FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00ML/HMF/2022/0026
Property	**:**	Knoll House, Ingram Crescent West, Hove, East Sussex, BN3 5NX (1)
Applicant	**:**	Stride and others – see List of Applicants in the schedule attached
Representative	**:**	Jake Mayes
Respondent	**:**	Oaksure Property Protection Limited
Representative	**:**	-----
Type of Application	**:**	Application for a rent repayment order by Tenant Sections 40, 41, 42, 43 & 45 of the Housing and Planning Act 2016
Tribunal Members	**:**	Judge J Dobson Mr N Robinson FRICS Ms T Wong
Date of Hearing	**:**	12th November 2024
Date of Decision	**:**	27th January 2025

DECISION

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Summary of Decision

1) The application is dismissed.

The Background and Application

1. On 10 October 2022, the Tribunal received an application [7- 51] under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") from the Applicants for a rent repayment order against the Respondent as the landlord. Originally there were 30 such Applicants, now 29 following the withdrawal of one. Varying amounts were claimed, the highest individual sum being £7200. The Applicants stated that the property did not have an HMO (House in Multiple Occupation) licence.

2. Knoll House ("the Property") is owned by Brighton and Hove Council ("the Council"), which is not a party to the application. It was formerly a residential care home or similar but then unoccupied. It was converted by the Respondent to comprise 33 bedrooms and to include shared kitchens and bathrooms.

3. The Applicants are former occupiers of the Property pursuant to agreements they entered into, each described as a Licence Agreement [e.gs., 52- 70, 71-89, 94-112]. They occupied as what are described as Property Guardians ("Guardians") pursuant to agreements. They occupied rooms in the Property.

4. The Respondent is a company which entered into an agreement with the Council to install Guardians in the Property. It was common ground within the proceedings that its business is the provision of property guardianship services to owners of properties. The Respondent enters into a form of agreement with the property- owner which, it was said on behalf of the Respondent and not disputed, varies from instance to instance. The Respondent is now in liquidation.

5. The installation of what are described as Property Guardians in various buildings has occurred in significant numbers in recent years and has thrown up a number of issues, some relevant earlier in this case, although not especially so for the purpose of the matters to be addressed in this Decision.

6. The agreement between the Respondent and the Council is undated but provides for the provision of guardian services for a period commencing 1st November 2020. It was agreed in the course of this case by the parties that the Property was not licensed as a House in Multiple Occupation. There was a dispute which was the subject of the Preliminary Decision in this case- see below- about whether or not the Property was required to be licensed.

7. Both parties were represented throughout the majority of the life of the application, but both sets of representatives have ceased to act. For the Respondent's representatives, the Tribunal understands that to have been around the time of the liquidation and for the Applicant's representatives, more recently. There has been just one email, at least that the Tribunal

members are aware of, from the liquidators, indicating some ambivalence as to the outcome of this case.

The History of the Case

8. The history of this case has been more involved than the usual, but it is not necessary to set it out at length. However, there are some matters worthy of mention to set in context the determinations required in this Decision.

9. Various legal issues were identified in this case. The Respondent raised two particular limbs of argument, namely:

   That the "person managing" is the Council and so the Property was not a licensable HMO, and
   That the occupier's occupation was not solely residential.

   The Respondent argued that each provided a complete defence to the application. The Applicants argued against both.

10. The course adopted was that the Tribunal would determine first the legal issues and give a Preliminary Decision. Those legal issues were (subject to subsequent limitation of them by the parties or other clarification) identified as:

    i) Whether the Respondent was a lessee;
    ii) Whether the sole use of the Properties by the Applicant was residential;
    iii) Whether the local housing authority was managing or in control and
    iv) Whether the local authority must be both managing and in control to be exempt from licensing requirements or only one of those is required.

11. It had been conceded on behalf of the Applicants that if the Council was either the person managing or in control then an exception in section 72 of the Housing Act 2004 ("the 2004 Act") would apply and there would not be an HMO licensing offence committed. Counsel then instructed by the parties had agreed that the Respondent was the, or at least a, person in control. The Tribunal considered that must be correct- the payments were made to the Respondent by the occupiers. It was also agreed by both Counsel that the Council was not the person having control. Whilst there was reference to the authority of *Cabo v Dezotti* [2022] UKUT 240 (LC) and that decision has subsequently been the subject of judgment of the Court of Appeal, that has no substantive impact for the purpose of this Decision. The Tribunal does not consider it necessary say anything about those matters in the circumstances.

12. The summary of that Preliminary Decision set out the following determinations:

    1. The Respondent held a lease of the Property.
    2. The Applicants occupation was solely residential.
    3. The Respondent was the person managing pursuant to its lease and was also the person having control, as the person receiving the rent.
    4. Brighton and Hove Council was not the person managing the Property (or the person having control).

5. There was no requirement for the Council to be both managing and having control for the purpose of Schedule 14 in any event.

13. The net effect of the Preliminary Decision was that the Property was required to be licensed and in the absence of that the Respondent committed an HMO licensing offence subject to any defence to that (for which see below).

14. The Respondent sought permission to appeal the Preliminary Decision. That was granted by a Decision dated 10th January 2024 on the basis that one issue was of wider importance and the second, if relevant, had a realistic prospect of success. However, the Tribunal understands that the Respondent failed to comply with the directions issued by the Upper Tribunal, with the result that the appeal was struck out and thereby ended. The Preliminary Decision of this Tribunal therefore stands and so too the effect of it.

15. The Applicants' representative sought further directions from this Tribunal for the determination of the remainder of the case, which were issued dated 16th August 2024, and which provided for further steps to prepare the case for final hearing. The Directions had provided for a hearing bundle. The Applicants provided one containing some 1452 pages including the index. A substantial part of the bundle comprises the agreements entered into between individual Applicants and the Respondent, and the remainder predominantly witness statements of the Applicants and evidence of rent payments. The bundle is one prepared by, or at least overwhelming is, the former representative of the Applicants at a time prior to the Preliminary Decision at which it appears to have been perceived that the parties would each prepare their own bundles. The bundle lacked the Respondent's case, most of the Directions and the Preliminary Decision, by way of examples of the most striking matters.

16. In the event, and whilst not entirely satisfactory, the Tribunal was able to access the other Directions where relevant and the Preliminary Decision. The Tribunal noted that the Respondent's case had been directed towards matters dealt with in the Preliminary Decision. It was nevertheless necessary to seek out the Respondent's previous submissions and to identify whether anything of relevance to the issues remaining for determination in this Decision had been raised. In the event, it was identified that the Respondents had not addressed the Applicants' substantive case.

17. Insofar as reference is made to specific pages from the bundle, that is done by numbers in square brackets [ ], as occurs in the preceding paragraphs where appropriate, and with reference to PDF bundle page- numbering. Necessarily that cannot be done in respect of documents not within the bundle. Where the Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that they have been ignored or left out of account.

<u>The Hearing</u>

18. The adjourned hearing proceeded as a hybrid hearing, the Judge being unable to attend at Havant Justice Centre for particular reasons which arose.

19. The Applicants were represented at the hearing by Mr Jake Mayes, one of the Applicants and authorised by the other to represent them. None of the other Applicants were in attendance. Hence, the Tribunal only heard oral witness evidence from Mr Mayes. That was in response to specific questions of the Tribunal where it sought to better understand matters which had been raised in the Applicant's case. Mr Mayes was also invited to make any oral submissions he wished to in relation to the period of any offence committed by the Respondent and more generally by way of closing comments.

20. There was no attendance by or on behalf of the Respondent. There was consequently no challenge to the evidence of Mr Mayes by cross- examination and no oral submission on behalf of the Respondent.

21. The Tribunal also received a written witness statement from each of the Applicants [for example that of Mr Mayes 348- 349] and one from Ms Liza Wheeler, Environmental Health Officer, and Ms Rachel Dean, Senior Environmental Health Officer jointly from the Council [1395- 1396]. Whilst there was no challenge to the written evidence of those Applicants who did not attend, in considering the weight to be given to the written witness statements, the Tribunal did have regard to the lack of attendance necessarily meaning that the witnesses could not be questioned by the Tribunal where that might assist it. That was in the event most pertinent to the extent that no further information could be obtained about the position of the Council with regard to the application made by the Respondent for a licence in October 2021, discussed further below.

The law and jurisdiction in relation to Rent Repayment Orders generally

22. Rent Repayment Orders are one of a number of measures introduced with the aim of discouraging rogue 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 the circumstances of this case.

23. Section 40 gives the Tribunal power to make a rent repayment order where a landlord has committed a relevant offence. Section 40 (2) explains that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant (or where relevant to pay a sum to a local authority). Reference is variously made in the 2004 Act to "the landlord" in that provision, "a landlord" and "that landlord", which has caused some issues in other cases but does not in this one. The 2004 Act had referred to "the appropriate person", being the person entitled to receive payments but the 2016 Act altered that.

24. Section 41 permits a tenant to apply to the First-tier Tribunal for a rent repayment order against a person who has committed a specified offence, including the offence mentioned at paragraph 8 above, if the offence relates to housing rented by the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made.

25. More particularly the section states at 42(2) as follows:

> "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."

26. So, if either one of those criteria is not met, the tenant may not apply. Or at least if the tenant does apply, the Tribunal could not grant the application.

27. Section 262(9) of the 2004 defines a licence as follows:

> "9) In this Act "licence", in the context of a licence to occupy premises -
> (a) includes a licence which is not granted for a consideration, but
> (b) excludes a licence granted as a temporary expedient to a person who entered the premises as a trespasser (whether or not, before the grant of the licence, another licence to occupy those or other premises had been granted to him);
> and related expressions are to be construed accordingly. And see sections 108 and 117 and paragraphs 3 and 11 of Schedule 7 (which also extend the meaning of references to licences)."

28. The definition of "tenancy" in section 56 of the 2016 Act states:

> "tenancy-
> (a) includes a licence".

29. To that extent "tenant" includes a licensee and "landlord" as termed also includes a licensor, that is to say the grantor of a licence. The 2016 Act does not within the same interpretation section find the need to so state specifically and it may be that reflects the obviousness of one reflecting the other.

30. That is relevant because of the description of the Applicants' agreements with the Respondent as Licence Agreements. Irrespective of whether those agreements create a licence as they state or create tenancies, the Applicants are entitled to make this application.

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

32. It has been confirmed by established 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. The standard of proof for

matters found by the Tribunal other than in respect of the offence asserted to have been committed by the landlord is the balance of probabilities.

33. Where the application is made by a tenant, and the landlord has not been convicted of a relevant offence, section 44 applies in relation to the amount of a rent repayment order, setting out the maximum amount that may be ordered and matters to be considered –discussed further below.

HMO Licensing Offences

34. An offence under Part 2 section 72(1) of the 2004 Act is committed by a person (or company) having control of or managing where a property is required to be licensed as a house in multiple occupation and is not so licensed. Section 61(1) requires that every such house to which Part 2 applies must be licensed unless limited exceptions apply.

35. It is not necessary to dwell on the detail of those provisions in this Decision.

36. In the Preliminary Decision, the detail of the law as to whether a person had control or was managing was set out at some length. However, given the determination that the Respondent was the person managing pursuant to its lease and was also the person having control and so that it is the settled background to this Decision, it is not necessary to repeat such matters here.

37. Not all HMOs require to be licensed. In terms of the requirement for the HMO to be licensed, an HMO is of a prescribed description under the "standard test" for the purpose of the 2004 Act if it is occupied by five or more persons as their only or main residence (section 254(2)(b)) and the persons do not form a single household (section 254(2)(a). It is additionally necessary that the living accommodation is occupied by those persons as their only or main residence (or they are to be treated as so occupying it), which was another issue which arose and was considered in the Preliminary Decision (it was determined that the use in this instance was as only or main residence and that was not appealed).

38. That is five or more unless additional licensing requirements (as allowed for in section 56) have reduced that number. The Council introduced an Additional Licensing Scheme that came into force in March 2018 and hence an offence could also be committed for non- compliance with that Scheme pursuant to s.71(1) of the 2004 Act.

39. A building must also meet one of the relevant tests and will meet the standard test set out in Section 254(2) of the 2004 Act in the event of all of following circumstances:

> (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
> (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
> (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;
(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

40. Those properties which do not meet the tests do not in general require licensing. Properties may also require a licence in other situations but none that are relevant to this case.

41. Section 61(1) requires that every such house to which Part 2 of the 2004 Act applies must be licensed unless limited exceptions apply. Significantly, in the context of the Preliminary Decision in this case, Schedule 14 of the 2004 Act provides for other exemptions from the general requirement for licensing. The key exemption for this case was that a council (or other relevant body) is the person managing or having control of the Property. However, given the determination in the Preliminary Decision that the Council in this instance was not in control or managing, the details of the exemption do not need repetition here.

42. Breach of section 72(1) of the 2004 Act is a strict liability offence, as identified in, amongst other cases, *Mohamed v London Borough of Waltham Forest* [2020] EWHC 1083. That is to say that the relevant question is whether or not in fact the property was licensed and not the intention of the landlord.

43. As there would be a criminal offence committed, the standard of proof is the criminal one. That is to say beyond reasonable doubt, sometimes expressed to say that the Tribunal must be sure.

44. There are nevertheless a number of defences to having committed a licensing offence, as provided for in section 72 and most specifically section 72 (4) and (8).

45. Section 72(4) provides as follows:

"In proceedings against a person for an offence [in relation to licensing] it is a defence that, at the material time-

....
(b) an application for a licence had been duly made in respect of the house under section 63
and that .... application was still effective."

46. Section 72(8) adds the following:

"For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either-

(a) The authority have not decided whether to .... grant a licence, in pursuance of the .... application, or
....

47. It is also a defence to the commission of an HMO Licensing offence pursuant to section 72(5) that there is a reasonable excuse for having control of or managing the house, for permitting a person to occupy the house or for failing to comply with a licensing condition.

48. There is a body of caselaw which has considered and given judgment on various issues arising in respect of a defence of reasonable excuse. Most of those are case authorities are not directly relevant and it is unnecessary for the purpose of this Decision to do more than highlight key principles relevant to the determinations the Tribunal must make.

49. Those can be summarised as being that the Tribunal must identify whether anything said by the landlord may amount to a reasonable excuse even if the landlord does not raise the matter as being a defence of reasonable excuse. Further, the question of whether a reasonable excuse has been demonstrated requires the determination of factual matters on the balance of probabilities, and so a lower standard of proof than the standard to be applied in determining whether an offence was committed in the absence of such a reasonable excuse. The Tribunal would determine whether a matter was more likely than not, which does not require it to also be sure.

50. The making of a rent repayment order in this case would be a sanction imposed arising from an unlicensed HMO where the landlord has committed the offence. The licensing offence can be committed without the offender being the landlord, but the offender must be the landlord for it to be the subject of a Rent Repayment Order.

<u>The contract between the Council and the Respondent</u>

51. The contract between the Respondent and the Council ("the Contract") [1308-1326] was very significant in the arguments prior to the Preliminary Decision. Indeed, the provisions and their effect lay at the heart of the main issues. The rights and responsibilities of the Council and the Respondent under the Contract were set out at length in the Preliminary Decision and then discussed at length. That was for the purpose, principally, of determining whether the Respondent held a lease or a different set of rights and hence whether or not the Contract amounted to a lease.

52. The Tribunal concluded that the Respondent had a lease and that the key question was "the substance and reality", to borrow a phrase from another case, and hence the detail of the Contract is not of direct significance. Rather any relevant matter now would arise from the rights and responsibilities set out in the Respondent's agreements with the Applicants.

53. It merits mention that the Contract provides that the Council is paid a fee by the Respondent and that the Council is to receive 50% of the net profit share. (It is not clear what the net profit was as opposed to gross profit or any other form of profit or how those are calculated.) However, the Tribunal considers that to be a matter regarding how the rent received was applied by the Respondent and not to affect the amount of that rent paid itself.

The Licence Agreements

54. The Licence Agreements are relatively lengthy where they exist. Not all of the Applicants have been able to produce one, although it merits stating that they have instead provided a witness statement stating that they were licensees, which has not been challenged on the part of the Respondent, and they have provided evidence of payment of rent to the Respondent. The Tribunal should therefore make clear that it accepts those Applicants were licensees or tenants and are entitled to make their applications to the Tribunal.

55. It is not intended to recite the majority of the contents of any given example of a Licence Agreement. The extracts below are specifically taken from the first such agreement in the bundle, that of Mr Stride [19- 37]. Highlighting and/ or capitals appearing below are reproduced from the Licence Agreements which set the matters out in that manner.

56. The relevant extracts are as follows:

"Before signing this Agreement, please note:

1. This is an agreement under which Oaksure agrees to grant you a licence to share living space in a building as a Live- in-Guard
2. You do not get the right to exclusive occupation of any part of the living space

………

5. **This sort of sharing agreement does not create a tenancy**

…….

LICENSING AGREEMENT FOR NON- EXCLUSIVE SHARED OCCUPATION OF PREMISES

3.2 To assist Oaksure in providing those services the owner has agreed that, during the period set out in Oaksure's agreement with the owner, Oaksure may enter into license agreements with persons who will share accommodation in the Property.
3.3 Oaksure has permission to grant temporary, non- exclusive licences to persons selected by Oaksure to share occupation of such part or parts of the Property as Oaksure may from time to time designate, on terms which do not confer any right to the exclusive possession of the property or any part of it
3.4 Oaksure are not entitled to grant possession or exclusive occupation of the property or any part of it, to any person. In entering this agreement, Oaksure does not act as agent for the owner and has no authority to do so
…..

4.1 Oaksure gives the Live- in Guard permission to share the living space with such other persons as Oaksure may from time to time designate, provided that there shall always be sufficient living space to provide at least one room for each of the living guards who are authorised to share the living space
4.2 This permission is personal to the Live- in Guard it may not be assigned
……..
4.4 Oaksure may alter the extent and location of the Living Space within the property at any time on reasonable notice, provided that there shall always be

sufficient Living Space to provide at least one room for each of the Live- in Guards who are authorised to share the Living Space
4.5 This agreement does not give the Live- in Guard the right to use any specific room within the Living Space. The Live- in Guards occupying the property at any given time must agree where each Live- in Guard is to sleep (subject to the terms of this Agreement)
......
5.1 This agreement will come to an end when the Licence Period expires. It may also come to an end before then in [sic] any of the circumstances described in this clause arise
5.2 This Agreement will come to an end if Oaksure's own permission to use the Property is terminated. If that happens, Oaksure will inform the Live- in Guard as soon as reasonably possible
....
I confirm that in recognition of the temporary nature of this license to occupy, I will not use this Property as my Principal address or register it formally as my main and only address for legal and statutory purposes
SIGNED..........."

57. It will readily be identified that the Licence Agreement is expressed in terms that the Applicant or other occupier is a licensee. However, given that the definitions in the 2004 Act demonstrate that a licensee is just as able as a tenant to apply and that the Act defines both categories of occupiers as tenants, the Tribunal does not find it necessary to determine the exacts legal status of the Applicants and any reference to tenant below to reflect the provisions of the Act should be read as referring to the Applicant as, as termed, licensees.

Determinations required

58. The Tribunal is required to identify whether an offence was committed by the Respondent and, if so, for what period; that an application was made by the Applicants in time; whether a Rent Repayment Order should be made; and, if so, in what sum.

59. This Decision seeks to focus on the key issues and does not cover every last factual detail. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. A number of the various matters mentioned in the bundle or at the hearing do not require any finding to be made for the purpose of deciding the relevant issues in the case. Findings have not been made about matters irrelevant to any of the determinations required.

Was a relevant offence committed?

60. The evidence before the Tribunal is that the Property was not licensed at any time. Indeed, the Respondent has not asserted that it was. Insofar as the Respondent previously asserted that it did not require a licence because of the arguments advanced prior to the Preliminary Decision, those have fallen away in light of the determinations within that Preliminary Decision.

61. The Applicants' statement of case asserted that the Respondent made an application to license the Property on 11th October 2021 but that no licence was granted. Indeed, that date of application remained the Applicant's case throughout the proceedings and until- indeed beyond- the final hearing, until the second set of written submissions on behalf of the Applicants referred to below.

62. There was no dispute about the fact that the Property was occupied by at least five persons and in more than one household, so at least those aspects do not, the Tribunal considers, require any determination (although if one had been needed, the Tribunal would unhesitatingly have made findings of more than five persons and in more than one household in light of the evidence received). It follows that the additional licensing scheme adds nothing in practice in this instance, unless the Property was only the main or principal residence of less than five of the occupiers but at least three of them.

63. The witness statement of each of the Applicants states that the Property was the main address of the given Applicant. It is not said that the Property was the only address, which could have led to argument in an appropriate case but that is not relevant here.

64. Plainly that statement runs contrary to the wording towards the end of the Licence Agreement and the Tribunal is mindful that the Applicants entered into agreements in such terms (with the potential exception of any Applicant who did not receive a Licence Agreement or who has not produced one and received one in different terms, unlikely though the Tribunal considers that to be). They were able to read the terms for which they contracted.

65. The last part of the Licence Agreement as quoted above includes a statement that the Property will not be used as the "Principal address" of the given Applicant and refers to moving back into that address when the licence is terminated. The address described as the "Principal address" is stated at clause 1 of the Agreement along with the other basic details of the given Applicant.

66. However, given the previous determination that the Respondent held a lease despite the document as drafted suggesting otherwise on its face and given that the Respondent has not called contrary evidence to that of the Applicants or otherwise challenged their written witness statements, the Tribunal prefers the evidence of the Applicants sufficiently to be sure that the Applicants' accounts are correct and the wording of the Licence Agreement is wrong.

67. The Tribunal is also mindful, not that anything turns on it in the event, that there is no suggestion that the particular phrase would have contained significance for the Applicants at the time of entry into the Licence Agreements or that the particular wording was drawn to their attention and explained. In contrast, the Tribunal finds that the wording was placed in the Licence Agreement deliberately by the Respondent- whose agreements they were and where those in the bundle are in the same form- and with a specific purpose in mind. That differential in intention and likely understanding is significant.

68. The Tribunal finds on the evidence that the "Principal address" as described was either the address at which the given Applicant resided prior to moving into the Property or otherwise a family or similar address but was not in fact the main address of the given Applicant. Rather, and contrary to the provision in the Licence Agreement suggesting otherwise, the Property was at least the main address, and on balance in at least most instances the only address, of the given Applicant during the time of their occupation.

69. There was no reasonable excuse advanced for the commission of what would otherwise be an offence by the Respondent.

70. As identified above, the Tribunal is required to consider whether there is a reasonable excuse where a respondent refers to matters which may amount to one, irrespective of whether a defence of there being a reasonable excuse is advanced specifically by the given respondent. The determination is made on the balance of probabilities. However, the Tribunal is not required to guess whether there may be a reasonable excuse where a respondent has advanced nothing which could even potentially amount to one.

71. Not only has the Respondent not specifically advanced any such reasonable excuse but also the Tribunal is unable to identify any from the matters which were stated by the Respondent. Whilst it is possible that despite being a company in the business of providing guardian services, such a respondent could believe that it did not require a licence for the Property or a similar one, the Tribunal has received no evidence of that. The Tribunal considers that it cannot make any finding that the Respondent believed that it did not require a licence on the back of a lack of any evidence even expressing that. Insofar as the Respondent might have asserted that it did not believe that it required a licence given the nature of its rights in the Property as it asserted them, the Tribunal determined in the Preliminary Decision that the Contract had been written to suggest the lack of a lease to the Respondent but that the reality was that there was a lease. The Tribunal finds that the Respondent knew the legal reality of the situation, namely that it held a lease.

72. The Tribunal also considers that any such assertion which the Respondent might have sought to make would have been somewhat undermined by the fact that the Respondent did submit a licence application in October 2021, notwithstanding the position asserted in correspondence by its then-representatives below. The Tribunal does not consider it necessary to dwell on the point, considering the reason for applying when the application was made is not a point of particular weight in the context of the wider situation.

73. The Tribunal determines that there is no reasonable excuse.

74. The Tribunal therefore determines that a failure to license offence under section 72(1) of the 2004 Act was committed by the Respondent.

What was the period of the offence- including was the application made in time and did it remain effective?

75. The Tribunal now reaches the more difficult parts of this Decision. The first question the Tribunal addresses is whether the application was still effective as at the date of the application and this Decision. The second is the date of the application. Those produce the period of the offence.

- **Does the application remain effective?**

76. At first blush, this question being relevant that might seem a surprising state of affairs about an application for an HMO licence submitted in 2021. It is, however, an issue which prompted various exchanges between the representatives as they then were. It is relevant background that the Applicants case is that they all vacated the Property in August 2022.

77. The Applicants speculate that the licensing application was either rejected or withdrawn or was in some other way ineffective. Their statement of case asserts that the Respondent's position was that it had applied to withdraw the application. However, the Respondent had provided nothing to support that. The Applicants provided email correspondence with the Council [1388 in particular] indicating that their then- representative had heard from the Respondent that the application for a licence had been withdrawn. The communication identifies the representative's understanding that no decision had been made on the licence application.

78. The Tribunal has noted that in correspondence [1406], the Respondent's solicitors say that the Council mistakenly sought the Respondent to apply for a Licence and the application made is irrelevant. It is said that the Respondent sought to correct the error by withdrawing the application. If that were correct, there would be no live application. The Tribunal understands that to be the reason for the Applicant's then- representative's understanding as set out above, although it strictly matters not whether that is correct.

79. Of more direct relevance, communication from the Council said that the application was still being considered. In other correspondence, no change from that is expressed. Whilst the Applicants' then- representative sought to press the matter [1392] and pressed the application having been rejected by the Council, the Council at no time agreed.

80. The witness statement provided by the two officers of the Council states that:

> "I have searched our database and found that a Mandatory HMO licence application was submitted for Knoll House, Ingram Crescent, West Hove, BN3 5NX on 11th October 2021 ref: 15340-2021/03718/HMO/PS. The application was not granted because the premises was closed down and so the point became moot."

81. That is followed by reference to legal advice having been received that it would not be possible to grant a licence as the Council was the freeholder. However, that is rather overtaken by the Preliminary Decision. In any event, even if it had been correct that the premises did not require control by being licensed because the Council could exercise that via the Contract, the application was not actually rejected or refused for that reason.

82. The other items of communication between the Applicants' then-representatives and the Council add nothing of significance.

83. The Tribunal finds that the witness statement sets out the position correctly. That is that the Council had not made any decision whether to grant a licence and so the application remained effective at the time at which the Applicants vacated. Further, the Council then continued not to make any decision, such that the application remains effective. It has not at any time been determined one way or the other.

84. The Tribunal has noted the contrary statements in correspondence between representatives, no doubt written on understanding of their instructions. In contrast, there is unchallenged evidence from the Council's officers given in the course of their roles. The Tribunal considers that must be given the greater weight and the contents preferred.

85. The Council appears, from the witness statement, to have perceived that it did not matter whether it granted the application for a licence or not once the Applicants had vacated. That may well be correct from the perspective of the Council. The answer is rather different from the perspective of the Applicants. If the application had been refused it would- subject to an appeal- no longer have been effective. Nevertheless, whilst that is regrettable from the perspective of the Applicants, that cannot the actual position.

- **The date of the application for a licence and period of the offence**

86. The Tribunal therefore considered at the time of the Partial Decision and Directions that on the basis of the Applicant's case that the application was made on 11th October 2021, the last date on which the Respondent committed the HMO licensing offence was 10th October 2021. The Tribunal considered that the application for a licence being an effective application thereafter prevented the commission of an offence after that date.

87. The Tribunal did not adopt a final position and identified that it did not have the benefit of any submissions on the point at that time. It identified that the point had not been raised by the Respondent and was not referred to within any document in the bundle. Whilst the Applicants' statement of case in providing a set of figures for the amount of the Rent Repayment Order sought in favour of each Applicant identified the potential that the Tribunal may determine that the offence ended in October 2021 and the last relevant day of rent payment may be 10th October 2021, it did not identify any other impact of that.

88. The Tribunal accepted that it had not raised the matter in the hearing, being concerned to understand about the Property and any problems with it, the roles of guardian and head guardian, the last date for commission of the offence and matters relevant to the amount of any Rent Repayment Order which may be appropriate. It was only in the process of writing the Decision that the fact that the apparent last date of the offence- on the basis of the date

given for the application for a licence- and the date of the application to the Tribunal were identified to both be 10th October, albeit of different years.

89. The Tribunal therefore considered it appropriate for the parties to be given the opportunity to make submissions on the issue before the Tribunal arrived at any determination. The Tribunal considered that the most cost- effective approach was to seek written submissions, noting that in the event that the Tribunal considered there then to be a need for any further hearing, arrangements could be made.

90. The Tribunal directed on 18th November 2024 that the Applicants may by 29th November 2024 provide written submissions, with any relevant case authorities if any are relied upon, in relation to the question of whether the application was received in time and the Respondent may by 10th December 2024 provide written submissions, with any relevant case authorities relied upon, in response. The Applicants provided submissions, which are discussed below. The Respondent did not respond.

91. Matters have developed from there.

92. Firstly, that is by way of the Upper Tribunal decision referred to below. The Tribunal became aware that the point had also arisen in other cases the subject of a judgment of the Upper Tribunal issued in October 2024- and as it turns out in advance of the Partial Decision and Directions- but which the Tribunal was not aware of at the time of that. The Tribunal inevitably identified that the Upper Tribunal authority was relevant to the Tribunal's consideration of the submissions on behalf of the Applicant. The Tribunal considered itself compelled to give further Directions for additional written submissions, accepting the further delay caused. The case authority was provided with the further Directions. The Tribunal received further submissions on behalf of the Applicants. Nothing has been received from or on behalf of the Respondent.

93. Second, matters have developed by way of an additional document submitted by the Applicants.

94. The Tribunal takes each matter in turn below.

95. It is also relevant that the Tribunal said in the Partial Decision that the last date of the offence was 10th a determination expressed in the Partial Decision in unequivocal terms- it was not said to be made subject to any submissions being received or subject to any other matters. Nevertheless, the Tribunal made no final Decision at that time and so it is open to the Tribunal to re-visit matters for that reason irrespective of anything else. Any later change of view by the Tribunal does not, the Tribunal considers, require a Review Decision in respect of the Partial one.

96. Notwithstanding the submissions on behalf of the Applicant to the contrary, the Tribunal has no doubt that on the basis of the case advanced by the Applicants all the way to the hearing and beyond that the application for a licence was made on 11th October 2021, the correct finding would be that was

indeed the date of the application and the last date of commission of the offence was the day before- see Upper Tribunal decision below. That would be the end of the application.

The judgment of the Upper Tribunal- in summary-

97. The judgment of the Upper Tribunal on the point was give in the case of *Moh and others v Rimal Properties Limited* [2024] UKUT 324 (LC). Strictly the decision was made in two conjoined appeals against two separate decisions of the First Tier Tribunal. Most participants were represented.

98. In the first case, from which the Tribunal has derived the title of the judgment, on 4th May 2022 the respondent applied for an HMO licence at 13:44 and on 4 May 2023 the appellants made their application to the FTT at 15:36. An issue arose as to whether the offence was committed up to the time of the application and when the 12- month period ran.

99. In the second case, Kiely and others v Bostall Estates Limited, on 16 November 2022 the respondent made an application for an HMO licence but was not able to pay the fee because the local housing authority's website was not functioning, and the First Tribunal determined that to amount to a reasonable excuse such that the last day on which the offence was committed was 15 November 2022. The application to the First Tier Tribunal was made on 15 November 2023.

100. The Upper Tribunal addressed the question of what is the "period of 12 months ending with the day on which the application is made". The applicants argued that both 4th May 2022 and 4th May 2023, for example, were included in the 12- month period and on the basis of the law disregarding fractions of a day. The Upper Tribunal determined that the Act was concerned with a period ending with a date and not a time and that the caselaw relied upon by the Applicants had related to different questions. So too, the Act refers to a period within which matters occur and not a period after an event or within a period of the occurrence of an event.

101. The Upper Tribunal determined that if the statute had required that the offence must have been committed within the period of 12 months before the appellants make their application to the FTT, then the corresponding date rule would apply and the period would run from the first moment of 4 May 2022. However, it determined that "A period of 12 months ending on a particular date is not the same – as a matter of ordinary language – as the period of 12 months before that date. The language implies that the start and end date are each within the period. It therefore starts not on 4 May 2022, whose beginning is more than 12 months away from any point during 4 May 2023, but at the first moment of 5 May 2022."

102. The Upper Tribunal then moved on to consider when a defence takes effect. In particular, in dealing in whole days, which part of the day is to be disregarded. The applicant argued that limitation provisions are not to be construed in favour of defendants and hence the defence takes effect after the end of the day on which the events that constitute the defence took place. The respondents argued that in construing a statute that creates a criminal

offence, in a case of ambiguity a court or tribunal should lean in favour of offender. It was argued that the reference in the Act to "a particular time" indicates that the defence takes effect at the time the facts giving rise to it take place; so once the application has been made, from that time onwards the defence is operative, and also for the first part of the day on which the application is made since the courts and tribunals are not concerned with fractions of a day.

103. The Upper Tribunal noted difficulties with identifying the point at which a defence arises if fractions of a day are considered, and so parts of a day should be disregarded. The period specified in section 41(2) of the 2016 Act was held to not be the same kind of limitation period as those imposed by the Limitation Act 1980 in respect of civil claims. The 2016 Act creates a time-limited right for tenants to apply for a rent repayment order, which is not a right that they would have at all absent the suite of provisions. The most important feature is the fact that this is a matter of criminal liability so in disregarding fractions of a day the landlord has a defence in, for example, the morning because he applied for a licence later in the day. That is to say he or she has a defence for the whole day. So, the last date of the offence was the day before the application for a licence.

104. For completeness, the Upper Tribunal accepted that the inability of the landlord to pay the fee because of problems with the council's system ought to result in the application being treated as made on the date the application and any supporting information was submitted and not the later date when the council's system enabled payment of the fee to be made.

105. Hence both appeals failed, and the First Tier Tribunal had no jurisdiction on the date the application to it was made. The last date of the offence was the day before the application for a licence was submitted.

Further document-

106. The Tribunal turns to the second development, being that with the further written submissions, the Applicants have provided an email from Ms Deane of the Council. That states that the fee for the licence application was only paid on 1st November 2021.

107. It has taxed the Tribunal somewhat as to how to deal with that further document. That is an email dated 20th December of a year, that date being a Friday, from Ms Rachel Dean of the Council to Mr Aaron Mouland- one of the Applicants- in which it is said "Payment of the initial part of the fee was duly made on 01.11.2021". The Tribunal observes that indicates that there are at least two parts to the fees required to be paid by the particular Council. However, the Tribunal considers that nothing turns on that matter, given the implication that the further part or parts of the fee would only be payable later and so would not, the Tribunal considers prevent a valid application having been made on payment of the first part of the fee.

108. The Tribunal perceives that the relevant year is 2024, given that 20th December 2024 was a Friday and was last previously a Friday in 2019, so prior to any of the Applicants occupying the Property.

109. The Tribunal returns to the judgment of the Upper Tribunal and notes the facts in the Kiely part were that payment of the fee by the landlord could not be made whilst the council's payment system was not working and so until the following month. It is identified that meant that the application was not "duly made". The defence of reasonable excuse arose because otherwise an offence had been committed and more specifically because the payment could not be made. There was consequently a defence for the application not being "duly made" but it was a necessary one because the application was only "duly made" on the later date when the fee was paid. The Tribunal surmises that the council in that case only treated an application as complete when the fee was paid and not complete as at the date of submission if the fee was paid within a prescribed later period, as to which see below. It is not obvious from the Upper Tribunal judgment whether that point was raised and if so, what became of it.

110. The Tribunal agrees with the Applicants that, assuming always that the Council requires payment at the same time as the application form is lodged, the application for a HMO licence is only made when the required elements have been attended to. That is to say the application form is submitted, the necessary supporting evidence required to be submitted with the application (as opposed to anything not specifically required but which the given council later seeks) is provided and the fee is paid.

111. The key question therefore becomes how to approach the email from Ms Dean.

112. Clearly, if the contents of the email are correct and there is nothing at all more to the story, the contents of it are significant.

113. The Tribunal is also mindful that it does not adopt the stricter rules of evidence applicable in the courts and that its rules specifically recognise the importance of flexibility in its processes.

114. However, the email has been sent somewhat out of the blue on 23rd December 2024 in a case commenced in October 2022 and where the Applicants had to provide their case by 13th September 2024. Further, there has been no application on behalf of the Applicants for any further evidence to be admitted.

115. The Tribunal accepts that the Applicants act through one of their number and not through lawyers or other professional representatives. Nevertheless, the Directions given were clear and the information available to the Applicants is clear that there is an ability to make a case management application. The Directions permitted witnesses to attend to give oral evidence but the Applicants did not arrange for Ms Dean to do so.

116. The Tribunal is therefore effectively being asked to consider and give regard to a document on which there is no permission to rely- and in respect of which no permission has been requested- and to do so some weeks after the final hearing at which any evidence on which the Applicants wished to rely was able to be given.

117. The Tribunal acknowledges that the particular query raised by it was not raised until later and the Upper Tribunal decision was not known about- although it did already apply. However, the application for a licence by the Respondent was very much an issue already in the proceedings and had been the subject of much communication. Even if the matter had been raised at the hearing, neither Ms Dean or her colleague were present. The most that Mr Mayes could have done is to make submissions along the lines of those he has made and on the evidence which had been submitted in accordance with the Tribunal's Directions.

118. The Tribunal notes that at no time prior to the Applicant's further submissions has there been an assertion that the fee for the HMO Licence application was paid by the Respondent on 1st November 2021 as opposed to 11th October 2021 or another date. In any event, there has at no time been any other suggestion that the application was not duly made on 11th October 2021. The applications as submitted all referred to October 2021 and the correspondence [1386- 1409] between the Applicants' then- representatives and both the Council and the Respondent's then- representatives refers to an application in October 2021.

119. So too and very significantly do the witness statement of the Council's officers refer to 11th October 2021 and the Applicant's statement of case [see 7 and 10]. Notably, the Council's officers in their witness statements do not state, or even hint at, the licensing application not having been properly made on 10th October 2021. There is no suggestion that the application was only to be treated as made in the event of some other step being undertaken. The Tribunal refers to the relevance of that below.

120. In addition, none of the correspondence, the Council officers' statements or the individual witness statements of the Applicants refer to a date of 1st November 2021. Indeed, the individual witness statements of the Applicants say nothing about the date of the Respondent applying for a licence or about payment of the fee at all.

121. The Tribunal has no recollection of any prior mention of any date other than 11th October 2021 as the date for the application and in particular no recollection of any mention at any time of the Respondent paying the fee to the Council on any later date, whether 1st November 2021 or otherwise.

122. Hence, leaving aside the email, there is clear and unchallenged witness evidence, and that evidence is that the licensing application was submitted on 11th October 2021. There are no caveats or cautions to that.

123. It was open to the Applicants, and the representatives of the Applicants until they ceased to act, to provide evidence of the date of payment of the fee

for the licence by the Respondent as part of the Applicants' case if the Applicants wished to rely upon that. There is no discernible reason why the Applicants could not have done so, save that the paper cases were prepared by the representatives who wrongly believed the application to be submitted in time of the last date of the offence on the basis of that being 10th October 2021 and so did not address any later date and the Applicants adopted that position.

124. The case management decision by the Tribunal in relation to the admission of the further document- and on the premise that the Applicants seek that notwithstanding not having applied for it- is that the document is not admitted.

125. Consequently, the Tribunal addresses matters on the basis of the witness evidence as to the licence application and date of submission of it and which was unchallenged. It is not necessary to say more.

126. However, the Tribunal makes other brief observations in the next few paragraphs.

127. Firstly, even if the document had been admitted, the Tribunal considers that it would have needed to treat very cautiously a document which was not a witness statement and did not contain on statement of truth, especially where there is already a witness statement with a statement of truth from the same person which makes no mention of the particular matter. The document could not be treated as further evidence of the witness where it is not endorsed with a statement of truth.

128. Secondly, the question is also raised as to whether there is anything else of which the Tribunal is unaware in respect of the licensing application. For example, as to whether there is any reason for the later payment of the fee is unknown. That is again where the only witness evidence makes a simple and unequivocal statement about the date of submission of the licensing application being 10th October and says nothing to suggest it not to have been a complete application.

129. As to whether this particular Council requires the fee to be paid at the time the licence application is made or has a process by which the form is lodged and then the fee is requested is not known to the Tribunal. Neither is it known whether the fee must then be paid within a given time and if it paid within that time the application is treated as having been made when the application was lodged, so that later payment makes the application a duly completed one as at the date of original submission. Nor indeed is it known what in that event the timescale for payment is. The fact that the fee was paid 21 days after the date of the application may or may not have any significance. That approach of treating an application as made when lodged provided the fee is paid within a given period after is not an implausible approach for a body to adopt- it is for example exactly the approach taken by the Tribunal.

130. Indeed, the Tribunal file reveals that the Applicants' then-representative filed the application with the Tribunal on 10th October 2022

and then paid the Tribunal application fee on 29th November 2022. The Tribunal has treated the application as made on 10th October 2022 and not 29th November 2022, perhaps generously given the size of the gap. If it had taken the later date on which the fee was paid as the date of the application, the application would have been out of time for the period of the offence come what may. That approach of treating the application as made when submitted provided that the fee is then paid is the approach the Tribunal always takes. It does not mean that every other public body takes the same approach, but it certainly gives rise to the potential for that approach to be taken by the Council and other bodies. To repeat, there is no evidence of the Council's policy and/ or practice.

131. Excluding the further document and considering the witness evidence and other evidence contained in the bundle, the offence has not been proved beyond reasonable doubt to have been committed on 11th October 2021, or subsequently. The Tribunal cannot be sure that there was an offence committed after 10th October 2021. Hence on the evidence, 10th October 2021 is the last on date on which the offence has been demonstrated to have been committed.

132. The Tribunal adds that even if the email had been admitted in evidence, in light variously of the limited weight which could have been given to it where there was no document related to the contents endorsed with a statement of truth and where the witness was not present at the hearing and further in light of the questions arising from the lack of previous mention of any issue which may be relevant and the uncertainty as to the Council's approach to fee payment, the Tribunal would still not have been sure that the offence continued to be committed. The Tribunal would not have known whether the date of payment of the fee did with this Council result in the application only being duly made on the November date or on the October one. The Tribunal would have been uncertain whether there was a continuing offence. That is not enough for the Applicants to succeed. The Applicants would not have proved an offence to the required standard of beyond reasonable doubt from 11th October 2021 to 1st November 2021 or any period of that.

133. The Tribunal accepts that the Applicants may well regard the case management decision and this determination more generally as harsh. The Tribunal acknowledges that, as explained further below, this point decides the whole case.

134. The case management decision was not taken lightly. The assessment of the evidence even if the email had been admitted as evidence was undertaken with some care and consideration given to any potential effect. The Tribunal accepts that an alternative approach might possibly have been taken by a different Tribunal, but it is not easy to see how the matters which prevented this Tribunal from doing so could have been set aside or overcome. The Tribunal might well have taken the opposite approach if that thought that it could properly do so, given the impact of this determination. However, the Tribunal considers that admitting an email long after the hearing and then giving it weight such that it determines the outcome of the case where there remain unanswered issues arising from it is to go much too far.

135. So, the period of the offence as proved was until 10th October 2021.

Consideration of the Upper Tribunal judgment, the submissions and application to the facts

136. The Upper Tribunal determined that the last date of the offence must be the first day within the 12- month period ending on the date of the application to the Tribunal, where no offence was committed on the date on which the application for a licence was made.

137. It is right to say that in its initial consideration of the question prior to directing submissions, the Tribunal had not specifically identified any potential question as to the exact timing of the application, simply expressing its view of the day of the application for the HMO licence as being in full the first day of there being no offence. The Tribunal had determined that the offence would not be committed on any part of the day on which the application for an HMO Licence was submitted without seeking to address any more specific point. The Upper Tribunal was specifically referred to fractions of days but reached the same conclusion that the offence ends the day before the application for a licence is submitted.

138. Applying that, the Tribunal is satisfied that the last day of a period of 12 months within which an application may be made in this instance is necessarily 10th October 2022- the date of the application in this case– and the first day is therefore 11th October 2021. The last day on which the offence has been proved to be committed is 10th October 2021. That was outside of the 12- month period.

139. Mr Mayes sought in his original submissions submitted 12th December 2024 to argue that the Tribunal's preliminary view fell into error. He suggested that the period allowed for within which an application can be made is ambiguous. In his further submissions dated 23rd December 2024, Mr Mayes repeated the contention that the application for a licence was made within 12 months of the application to the Tribunal even if made on 10th October 2021. Mr Mayes made a secondary argument that the Tribunal exercise a discretion to permit a late application to proceed. In the later written submissions, Mr Mayes also asserted that the Respondent's application was invalid until 1st November 2021 when it is said in the email addressed above that the fee was paid to the Council.

140. As to the first submission, Mr Mayes argued that 10th October 2022, the date of the application to the Tribunal, was within the 12- month period. Reliance was particularly placed on a decision of the London Region of this Tribunal in 2018, LON/00AJ/HMF/2018/0053. It had originally been asserted that there was no binding caselaw, although that position has altered since. No copy was provided of the London decision, but the Tribunal has not sought one for reasons explained below. The Tribunal considers the answer to this first submission relatively simple.

141. The Tribunal accepts the date for the application to the Tribunal as being within the 12- month period as correct. It always must be. The last day of the relevant period is the date of the application to the Tribunal, so the application cannot fail to be within the 12 months, it is whole basis for calculating the 12 months. It is not that date which causes the difficulty. The problem with the Applicants' submissions is the assertion that the date of the landlord applying to the Council on 10th October 2021 also fell within 12 months ending on 10th October 2022.

142. Whilst the London Region of this Tribunal may have found the equivalent to be correct in its decision relied upon, Mr Mayes is wrong to argue that decision established a clear principle. One wider reason for that is that decisions of the First Tier Tribunal have no precedent value- there is no requirement to follow them. Hence, whilst this Tribunal should have respect for the decision of its colleagues in the London Region, if this Tribunal disagrees with them, it is entitled to reach its own and different conclusion.

143. More specifically, the Tribunal is required to follow the contrary judgment of the Upper Tribunal. Short of a case proceeding as far as the Court of Appeal and the judgment of the Upper Tribunal being overturned, the Tribunal considers the position to be settled. Mr Mayer's arguments cannot stand against that. The Tribunal is content that applying the judgment to this case is the correct and only correct course of action open to it. Hence on the evidence, the application was one day out of time unless the argument arising from the date of the payment of the fee succeeds.

144. Hence, on the basis that the Tribunal has only found the offence to be proved until 10th October 2021, the application for a rent repayment order was made out of time because the offence ceased to be committed prior to the period of 12 months- which commenced 11th October 2021- ending on the date of the application to the Tribunal being made, being 10th October 2022.

145. Interestingly, correspondence from the Applicant's then representative to the Council referred to the application by the Respondent being 11th October 2021 and the application to the Tribunal being 10th October 2022 and so before the anniversary of the Respondent's licence application. The Tribunal surmises that the representatives believed the application to be in time for that reason but omitting to identify the last date of the offence on the basis of an application for a licence on that date.

146. The Tribunal can deal quite briefly with the second argument, being one that the Tribunal should exercise discretion to allow the application to proceed if made out of time.

147. It may very well be that if the Tribunal possessed such a discretion- and subject to any hurdle which the Applicants may have needed to overcome such as, for example, showing a good reason for each day of delay- the Tribunal would have exercised that. However, the Tribunal determines that it lacks any such discretion. The 2016 Act in particular does not provide dates for applications to be made to the Tribunal in various instances and / or otherwise the question is whether the application was made in time or there

was a good reason for any late application. However, no such provision appears in the Act in respect of rent repayment orders. Neither is the Act silent. Rather there is the specific period provided for within which the application can be made.

148. Whilst there are a number of good points made as to why discretion might have been exercised in favour of the Applicants if such discretion existed, there nothing to be gained by other comment where there is no discretion to apply.

149. As to the third argument as to the date for payment of the fee, the Tribunal acknowledges that in the second case within *Moh*, of *Kiely*, the Upper Tribunal considered the fact that the landlord could not make the fee payment because of the difficulties with the website of the particular council. Mr Mayes argues that the application for a licence by a landlord is only valid when the fee is paid and any delay in fee payment invalidates the application for the period prior to payment. The Tribunal considers it would be better to say that the application may only be complete and so made when all elements are dealt with including the payment of the fee, such that in effect there is no application until that time, although the net effect is the same whichever approach is adopted.

150. However, the Tribunal refused to admit the email on which Mr Mayes's argument relies. So the foundation of Mr Mayes argument does not exist and the argument necessarily falls. The Tribunal has already gone some way beyond what it needed to say in explaining why the email would not have assisted the Applicants even if it had been admitted and so does not repeat any of those observations.

151. Mr Mayes also argued that the purpose of the 2016 Act is to ensure compliance with licensing requirements for HMOs. He asserts that a delay in fee payment and subsequent invalidity of the respondent's licence. The Tribunal understands Mr Mayes to mean that if a landlord can submit an application and delay in paying the fee and yet not commit an offence in the intervening period, that detracts from the requirement for payment of the fee and he contends undermines the purpose of the legislation. It might also be argued that may facilitate delay in the processing of the application by the local authority and continue the landlord having a defence for longer than it ought without the application having been processed.

152. However, that is premised on the email which is in not admitted and ends there. The uncertainty as to the Council's policy and the determinations of the Upper Tribunal in *Moh* also detract from the argument in any event.

Was the application to the Tribunal submitted in time?

153. The key point is whether the application to the Tribunal was made in time as compared to the last date of the licensing offence proved and so whether the Applicants were therefore entitled to seek a Rent Repayment Order. As identified above, one of the criteria which must be met by the Applicants pursuant to section 42(4) in order to be able to apply for a Rent

Repayment Order- and consequently for the Tribunal to be able to make one in the event that it considers it appropriate to exercise its discretion to do so- is that the offence was committed in the period of 12 months ending with the day on which the application is made.

154. The answer to this question will by now be obvious. The application to the Tribunal was made on 10th October 2022. The offence has not been proved beyond reasonable doubt to have been committed on 11th October 2021, or subsequently, on the evidence presented, so after 10th October 2021. Hence on the evidence, 10th October 2021 is the last on date on which the offence has been demonstrated to have been committed. In light of the judgment of the Upper Tribunal, on the basis of the offence last being proved to have been committed on 10th October 2021, the application to the Tribunal was out of time.

155. On the last day of a period of 12 months within which an application may be made being the date of the application- here 10th October 2022- the first day is necessarily one digit higher- here 11th October 2021. In contrast, the equivalent date in the previous year- here 10th October 2021- is one day prior to the 12- month period.

156. Whilst it is plainly highly regrettable from the Applicant's perspective, in light of the above, the Tribunal determines that the application was made one day out of time. Hence the Tribunal has no jurisdiction to consider the application and to make any rent repayment order.

157. The application must necessarily be dismissed on that basis and is so dismissed.

158. The Tribunal touches more briefly than it otherwise would below on the other matters which would have been relevant in the event that there had been jurisdiction. The Tribunal does so in the event that the Tribunal is subsequently held to be wrong in dismissing the application or in the event that the outcome which would have been achieved may subsequently in any way be relevant.

Would an award have been made and to what extent in the event of the application having been made in time?

The decision in respect of making a rent repayment order

159. 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 the making of a rent repayment order has been made out. Pursuant to the 2016 Act, a rent repayment order "may" be made if the Tribunal finds that a relevant offence was committed. Whilst the Tribunal could determine that a ground for a rent repayment order is made out but not make such an order, Judge McGrath, President of this Tribunal, whilst sitting in the Upper Tribunal in *The London Brough of Newham v John Francis Harris* [2017] UKUT 264 (LC) under previous provisions but with the same purpose,

identified that, “it will be a rare case where a Tribunal does exercise its discretion not to make an order”.

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

161. The Tribunal is given a wide discretion and considers that it is entitled to look at all of the circumstances in order to decide whether or not its discretion should be exercised in favour of making a rent repayment order. That is a different exercise to any determination of the amount of a rent repayment order in the event that the Tribunal exercises its discretion and makes such an order, albeit that there may be an overlap in factors relevant. It necessarily follows from there being a discretion to make a rent repayment order, as opposed to such an order following as a matter of course, that there will be occasions on which it may considered not appropriate to make an order notwithstanding that a relevant offence has been found to have been committed, albeit such occasions are likely to be rare.

162. Having considered the circumstances and the purpose of the 2004 Act, the Tribunal is confident that it would have exercised its discretion to make a rent repayment order in favour of the Applicants against the 1st Respondent if it had possessed the jurisdiction to do so.

<u>The manner of determining the amount of rent to be repaid</u>

170. Having exercised its discretion to make a rent repayment order and having determined the period for which the order should be made and against whom the order should be made, the next decision would have been how much should the Tribunal order.

163. In the absence of a conviction, the relevant provision is section 44(3) of the 2016 Act, which states in respect of the offence found to have been committed by this Respondent that the amount ordered to be repaid must “relate to” rent paid during the period identified as relevant in the table in section 44(2), being:

> ‘a period, not exceeding 12 months, during which the landlord was committing the offence’.

164. That 12 months need not necessarily be the last 12 months prior to the date of the application.

165. Section 44(3) explains that the Tribunal must not order more to be repaid than was actually paid out by the Applicants to the (Second) Respondent during that period. The section explains that:

> “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."

166. The Tribunal has a discretion as to the amount to be ordered, such that it can and should order such amount as it considers appropriate in light of case law and the relevant facts of the case.

Relevant caselaw

167. There have particularly been several decisions of the Upper Tribunal from 2020 onwards in relation to the amount to be awarded rent repayment order cases. Those include, by way of examples, *Vadamalayan v Stewart and others* (2020) UKUT 0183 (LC), *Williams v Parmar* [2021] UKUT 0244 (LC)- a judgment of the President of the Chamber- and *Acheampong v Roman* [2022] UKUT 239 (LC), at which point matters of principle in relation to the amount of an award essentially rest. Given the circumstances in this case, the Tribunal does not set those authorities out at any length but does summarise below and then apply them.

168. In essence, the amount of the order must always "relate to" the amount of the rent paid during the period in question and may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. It is not simply any profit element which the landlord derives from the property and 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. As was explained in *Kowalek v Hassanein* [2021] UKUT 143 (LC) the relevant rent has to be both paid during the relevant period and relate to rent due for that period.

169. The Tribunal should take account of the fact of the rent being inclusive of the utilities where it was so and in those instances the rent should be adjusted for that reason. There are matters which the Tribunal "must, in particular take into account"- in *Williams*, they are described as "the main factors that may be expected to be relevant in the majority of cases but the Tribunal should also take into account any other factors- there is no exhaustive list- that appear to be relevant. Subsequent decisions of the Upper Tribunal demonstrated the importance of the conduct of the parties and the seriousness of the offence.

170. *Acheampong* suggested a four- stage approach to assessment of the amount of an award, namely to "a. ascertain the whole of the rent for the relevant period; b. subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal is expected to make an informed estimate where appropriate; 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 whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That percentage of the total amount applied for is then the starting point (in the sense that

that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step and then 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)."

171. The 2016 Act does not specifically refer to such approach and in particular any division of suggested stages c. and d. and *Williams* had not suggested such approach. The Tribunal considers that it is not necessary to work in sequence through each stage and answer each question separately, although it accepts that if the suggested framework is followed, that is one way in which it can be demonstrated that relevant matters were considered.

The relevant factors and the appropriate award

172. The Tribunal does not in light of the dismissal of the application set out the amount claimed by each individual Applicant or provide a sum for the award which would have been made for each individual Applicant. That would not be proportionate where in the event no award is made.

173. The Tribunal identifies that the application made sets out the rent paid by each Applicant during the period of their licence prior to 10th October 2021 and so the Applicants and the Respondent will know what claim each made.

174. It does necessarily follow from the determination about the period of the offence and the end of that period that any Applicant whose licence commenced after 1st October 2021 or otherwise did not pay rent prior to that date and in respect of a period prior to that date would not have received any award. The Tribunal believes, without checking the specific circumstances of each Applicant that some would have received no award for that reason even on an application made in time.

175. In terms of utilities and whether the rent should be adjusted for that reason, the Tribunal notes that clause 7.5 in the agreement between the Respondent and the Council [1308] that specifies that the latter is responsible for utility charges up to £12,000 per period of six months. There is no evidence before the Tribunal that the cost of the utilities exceeded that sum and that the Respondent paid it. Whilst it is right to say that the amounts paid by the Applicants were for occupation with utilities paid, in the absence of any evidence of payment for those utilities by the Respondent, the Tribunal considers there to be no basis for making any allowance for the costs of the utilities as between the parties.

176. In any event, there is no evidence as to any amount of any utility charges and so there is no basis on which the Tribunal could determine any deduction. It is not appropriate for the Tribunal simply to take a guess. Therefore, no deduction from the rent should be made for utility costs.

177. The Tribunal acknowledges that the Respondent increased the rent payable by the Applicants by £50.00 per month in February 2022 [1385] purportedly because of the increased cost of utilities but that does not assist with identifying any utility costs paid by the Respondent prior to that date.

The amount of any utilities paid by the Respondent after that date is irrelevant because the rent paid at that time is irrelevant, unless to conduct generally, as the offence had ceased to be committed on 10th October 2021.

178. In relation to the seriousness of the offence and other factors, it is generally accepted that the failure to licence is not of itself one of the more serious of the offences for which rent repayment orders can be made. It is less serious than unlawful eviction or harassment, violence for securing entry and breach of a banning order. The offence does not of itself require anything other than the lack of a licence.

179. That said, there are various levels of seriousness of instances of failure to licence. Decisions of the Upper Tribunal have recognised and distinguished between different levels of ownership of rental properties and professionalism of landlords, involvement or otherwise of managing agents and presence or absence of hazards. The Tribunal is well aware of the cases to which the Applicants refer. In respect of the latter, the Tribunal accepts that licensing was introduced to improve standards and reduce risks to occupants. The Tribunal accepts the Applicants' argument that the Tribunal could award 100% of the relevant rent paid to be repaid in a case of lack of a licence, although the Tribunal considers that would a rarity and that on the whole cases where for a period 100% was often awarded reflected a misunderstanding of the approach to considering the level of award appropriate arising from *Vadamalayan* and addressed by *Williams*.

180. It is apparent that the Respondent is a professional provider of accommodation such as that provided in this case. It is, as the Tribunal understands matters, its entire business to provide guardian services and persons occupying to be those guardians.

181. The Applicants made a number of allegations as to conduct on the part of the Respondent, summarised in their statement of case as:

Extended periods with no hot water or heating in Winter
Leaks from plumbing and through the roof
Broken lift
Uncollected rubbish
Broken and blocked toilets and sinks
Lack of electrical appliance testing
A rent increase with 5 days' notice for utilities
Dangerous and undersized bedrooms
Blocked fire escape
Lack of fire safety measures

182. The Applicants' individual witness statements refer to the rent increase. Some say nothing about the other allegations, including any suggestion of any effects upon the individual Applicants arising from those matters.

183. Certain of the statements refer to problems with heating and hot water at the start of the period of any Applicant occupying, including a single electric shower, and refer to ongoing storage of medical equipment and lack of

cleaning then. The Tribunal identifies that there were issues at the start of the period of the Property being occupied by Applicants. That is to say October/ November 2020. Those affected the Applicants in occupation at that time.

184. There are some references to leaks and other issues but the detail is generally lacking- with the impact explained below- save for that explained in the witness statement of Wendy Paver [125- 128]. At least some of the issues related to various communal areas and facilities. The Tribunal accepts that across the statements as a whole, and some in particular, those of Ms Paver and of Mr Mayes by way of examples, the various matters identified above are asserted.

185. With specific regard to fire safety, which is the matter which the Tribunal recognises of particular concern with regard to houses in multiple occupation. It was particularly addressed by Mr Mayes in his witness statement [341- 345]. He explained that there was no training, including for appointed head guardians, he described fire extinguishers years out of date (although it is unclear whether any occupier ought to have been seeking to use such in any event), the waking watch employed lacking proper information and fire doors not being fixed. Various Applicants also referred to lack of or limited PAT testing of electrical appliances.

186. Mr Mayes at the hearing added some detail to certain of the above matters and that was helpful. However, the essence of the position remained as above and so the Tribunal does not consider it necessary to set out that oral evidence.

187. The Tribunal accepts the oral and written evidence given by the Applicants. It was not challenged and there is no other proper reason to disbelieve any of the Applicants, who the Tribunal accepts have, where they have given such evidence, described the conditions experienced by them from time to time.

188. Hence, the Tribunal accepts there being matters in respect of the Property which make the case more serious than one where there has been a lack of licensing and that is the end of the matter. It should be clarified that the Tribunal so accepts to the extent that the individual witness statements refer to such matters, which the Tribunal considers does not provide evidence for all of the matters listed in the statement of case.

189. The Tribunal identifies no conduct on the part of any Applicant which ought to go to reduce the level of award. The Applicants all, for example, asserted that they had no rent arrears and there was no reason to doubt them. Equally, whilst there was no basis for criticism of the Applicants, neither was there any conduct which the Tribunal considered ought specifically to go to increase the award and there is nothing at all unusual about that.

190. There was reference by the Applicants in their statement of case that the Respondent had been convicted of a relevant housing offence. That was no reason to reduce the level of awards otherwise appropriate, but neither was it a reason for any increase.

191. There was no direct evidence of the financial position of the Respondent and the relevance of that to the level of order. There was the fact of the Respondent company having gone into liquidation, demonstrating difficulty with paying creditors when required to. However, there was a lack of actual information, including about capital assets. The Tribunal determined, doing the best it could on the little available, that it had not been demonstrated that there was anything about the financial position of the Respondent which should go to increase the amount of the order but equally that there was insufficient that should go to reduce it.

192. The Tribunal did not identify any other relevant circumstances of this specific case which require additional weight to be given on the evidence presented and which impact on the amount of the order which would have been made. The Tribunal considers the key aspects have been addressed above and whilst aspects could also be categorised in another manner, they ought not to be weighed again, which would amount to double- counting.

193. The Tribunal carefully weighed the conduct of the Respondent and other circumstances as identified, including matters relevant to the seriousness of the offence, and considered the appropriate percentage of the relevant rent paid which reflects that.

194. The Tribunal determines it would have been appropriate to make a rent repayment order of 70% of the rent payable by any Applicant for the period of their occupancy to a maximum of 12 months ending 10th October 2021 and paid during that period. The Tribunal identifies that effects were not exactly the same for each Applicant and notes that, for example, particular leaks affected particular occupants, so there is at least an argument for a greater award having been appropriate for them, or perhaps more likely a lower award for the other Applicants. Potentially, there could have a basis to distinguish between head guardians as termed and other guardians, whether up or down.

195. However, taking matters in the round, on a relatively fine balance the Tribunal considers the effects of particular issues insofar as identified in the evidence do not add sufficient to the other matters to distinguish between the Applicants for that reason.

196. The Tribunal does not in light of the dismissal of the application set out the amount claimed by each individual Applicant or provide a sum for the award which would have been made for each individual Applicant. That would not be proportionate where in the event no award is made.

197. The Tribunal identifies that the application made sets out the rent paid by each Applicant during the period of their licence prior to 10th October 2021 and so the Applicants and the Respondent will know what claim each made.

198. It does necessarily follow from the determination about the period of the offence and the end of that period that any Applicant whose licence commenced after 1st October 2021 or otherwise did not pay rent prior to that

date and in respect of a period prior to that date would not have received any award. The Tribunal believes, without checking the specific circumstances of each Applicant that some would have received no award for that reason even on an application made in time.

199. The Tribunal would have added a further 10% of the rent paid by an Applicant who moved into the Property in October or November 2020 to reflect the additional problems then experienced by the Applicants in occupation at that time (and necessarily not experienced by such of the Applicants as moved in later) so that such Applicants would have received an order for 80% of their rent payable for the period of their occupancy to a maximum of 12 months prior to 10th October 2021 and paid during that period to be repaid.

200. It will be appreciated that in practice, the Tribunal makes no such order, lacking the jurisdiction to do so.

201. For the avoidance of doubt, any Applicant who went into occupation 11th October 2021 onward would have received no rent repayment order. And insofar as payment of rent was made by sums paid by way of benefits for housing costs, any repayment would not have been ordered as a percentage of such sums.

Application for refund of fees

202. The Applicants had 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.

203. It will be readily identified that the Applicants were not successful. The Tribunal identifies no reason for there to be an award of refund of the fees by the Respondent. No order is therefore made in relation to the fees.

Rights of appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

SCHEDULE OF APPLICANTS

1. Simon Stride
2. Rose Hegarty
3. Aaron Mouland
4. Wendy Paver
5. Katrina Tomlinson-Wrenn
6. Alice Manor
7. William Stedman
8. Jake Mayes
9. Phoebe Dunstan
10. Stephanie Sams
11. Nicole Francesca Maria Febbraio Saetta
12. Alexandra Michael
13. Pavel Slama
14. Ian Murphy
15. Layla Green (formerly known as Louise Heliczer)
16. Garth Maxted
17. Francisco Pais
18. Jamie Edkins
19. Dominic Hammond
20. Ben Crosby
21. Jodie Day
22. Kieran O'Neill
23. Marina Rivers
24. Anna Young
25. Vida Edon
26. Kate Mager
27. Matthew Goddard
28. Kirsty Brown
29. India Magson