FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references:	**MAN/00CJ/HMF/2021/0027 & MAN/00CJ/HMF/2022/0001**
HMCTS code (audio,video,paper):	**V:FVHREMOTE**
Property:	**10 Otterburn Terrace, Jesmond, Newcastle upon Tyne NE2 3AP**
Applicants:	**Deivid Flores (1) & Jasmine Woodward (2)**
Respondent:	**Mundeep Nayyar**
Type of Applications:	**Applications for rent repayment orders under Section 41 of the Housing and Planning Act 2016**
Tribunal Members:	**Judge J.M. Going** **J. Faulkner FRICS**
Date of Hearing:	**17 August 2023**
Date of Decision:	**9 October 2023**

DECISION

The Decision and Order

The Company (Smurk Investments Ltd) is ordered to repay :-
(1) rent of £418.27 to Mr Flores together with his application fee of £100,
and
(2) rent of £966.01 to Ms Woodward together with her application fee of £100.

Background

1. The First Applicant ("Mr Flores") and the Second Applicant ("Ms Woodward") have each individually applied to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under Section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a rent repayment order ("RRO").

2. Mr Flores' Application was dated 5 November 2021, and originally referred to 3 applicants being Mr Flores, Ms Woodward and a Mr Esfahani, each of whom had individual tenancy agreements.

3. The Tribunal advised that a separate application was required for each tenancy.

4. Ms Woodward subsequently submitted her own separate Application dated 6 May 2022, received on 6 August 2022, and paid the appropriate fee.

5. No further or separate application was received from Mr Esfahani.

6. Both Mr Flores' application and Ms Woodward's applications referred to the Respondent as Mundeep Nayyar ("Mr Nayyar").

7. The bundle of documents supplied by the Applicants included representations, copies of their respective Tenancy Agreements, bank statements, EPC, gas and other certificates and written guidance supplied when the tenancies were agreed, emails, as well as reports on and photographs of issues within the property.

8. Mr Nayyar provided a statement of truth, a further response, copies of various correspondence and emails, invoices relating to various outgoings and refurbishments, photographs, and evidence of rental payments and arrears.

9. In August 2022 the Tribunal handed down a decision ("the Matthews decision") under Case reference MAN/00CJ/HMG/2021/0002 relating to a separate rent repayment application in respect of the same property.

10. Minded that the Matthews decision gave rise to various common or related issues to those within present applications the Tribunal issued further Directions to each of the parties on 28 March 2023 enclosing a copy of the Matthews decision and allowing each a further 28 days to respond with such further written submissions that they might wish to make, and specifically to confirm if they wished to object (including the grounds for any such objection) to the Tribunal's proposal to make

and record its decision on any such common or related issues in the present cases in materially identical terms to the Matthews decision.

11. No such objections were received.

12. A Full Video Hearing was held on 17 August 2023 with Mr Flores, Ms Woodward and Mr Nayyar in attendance.

The Property

13. The property is a 3 storey mid-terraced house in the sought-after
14. suburb of Jesmond close to Newcastle city centre and its universities. The Tribunal did not inspect it but understands that it has 7 or 8 bedrooms with shared bathroom and kitchen facilities.

Facts

15. None of the following matters, which are evident from the papers or are of public record, have been disputed.

16. Since April 2006 it has been a national legal requirement for specified Houses in Multiple Occupation ("HMOs") meeting certain designated tests to be licensed under part 2 of the Housing Act 2004 ("the 2004 Act") with a mandatory HMO licence. These included houses with 3 storeys, occupied by 5 or more people, living as 2 or more households containing shared facilities such as the kitchen, bathroom and toilet.

17. On 1 October 2018 the types of buildings requiring a mandatory HMO licence were extended to include those with less than 3 storeys, occupied by 5 or more people, living as more than 1 household, and containing shared facilities.

18. On 25 June 2019 Newcastle City Council ("the Council") in exercise of its powers under section 56 of the 2004 Act designated the whole of its administrative area as an Area for Additional Licensing thereby extending the requirement for a licence within the city to include any HMO occupied by 3 or more persons living in 2 or more separate households. The designation came into force on 6 April 2020 and continues to 5 April 2025, unless revoked by the Council.

19. The property was duly licensed as an HMO up until 1 June 2019, and the papers include copies of various emails between the Council and Mr Nayyar at that time.

20. Mr Nayyar in an email on 31 May 2019 to the Council's HMO team stated "…we are having some renovations carried out at the above premises …. which is unoccupied. We are intending to have the work completed by the end of June at which time I will be able to provide copies of the information requested. Please can you confirm this will be acceptable in view of the 14 days' notice that you had sent on 29 March?..".

21. The Council replied with an email on 3 June 2019 confirming "…As the property is unoccupied you can disregard the 14-day deadline. If you can submit certificates when the work has been completed."

22. Mr Nayyar sent a further email to the HMO team on 9 August 2019 stating "Please find attached electrical inspection certs. CP12 to follow. Please note, the property is still vacant."

23. On 31 January 2020, Mr Flores entered into an Assured Shorthold Tenancy Agreement of property described as "the dwelling known as 10 Otterburn Terrace (Room 4) Jesmond…. for the term of 12 months commencing on 9 March 2020 and thereafter from month-to-month" and with the rent specified at "£451 monthly (£5412 for the full 12 months inclusive of council tax, exclusive of all other utilities) Payment – in advance by equal payments on the 9th of each month". The Tenancy Agreement referred to Smurk Investments Ltd ("the Company") as the Landlord of the property. The Landlord's Agent Pat Robson and Co Ltd. dealt with the marketing and setting up of the Tenancy Agreement.

24. On 4 May 2021, Ms Woodward entered into a separate Assured Shorthold Tenancy of 10 Otterburn Terrace (Room 3) for the term of 8 months commencing on 3 May 2021 and thereafter from month-to-month" and with the rent specified at "£451 monthly" and payable in advance by equal payments on the 8th of the month. Ms Woodward's Tenancy Agreement was otherwise in entirely comparable terms to that of Mr Flores.

25. The Matthews decision refers to various emails and messages between Mr Nayyar and different tenants relating to various concerns, principally relating to cold and infestations of slugs, and as to how these were subsequently addressed. (Paragraphs 18, 20-23, 35-36, 43, 53-58).

26. In the event, some of those concerns were then related to the Council and in an email to Mr Flores dated 30 September 2021, it confirmed "the property is currently unlicensed and as such, as rent paying tenants, you are quite within your rights to submit a rent repayment order to claim back rent for up to a maximum 12 months".

27. The Council had also on 23 September 2021 sent an email to Mr Nayyar attaching two letters and asking for him to make contact "asap". A subsequent email on the same day stated "as per our conversation, please find attached the link to the licensing portal – please submit your application asap".

28. Following a further email from the Council to Mr Nayyar on 5 October 2021 stating "I note that an application still not been submitted. Your tenants contacted me to suggest there are some issues with the property also? (draughty windows) which could result in excess cold in the winter? I must remind you that operating without a valid licence is a criminal offence. An Environmental Health Officer may be in touch to agree a suitable time to inspect the property soon". Mr Nayyar replied immediately "Application was submitted 26/09 following our last call..". The Council responded on 6 October stating "As the application was made outside the original licensing period, this application will not be accepted…… A new application will need to be made using the link below …" On 9 October Mr Nayyar responded confirming

that the application was underway. He followed that with a further email 14 October stating "I have managed to complete all of the form and submitted it …. Pending is fire safety certificate which I should have next week once our service provider Chubb Fire & Security is able to visit the property… Unfortunately I tested positive for Covid and I am isolating this week, so have been unable to do this sooner. I apologise for the delay."

29. On 18 October 2021 the Council replied "I confirm receipt of the application, hope you recover well".

30. On 29 November 2022 the Council gave notice of its proposal to grant the Company a licence for a period of 18 months allowing the property to be occupied by a maximum of 7 people living as 7 households and subject to conditions.

The Applicants' written submissions

31. Mr Flores in his application referred to his tenancy having been extended beyond the initial period of 12 months stating, "the agreed rent… was £451 a month… this amount has been paid since April 2020 on a monthly basis". He applied for an RRO "for the maximum amount the court is willing to award".

32. In further representations he referred to contacting the letting agents Pat Robson, after a few weeks of living in the property, raising various concerns about some physical aspects of the property, in particular the cold, a need for certain window repairs, thin and ill-fitting curtains, a broken doorbell, and questioning who was responsible for the maintenance of the garden, which, on their advice, he then related to Mr Nayyar. He also referred to subsequent complaints about a leaking radiator, and his attempts to limit the draughts using scotch tape to cover gaps in the window frames, and where photographs were supplied. He reiterated the problems with slug infestations as more particularly detailed to in the Matthews decision, the request for an additional fridge/freezer because of the number of tenants, and ongoing concerns about the windows, after which the Council was contacted, and when it then became apparent that the property did not have an HMO licence. Mr Flores, who is Brazilian, said that he then felt "completely frustrated and concerned about the management of this house. My initial thoughts were that, by living in a property with irregularities in it, I could be in danger with my own situation in the country…and such irregularities could put in risk my residence in the UK".

33. He also stated that "On April 14th 2022, I was threatened by another tenant, Aria Esfahani, who had previously presented a strange behaviour in the property. This same tenant had previously shouted at another individual (also a tenant) with a knife in the kitchen (we encouraged this to be reported to the police, but the housemate didn't feel comfortable about it and didn't tell Mr Nayyar about it). Mr Esfahani was, based on the comments from other tenants, regularly using illicit substances in the property (I haven't seen this myself, so I am unaware of the veracity of such substances). As you can see from the email below, sent to Mr Nayyar, I had to contact and report such a situation to the local police after hearing from Mr Esfahani that he would 'kill me', which made me feel completely vulnerable and insecure (case 1115, reported to Northumbria Police in April 14th 2022, with testimonials of other 3 tenants). Personally, I am not sure about the responsibilities of a landlord in this situation, but whilst the police had asked me to stay away from

the property, other housemates reached out to Mr Nayyar in regards to the behaviour and attitudes of Aria, and little action was taken. On a telephone conversation, Mr Nayyar then told me he was 'unable' to finish Mr Esfahani's contract and would wait until the end of his contract to let him go (by not renewing his contract). In the meantime, I was still unable to return to the property and had to stay at a friend's house. I was offered counselling sessions by the NHS whilst dealing with feelings of stress and panic. Having Mr Nayyar had a different attitude would have us addressing this situation quicker and avoid other tenants leaving the property (after my departure, other tenants reported seeing Mr Esfahani punching walls, and causing damage to the property). Whilst I appreciate the latter situation isn't directly related to structural repairs primarily mentioned in this repayment order, they made clear to me the lack of interest of Mr Nayyar in any care with this property and its tenants. As stated by Ms Matthews, I would never describe Mr Nayyar as a "rogue landlord", but in my personal opinion he is a very busy businessman who has a lot of responsibilities managing his own investments company and should have perhaps take some time to understand the demands of a HMO property before having one, as he doesn't seem to have the time or commitment to deal with the demands of this type of property and his lack of responsiveness caused a lot of distress to the tenants living in this property".

34. Ms Woodward in her application confirmed that "after recent complaints to Newcastle City Council on the lack of management on our property from the landlord responsible, we were told the house was unlicensed. Additionally, we were strongly advised … to make a RRO". She confirmed that her claim related to "7 months at £451 per month equalling £3157". I rented a room in the property for May 2021 to January 202(2) but (am) only claiming until October 2021 as this is when the respondent submitted the property licence application."

Mr Nayyar's written submissions

35. Mr Nayyar in a statement of truth dated 3 February 2023 confirmed that he is a director of the Company which is the freehold owner of the property.

36. He stated that on 31 August 2018 it became empty and was taken off the market for "a complete refurbishment".

37. He also referred to the correspondence and emails with the Council in 2019 and to the Council's request for documents which he "believed were required for the renewal of the HMO licence… although this was not clear…There was no sense of urgency or concern raised in relation to the HMO licence.. I was not notified at this stage that the HMO licence had lapsed. The refurbishment…took longer than expected, however on 9 August 2019 I sent a follow-up email.. supplying the certificates requested and I understood that everything was in order. I was not advised of any issues nor that the licence had not been renewed."

38. "During the period until February 2020 the property was completely internally refurbished". Invoices were exhibited referring to the provision of new floorboards in the kitchen with labour costs of £660, a new gas boiler provided by British Gas for £4568.40, carpets costing £1994, a new fridge freezer and tumble dryer costing £939.97, and various furniture and other items from IKEA costing

£6009 and £129. Mr Nayyar also referred to a further £5202 being spent on the "new kitchen" with the total cost of the noted items being £19,502.37.

39. Mr Nayyar stated "the first tenant following the refurbishment moved into the property in February 2020. A second tenant moved into the property in March 2020 followed by a third in July 2020".

40. "On 23 September 2021 I received an email from Newcastle City Council regarding the lapsed HMO licence… I actioned the renewal of the licence immediately and submitted the application within 3 days of becoming aware of the issue. On 6 October 2021 I was notified.. that a new (rather than a renewal) application was required… A fresh application was submitted.. This required more detail but was completed in the shortest possible time. Confirmation from… Newcastle City Council was received that the property is covered un(der) the HMO licence requirements until the application is decided. I understood there was a backlog and the application (would) not be granted for some time."

41. Mr Nayyar then referred to further exterior works carried out in October 2021, with the replacement of the roof, replacement dormers and velux and 10-inch loft insulation throughout costing £11,880 and complete double-glazing costing £6,912. He also exhibited copies of the relevant invoices.

42. He also provided evidence of a reduction/allowance of £150 per month whilst these works were undertaken.

43. Mr Nayyar submitted that there were two defences. The first that he was "not the correct person to whom this application should be made… the landlord to the property is Smurk Investments Ltd… evident from the tenancy agreements and the payments by the tenants for rent which are made to Smurk Investments Ltd".

44. The second defence was that he had a reasonable excuse. The "error was made due to an oversight when the property was being developed for the benefit of future tenants. Had I been notified during this period by Newcastle City Council the licence had elapsed, or was not to be automatically renewed, I would have actioned the renewal of the licence immediately. I believe due to the ongoing correspondence… it would be reasonable for me to believe that they would let me know and put me on notice that action was require(d). I understand that …. the local authority ha(d) a 9-month backlog for HMO renewals. On this basis it is reasonable me to have believed, subject the documents that had been requested by the HMO team, that the licence was valid and in the process of being automatically renewed. I had no information to the contrary in the period that had been elapsed".. He also said that "There are certainly extenuating circumstances as result of the pandemic. I did not have access to the company's postal correspondence from Newcastle City Council and it was only when I received an email that I realised there was an issue…"

45. He also submitted that if the Tribunal was satisfied, beyond reasonable doubt, that the offence had been committed, various matters should be taken into account in mitigation.

- "As noted, I have arranged for extensive works and refurbishments to the property costing in the region of £38,294.37. This represents a significant investment in a relatively short space of time and is indicative of the pride

taken in the property and my good faith in wishing to sincerely establish a comfortable and safe home for tenants. It would neither be justifiable nor reasonable to find that a refund for the maximum amount sought by the Applicants should be made…

- I have always been extremely compassionate and understanding of the tenant's personal circumstances and concerns … I firmly believe that we have been attentive to the tenants concerns we follow up to issues raised in a timely manner.
- It is notable that each of (Mr Flores and Mr Esfahani) had extended their agreements by a further 12 months. I believe that this is testament to the quality of accommodation indicative of the responsible way I have acted in general. This also further endorses my claim that the application does not warrant the maximum amount sought…
- Furthermore, soon as any non-compliance of my HMO licensing requirements were brought to my attention, I acted diligently and with speed to ensure that the application was submitted… I pride myself on operating in a professional manner and I was extremely concerned upon being notified that any non-compliance may be in place.
- (Mr Flores) was in substantial rent arrears of £2255 throughout his occupation of property, which were only recently settled..
- (Mr Esfahani) was investigated by police for an alleged attack on (Mr Flores) (Mr Esfahani) wanted to stay in the property for another year (after the initial extension) however we declined due to complaints received from (Mr Flores) and other tenants."

46. Mr Nayyar in responding to Mr Flores comments noted that many centred around alleged disrepair and that he had addressed many of those comments within the "Matthews application", and that he repeated those comments made in his initial statement.

The Hearing

47. The Tribunal confirmed that it had carefully reviewed the Matthews decision without finding any need to alter it, and nor had not it found anything within the written submissions to disturb its previous decisions as to its jurisdiction and that the offence of controlling or managing an unlicensed HMO had been committed.

48. The parties, and in particular Mr Nayyar, were asked if they wished to object, or make further submissions in response to the Tribunal's previously published proposal to make and record its decision on any common or related issues in materially identical terms to the Matthews decision. The answer was no. Mr Nayyar confirmed that he had not sought to appeal the Matthews decision which had been reviewed by his solicitor and barrister.

49. It was noted that the Court of Appeal has emphasised in *Kowalek & Anor v Hassanein Ltd [2022] EWCA Civ 1041* that the main object of the RRO provisions is "deterrence rather than compensation". In that case it was stated that "Parliament's principal concern was… not to ensure that the tenant could recoup any particular amount of rent by way of recompense, but to incentivise landlords".

50. The timeline and core events referred to in the written submissions and the Matthews decision were discussed and amplified.

51. The Tribunal found all of the participants honest, credible and straightforward. There was little dispute as to the facts, albeit some understandable disagreement as to the significance of some of the matters discussed.

52. It was confirmed that :-

- at the start of Mr Flores tenancy there was only one other tenant. There was discussion as to when a third tenancy began, and whether that was in June or July 2020. Whilst recollections differed as to the exact date, both Mr Flores and Mr Nayyar agreed that the third tenant was Mr Esfahani. The Tribunal has subsequently checked Mr Esfahani's Tenancy agreement which refers to it beginning on 1 August 2020.
- Ms Woodward felt Mr Nayyar had been unresponsive about problems encountered with the curtains in her room, which she regarded as too thin, and the curtain rail fixings which could not properly hold up heavier curtains required because of the cold. She felt particularly exposed when the property had been scaffolded and workers arrived. Mr Nayyar said that curtains had been properly in place at the beginning of the tenancy, and any problems were reported to his handyman who attended the property. He denied the assertion that tenants were taken by surprise when contractors were on hand and referred to the WhatsApp group messages made beforehand.
- He confirmed that he had tried to address the occupants concerns in good faith and with his best endeavours. He noted the ability to get works done had inevitably been adversely affected by the pandemic.
- He referred to the various tenants asking for extensions of their initial terms as indicative of their general satisfaction with the property.
- Ms Woodward was also critical of what she regarded as a lack of communication between Mr Nayyar and Pat Robson and the reletting of her room after he had orally agreed an extension when the proposed start date to her move abroad had been delayed.
- Mr Nayyar strongly refuted that he had been unengaged, unresponsive or uncaring and pointed to the various works undertaken in response to the tenants' concerns, some of which they acknowledged were minor, as well as several attempts to deal with any issues as clear evidence that he had not been unresponsive. He also referred to the goodwill gesture of a rent reduction when the major works were under way.
- Mr Flores gave further details of the incidents with Mr Esfahani in April 2022, (which occurred after Ms Woodward had left the property) following which he had been advised by the police to stay away from the property, and his feelings of being totally unprotected. It was clear that he was given the impression by the police they would be follow up on the matter much more quickly than they actually did, if at all.
- Mr Nayyar in response to the accusation that he could or should have done more stated that initially there were messages asking him not to raise the matter with Mr Esfahani, whilst the police were dealing with it, in order not to exacerbate the situation. He said that he did speak to Mr Esfahani who denied the incident, but that he sought advice and thereafter served a section 21 notice as being the quickest and most practical way to end his tenancy.

- He also noted that Mr Flores had helped introduce other tenants to the property.
- Mr Flores confirmed that the six-month arrears referred to in the Company's letter of 26 April 2022 occurred unwittingly. Analysis of his bank statements showed that standing orders had consistently been returned marked "Payee Bank Response. Sort code/account number unknown". After becoming aware of the problem, he had sought confirmation of the bank details from other tenants, but the error was repeated. He acknowledged that this was due to poor oversight (and being more focused on the organisation of the utility payments for the different tenants). He confirmed that as soon as he received the Company's letter, he checked his statements more carefully and paid the arrears in full on 29 April 2022.
- Both Mr Flores and Ms Woodward confirmed that they had not been in receipt of universal credit.
- When discussing the council tax position, Mr Flores confirmed that he had been employed throughout this tenancy and Ms Woodward confirmed that she was a full-time student throughout hers. Mr Nayyar confirmed that the Company had paid the council tax and could provide copies of the appropriate accounts and details of the relevant payments. Directions were confirmed for the accounts to be produced after the hearing and for the parties to confirm the status of each tenant occupying the property whilst it was unlicensed.

The Law

53. Section 40(3) of the 2016 Act lists those offences which if committed by a landlord entitle the Tribunal to make a rent repayment order.

54. The list, repeated in the Directions, includes the offence under Section 72 (1) of the 2004 Act of controlling or managing an unlicensed HMO. Section 72(3)(b) states that it is a defence if, at the material time, an application for a licence had been duly made. Section 72(5) confirms that it is also a defence if he had a reasonable excuse.

55. Section 251 of the 2004 Act states that:
"(1) where an offence under this Act committed by a body corporate is proved to have been committed with the consent of, or connivance of, or to be attributable to any neglect on the part of –
(a) a director, manager, secretary or other similar officer of the body corporate, or
(b) a person purporting to act in such a capacity,
he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly."

56. Section 263 defines the meaning of a "person having control" as the person who receives the rack rent for the premises.

57. The law concerning RROs is set out in Sections 40 – 52 of the 2016 Act.

58. Section 41(2) provides that a tenant may apply for a RRO 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.

59. Section 43 of the 2016 Act provides that the Tribunal may make an RRO if satisfied, beyond reasonable doubt, that the landlord has committed one of the offences specified in Section 40(3).

60. When the Tribunal decides to make a RRO in favour of a tenant, it must go on to determine the amount of that order in accordance with Section 44.

61. If the order is made on the ground that the landlord has committed the offence of controlling or managing an unlicensed HMO, the amount must relate to rent paid during a period not exceeding 12 months, during which the landlord was committing the offence (section 44(2)).

62. Section 44(3) confirms that the amount that the landlord may be required to repay must not exceed:
(a) the rent paid in respect of the period in question, less
(b) any relevant award of universal credit paid (to any person) in respect of rent and the tenancy during that period.

63. In cases such as this the Tribunal has a discretion in determining the amount, but Section 44(4) states that it must, in particular, take into account
(a) the conduct of the landlord and the tenant,
(b) the financial circumstances of the landlord, and
(c) whether the landlord has at any time been convicted of any of the specified offences.

The Tribunal's Reasons and Conclusions

As to the correctness of the Applications and the Tribunal's jurisdiction

64. Whilst it is readily agreed that any RRO can only be made against a landlord, which in this case is the Company, the Tribunal does not accept Mr Nayyar's submission, set out in his statement of truth but not pursued at the Hearing, that it does not have jurisdiction because of the Applicants having named him as the Respondent in their respective Applications, rather than the Company.

65. The Tribunal is content that the Applications were duly made and correctly accepted by the Tribunal and that any technical clerical errors within the Applications form do not limit or exclude the Tribunal's jurisdiction. Its reasons are more particularly set out in paragraphs 84- 86 of the Matthews decision.

As to whether an offence has been committed

66. There is no dispute between the parties that the property did not have an HMO licence between 1 August 2020 and 14 October 2021.

67. The Tribunal is satisfied, beyond any reasonable doubt, that the Company then committed the offence of having control of or managing an HMO which was required to be licensed but was not.

68. The Tribunal had next to determine whether the Company had either the defence of a reasonable excuse or of having duly made a licence application during that time. In each case the Tribunal found that it did not. The Tribunal's detailed reasons are those set out in paragraphs 88- 98 of the Matthews decision.

69. Because the offence was committed within the period of 12 months before the Applications, the Tribunal is also clear that it has jurisdiction.

As to whether rent repayments should be ordered

70. The Tribunal (particularly having regard to the policy objectives behind the statutory provisions i.e. to secure compliance with the law on housing standards, one object of which is to ensure that HMOs are safe and free from serious defects, to enable a penalty in the form of a civil sanction to be imposed in addition to any penalty payable for the criminal offence of operating an unlicensed property, to help prevent a landlord from profiting from renting properties illegally, to deter the particular landlord from further offences and dissuade others from breaching the law) is satisfied that it is appropriate to make a RRO in the circumstances of this case.

71. Having decided that an order should be made, the Tribunal then went on to consider carefully the amount of rent which had to be repaid.

The amount of the order

72. The Tribunal reminded itself of the various considerations and guidance referred to in paragraphs 106- 111 of the Matthews decision.

73. It also had regard to the further advice since given by the Upper Tribunal in the case of *Acheampong v Roman [2022] UKUT 239 (LC)* being that it should work through a 4- stage test, and in summary:
(a) ascertain the whole of the rent for the relevant period,
(b) subtract any element from that sum that only benefits the tenant, such as any utilities paid for by a landlord in an inclusive rent,
(c) consider how serious the offence was both compared to other types of offences for which an RRO can be made and examples of the same type of offence. The Tribunal should decide what proportion of the rent (after any deductions as above) is a fair reflection of the seriousness of the offence? This is the starting point. It is also the default penalty in the absence of any other factors but may be higher or lower in light of the final step,
(d) consider deductions or additions in light of factors set out in section 44(4) of the Act (these are matters that the Tribunal must take into account being the conduct of landlord and tenant, the financial circumstances of landlord and any previous convictions of the landlord in relation to specified housing offences).

74. With such considerations in mind the Tribunal began its calculations of the amount of rent to be repaid.

The whole of the rents for the relevant periods

75. Mr Flores was a tenant of the property throughout the whole of the period that the property should have been licensed but was not. The need for a licence began when the third tenancy began, i.e. on 1 August 2020. The offence of having an unlicensed property then continued until the appropriate application was duly made on 14 October 2021. Mr Flores was entitled to claim a RRO for any period of up to 12-months during which the offence was committed (section 44(2) of the Act) but an RRO can only be made in respect of rent actually paid during the period the offence was committed. Payments made after the offence had ceased do not count, even if paid in respect of rent due during the period of the offence *Kowalek v Hassanein*.

76. With such considerations in mind the Tribunal calculated, that, in his case, the whole of the rent for the relevant period amounted to £3608. The maximum amount of rent paid by Mr Flores within any of the rolling 12-month periods within the window whilst the offence was being committed was £3608 (being the total of the payments of £451 paid on 10 September, 19 and 30 October 2020, and 13 January, 3 February, 19 April, 28 June, and 11 August 2021).

77. In Ms Woodward's case, the relevant period was from the start of her tenancy on 3 May 2021 to 14 October 2021. She made 6 monthly payments of £451 each during that period totalling £2706, of which, on a strict apportionment, £2415.03 related to the period to 14 October 2021.

Subtraction of any personal elements included within in the rents

78. Both Mr Flores' and Ms Woodward's tenancy agreements obliged them to pay for the costs of utilities direct and in addition to the stated rents.

79. The council tax was paid by the Company, which was liable as the property was an HMO not occupied exclusively by full time students. Council tax is ordinarily indemnified by an occupier, if the occupier is not personally exempt. Mr Flores confirmed that he was in employment and not exempt. His Tenancy Agreement referred to his rent as being inclusive of council tax, and, by analogy to those matters explicitly referred to in *Acheampong v Roman,* the Tribunal decided that the proportion of the council tax which was effectively paid on his behalf during the relevant period should be deducted. Following an analysis of the bills, submitted after the hearing, and based on the information confirmed as to the number of tenants who were not students and not exempt, the Tribunal calculated that Mr Flores personal liability for council tax during the 12 months in question amounted to £2213.76 (During the 12 months in question £4980.98 was paid by the Company in respect of council tax. For 9 months there was one other non-student tenant and for the remaining 3 months there were two). By subtracting that figure (£2213.76) from the previously referred to figure of £3608 the Tribunal arrived at a net sum of £1394.24.

80. Ms Woodward's Tenancy Agreement, in contrast to that of Mr Flores, did not refer to her rent as being inclusive of council tax, but as a full-time student throughout the relevant period, she would normally be exempt from any personal liability to council tax. In her case therefore there was nothing to subtract under this heading from the previously referred to figure of £2415.03.

The seriousness of the offence

81. Whilst Mr Nayyar's misunderstanding of the licence renewal process was not found to be a sufficient excuse to afford the Company a defence, the Tribunal did have sympathy as regards the Council's failure to highlight in its emails in the summer of 2019 that more would need to be done before a new licence would be granted. Without excusing the Company, the Tribunal understands why such emails could have been misunderstood. The Tribunal also believes that his letting agents could have done more to prompt a proper investigation of the situation before arranging for rooms to be let again in 2020. In *Hallett v Parker* it was stated that "the agent's failure to warn the landlord of the need for a licence when sourcing 3 tenants should be considered in mitigation".

82. The Tribunal reviewed all the circumstances, and carefully weighed, and in some cases balanced, the various relevant considerations, including, in particular: –

- the overall state of repair the property, which appeared at the relevant times to include various fire protection measures,
- that past adaptations had been sufficient to secure an initial HMO licence, and its subsequent renewal, and that there was no evidence of the Council taking any formal steps to require improvements before granting any new licence,
- that there were some obvious physical deficiencies in an older terraced property, a number of which would have been self-evident on inspection before the tenancy began, such as the windows and its energy performance rating,
- there were other problems which could not necessarily have been foreseen, such as when parts of the heating system malfunctioned, but which Mr Nayyar took reasonable steps to see was repaired and improved,
- and there were some deficiencies which were not solved as quickly as they should have been, principally when the problem with the slug infestation in the kitchen was not properly followed up on after initial attempts failed, resulting in considerable disruption and understandable concerns felt by the various tenants,
- nevertheless, there was also manifest evidence of investment in, and repairs and improvements having been undertaken to, the property, and of Mr Nayyar and the Company being responsive to tenants' concerns, if not always to their entire satisfaction,
- the covid pandemic subsisted throughout the relevant period and this undoubtedly impacted adversely on all the parties and also had a direct effect on the availability of tradesman, materials and response times,
- the Company and Mr Nayyar were not insensitive to the tenants' concerns as to the ability to keep the property warm and had engaged British Gas to install a new gas boiler before the tenancies began,
- it is also clear that substantial further improvements, in the form of full double glazing and new windows throughout together with increased insulation and a new roof were planned and began, without any prompting from the Council, before Mr Nayyar was alerted to the lack of the necessary HMO licence and,

- that, as the Applicants readily agreed, neither Mr Nayyar nor the Company could in anyway be regarded as “rogue landlords”,
- the Company was an experienced landlord, fully aware that the property was an HMO with the potential to house to 7 occupants, and clearly required to be licensed,
- nevertheless, the Council could, and possibly should, have been clearer in the 2019 emails that more was needed to obtain a new licence,
- and one might have expected the letting agents to have prompted a proper review before re letting commenced in 2020,
- this was a first offence with no previous convictions,
- the Company owned but a single property which was self-managed, and
- when alerted by the Council to the fact that the property was not licensed, it took immediate steps to make the appropriate application,
- which the Council, principally because of its backlog, processed but some 13 months later.

83. The Tribunal concluded that this was clearly not a case justifying the most stringent possible penalty and, having weighed all the relevant considerations and the relative seriousness of the case, decided that 40% of its previously calculated figures should be its starting point before moving on to particularly considering those factors which section 44(4) of the Act confirms must specifically be taken into account.

84. The Tribunal considered each in turn.

The conduct of the parties

85. The Tribunal found little evidence of conduct which went beyond that which generally occurs in a landlord and tenant relationship.

The conduct of the landlord

86. The Tribunal found no compelling evidence of any wholly unreasonable or inappropriate conduct by the Company or Mr Nayyar, beyond his ignorance of the fact that the property was unlicenced. The Tribunal concluded that in numerous instances he had conducted himself, and thereby the Company, as a responsible and considerate landlord, willing to invest in and improve the property.

87. Whilst not in any way unsympathetic to Mr Flores' position following the incidents with Mr Esfahani in April 2022, the Tribunal did not find that Mr Nayyar's subsequent actions or inactions as either indicative or conclusive of the accusation of poor, inadequate or insensitive management. The Tribunal accepts that Mr Nayyar was placed in a very difficult situation, not of his making, was asked initially to delay being involved in order not to exacerbate the position, and in particular whilst the police were thought to be actively investigating the complaint, that he took advice, and following that advice steps to terminate Mr Esfahani’s tenancy by the quickest practicable means. It was also noted that the incidents took place 6 months after the licensing offence had ceased. The Tribunal concluded that there was nothing in the conduct of the landlord, beyond that which had already been taken into account in its

assessment of the seriousness of the offence, which needed to be further factored into its calculations.

The conduct of the tenants

88. There was no evidence or assertion of Ms Woodward being anything other than a model tenant and there was no evidence of any unreasonable or inappropriate conduct by either of Applicants, save for the matter of Mr Flores' arrears and the late payments of his rent.

89. Whilst, and to his credit Mr Nayyar did not seek to overstate the matter, accepting Mr Flores's explanation that the arrears occurred inadvertently due to poor administration, the non-payment of rent and allowing 6 months arrears to accumulate is clearly a relevant consideration to be taken into account when having regard to a tenant's conduct as part of determining the amount of an RRO. *Kowalek v Hassanein* approving *Awad v Hooley [2021] UKUT 55(LC)*.

90. In this instance and to reflect the haphazard nature of the payments made during the relevant period, the Tribunal determined that there should be a further 10% reduction to the figure previously calculated for Mr Flores.

The landlord's financial circumstances

91. Mr Nayyar confirmed that the Tribunal's analysis of the Company's financial circumstances as outlined in the Matthews decision was correct, and that therefore there was no element of financial hardship needing to be factored into its considerations.

Whether the landlord has any relevant convictions

92. There is nothing in the case papers to suggest that Mr Nayyar or the Company have been convicted of any of the offences specified in section 40(3) of the 2016 Act. He reaffirmed at the Hearing that neither he nor the Company have ever been convicted of any such offences, and nor had there ever been any formal steps taken by the Council to impose Improvement Notices or the like.

Completion of the calculation

93. Having completed the 4-stage revue referred to in *Acheampong v Roman* and having decided that there were no other relevant considerations the Tribunal was able to complete the calculation of the two RROs. In doing so it noted that there were no universal credit payments to be factored in or deducted. By the calculations more particularly referred to above, the Tribunal concluded that the Company should make an RRO to Mr Flores of £418.27 (being 30% of £1394.24) and an RRO to Ms Woodward of £966.01 (being 40% of £2415.03).

Reimbursement of the Tribunal application fee

94. Each Applicant has incurred an application fee of £100 in connection with these proceedings. Because each has succeeded in obtaining a RRO, it is appropriate that the Company should also reimburse those fees.