FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AL/HMF/2023/0226**
Property	:	**337 Plumstead High Street, London SE18 1JX**
Applicant	:	**Ms Brooke Sargent**
Representative	:	**In person**
Respondent	:	**Alexander Property Consulting Limited**
Representative	:	**Ms Janet Adefolake Ifidon (director)**
Type of application	:	**Tenant's application for a Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal members	:	**Judge M Jones** **Mr S Mason FRICS**
Date and venue of hearing	:	**13 May 2024, 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**17 June 2024**

DECISION

Decisions of the tribunal

(1) Pursuant to Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the company Alexander Property Consulting Limited is added as a Respondent to these proceedings, in substitution for Ms Janet Adefolake Ifidon.

(2) The Tribunal orders the Respondent to repay to the Applicant the sum of £4,820.19 by way of rent repayment.

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

Introduction

1. By application dated 30 August 2023, the Applicant has applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("***the 2016 Act***").

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

3. The Applicant seeks a rent repayment order in the sum of £8,438.70 in respect of rent paid for the period 4 October 2022 to 31 July 2023, and a deposit.

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

5. The parties each filed bundles in advance of the hearing. The Applicant's bundle numbered some 175 pages, and the Respondent's some 351 pages.

6. At the commencement of the hearing we considered the Respondent's director's application to rely upon a supplemental bundle of some 88 pages, that she had submitted to the Tribunal (and served on the Applicant) with an application notice seeking permission to rely upon it dated 10 April 2024. The evidence contained within related in particular to her personal circumstances, the financial circumstances of the Respondent company, and expenses incurred by the Respondent which are highly relevant to our decision. We permitted the Respondent to rely upon that additional evidence, finding it to contain material useful to our determination, and where the Applicant had

received and been able to consider the material more than a month prior to the hearing, we found that she would suffer no unfair prejudice by its admission.

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.

The Property

9. The Property is a mid-terraced house of brick construction, originally comprising 3 bedrooms with a loft conversion, sitting and dining room, a kitchen, bath/shower room and downstairs wc. By use of the loft room, the living and dining room as bedrooms it has been converted for use as a 6-bedroom dwelling, used as a *de facto* house in multiple occupation (*"**HMO**"*).

10. It was common ground between the parties that at all material times the Property met the criteria to be licensed as an HMO within the meaning of s.72(1) of the 2004 Act, and not being subject to any statutory exemption.

11. It was agreed between the parties that during the relevant period of 4 October 2022 to 31 July 2023 the Property was occupied by at least three persons living in two or more separate households, and occupying it as their main residence.

Applicant's Case

12. In written submissions, the Applicant states that the Property did not have a licence, but required one, for the entirety of the period 4 October 2022 to 31 July 2023. The hearing bundles contain documents confirming that to be the case; this is not disputed by the Respondent.

13. The hearing bundles contain a copy of the Applicant's tenancy agreement dated 12 October 2022, with the Respondent named as the landlord.

14. There is a copy of the HM Land Registry title register 394938 showing a Ms Josephine Edeki as the freehold proprietor of the Property. The Respondent has explained, and we accept, that by an agreement in writing dated 5 October 2022 Ms Edeki let the Property to the Respondent company, which has thereafter undertaken all lettings to residential tenants and management. Ms Ifidon does not dispute that the Respondent was the Applicant's landlord.

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

16. The Applicant raises a series of complaints concerning the Respondent's discharge of its duties as landlord, in particular derived from her role as a property manager as defined by s.263 Housing Act 2004, including:

    (i) Misleading her, prior to the entry into her tenancy, as to the broadband connection in the Property, which was not in fact operational for approximately six months after the commencement of the tenancy. The stopgap solution of use of a 'dongle' was inadequate for purposes of video conferencing necessary for the Applicant's employment, causing her inconvenience and expense of having to travel into her office rather than working from home as she had intended.

    (ii) Initially, erratic gas supply in consequence of insufficient funds having been applied by the Respondent to the pre-pay gas meter.

    (iii) A complaint that an (initially unknown) woman had entered the Property on one occasion and sought to enter the Applicant's room.

    (iv) A complaint that the communal oven was broken.

    (v) The incidence of a leak under the kitchen sink, leading to mould growth in the cupboard below.

    (vi) 2 instances of efflorescence through plaster, one in another tenant's room, and one low, to the side of a French window in the ground floor rear room occupied by the Applicant.

17. The Applicant gave evidence at the hearing, albeit that Ms Ifidon on behalf of the Respondent did not seek to cross-examine her.

18. In response to questions from the Tribunal the Applicant explained the rent calculation by reference to her banking records that were in the bundle, and explained that the additional sum of £184.61 had been paid by her as a holding deposit prior to entering into the tenancy. When shown an entry that appeared to show the return of that sum, she stated that she believed she had paid it twice, due to an error, but only the one payment was refunded. The corresponding debit could be discerned on one occasion, but not twice, albeit that after the hearing the Applicant emailed to the Tribunal an exchange of text messages clarifying the matter. While the Tribunal does not encourage parties to send in evidence which has not been specifically requested after hearings, in the interests of justice we have admitted the text messages as evidence and considered them.

19. As to the complaints summarised under §16 of this decision:

(i) The Applicant confirmed that it took around 6 months for the broadband/Wi-Fi issue to be satisfactorily resolved.

(ii) The issue of the erratic gas supply was resolved within a few months, by installation of a non-prepaid metered supply. In the interim the tenants had to contact the Respondent, which was able to arrange top-up payments remotely.

(iii) The issue regarding the unknown woman transpired to be the freeholder, who had attended at the Property in the company of her children to meet Ms Ifidon. The complaint was expanded upon that there was little or no advance warning of visits by Ms Ifidon and other persons such as tradesmen to the common areas of the Property.

(iv) The issue with the oven transpired to be an electrical problem whereby the oven, when used, could trip the circuit breaker. This was resolved within around a fortnight.

(v) The leak under the kitchen sink, was resolved within a fortnight.

(vi) As to the plaster efflorescence, the Applicant confirmed that she had not brought this to the attention of her landlord.

The Respondent's Case

20. In her compendious written evidence, contained in a statement of some 71 pages, augmented by a skeleton argument, Ms Ifidon for the Respondent asserted that the application was not meritorious, and that the essential elements for a rent repayment order could not be made out on the facts of the case.

21. The Respondent provided evidence of the fine decorative condition of the Property, where the refurbishment and conversion works had concluded shortly before the inception of the Applicant's tenancy. Ms Ifidon's evidence was to the effect that, through her company, she was a considerate landlord who provided extremely high-quality accommodation, and who was very responsive to tenants' complaints.

22. The Respondent also provided details of her range of educational qualifications, and some difficult, indeed tragic personal circumstances.

23. Ms Ifidon gave evidence at the hearing, but the Applicant did not cross-examine her.

24. In response to questions from the Tribunal, Ms Ifidon confirmed the contents of a useful spreadsheet that she had prepared providing indicative monthly costs of various expenses incurred by way of utility payments and similar items. We shall return to these below.

25. As to the various complaints made, Ms Ifidon stated that she had never tried to enter any tenant's room without permission, and while she had on occasion attended the common areas of the Property this was in the context of inspecting reported defects and ensuring tradesmen were addressing issues correctly. She stated that, but for showing her round the Property prior to the commencement of her tenancy, she had set eyes on the Applicant just twice.

26. Ms Ifidon confirmed that the sink incident was addressed within a very short period of it being reported. The oven required 3 separate call-outs to resolve, over around a fortnight. The gas meter took a little longer to sort out. She knew nothing of the flaking paint in the Applicant's room.

27. As to the broadband issue, Ms Ifidon explained that this was supposed to have been installed at the time the tenancy commenced: she had in fact signed a contract with the service provider, Virgin media. A significant problem was then detected by their installation team which required some unknown subterranean work to be effected before the supply contracted for could be installed. This took months of chasing before it was finally resolved in late March or early April 2023. In the interim she had set up 2 'dongles', portable wifi devices for the tenants, and had offered compensation to anyone who was inconvenienced, so that one tenant received £20 a month for 5 months. Had the Applicant

raised it, she said that she would have offered similar compensation, but the Applicant did not do so.

28. As to the HMO designation of the Property, the Respondent confirmed that as a condition precedent of being able to seek a licence, it needs (first) appropriate planning permission for the change of use from a residential dwelling to an HMO. An application was made on 4 November 2022 and rejected by LB Greenwich by a decision notice dated 23 January 2023. A second application was made on 13 March 2023 and rejected on 4 May 2023.

29. There followed a series of appeals, in which Ms Ifidon stated the issue was that permission had been wrongly refused where the local authority had wrongly applied a test for a 9-bedroom home, where the Property contained (just) 6 bedrooms. She indicated that the Secretary of State had very recently made 2 recommendations on the basis of a grant of planning permission, showing the Tribunal an email dated 7 May 2024 (which we admitted in evidence) from the Planning Inspectorate.

30. That email contains recommendations but makes it clear from its terms that the appeal against the refusal of planning permission was ongoing, and had yet to be determined as at the date of the hearing.

31. After the hearing, Ms Ifidon emailed to the Tribunal an Appeal Decision from the Planning Inspectorate dated 15 May 2024, confirming that planning permission was on that date granted for the change of use of the Property from class C3 residential to class C4, House in Multiple Occupation. Once more, while the Tribunal does not encourage parties to send in evidence which has not been specifically requested after hearings, in the interests of justice we have admitted the grant of planning permission as evidence and considered it.

Relevant statutory provisions

32. 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	Housing and Planning Act 2016	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

33. The Applicant's uncontested evidence is that the Property was a dwelling which was required to be licensed but was not licensed at any point during the period of the claim. Having considered that uncontested evidence we are satisfied beyond reasonable doubt that for the whole period of claim the Property required a licence and it was not licensed.

34. Indeed, for the entire period in issue the Property was functionally incapable of being licensed, where the appropriate planning permission

required as a condition precedent of seeking such licence had not been obtained, and was not in the event obtained until 15 May 2024.

35. It is also clear that the Respondent was the landlord for the purposes of section 43(1) of the 2016 Act, as it was named as landlord in the tenancy agreement. Again, Ms Ifidon does not dispute this.

36. The next question is whether the Respondent was a *"person having control of or managing"* the Property within the meaning of section 263 of the 2004 Act. The evidence shows that the rent was paid to the Respondent. The Respondent has not sought to argue that it 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 it was the owner and that it received rent from the Applicant. The company was therefore at the relevant time at the very least a person managing the Property.

The defence of "reasonable excuse"

37. 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.

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

39. The Respondent has described the circumstances in which she failed to license the Property, where the state of the decorations and fittings was very good, but she faced the practical difficulties of obtaining planning permission, and we accept that her explanation is credible. Nevertheless, it was the Respondent's responsibility to obtain a licence and there is nothing in her explanation which in our view is sufficient to amount to a complete defence. In particular, there is nothing to suggest that the matter was wholly outside Ms Ifidon's control or that she was relying on somebody else to take appropriate steps in circumstances where it was reasonable to do so.

40. 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.

41. Ultimately, the Respondent knew that it needed a license, but was simply unable to apply for one due to the planning situation. That does not constitute a reasonable excuse.

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

The offence

43. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. An offence under section 72(1) of the 2004 Act is one of the offences listed in that table.

44. 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.

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

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

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

47. 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.

48. In this case, the Applicant's claim relates to a period not exceeding 12 months: it is in fact limited to 10 months and 17 days, ending when the Applicant left the Property on 31 July 2023.

49. Subject to her evidence as to occasional late payments, the Respondent has not disputed that the rental amounts claimed were in fact paid by the Applicant. These total £8,438.70.

50. We have not included in this calculation the sum of £184.61 paid by way of a deposit, because that was not 'rent', and accordingly does not fall to be considered under section 44 of the 2016 Act.

51. We are satisfied on the basis of this uncontested evidence that the Applicant was in occupation for the whole of the period to which her 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 £8,438.70, this being the amount paid by the Applicant by way of rent in respect of the period of claim.

52. 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.

53. The Upper Tribunal decision in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* is one of the authorities on how a tribunal should approach the question of the amount that it should order to be repaid under a rent repayment order if satisfied that an order should be made. Importantly, it was decided after the coming into force of the 2016 Act and takes into account the different approach envisaged by the 2016 Act.

54. 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.

55. 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.

56. 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.

57. 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).

58. 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.

59. 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.

60. 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.

61. 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).

62. Adopting the *Acheampong* approach, the whole of the rent in this case means the whole of the rent paid by the Applicant out of her own resources, which is the whole of the rent in this case being £8,438.70.

Utilities

63. In relation to utilities, the tenancy agreement provides that the landlord is responsible for paying for water supply, gas, television license, broadband, and electricity.

64. The Respondent states that it paid these, and in addition provided a subscription-based television service, paid council tax and provided cleaning which was initially once a month and then doubled to provide a better service for tenants. The Applicant does not dispute this point.

65. In the helpful table provided at p.83 of her supplemental bundle, the Respondent calculates the costs of the various services provided. The listed items include gas, water, electricity and broadband, which are clearly all utilities provided that only benefitted the tenants of the Property.

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

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

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

69. Other expenses referred to in the spreadsheet are not allowable as against the tests that we must apply, where such matters as rent paid to the freeholder by the Respondent, insurance, contributions to a repairs reserve and the retention of Idwell management are, contrary to domestic utilities and services provided for the sole benefit of tenants occupying the Property, of a fundamentally different character, being contractually payable by the Respondent to its lessor as a condition of its lease and various expenses incurred in managing and protecting its investment.

70. We therefore allow the following monthly sums as allowable deductions representing payment by the landlord for utilities that only benefited the tenant:

	£
Gas	217.55
Electricity	207.83
Water	76.85
TV	55.00
Broadband	61.99
Council Tax	204.00
Cleaning	60.00
	883.22

71. Of these sums, the share applied to the Applicant's benefit as one of six occupiers of the property is one sixth, thus 883.22 / 6 = £147.20 per month.

72. For the period in question, 10 months and 17 days, the total sum applied solely for the Applicant's benefit for which a deduction must be made is £1,552.72[1].

73. The Tribunal is satisfied that this is a fair and equitable way to divide the relevant costs incurred, and notes that the indicated approach was not challenged by the Applicant.

74. For these reasons, the Tribunal finds that the appropriate deduction in respect of payment by the Respondent for utilities and services that only benefitted the Applicant, is £1,552.72.

Seriousness

75. 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?"*

[1] 10 months x £147.20 = £1472.00, plus 438.70/800 = 0.548 x £147.20 = £80.72, total therefore £1,552.72.

76. 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.

77. 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.*"

78. 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."

79. As to the condition of the Property, we consider that it has been refurbished, decorated and maintained to a high standard. This is not, so far as we are aware, a case of a building containing obvious hazards.

80. Unfortunately, however, in the absence of an application for a licence it is impossible to know whether the Property is of a standard that would lead to a licence being granted, without further works being necessary.

81. We cannot ignore the fact that the Respondent, and through it Ms Ifidon, seeks to trade as a professional property management business. For all the admirable qualifications she has obtained, Ms Ifidon knew that the Property was required to be licensed as an HMO, and that such licence required, as a condition precedent, planning permission. The Respondent had obtained neither through the duration of the Applicant's occupation of the Property, and the inevitable conclusion we come to is that, cognisant of the fact that the applicable licence had not been granted and indeed could not be applied for until the planning situation was resolved, Ms Ifidon deliberately let the Property to the Applicant as an HMO (which designation is referred to in the tenancy agreement). She did so in the knowledge that the Respondent required a licence that it did not possess. This was, we regret to conclude, a deliberate breach.

82. 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)). A a theme of the Applicant's evidence was to suggest that the Respondent had been an unresponsive landlord, failing to address concerns raised by her and otherwise not acting as a responsible landlord should. Insofar as may be necessary, we reject those suggestions, finding that the Respondent was admirably responsive to requests made by its tenants, including the Applicant.

83. In relation to the main areas where this evidence was explored, we find (a) that the Respondent was repeatedly frustrated by the unresponsiveness of the contracted broadband provider when the difficulty in installation was encountered, but chased the matter repeatedly until it was resolved, offering compensation to tenants that raised the issue (which, we find, the Applicant did not), (b) that issues with the oven, gas supply and leak under the kitchen sink were each addressed with reasonable celerity, (c) that the Respondent was unaware of the peeling paint issue, and (d) that the complaints regarding attendance at the Property on occasions do not by any objective token reflect badly upon the Respondent or Ms Ifidon. We find that she attended only when reasonably necessary, for purposes of assisting the tenants, and the incident regarding the attendance of the freeholder cannot be attributed to the Respondent.

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, Ms Ifidon presents her personal circumstances as constituting significant relevant mitigation.

86. In relation to what we find to have been a deliberate breach of the obligation to be licensed lawfully to let premises as a HMO, we cannot conclude that any of the undoubtedly distressing personal circumstances advanced amount to relevant mitigation of the offence.

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 find the Applicant's complaints regarding the Respondent's conduct to amount to no more than the usual incidents of housing in general, and living in shared housing in particular. So far as the broadband issue was concerned, we find that Ms Ifidon did all she reasonably could to seek to rectify matters with a bureaucratic, slow-moving organisation against which she could do no more than make requests, which she did frequently. All other complaints brought to her attention were addressed, we find, entirely reasonably.

89. One aspect of the evidence presented by each party was to the effect that they found the other 'difficult', indeed 'hostile' in their interactions. It may be that there was a clash of personalities, or that the views each witness has of the other have been coloured by what might be anticipated to be disagreeable proceedings from both perspectives, but we find no cause for criticism in the conduct of either witness.

90. Insofar as there may be some elision between the tests at (c) and (d), the analysis addressed in §§82-3, above, is repeated. The Tribunal repeats the finding that the Respondent through Ms Ifidon provided agreeable accommodation of good quality and was highly responsive in relation to problems raised by tenants. There are no other, or no other credible, complaints about the Respondent's conduct.

91. We consider that there is nothing in the conduct of either the Applicant or Respondent to cause us to make any adjustment to the level of the rent repayment order.

Financial Circumstances of the Landlord

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

93. There was limited documentary evidence before the Tribunal of Ms Ifidon's financial circumstances. The Applicant did not seek to cross-examine her further on that evidence.

94. The Respondent company produced accounts showing a small balance sheet deficit, but these were not profit and loss accounts so that it is impossible for the Tribunal to understand the application of its turnover, where gross profit for the year to 31 March 2023 was £53,568.

95. We conclude that the Respondent provided no evidence of financial hardship, or any other circumstances that would lead the Tribunal to conclude that it 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 its financial circumstances that would require any adjustment to the appropriate percentage.

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

96. 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

97. 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

98. The four-stage approach recommended in *Acheampong* has been set out above. The amount arrived at by considering the first stage is £8,438.70.

99. Deducting the sums required by stage (b) provides the calculation £8,438.70 - £1,552.72 = £6,885.98.

100. Considering the further matters required by stages (c) and (d), the Tribunal's conclusion is that the appropriate amount is reduced to 70% of that sum, and there is nothing further to add or subtract for any of the other s.44(4) factors.

101. Accordingly, taking all of the factors together , the rent repayment order should be for 70% of the maximum amount of rent payable, less deductions for utilities and services. The amount of rent repayable is, therefore, £6,885.98 x 70% = £4,820.19.

Reimbursement of Tribunal Fees

102. The Applicant was asked by the Tribunal whether she wished to apply 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. She replied that she did not. We therefore make no order in this regard.

Name: Judge M Jones **Date:** 17 June 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).