FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/HMF/2023/0270**
Property	**:**	**33 Bywater Place, London, SE16 5ND**
Applicant	**:**	**(1) Daisy Lio** **(2) Massimo La Faci** **(3) Nathan Samuels** **(4) Minhee Seraphina Seo** **(5) Peter Sobamiwa** **(6) Marie-Jeanne Keni Maghoma**
Representative	**:**	**Mr. Elliott (Justice for Tenants)**
Respondent	**:**	**Fethi Nam**
Representative	**:**	**Mr. Babul (Direct Access Counsel)**
Type of application	**:**	**Application for a rent repayment order by tenant – sections 40, 41, 43, & 44 Housing and Planning Act 2016**
Tribunal members	**:**	**Judge Sarah McKeown** **Ms. L. Crane MCIEH**
Date and Venue of hearing	**:**	**10 May April 2024 at 10 Alfred Place, London, WC1E 7LR**
Date of decision	**:**	**19 June 2024**

DECISION

Decision of the Tribunal

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

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

(3) The Tribunal makes a rent repayment order in favour of the Applicants against the Respondent, in the total sum of £29,400.62, to be paid within 2 months of the date of this decision. The award is apportioned between the Applicants as follows:

(a) Miss. Lio: £5,261.66;
(b) Mr. La Faci: £5,261.66;
(c) Mr. Samuels: £5,261.66;
(d) Miss. Seo: £5,261.66;
(e) Mr. Sobamiwa: £5,261.66;
(f) Miss. Maghoma: £3,092.32.

(g) The Tribunal determines that the Respondent shall pay the Applicants an additional £300 as reimbursement of Tribunal fees to be paid within 28 days of the date of this decision.

Page references are to the bundle provided by the Applicant for the hearing

Introduction

1. This is a decision on an application for a rent repayment order under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") (p.16).

Application and Background

2. By an application dated 27 September 2023 (p.186) the Applicants applied for a Rent Repayment Order("RRO") in the sum of £45,096.49.

3. The application was brought on the ground that the Respondent had committed an offence of having control or management of an unlicensed House in Multiple Occupation ("HMO") for failing to have an HMO licence ("licence") for 33 Bywater Place, London, SE16 5ND ("the Property"), an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act").

4. The Property is a four-storey house, with six bedrooms.

5. The Property was let to the Applicants. The "Summary of Agreement" (p.195) states that the landlord is the Respondent and the tenants were Mr. Peter Sobamiwa and Miss. Maghoma, with the permitted occupiers being Miss. Lio, Mr. La Faci, Mr. Samuels and Miss. Hee (named as Miss. Seo in the application). The rent was £4,100, due from 5 December 2021 (when the tenancy commenced). The agreement provides (p.199) that "permitted occupier" includes any person who is licensed by the landlord to reside at the Property and who will be bound by all the terms of the agreement apart from the payment of rent.

6. The document goes on (p.200) and is headed "Assured Shorthold Tenancy Agreement" which states that it is between the Respondent as landlord and the following: Mr. Sobamiwa, Miss. Maghoma, Miss. Lio, Mr. La Faci, Mr. Samuels, and Miss. Hee. The Property is let from 5 December 2021 at a rent of £4,100 per calendar month. It states that the tenant(s) are liable to pay all utilities and council tax.

7. On 7 December 2023 (p.170) the Tribunal issued Directions for the determination of the application, providing for the parties to provide details of their cases and the preparation of a hearing bundle.

Documentation

8. The Applicant has provided a bundle of documents comprising a total of 504 pages. It includes: the Applicant's Statement of Case (p.2); witness statement of Daisy Lio (p.21); witness statement of Massimo La Faci (p.55); witness statement of Nathan Samuels (p.70); witness statement of Minhee Seraphine Seo (p.99); witness statemet of Peter Sobamiwa (p.106); witness statement of Marie-Jeanne Kenji Maghoma (p.145)

9. No documents were provided by the Respondent until the morning of the hearing (see below). A Case Officer from the Tribunal contacted Mr. Babul on 8 May 2024 as no documents had been received. There was no response.

10. The Tribunal has primarily had regard to the documents to which it was referred during the hearing.

The Position of the Parties

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

(a) The Property met the criteria to be licensed under the mandatory scheme as an HMO or, without prejudice, it was within an additional licensing area designated by the London Borough of Southwark (which came into force on 1 March 2022) and the Property met all the criteria to be licensed under the said designation;

(b) During the relevant period the Property was occupied by at least five persons living in two or more separate households and occupying the Property as their main residence;

(c) The Respondent was the Applicants' landlord, is the beneficial owner of the Property and is a person with "control" of the Property for the purpose of s.263 HA 2004;

(d) No licence was held and no application for a licence was made at any time during the Applicants' tenancies;

(e) The Respondent did not ensure that his name, address and telephone number was available to all the households in the Property and that they were clearly displayed in a prominent position in the HMO (s.3 The Management of Houses in Multiple Occupation (England) Regulations 2006;

(f) The hot water tank was not maintained which led to a rise in utility prices and was not resolved in a timely manner (s.5);

(g) An electrical installation certificate was not provided at the start of the Applicant's occupation (s.6);

(h) The windows on the bottom and first floor did not close properly (s.7);

(i) The Respondent would attend the Property without notice and enter the garden to leave refuse in the back and front gardens without the consent of the Applicants (s.7);

(j) The Respondent did not remove the possession, including the furniture of the former occupants prior to the Applicants moving in (s.8);

(k) The Respondent did not ensure the deposit was protected throughout the Applicants' occupation;

(l) The Respondent breached the Tenants Fees Act 2019 as he attempted to charge a "6-week" deposit;

(m) A gas safety certificate was not in place throughout the tenancy and provided to the occupants (s.36 The Gas Safety (Installation and Use) Regulations 1998;

(n) A copy of an EPC was not provided (s.6 The Energy Performance of Buildings (England and Wales) Regulations 2012;

(o) A copy of the How to Rent Guide was not provided (s.39 Deregulation Act 2015);

(p) The Respondent failed to rectify issues revolving around the manhole at the Property, namely ensuring a rat cage was installed;
(q) The Respondent dumped refuse and debris in the gardens which allowed for the harbouring of pests;
(r) No carbon monoxide detector was provided;
(s) The Respondent did not give quiet enjoyment as he entered the Property as set out above and he requested that internal security cameras were kept active.

The Hearing

12. All but one of the Applicants (Miss. Lio) attended the hearing. They were represented by Mr. Elliott. The Respondent attended the hearing (with his son). He was represented by Mr. Babul. The Respondent produced some documents on the morning of the hearing being: a witness statement from the Respondent dated 9 May 2024 and two tenancy deposit certificates.

13. The first issue for the Tribunal was whether the Respondent should be permitted to rely on these documents and what, if any, part he should be allowed to play in the hearing.

14. The Tribunal heard submissions from both parties.

15. The Tribunal considered rule 8 and rule 9 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and, in particular, whether to bar the Respondent from taking part in the proceedings. The Tribunal noted the following:

16. The application and directions were sent to the Respondent's agent as named on the tenancy agreement (p.195 and the agent's address was the one given at cl. 10.9.1 for service of notices). The directions provided, among other things, that if the Respondent failed to comply with the directions, the Tribunal may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.

17. The agents emailed the Tribunal on 16 January 2024 (i.e. after the application and directions had been sent out) stating that they were not managing the property and providing an email address for the Respondent and for Mr. Babul (described as "His Barrister"). The Tribunal received a signed Notice of Acting dated 7 March 2024 stating that Mr. Babul was authorised to "receive any papers, proceedings or other correspondence and represent in tribunal or any other court on behalf of the Respondent". Mr. Babul told the Tribunal that he had received instructions very late, and he did

not have much in the way of papers. He stated that he got a message on Wednesday that the hearing was today. He referred to a letter from "Represent Law" and stated that he had responded to that. He stated that he had not seen the bundle for the hearing.

18. Mr. Elliott stated that the bundle for the hearing had been sent to the Respondent and Mr. Babul at email addresses (which they confirmed were correct) and no "bounce-back" had been received. He initially said that he could address the issue concerning the deposit and the allegation of rent arrears. He said he had no record or details of any allegation of property damage. He later changed his position and stated that the Respondent should be barred entirely from taking part in the proceedings.

19. A copy of the bundle was emailed again to the Respondent during the hearing.

20. The directions made clear that, in the event of non-compliance, the Tribunal may bar the Respondent from taking part in the proceedings.

21. The Tribunal informed the parties that it would take the Respondent's documents into account, allow him to give evidence (his evidence in chief being limited to that contained in his witness statement) and hear submissions from Mr. Babul. The Tribunal noted that Mr. Babul stated that he had received instructions very late, but he had filed a Notice of Acting dated 7 March 2024. As at this date, the Respondent and Mr. Babul were clearly aware of the existence of this application. Mr. Babul was not able to say when he had contacted the Tribunal and the only correspondence the Tribunal had was the email from the agent and the Notice of Acting. There was an onus on the Respondent, once he became aware of the application, to engage with the application. Having regard to the Respondent's documents, the letter from Represent Law (which was not provided to the Tribunal but it was discussed) concerned a separate matter: a claim (or potential claim) in the County Court for an order pursuant to s.214 Housing Act 2004 in respect of the deposit. The Tribunal reached its decision on the basis that, although the matters addressed in the Respondent's witness statement largely related to a letter in respect of a different claim, the assertion that the deposit had been protected, the allegation of rent arrears and the allegation of damage to the Property were potentially relevant to this application. Those issues could be dealt with in the Applicant's evidence and in submissions.

22. The Tribunal therefore proceeded to hear Mr. Elliott open the case and then the five Applicants who had attended the hearing confirmed their witness statements. Mr. Sobamiwa was asked some questions by Mr. Elliott. He confirmed that he was not aware of any allegation of property damage during his time as a tenant. It appeared that there may have been some allegations of damage and/or rent arrears, but this was when others were living in the premises. He stated that there was no property damage he had caused, and he was not aware of any property damage. He stated that the water tank did not work reliably in the period he was living at the Property.

He said that he was not aware at the time that the deposit was not protected, but it later came to light that it had not been protected due to the change of tenants in the Property. In response to a question from Ms. Crane, Mr. Sobamiwa confirmed that on 4 September 2022 only £4,060 was paid as he had chased the issue about debris in the garden with the Respondent's agent and a deduction of £40 was agreed. Mr. Babul was asked if he wished to ask Mr. Sobamiwa any questions and his response was that he had not had time to read the bundle.

23. The other Applicants were asked to comment if their evidence differed from Ms. Sobamiwa's and none of them said that it did. Mr. Babul was then asked if he wished to ask any of them questions and, again, he said that he had only just seen the bundle. At this time, the Tribunal raised with the parties that whilst Mr. Babul had not asked for an adjournment, whether the hearing should be adjourned given his position. The Tribunal heard from both parties and then informed them that it would not adjourn the hearing: The Tribunal had regard to the history of the matter (particularly as set out above), including that the Respondent and Mr. Babul had been aware of the existence of the application since 7 March 2024, the bundle had been sent to both of them, to the correct email addresses, the Respondent had not engaged with the Applicant or the Tribunal until the morning of the hearing and had been granted some indulgence in that the Tribunal agreed to have regard to his documents.

24. The Respondent was invited to give evidence and Mr. Babul stated that he did not speak English. Mr. Babul was asked how the Respondent had signed his witness statement and it was said that his son had read it, explained it and then the Respondent had signed it. The Respondent was able to answer some questions, but when there was an issue, his son translated (Turkish) for him. He confirmed he has three properties which he rents out (including the Property), the Property is rented out at the moment (for £6,000 pcm) as was one of the other properties (£4,000 pcm) and there was an application in respect of the Property which had been submitted for an HMO licence. He stated that he had an agreement with his agency, that he had an EPC and other documents. He said that he had contact with the agency he had "rented" to, that he had never "rented" to the Applicants, but he did confirm that he had visited the Property on 2-3 occasions. He said that he knew he needed an EPC and gas safety certificate etc. He was asked how long he would need to pay any RRO and he said that he used the rental money to pay the mortgage and he could not say when he could pay.

25. Mr. Babul was invited to make submissions. He said that this was a case without evidence and, if possible, he wanted another date. It was explained that the Tribunal had already ruled that it would not adjourn the hearing. He stated that some information had come new to him and there was the problem with the language barrier. He said that claim should be dismissed as the Respondent was not in a position to pay a RRO and that it was the agent who had been responsible.

26. Mr. Elliott made submissions, in summary, as follows:

27. He said that there had been a breach of the mandatory requirement for a property licence from 4 November 2020-5 November 2022, during which time there were at least 5 occupants who all resided in separate households. He referred to the tenancy agreement which listed six tenants. The Tribunal raised an issue about whether the tenancy agreement listed some of the Applicants as permitted occupants or tenants. Mr. Elliott stated that all were listed as tenants later in the form and the form was supposed to list all permitted occupants (at p.212) and there were no names there. Further, it was said that s.254 Housing Act 2004 only required occupants, not tenants. It was said that all the rent came from Mr. Sobamiwa's account as everyone else paid to him (the witness statements of the Applicants confirm that the rent was split evenly).

28. He stated that the requirements of s.254 Housing Act 2004 were met. Without prejudice to this, it was said that the Property was within an additional licensing area (p.478) but it was acknowledged that in that event, the period of claim would be affected as the scheme only came into force on 1 March 2022. It was said that the Respondent was named as the landlord on the tenancy agreement (p.198) and he met the requirements of s.263 Housing Act 2004.

29. It was said that the Applicants had conducted themselves well for the period of 2020-2022, during which time they were the occupants of the Property: he could not comment on any other periods. It was said that the period of breach was 2 years. There was no reasonable excuse: the Respondent had experience as he rented out two other properties; none of the circumstances which would entitle the Respondent to rely on the agent were made out; the Respondent had clearly visited the property and some of the evidence (p.41) showed that he did have involvement; he was capable of understanding the need for a licence and could have kept himself aware of the requirements. In terms of quantum, a number of submissions were made which were, in summary: there was an argument that the £40 deducted from the rent should not be discounted; the offence was serious; the Respondent had not kept to his legal requirements (in respect of the electrical safety certificate, carbon monoxide detector, deposit for example), he was a professional landlord, the offence had gone on for at least 2 years and continued after the Applicants had moved out. The purpose of a RRO is to punish and deter and to remove the financial benefit from the landlord, which would justify a substantial award. The Applicants were good tenants and no deduction should be made. It was said that an award of about 90% should be made. The Applicant also asked for reimbursement of fees.

Statutory regime

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

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

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

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

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

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

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

41 Application for a rent repayment order
(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
(2) A tenant may apply for a rent repayment order only if-
(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
(b) the offence was committed in the period of 12 months ending with the day on which the application is made
…

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

43 Making of rent repayment order
(1) The First-tier Tribunal may make a rent repayment order if satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).
(2) A rent repayment order under this section may be made only on an application under section 41.
(3) The amount of a rent repayment order under this section is to be determined in accordance with-
(a) section 44 (where the application is made by a tenant);
…

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

37. It has been confirmed by case authorities that a lack of reasonable doubt, which may be expressed as the Tribunal being sure, does not mean proof beyond any doubt whatsoever. Neither does it preclude the Tribunal drawing appropriate inferences from evidence received and accepted. The

standard of proof relates to matters of fact. The Tribunal will separately determine the relevant law in the usual manner.

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

44 Amount of order: tenants
(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
(2) The amount must relate to rent paid during the period mentioned in the table.

If the order is made on the ground that the landlord has committed	The amount must relate to rent repaid by the tenant in respect of
…	
An offence mentioned in row 3, 4, 5, 6, or 7 of the table in section 40(3)	A period, not exceeding 12 months, during which the landlord was committing the offence
…	

(3) The amount that the landlord may be required to repay in respect of a period must not exceed-
(a) the rent repaid in respect of that period, less
(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.
(4) In determining the amount the tribunal must, in particular, take into account-
(a) the conduct of the landlord and the tenant,
(b) the financial circumstances of the landlord, and
(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

Determination of the Tribunal

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

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

Was the Respondent the Applicants' landlord at the time of the alleged offence?

40. The occupants of the Property were as follows:

(a) Nathan Samuels (Room 1) – 04/11/20-28/02/23;
(b) Marie-Jeanne Kenji Maghoma (Room 2) – November 2020-14/02/23;
(c) Massimo La Faci (Room 3) – November 2020-June 2023;
(d) Daisy Lio (Room 4) – 04/11/20-04/12/22;
(e) Minhee Seo (who appeared as Seo Min Hee on the tenancy agreement) (Room 5) – December 2021-June 2023. The previous occupants were Arabella Gayle (November 2020-September 2021) and Lucy Crouch (September 2021-December 2021);
(f) Peter Sobamiwa (Room 6) – November 2020-November 2022 (and thereafter by Beth Duxbury from November 2022-June 2023).

41. The Property was let to the Applicants (tenancy agreement - p.195). The "Summary of Agreement" states that the landlord is the Respondent and the tenants were Mr. Peter Sobamiwa and Miss. Maghoma with the permitted occupiers being Miss. Lio, Mr. La Faci, Mr. Samuels and Miss. Hee. The rent was £4,100, due from 5 December 2021 (when the tenancy commenced). The agreement provides (p.199) that "permitted occupier" includes any person who is licensed by the landlord to reside at the Property and who will be bound by all the terms of the agreement apart from the payment of rent.

42. The document goes on (p.200) where it is headed "Assured Shorthold Tenancy Agreement". It states that it is between the Respondent as landlord and the following: Mr. Sobamiwa, Miss. Maghoma, Miss. Lio, Mr. La Faci, Mr. Samuels, and Miss. Hee. It states that the Property is let from 5 December 2021 at a rent of £4,100 per calendar month. It states that the tenant(s) are liable to pay all utilities and council tax.

43. The Tribunal finds as a fact, that the Respondent was the landlord of the Applicants as the Property was let to the Applicants from 5 December 2021 until 4 December 2022. Although there is reference in the tenancy agreement (p.198) to some of the Applicants being permitted occupants in the "Summary of Agreement", all are named on the "Tenancy Agreement" as tenants. In any event, this would affect whether an order could be made in respect of all of the named Applicants, but does not bear on whether an order can or should be made, nor the amount of the order (as, on either case, the rent for the whole of the Property was £4,100 pcm).

44. Although the Respondent made reference to his agent having let the Property to the Applicants, the tenancy agreement is clearly between the Respondent and the Applicants.

Was a relevant HMO licensing offence committed during the period 5 December 2021-4 December 2022 and by whom?

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

46. The Tribunal's findings as to the "relevant period" are set out below.

47. The Tribunal finds that, during the relevant period(s), the Property was a "HMO" (s.254-259) and, pursuant to the Housing Act 2004 ("the 2004 Act") and the regulations made under it, the Property required a licence in order to be occupiable by five or more persons living in two or more separate households. The Tribunal finds that the Property was, at the material time, occupied by six people living in more than two separate households.

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

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

49. Section 61(1) states:

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

50. Section 55 states:

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

51. On the evidence, the Tribunal finds (applying the criminal standard) that no licence was in place during the material time (p.470) and, indeed, there was no licence in place at any time when the Applicants were occupying the Property. The Property met the criteria to be licensed under the mandatory scheme as an HMO.

52. Where the Respondent would otherwise have committed an offence under section 72(1) of the 2004 Act, there is a defence if the Tribunal finds that there was a reasonable excuse pursuant to section 72(5). The standard of proof in relation to that is the balance of probabilities.

53. The offence is strict liability (unless the Respondent had a reasonable excuse) as held in *Mohamed v London Borough of Waltham Forest* [2020] EWHC 1083. The intention or otherwise of the Respondent to commit the offence is not the question at this stage, albeit there is potential relevance to the amount of any award. In of *Sutton v Norwich City Council* [2020] UKUT 90 (LC) it was held that the failure of the company, as it was in that case, to inform itself of its responsibilities did not amount to reasonable excuse. The point applies just the same to individuals.

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

(a) the Tribunal should consider whether the facts raised could give rise to a reasonable excuse defence, even if the defence has not been specifically raised by the Respondent;
(b) when considering reasonable excuse defences, the offence is managing or being in control of an HMO without a licence;
(c) it is for the Respondent to make out the defence of reasonable excuse to the civil standard of proof;
(d) a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least, the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord

informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition, there would generally be a need to show that there was a reason why the landlord could not inform him/herself of the licensing requirements without relying upon an agent (e.g. because the landlord lived abroad).

55. The Respondent did not specifically seek to raise a reasonable excuse defence, but it was asserted on this behalf that the fault was his agents, and the Tribunal is mindful of the guidance set out above.

56. It is noted that the Respondent used an agent, but there is no evidence of a contractual obligation on the agent to keep the Respondent informed of licensing requirements; there is no evidence that the Respondent had a good reason to rely on the competence and experience of the agent; there is no evidence of a reason why the Respondent could not inform himself of the licensing requirements without relying upon an agent. Taking everything into account, there is nothing which the Tribunal found to demonstrate a reasonable excuse.

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

58. The Tribunal is satisfied that the offence was committed from 5 December 2021 until 4 December 2022 (p.16, para. 4). In their Statement of Case (p.3), the Applicants assert that the offence was committed from 4 November 2020-4 December 2022. This is also relevant to the issue of ascertaining the whole of the rent for the relevant period (see below).

59. Miss. Seo states in her witness statement (p.101) that she occupied the Property from December 2021-June 2023 and the Statement of Case (p.3) states that she moved in in December 2021: Miss. Lio says that Miss. Seo moved in in "early December 2021" (p.23); Mr. La Faci says that Miss. Seo lived at the Property from December 2021 (p.57-8); Mr. Samuels states that Miss. Seo's tenancy began in December 2021 (p.74); Mr. Sobamiwa states that Miss. Seo resided at the property from January 202 (she explains in her witness statement that she was not at the Property over Christmas 2021). Further, the only tenancy agreement provided states that the tenancy starts on 5 December 2021. Finally, the period said to be claimed for is 5 December 2021-4 December 2022 (p.16), the table at Exhibit D (p.216) states that rent was being claimed for the period 5 December 2021-4 December 2022 and that the Tribunal clearly set out that the period of claim was from 5 December 2021 in its order of 7 December 2023 (p.171) and no issue was taken with this.

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

Should the Tribunal make a RRO?

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

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

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

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

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

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

The amount of rent to be repaid

66. Having exercised its discretion to make a RRO, the next decision was how much should the Tribunal order?

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

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

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

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

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

70. The Tribunal is mindful of the various decisions of the Upper Tribunal in relation to RRO cases. Section 44 of the 2016 Act does not, when referring to the amount, include the word "reasonable" in the way that the previous provisions in the 2004 Act did. Judge Cooke stated clearly in her judgement in *Vadamalayan v Stewart and others* (2020) UKUT 0183 (LC) that there is no longer a requirement of reasonableness. Judge Cooke noted (paragraph 19) that the rent repayment regime was intended to be harsh on

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

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

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

73. The Tribunal must not order more to be repaid than was actually paid out by the Applicants to the Respondent during that period, less any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period (s.44(3) 2016 Act). That is entirely consistent with the order being one for repayment. The provision refers to the rent paid during the period rather than rent for the period.

74. It was said, in *Williams v Parmar*, by Sir Timothy Fancourt [43] that the *Rent Repayment Orders* under the Housing and Planning Act 2016: Guidance for Local Authorities identifies the factors that a local authority should take into account in deciding whether to seek a RRO as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from

landlords the financial benefit of offending. It was indicated [51] that the factors identified in the Guidance will generally justify an order for repayment of at least a substantial part of the rent. It was also said that a full award of 100% of the rent should be reserved for the most serious of cases (see also *Hallett v Parker* [2022] UKUT 165).

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

Ascertain the whole of the rent for the relevant period

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

77. In the case of *Kowalek v Hassanein Ltd* [2022] EWCA Civ 1041, the tenants application for a RRO included a claim for the repayment of rent in the sum of £2,000 which had been paid the day after the landlord applied for its licence. The First-tier Tribunal made a RRO but held, among other things, that the £2,000 was outwith the scope of that order, since it was not "rent paid during the period mentioned in the table" contained in s.44(2) 2016 Act, namely "a period, not exceeding 12 months, during which the landlord was committing the offence". The Upper Tribunal dismissed the tenants' appeal and the matter was the subject of a second appeal. The Court of Appeal held, among other things that, on a true construction of s.44(2) of the 2016 Act, in order to be recoverable under a RRO, the rent in question had both to have been paid to discharge indebtedness which had arisen during the relevant period of offending by the landlord and in fact paid during that period.

78. The Applicant's schedule (p.216) states that rent paid during the period is said to have been £4,100 per calendar month (save one month when £4,060 was paid - p.216) and so the total rent paid was £49,160. The Applicants accept that Universal Credit of £4,063.51 (p.446-465) was paid and so the total rent asserted by the Applicant is £45,096.49. The Tribunal notes, however, that the first payment of £4,100 was paid on 4 December 2021, i.e. outside the period claimed (being 5 December 2021-4 December 2022) and on the day before the Applicants' tenancy of the Property commenced.

79. The Tribunal raised this matter with the parties in correspondence after the hearing. Submissions were made by the Applicants on 17 May 2024, which have been considered. In summary, these were as follows:

80. First, that the test, derived from *Kowalek v Hassanein Ltd*, as to whether rent was recoverable was as follows: had the rent been paid during the period the Respondent was committed the offence?; had the rent been

paid in respect of the period during which the Respondent was committed the offence?

81. Secondly, it was said that the rent payment on 4 December 2021 satisfied both tests: it was paid during the period, not exceeding 12 months, when the landlord was committing the offence. It was said that the Applicants' period of claim ran from 5 December 2021-4 December 2022, but the period in which the offence was being committed began on 4 November 2020, when the Property was occupied by five or more people, forming two or more households (all of whom were said to be contained in the claim). It was said that Miss. Seo moved into the Property on 4 November 2021 (and that the offence had started in 2020). It is said that the rent payment was paid during the period in which the offence was being committed, even though the date of payment fell outside the period of claim.

82. Thirdly, the payment was in relation to the rental period between 5 December 2021-4 January 2022. It is said that this was a rental period during which the offence was committed and was a payment of rent which related to a period in which the Respondent was committing the relevant offence.

83. The Respondent was copied in to these submissions. The Tribunal then invited submissions from the Respondent. Some submissions were received, but they did not address the issue: they asked for further time to submit a "full statement of defence" as it was said that the Respondent did not have an opportunity to submit all the facts and circumstances of the matter, it was said that all rental payments were protected under the "rent deposit scheme", that the Respondent did not disregard the law and had committed no offence as the rent was "always put in the deposit scheme" and it was said that the Applicant caused damage to the Property.

84. As stated above, the Tribunal has found that the Respondent committed the offence from 5 December 2021-4 December 2022 (and this is the period claimed for as stated at p.15). The Tribunal finds that the payment made on 4 December 2021 cannot be included in the calculation of the "whole of the rent for the relevant period". It is not the case that the Applicant can establish (and the Tribunal cannot be and is not satisfied) that Miss. Seo moved into the Property on 4 November 2021. The Tribunal has taken account of its findings hereinabove at paragraphs 56-57.

85. The Tribunal considered whether the £40 deduction from the rent paid on 4 September 2022 should be considered as rent paid. As the deduction had been agreed by the agent (and had been on the basis of reimbursing Mr. Sobamiwa for the expense of getting someone to clear the garden debris), the Tribunal takes the view that this amount should be included in the rent paid, meaning that the rent paid (before taking account of Universal Credit) was £45,100.

86. Universal Credit (said to be £4,063.51) was paid in respect of Miss. Maghoma, but two payments (£516.52 – p.447 and p.449) were for outside the

relevant period (i.e. outside the period 5 December 2021-4 December 2022). The "relevant" payments are as follow: payments of £516.52 made for 7 December 2021-6 January 2022 (p.451), 7 January 2021-6 February 2022 (p.453), 7 February-6 March 2022 (p.455), 7 March-6 April 2022 (p.457), 7 April-6 May 2022 (p.459), 7 May-6 June 2022 (p.462). This is a total of £3,099.12.

87. The whole of the rent for the relevant period is therefore £42,000.88.

Deductions for utilities?

88. The Applicants were liable for all charges in respect of supply and use of utilities, and so no deduction for utilities is made.

Seriousness of the offence

89. In *Williams v Parmar* [2021] UKUT 244 (LC) it was said that "the circumstances and seriousness of the offending conduct of the landlord are comprised in the 'conduct of the landlord', so the First Tier Tribunal may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness of mitigating circumstances or otherwise".

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

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

92. The Tribunal determines that the relatively less serious offence committed by the Respondent should be reflected in a deduction from the maximum amount in respect of which a RRO could be made. It is noted that a failure to have a mandatory licence is more serious than a failure to have an additional or selective licence. Further, the Tribunal notes, however, that it was incumbent on the Respondent to have sufficient knowledge of the

legislative and licensing requirements and the Respondent did not have a system in place to ensure that he did have such knowledge.

93. The starting point for the Tribunal, taking account of this, is that a RRO should be made, reflecting 60% of the total rent paid for the relevant period.

Conduct

94. The Tribunal takes into account the conduct of the Applicants and the Respondent, the financial circumstances of the Respondent and whether the Respondent has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies when considering the amount of such order. Whilst those listed factors must therefore be taken into account, and the Tribunal should have particular regard to them, they are not the entirety of the matters to be considered: other matters are not excluded from consideration. Any other relevant circumstances should also be considered, requiring the Tribunal to identify whether there are such circumstances and, if so, to give any appropriate weight to them.

95. The Respondent is a professional landlord in that he rents out three properties (and appears to do so through a company, which is named as the registered proprietor of the Property – p.466).

96. The Tribunal is satisfied that there were failings on the part of the Respondent – the ones which the Tribunal takes account of the following:

(a) The Respondent did not ensure that his name, address and telephone number was available to all the households in the Property and that they were clearly displayed in a prominent position in the HMO (s.3 The Management of Houses in Multiple Occupation (England) Regulations 2006;
(b) An electrical installation certificate was not provided at the start of the Applicant's occupation (s.6);
(c) Some refuse was left in the back and front gardens without the consent of the Applicants (s.7);
(d) The Respondent did not remove the possession, including the furniture of the former occupants prior to the Applicants moving in (s.8);
(e) The Respondent did not ensure the deposit was protected throughout the Applicants' occupation – (p.488) there was no protected deposit from 5 December 2021 until the end of the relevant period;

(f) A gas safety certificate was not in place throughout the tenancy and provided to the occupants (s.36 The Gas Safety (Installation and Use) Regulations 1998;

(g) A copy of an EPC was not provided (s.6 The Energy Performance of Buildings (England and Wales) Regulations 2012;

(h) A copy of the How to Rent Guide was not provided (s.39 Deregulation Act 2015);

(i) The Respondent failed to rectify issues revolving around the manhole at the Property, namely ensuring a rat cage was installed;

(j) No carbon monoxide detector was provided.

97. The Tribunal also has regard to the fact that the condition of the Property, generally, was good. In summary, taking account of the criticisms of the Respondent, overall it was sufficiently significant to warrant further adjustment of the amount of the RRO, in the amount of 10%, that is that a RRO should be made, reflecting 70% of the total rent paid for the relevant period.

98. As to the allegations of damage by the Applicants, the Tribunal notes the allegations made by the Respondent, but there was no evidence given as to this, and certainly no detail provided. For these purposes, therefore, the Tribunal is not satisfied that there was damage caused to the Property by the Applicants and no behaviour on their part which could be regarded as sufficiently significant to warrant further adjustment of the amount of the RRO.

Whether the landlord has been convicted of an offence?

99. Section 44(4)(c) of the 2016 Act requires the Tribunal to take into account whether the Respondent has at any time been convicted of any of the offences listed in section 40(3). The Respondent has no such convictions.

Financial circumstances of the Respondent

100. In terms of the financial circumstances of the Respondent, the Tribunal noted what he said (as set out above). The Tribunal makes no deduction, taking account of the financial circumstances of the Respondent.

The amount of the repayment

101. The Tribunal determines that, in order to reflect the factors discussed in paragraphs 89-92 above, the maximum repayment amount identified in paragraph 84 above should be discounted by 30% (i.e. the RRO is 70% of the rent paid in the material period). The Tribunal therefore orders under s.43(1) of the 2016 Act that the Respondent repay the Applicants (jointly) the sum of £29,400.62. The total award is apportioned between the Applicants as follows:

(1) Miss. Lio: £5,261.66 (as no Universal Credit was paid by her, her share is 70% of 1/6th of £45,100;
(2) Mr. La Faci: £5,261.66 (as above);
(3) Mr. Samuels: £5,261.66 (as above);
(4) Miss. Seo: £5,261.66 (as above);
(5) Mr. Sobamiwa: £5,261.66 (as above);
(6) Miss. Maghoma: £3,092.32 (remaining amount to reflect the payments of Universal Credit).

102. The Tribunal has had regard to all the circumstances in setting a time for payment, including the amount of the RRO. The Tribunal orders repayment in 2 months from the date of this decision.

Application for refund of fees

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

Judge Sarah McKeown
19 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.

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

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

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