joint and several nature of the obligation to pay the full contractual rent. She stated that she had repeatedly sought a tenancy agreement on a room-only basis, to protect her from the potential to be liable for the entire rent in the event other occupiers of the Property left.

21. The Applicant also complained that the Respondent had falsely accused her of being aggressive to her flatmates, and had falsely accused her of stealing a sofa and a television, while failing to take action against those flatmates when she, the Applicant, complained of them smoking marijuana in the Property. She also stated that the Respondent had failed to protect her deposit for 4 months after the tenancy commenced.

22. In her oral evidence at the hearing, the Applicant explained that she had only ever wanted to rent a room, not be a party to a joint tenancy. This was brought into focus when Ms Kasia Franczak left the Property in November 2020, which then, she said, prompted the Respondent to tell her that she and the remaining flatmate would need to make up the shortfall against the contractual rent.

23. The Applicant confirmed that no claim was made for December 2020 and January 2021 as there were only 2 people living in the Property in those months. She then claimed for February to April 2021 as a third person was in occupation, albeit that that gentleman then left in April.

24. We find that the Applicant's concern as to potential liability for increased rent informed her conduct whilst in occupation of the Property, where she conceded that she had stopped paying rent in February 2021, and between February and July 2021, when she vacated the Property, she paid nothing at all. Her explanation was that the Respondent was blackmailing her while refusing to give her a room only agreement.

25. The Applicant expanded in her evidence upon her complaints against the Respondent, stating that the Respondent had called police in response to accusations of aggression made against the Applicant by her flatmates, but had done nothing to address her own complaints of marijuana use by her flatmates. She asserted that evidence of the deposit having been protected earlier than she alleged was fake.

26. The Applicant agreed, in response to questions from the Tribunal, that the Respondent had obtained judgment against her in respect of the rent arrears, in the sum of £3,250 plus costs in the County Court at Bromley on 10 August 2022, under Claim No. H28YJ949. This represented 5 months' arrears at £350.

27. Cross-examined by the Respondent, the Applicant agreed that when she moved into the Property she had put a fridge in the kitchen, under the window, and left a bed frame on the living room sofa in the Property, leaving it unusable. She agreed that the Respondent had asked her to move them shortly after she moved in, but she had not done so until February 2021. She agreed that by email dated 23 February 2021 she had given the Respondent notice of her intention to vacate the Property at the end of that month, but had then failed to do so. She also agreed that she had received correspondence from the Respondent clearly stating that no new tenancy agreement would be granted following expiry of the 6-month term of the original agreement, until the rent arrears were resolved.

The Respondent's Case

28. In her written evidence Ms Trollope explained that she had let the property to the 3 named persons. Ms Kasia Franczak left on 16 November 2020, and Chiara Eramo on 31 January 2021. She denied that the copy assured shorthold tenancy agreement provided to the Applicant was unreadable, and showed the Tribunal a perfectly legible copy within the papers. She also asserted that she provided all necessary tenancy information at the outset.

29. As to the deposit, the Respondent asserted that she had protected this on 7 August 2020. After DPS mediation the sum of £600 was paid to her in respect of cleaning and legal fees incurred after the Applicant had left the Property. The Respondent exhibited conformation of the protection of the sum of £600 with DPS on 7 August 2020, albeit that the confirmation notice did not name the Applicant. This engendered a good deal of cross-examination from the Applicant, who stated in clear terms her belief that this document was a forgery, where the reference number (she said) did not relate to her.

30. The Respondent asserted that, following her expression of her intention to leave at the end of February 2021, the Applicant said goodbye to the other occupiers of the Property on 28 February and removed her fridge, stating that she would hang onto the key so she could return to collect her remaining belongings. It was around this time that the television went missing.

31. As to the HMO designation of the Property, the Respondent explained in her oral evidence that she had not obtained the relevant licence at the time she rented the Property to the Applicant, as she was unaware that one was needed. She drew our attention to two emails sent to the RBG HMO licensing department in June 2019 inquiring as to whether an HMO license was required, which elicited no response.

32. The Respondent exhibited a series of documents to demonstrate that that she notified the Royal Borough of Greenwich HMO licensing department of further queries regarding the licensing of the Property in February 2021, as soon as she had spoken with a friend who suggested such a license might in fact be required.

33. The Respondent gave evidence that she had in fact provided the Applicant with an incomplete, *proforma* letting agreement for a room alone, in January 2021, anticipating the Applicant's comments upon it, but instead the Applicant produced a redrafted version, prepared (she said) by her lawyer. The Respondent took this to her own solicitor, who advised her not to sign it. The Respondent then sent an Association of Residential Letting Agents proforma to the Applicant in early February. When no response was forthcoming, she chased the matter on or around 16 February, by which time the Applicant's rent was 15 days overdue, and stated that she required rectification of that issue before she would enter into any new agreement. This *impasse* subsisted until the Applicant vacated.

34. Regarding issues of tenants' conduct, the Respondent produced evidence of a series of complaints regarding the Applicant's behaviour from her flatmates, producing a series of complaints of aggressive behaviour including assault and threats against the Applicant from Ms Franczak, leaving her feeling so uncomfortable that she sought the assistance of her student support team, and ultimately moved out of the

Property on 16 November 2020, citing the Applicant's behaviour as making it impossible to continue living there. The Respondent then received a further series of complaints from another tenant, Ms Carla SanFeliz in early 2021, leading ultimately to that lady leaving the property, once more citing the Applicant's conduct as making living conditions intolerable.

35. So far as the Applicant's complaints about her flatmates' marijuana use were concerned, the Respondent emailed the 3 current tenants on 17 February 2021 reminding them that nobody should smoke in the Property, warning each of them about the unacceptability of harassment or intimidation, and offering to accept just 2 weeks' notice to vacate from any of them.

36. We heard evidence from Mr Kevin Shortis, who explained his observations when visiting the Property in April and then in May 2021, in particular relating to his observations of what he described as the aggressive behaviour displayed by the Applicant on the latter occasion, whilst Ms SanFeliz was moving out. We found him a credible witness.

37. Ms Kasia Franczak gave evidence, to the effect that on 25 October 2020 she had sent a message to the Applicant trying to explain how the latter's behaviour was making life in the Property difficult. That seemed to goad the Applicant into increasingly confrontational behaviour, including threats and 'shoulder barging' on several occasions, creating an atmosphere that was so intolerable as to make her afraid. She confirmed that her leaving the Property on 16 November 2020 was a consequence of this behaviour. We accept that evidence.

38. Ms SanFeliz provided a witness statement dated 30 May 2021. She did not attend to give evidence in person. We have regard to the contents of the statement, albeit that the weight we attach to it is necessarily limited by the absence of the witness for cross-examination.

Relevant statutory provisions

39. Housing and Planning Act 2016

Section 40

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

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

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

	Act	***section***	***general description of offence***
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

Section 41

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

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

Section 43

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

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

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

Section 44

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

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

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

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

(4) In determining the amount the tribunal must, in particular, take into account – (a) the conduct of the landlord and the tenant, (b) the financial circumstances of the landlord, and (c) whether the

landlord has at any time been convicted of an offence to which this Chapter applies.

Housing Act 2004

Section 72

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

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

Section 263

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

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

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises – (a) receives … rents or other payments from … persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or (b) would so receive those rents or other payments but for having entered into an arrangement … with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments …

Tribunal's analysis

40. The 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 the claim the Property required a licence, and it was not licensed.

41. It is also clear that the Respondent was the landlord for the purposes of section 43(1) of the 2016 Act, as she was named as landlord in the

tenancy agreement, and she agreed that she was the registered proprietor of the Property. Again, this was undisputed.

42. The next question is whether the Respondent was a *"person having control of or managing"* the Property within the meaning of section 263 of the 2004 Act. The evidence shows that such rent as was paid, was paid to the Respondent. The Respondent has not sought to argue that she was not a person having control of or managing the Property or that the rent paid was not the *"rack-rent"* as defined in section 263. We are, accordingly, satisfied that the Respondent was the owner and that she received rent from the Applicant. The Respondent was additionally and in any event at the relevant time a person managing the Property.

The defence of "reasonable excuse"

43. 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.

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

45. Ms Trollope has described the circumstances in which she failed to license the Property, in particular where she sought a response from RBG in 2019. The failure of any party on behalf of the local authority to contact her is regrettable. The Tribunal accepts that Ms Trollope's explanation is credible.

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

    (i) In June 2019 the Respondent was clearly concerned about the possibility of requiring a licence, and commenced enquiries.

    (iii) On her own admission, Ms Trollope 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.

47. We find that there is nothing in the Respondent's explanation which in our view is sufficient to amount to a complete defence. In particular, there is nothing to suggest that the matter was wholly outside her control, or that Ms Trollope was wholly reliant on somebody else to take appropriate steps in circumstances where it was reasonable to do so. Again, while RBG'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. 18 months is not such a reasonable period.

48. 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.

49. Ultimately, the Respondent simply failed to make all such enquiries as were reasonable as to what her legal responsibilities were, cognisant of the existence of a potentially (and, as we find, actually) relevant licensing scheme. In such circumstances, ignorance or mistake as to the nature and extent of those obligations does not constitute a reasonable excuse.

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

The offence

51. 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.

52. An offence under section 72(1) of the 2004 Act is one of the offences listed in that table. Section 72(1) states that *"A person commits an offence if he is a person having control of or managing a HMO which is required to be licensed under this Part … but is not so licensed"*, and for the reasons given above we are satisfied (a) that the Respondent was a "person managing" the Property for the purposes of section 263 of the 2004 Act, (b) that the Property was required to be licensed throughout the period of claim and (c) that it was not licensed at any point during the period of claim.

53. Insofar as Ms Trollope endeavoured to persuade us that the application was made too late to be considered, referring to the application notice dated 14 February 2023, the issue was settled beyond peradventure by Judge Percival's ruling on 18 October 2023 that the application provided by the Applicant dated 18 March 2022 is the effective application starting the proceedings.

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

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

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

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

57. In this case, the Applicant's claim relates to the periods 10 August 2020 to 30 November 2020, and then the months February to April 2021 inclusive.

58. The Applicant seeks a rent repayment order in the total sum of £4,334, as the aggregate of £434 as a pro-rata payment made for part of August 2020, and then £650 per month for the months September to November 2020 inclusive, and February to April 2021, also inclusive.

59. No rent was, in fact, paid in February, March or April 2021. Consequently, the application must as a matter of law be limited to the rents paid Between August and November 2020. The Applicant conceded at the hearing, and we find as a fact, that this was £434 for August and then £650 per month from September to November 2021, inclusive. The total was £2,384.

60. There is no evidence that Ms Santorini received Universal Credit during the period.

61. We are satisfied on the basis of the uncontested evidence that the Applicant was 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 £2,384, this being the amount paid by the Applicant by way of rent in respect of the period of claim.

62. 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.

63. 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.

64. 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.

65. 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.

66. 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.

67. 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).

68. 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.

69. 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.

70. 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.

71. 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).

72. Adopting the *Acheampong* approach, the whole of the rent in this case means the whole of the rent paid by the Applicant out of their own

resources, which (where we have been unable to discern any relevant components of Universal Credit) is £2,384.

Utilities

73. Clause 2.2 of the tenancy agreement requires the tenant to indemnify the landlord in respect of utility charges incurred.

74. On the evidence provided by the Respondent, which we accept, we find that the total of utilities, including council tax, incurred by the landlord for the tenants' benefit over the relevant period was £2,904. This does not include service charges levied by the freeholder of the building within which the Property is comprised, as these do not apply for the sole benefit of the tenants, and include protection and refurbishment of then Respondent's asset.

75. We consider an equitable proportion of the utilities attributable to the Applicant to be 33%, based upon her occupation of one of the 3 bedrooms throughout the relevant period. There is, therefore, a deduction of £968 to be applied.

76. This, therefore, reduces the maximum that may be awarded to £1,416.

Seriousness

77. 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?"*

78. Failure to license leads – or can lead – to significant health and safety risks for often vulnerable tenants, and sanctions for failure to license have an important deterrent effect on future offending as well as encouraging law-abiding landlords to continue to take the licensing system seriously and to inspire general public confidence in the licensing system. In addition, there has been much publicity about licensing of privately rented property, and there is an argument that good landlords who apply for and obtain a licence promptly may feel that those who fail to obtain a licence gain an unfair benefit thereby and therefore need to be heavily incentivised not to let out licensable properties without first obtaining a licence. Furthermore, even if it could be argued that the Applicant did not suffer direct loss through the Respondent's failure to obtain a licence, it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If

landlords can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show that they have suffered actual loss, this will significantly undermine the deterrence value of the legislation.

79. 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.*"

80. 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."

81. We do note that the Respondent describes herself being retired, and does not maintain a large property portfolio.

82. We discern no relevant issues as to the condition of the Property.

83. 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 Applicant's 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, we reject those suggestions, finding that the Respondent was, generally, very responsive to requests made by her tenants, including the Applicant.

84. 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

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

86. In this case, we find no such mitigation: Ms Trollope rented the Property; that presupposes an obligation to inform oneself of the relevant licensing regulations, however busy one may otherwise be.

87. 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

88. We reject the Applicant's contentions that the Respondent was a bad landlady, who ignored her concerns, sent her an illegible tenancy agreement, and sought to blackmail her.

89. We find, by contrast, that the Respondent was very responsive to her tenants' concerns. Her unwillingness by mid-February 2021, and thereafter to enter into a new tenancy agreement with the Applicant was entirely understandable in consequence of the arrears of rent, the fact that Ms Franczak had surrendered her own tenancy in consequence (as we find) of the Applicant's behaviour, and the ongoing complaints of similar behaviour made by the (then) current occupiers.

90. This is exacerbated by the Applicant's refusal to pay rent from February 2021. We also note that despite a County Court judgment for the arrears, the Applicant has paid nothing.

91. This is further exacerbated by the Applicant giving notice in February 2021 that she would leave by the end of the month, and then failing to do so, instead remaining *in situ* (and, rent-free) for a further 5 months.

92. 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".*

93. 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."*

94. 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.

95. We note that the County Court order for payment of the arrears has not been satisfied, even in part.

96. We also note the indisputable evidence of persistent complaints from the Applicant's flatmates regarding her behaviour. Without making any findings of fact on the various allegations, we do find that Ms Franczak found habitation with the Applicant to be so intolerable that she left the Property, to the Respondent's prejudice.

97. As for the Respondent's 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 Respondent's conduct.

98. We consider that the clear breach of the Applicant's 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 35%.

Financial Circumstances of the Landlord

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

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

101. The Respondent 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 her financial circumstances that would require any adjustment to the appropriate percentage.

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

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

Other Factors

103. 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

104. The four-stage approach recommended in *Acheampong* has been set out above. The amount arrived at by considering the first stage is £2,384.

105. Stage (b) warrants the deduction of £968, reducing the maximum that may be awarded to £1,416.

106. Considering the further matters required by stages (c) and (d), the Tribunal's conclusion is that the appropriate amount is reduced to 35% of that sum, and there is nothing further to add or subtract for any of the other s.44(4) factors.

107. Accordingly, taking all of the factors together , the rent repayment order should be for 35% of the maximum amount of rent payable. The amount of rent repayable is, therefore, £1,416 x 35% = £495.60.

Reimbursement of Tribunal Fees

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

109. The Tribunal considers the application to have been wholly disproportionate, and to have sought repayment of sums that were never paid to the Respondent by way of rent, which is to be deplored.

110. While the Applicant's claim has been in very small part successful, the decision of this Tribunal awards her less than 12% of the sums claimed in her application.

111. In the circumstances, we do not consider it appropriate to order the Respondent to reimburse these fees.

Name: Judge M Jones **Date:** 23 April 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).