FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AK/HMF/2023/0004**
Property	**:**	**321 Haselbury Road, London N9 9AL**
Applicants	**:**	**Cristina Lopez Hernandez and Alexandra Balota**
Representative	**:**	**Arjona Hoxha, Solicitor, of Represent Law Ltd**
Respondent	**:**	**Sonja Mitterhuber**
Representative	**:**	**In person**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge P Korn** **Mr S Wheeler MCIEH CEnvH**
Date of Hearing	**:**	**25 September 2024**
Deadline for post-hearing submissions	**:**	**9 October 2024**
Date of Decision	**:**	**29 October 2024**

DECISION

Description of hearing

This was a face-to-face hearing.

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Decisions of the tribunal

(1) The tribunal orders the Respondent to repay to the Applicants the following sums by way of rent repayment:
- to Cristina Lopez Hernandez the sum of £461.31; and
- to Alexandra Balota the sum of £961.82.

(2) The tribunal also orders the Respondent to reimburse to the Applicants the application fee of £100.00 and the hearing fee of £220.00.

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

Introduction

1. The Applicants have each 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 a house in multiple occupation which was required to be licensed but was not licensed, contrary to section 72(1) of the Housing Act 2004 ("**the 2004 Act**").

3. The Applicants seek rent repayment orders in the following sums in respect of the following periods (the exact amounts having been clarified at the hearing):

    - Cristina Lopez Hernandez – the sum of £3,083.87 for the period 28 February to 31 July 2022; and

    - Alexandra Balota – the sum of £5,600.00 for the period 26 March to 26 December 2022.

Applicants' case

4. In written submissions the Applicants state that the Property was a three-bedroom flat, with a living room converted into a bedroom, plus a toilet, a shower room, a kitchen and bathroom. Cristina Lopez Hernandez was a tenant from 28 February 2022 until 31 July 2022 and Alexandra Balota was a tenant from 26 March 2022 until 26 December 2022. The Respondent was the Applicants' landlord and was a person having control of or managing the Property at all material times.

5. The Property is located in the Haselbury ward in the London Borough of Enfield, and the Applicants state that throughout the period of claim the Property was occupied by 3 or more tenants forming 2 or more households. Accordingly, the Property was required to be licensed by

the Council under its additional HMO licensing scheme which has been in force since 1 September 2020. At no time during the period of claim was the Property licensed and nor did the Council receive any application to license the Property during that period. The Respondent has therefore committed an offence under section 72(1) of the 2004 Act, namely having control of or managing a house in multiple occupation which was required to be licensed under Part 2 of the 2004 Act but was not so licensed.

6. The Applicants note the Respondent's contention (see later) that the Applicants were merely licensees at the Property, but in response they submit that the legislation merely requires 'occupation' of the Property and does not require the occupiers to be tenants.

7. The Applicants also note that the Respondent claims to have lived at the Property, which the Applicants deny. According to paragraph 4 of the Council's Designation of an Area for Additional Licensing, an exception to the requirement to apply for a licence applies where a building is occupied by a resident landlord (subject to the proviso in Schedule 14 of the 2004 Act) and by no more than the maximum number of persons outside the owner's household as is specified by regulations. The relevant regulations are The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006, and the maximum number of persons specified by those regulations is two. Therefore, say the Applicants, even if the tribunal accepts that the Respondent was in occupation the Property will still have required a licence as there were 3 occupiers apart from the Respondent.

8. The Applicants add that in their submission by failing to obtain a licence the Respondent attempted to avoid her legal obligations and that she obtained a considerable financial benefit from letting the Property.

9. The Applicants did not receive any housing element of Universal Credit or Housing Benefit rent contributions for the Property.

10. The Applicants' hearing bundle contains a copy of the Land Registry title register, the Council's additional licensing designation, copy bank statements and copy correspondence.

Respondent's case

11. In written submissions, the Respondent states that the Applicants both claim to have been 'tenants' of hers but that they were always excluded licensees under a licence agreement. She adds that the key elements of a tenancy were never present. The licence agreement did not at any time give the Applicants exclusive possession of their respective rooms

or exclusive possession of any area within the Property and the Respondent was free to inspect and access all rooms of the Property as she so wished. The Respondent was a resident owner-occupier and has always occupied the Property as her only or principal home. There were periods when the Respondent was away from the Property, but the Property always remained her only and principal home. She has a bedroom at the Property where she keeps all her personal possessions and locks the room. She has also always received all her post at the Property.

12. The Respondent suffers from fibromyalgia and is disabled. Her eldest daughter suffers from bipolar disorder and emotionally unstable personality disorder and receives the highest amounts of Personal Independence Payment for both care and mobility components. Her middle son suffers from ADHD and autism and is in receipt of the highest amounts of Personal Independence Payment for both care and mobility components. Her youngest son suffers from agoraphobia and depression and is in receipt of Personal Independence Payment for both care and mobility components. She has provided supporting documentary evidence.

13. She notes that Christina Lopez Hernandez claims in her witness statement that there were two other tenants at the Property and that she refers to an email in which such alleged tenants are purported to be copied in. However, the Respondent asserts that there have never been other 'tenants' residing at the Property and that this email in no way shows that there were other individuals residing at the Property as tenants.

Discussion at hearing

14. At the hearing, Ms Hoxha submitted that it was irrelevant – for the purposes of the rent repayment legislation – whether the occupiers were tenants or licensees because section 56 of the 2016 Act defined "tenancy" as including a licence. She also submitted that it was irrelevant for these purposes whether the Respondent was in occupation because the additional licensing scheme caught properties where there were 3 or more occupiers forming 2 or more households regardless of whether the landlord was resident.

15. In response, the Respondent accepted that the key issue was whether there were 3 or more occupiers (forming 2 or more households). She added that 2022 had been an incredibly difficult year as both of her parents died that year and that prior to their passing she was caring for them in Austria. She also had to care for her disabled children at their respective residences and had to deal with her own health issues. She received no actual benefit from the income received from the Property as she had to pass it on to a third party from whom she had obtained an unsecured loan.

16. Regarding the benefit to her from receiving the rent, the Respondent said that there was no benefit as she had to use it to repay a loan.

Witness evidence

Cristina Lopez Hernandez

17. In her witness statement, Ms Hernandez states that the Property only had one smoke alarm in the corridor. Two other tenants, Anami and Alexandra Balota lived with her at the Property and they each had their own rooms. Her proof that they lived at the Property at the same time as her is in the form of an email in which Ms Balota emailed the Respondent about her proposal to increase the rent, and she copied it to Ms Hernandez and Anami because it was an email about the rent increase and it was signed off "Tenants from 321 Haselbury Road."

18. She states that she mistakenly transferred a whole month's rent and asked for it to be transferred back but the Respondent said she would only transfer it to her once she had supervised the room. Ms Hernandez countered that that money was not part of the deposit and then requested clarification about which protection scheme her deposit was in.

19. The Respondent also sent her a Whatsapp message asking her to leave on the 13 July 2022. Her dog was poorly due to the heatwave back in July 2022, and the Respondent came home whilst she was at work. The dog had made a mess on the balcony and the Respondent asked her to leave.

20. She says that when she vacated the Property she left it in good condition with the rent fully paid. Despite this only £180 of her deposit was returned and her solicitors found out that her deposit had never been protected.

21. In cross-examination the Respondent put it to her that her assertions that there were other tenants did not amount to proof that there were. In response, Ms Hernandez said that Anami was in occupation when she moved in, but she did not know her surname. On being asked by the tribunal for more detail she said that the occupiers were just herself and Anami until 26 March 2022 when Ms Balota moved in. She confirmed that she still had contact details for Anami but she had not tried to contact her in connection with this application.

Alexandra Balota

22. In her witness statement, Ms Balota states that she lived at the Property from 26 March 2022 until 26 December 2022. When she first moved in it was her, Ms Hernandez and Anami, and they each had their own

room. When Ms Hernandez moved out at the end of July another girl from Egypt called Yasmin moved in and stayed at the Property until around the end of November. Yasmin then moved out and another girl called Hande took her room.

23. At the hearing she said that Anami is still living at the Property and they are still friends and in contact. When pressed about dates, Ms Balota said that Yasmin moved in about a week after Ms Hernandez moved out and that Hande moved in a week or two after Yasmin moved out. She did know the surname of either of them but she had Yasmin's telephone number.

Sonja Mitterhuber (the Respondent)

24. The Respondent's witness evidence is summarised above in the section headed "Respondent's case". In cross-examination Ms Hoxha put it to her that there was nothing in her statement of case to indicate that she did not believe there to be three occupiers at the Property, and her case was mainly focused on her contention that there could be no repayment order because the occupiers were merely 'licensees' in her view. In response the Respondent said that she missed this point and now realised that she should have raised it. She added that she denies that there were three occupiers at any point. By way of explanation she said that Anami was never a permanent resident and was just a friend – and, in particular, a friend of her daughter. As for Yasmin and Hande, she said that they were not in occupation and therefore that the Applicants were lying on this point.

25. The Respondent said that she had not been fully aware of the RRO legislation but that she knew about safety issues, although mainly insofar as relevant to her own protection.

26. As regards her financial position, there is no mortgage on the Property but she has debts and relies on personal independence payments for income.

Further submissions at hearing

27. Following the cross-examination of the Applicants, it was accepted on their behalf that no offence was being committed between February and March 2022. However, leaving that point to one side there were two witnesses who confirmed that there were three occupiers. Ms Hoxha added that the Respondent's evidence was evasive and that her objection that there were not three occupiers was only raised at the hearing. The Applicants accepted that utilities were included in the rent.

28. The Respondent in response said that she had not absorbed the key legal issues at an earlier stage because she relied on information that had been provided to her by another person and she was juggling too many difficult issues in her life.

Relevant statutory provisions

29. Housing and Planning Act 2016

Section 40

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

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

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

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

			unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

Section 41

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

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

Section 43

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

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

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

Section 44

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

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

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

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

(4) In determining the amount the tribunal must, in particular, take into account – (a) the conduct of the landlord and the tenant, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

Housing Act 2004

Section 72

(1) A person commits an offence if he is a person having control of or managing a house in multiple occupation 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

30. The Applicants state that under the Council's additional HMO licensing scheme in force since 1 September 2020 any property within the area in which the Property is situated and which is occupied by 3 or more tenants forming 2 or more households is required to be licensed. They also state that a failure to license such a property on the part of a person having control of or managing such a property is an offence under the 2004 Act. The Applicants have provided supporting evidence for these points, the Respondent has not challenged the Applicants' submissions on these points, and we are satisfied on the basis of the evidence before us that this is the position.

31. The Applicants also state that at no time during the periods of claim was the Property licensed and nor did the Council receive any application to license the Property during that period. Again, the Respondent does not dispute this.

32. The Respondent states that she was herself living at the Property during the period of claim, and one of her arguments – at least in the early part of the hearing – was that this affects the question of whether she needed a licence. However, as discussed at the hearing, the licensing exemption relied on by her only applies where a building is occupied by a resident landlord and by no more than two people outside the landlord's household. Since the Applicants' case is dependent on there being three people in occupation not forming part of the landlord's household (whether in addition to or instead of the landlord) this exemption is not relevant to the present case.

33. As noted above, the Chapter of the 2016 Act that begins with section 40 confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which that Chapter applies (see section 40(1) of the 2016 Act), and a failure to license under section 72(1) of the 2004 Act is one such offence (see section 40(3) of the 2016 Act).

34. Under section 40(2) of the 2016 Act *"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 …"*. The word "tenancy" is defined in section 56 of the 2016 Act as including a licence, and therefore even if the Applicants occupied the Property under licences rather than leases that fact would not by itself prevent them from being entitled a rent repayment order.

35. The Respondent has argued in the alternative that there were not three people occupying the Property at any stage during the periods of claim. For their part, the Applicants have provided witness evidence in support of their contention that the Property was occupied by three people during the relevant times, and both Applicants were available to be cross-examined on that evidence.

36. Having considered the Applicants' and the Respondent's evidence, we are satisfied beyond reasonable doubt that there were three people in occupation of the Property for at least part of the period of claim. The Respondent did not even raise the objection that there were fewer than three people in occupation until the day of the hearing, and in our view it was only put forward as an objection once the Respondent's primary objection (that the Applicants were mere licensees) had demonstrably failed. Her assertion that Anami was never a permanent resident and was just a friend of her daughter was not at all convincing, nor was her assertion that Ms Balota was lying when stating that Yasmin and Hande were fellow occupiers.

37. Both Applicants were cross-examined, and whilst they were a little vague on a couple of the dates and should have tried harder to obtain corroborative evidence from the other occupiers, the tribunal found them to be credible witnesses on the basic point of whether Anami, Yasmin and Hande had been in occupation.

38. In the Upper Tribunal decision in *Williams v Parmar & Ors [2021] UKUT 244 (LC)*, the issue arose as to whether a tribunal needs to be satisfied beyond reasonable doubt as regards the precise length of the period for which an offence has been committed. Mr Justice Fancourt held in that case that *"although the FTT must be satisfied beyond reasonable doubt that an offence to which Chapter 4 of Part 2 of the 2016 Act applies has been committed, thereby establishing jurisdiction to make an RRO, it is not required to be satisfied to the criminal standard on the identity of the period specified in s. 44(2)"*. In other words, once a tribunal is satisfied beyond reasonable doubt that an offence had been committed it only needs to be satisfied on the balance of probabilities as to the exact length of the period for which the offence was being committed.

39. Applying the Upper Tribunal's decision, the exact period for which the offence was being committed is not clear beyond reasonable doubt.

But having cross-examined the Applicants and considered their evidence, our conclusion on the balance of probabilities is that (a) no offence was committed until 26 March 2022, Ms Hernandez having conceded on reflection that Anami did not move until then and (b) no offence was committed during the week before Yasmin moved in or during the "week or two" before Hande moved in, these two periods having been effectively conceded by Ms Balota. We will treat the two periods before Yasmin and Hande moved in as 3 weeks in aggregate given that Ms Balota was unable to be more specific.

40. We are therefore satisfied to the necessary standard of proof that the Property required a licence and was not licensed for the whole period of claim other than the period prior to 26 March 2022 and the 3 week period referred to above.

41. It is also clear that the Respondent was the landlord for the purposes of section 43(1) of the 2016 Act, as she was named as landlord/licensor in the tenancy/licence agreements and was the registered leasehold owner of the Property.

42. The next question is whether the Respondent was a "person having control of or managing" the Property within the meaning of section 263 of the 2004 Act. The Respondent does not dispute that she was, and having considered the definitions in section 263 we are satisfied that she was both a "person having control of" and "a person managing" the Property as the rents (or licence fees) were paid to her for her benefit.

The defence of "reasonable excuse"

43. Under section 72(5) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a house which is licensable under Part 2 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.

44. In this case, the Respondent has not 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.

45. The Respondent has described the circumstances in which she failed to license the Property. She states that she did not believe it to be necessary to license the Property, and it seems that she took advice from her daughter on this point who used to be legally qualified but who for a while now has been unable to practise law for mental health reasons. The Respondent has also cited her own health issues and the other difficulties experienced by her during 2022.

46. Whilst we note the Respondent's explanations for her failure to obtain a licence, it was still her responsibility to obtain one 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 outside her control or that she was relying on somebody else in circumstances where it was reasonable to do so.

47. 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 forget to apply for a licence or to fail to check properly whether they needed to do so. However, it is clear from the decision of the Upper Tribunal in *Fashade v Albustin and others (2023) UKUT 40 (LC)* that where an excuse for failing to license is not strong enough to amount to a complete defence it might still be relevant as mitigation. We will return to this point later.

The offence

48. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. An offence under section 72(1) of the 2004 Act is one of the offences listed in that table, and for the reasons given above we are satisfied to the necessary standard of proof (a) that the Respondent was a "person having control" of and 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 (less the weeks where there were fewer than three occupiers) and (c) that it was not licensed at any point during the period of claim.

49. 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. Based on the end date for each Applicant's claim, we are satisfied in respect of both Applicants that the offence was committed in the period of 12 months ending with the day on which their application was made.

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

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

51. 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 relevant 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.

52. In this case, the Applicants' respective claims relate to periods not exceeding 12 months. The evidence before us indicates that no part of the rent was covered by the payment of housing benefit, and the Respondent has not disputed that the rental amounts claimed were in fact paid by the Applicant.

53. We are satisfied on the basis of their evidence that the Applicants were in occupation for the whole of the period to which their respective rent repayment applications relate. In relation to Ms Hernandez's claim, the Property required a licence from 26 March 2022 to 31 July 2022. In relation to Ms Balota's claim, the Property required a licence from 26 March 2022 to 26 December 2022 less 3 weeks.

54. Ms Hernandez paid rent at £600 per month which equates to £19.73 per day. The period from 26 March 2022 to 31 July 2022 amounts to 128 days, and 128 x £19.73 = £2,525.44. Therefore, the maximum sum that can be awarded by way of rent repayment to Ms Hernandez is £2,525.44, this being the amount paid by her by way of rent in respect of the correct period of claim.

55. Ms Balota paid rent at £600 per month (£19.73 per day) until the end of June 2022, and then at £625 per month until the end of August 2022 (£20.55 per day) and then at £650 per month thereafter (£21.37 per day). The period from 26 March 2022 to 30 June 2022 amounts to 97 days, and 97 x £19.73 = £1,913.81. The period from 1 July 2022 to 31 August 2022 minus the week until Yasmin moved in amounts to 55 days, and 55 x £20.55 = £1,130.25. Then the period from 1 September 2022 to 26 December 2022 minus the two weeks until Hande moved in amounts to 103 days, and 103 x £21.37 = £2,201.11 Therefore, the maximum sum that can be awarded by way of rent repayment to Ms Balota is £1,913.81 + £1,130.25 + £2,201.11 = £5,245.17, this being the amount paid by her by way of rent in respect of the correct period of claim.

56. 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.

57. 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.

58. 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. She departs from the approach of the Upper Tribunal in *Parker v Waller (2012) UKUT 301*, in part because of the different approach envisaged by the 2016 Act, *Parker v Waller* having been decided in the context of the 2004 Act. Judge Cooke notes that the 2016 Act contains no requirement that a payment in favour of a tenant should be reasonable. More specifically, she does not consider it appropriate to deduct everything that the landlord has spent on the property during the relevant period, not least because much of that expenditure will have repaired or enhanced the landlord's own property and/or been incurred in meeting the landlord's obligations under the tenancy agreement. There is a case for deducting utilities, but otherwise in her view the practice of deducting all of the landlord's costs in calculating the amount of the rent repayment should cease.

59. 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.

60. 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.

61. 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).

62. 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.

63. 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.

64. 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 reduce the amount to be repaid.

65. 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).

66. Adopting the *Acheampong* approach, the whole of the rent means the whole of the rent paid by the Applicant out of his own resources, which is the whole of the rent in this case as no part of the rent was funded by housing benefit.

67. In relation to utilities, the Respondent has provided a breakdown as to how much she has spent on utilities and that breakdown and the total figure have not been challenged by the Applicants. It equates to £51.91 per Applicant per month of occupation and therefore £1.71 per Applicant per day. Ms Hernadex's period of (valid) claim is 128 days, and 128 x £1.71 = £218.88. Ms Balota's period of (valid) claim is 255 days, and 255 x £1.71 = £436.05.

68. We agree that these charges should be deducted as they relate to the Applicants' share of gas and/or electricity consumption are exactly the sorts of utility charge envisaged by the Upper Tribunal in *Acheampong*. Therefore, the starting point for Ms Hernadez is reduced by £218.88 to £2,306.56. The starting point for Ms Balota is reduced by £436.05 to £4,809.12.

69. As regards the seriousness of the type of offence, whilst it could be argued based on the maximum criminal penalty available that there are offences covered by section 40(3) of the 2016 Act which can give rise to a greater criminal sanction, a failure to license is still a serious offence. 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 inspiring 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.

70. In the light of the above factors, we consider that the starting point for this offence should be 70% of the maximum amount of rent payable.

71. As for the seriousness of the offence in this particular case compared to others of the same type, in our view it was less serious than average. Whilst the Property did remain unlicensed for a considerable period of time and whilst the Applicants have identified some possible other concerns, the Applicants have not in our view raised any big safety issues or other significant issues. This in our view reduces the starting point from 70% to 60%, subject to the further points set out below.

72. In relation to the failure to license the Property, whilst the Respondent's explanation of the circumstances does not amount to a complete defence, we accept that those circumstances constitute relevant and very significant mitigation. The evidence indicates that the Respondent's personal circumstances are extremely difficult. She suffers from fibromyalgia and is disabled, her eldest daughter suffers from bipolar disorder and emotionally unstable personality disorder,

her middle son suffers from ADHD and autism and her youngest son suffers from agoraphobia and depression. In addition, whilst as already noted this is not sufficient to amount to a complete defence, in practice it seems that she placed some reliance on her daughter's advice in deciding not to apply for a licence. We consider the Respondent's evidence to be credible on all of these points, backed up where relevant by appropriate medical evidence, and they therefore constitute significant mitigation.

73. On the basis of the above mitigating circumstances in this particular case, we consider that the starting point should be further decreased to 20%.

74. 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 take these in turn.

Conduct of the parties

75. There is no real evidence before us that the Applicants' conduct has been anything other than satisfactory. As for the Respondent's conduct, aside from the failure to obtain a licence her conduct has been broadly acceptable, especially in the light of her personal difficulties. The possible issue with the deposit is offset by what we consider to be the Respondent's honestly held belief that the rules about deposits did not apply to what she considered to be a licence arrangement. We do not consider that any adjustment to the amount of rent repayment should be made due to the parties' conduct.

Financial circumstances of the landlord

76. The tribunal is required to take the Respondent's financial circumstances into account when making its decision where there is concrete information available to it. However, all that the tribunal really has before it is the Respondent's statement that the rent was used to pay off a loan and there is no actual evidence of poor financial circumstances that can actually be tested. Therefore, no adjustment can reasonably be made to reflect her financial circumstances. As regards the Respondent's argument that she received no financial benefit from the rent because she used it to repay the loan, we do not accept this as the ability to pay off that loan was itself a financial benefit.

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

77. 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

78. 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

79. The four-stage approach recommended in *Acheampong* has already been set out above. The amount arrived at by going through the first two of those stages for Ms Hernandez is £2,306.56. The amount arrived at by going through the first two of those stages for Ms Balota is £4,809.12. As for the third stage, namely the seriousness of the offence including mitigating circumstances, this reduces the amount to 20% of that sum, subject to any adjustment for the section 44(4) factors referred to above.

80. As noted above, there is nothing to add or subtract for any of the other section 44(4) factors.

81. Therefore, taking all of the factors together, the rent repayment order for Ms Hernandez should be for £2,306.56 x 20% = £461.31, and the rent repayment order for Ms Balota should be for £4,809.12 x 20% = £961.82.

Cost applications

82. The Applicants have applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for an order that the Respondent reimburse their application fee of £100.00 and the hearing fee of £220.00.

83. As the Applicants' claim has been successful, albeit that there has been a deduction from the maximum payable, we are satisfied that it is appropriate in the circumstances to order the Respondent to reimburse these fees.

Name: Judge P Korn **Date:** 29 October 2024

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office 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 extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason 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.