FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/HMF/2024/0101**
Property	:	**Flat 28, Gordon Mansions, Torrington Place, London WC1E 7HE**
Applicant	:	**(1) Lok Yee Priscilla Lee** **(2) Long Kiu Choy** **(3) Tjun Yi Lum**
Representative	:	**Peter Eliot, Justice for Tenants**
Respondent	:	**Saloni Saraf**
Representative	:	**Andrew Carter, counsel**
Type of application	:	**Tenants' application for a Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal members	:	**Judge Mark Jones** **Mr Steve Wheeler MCIEH, CEnvH**
Date and venue of hearing	:	**08 January 2025** **remotely by Cloud Video Platform** **Reconvened hearing on 07 March 2025**
Date of decision	:	**29 April 2025**

DECISION

Decisions of the tribunal

(1) The Tribunal orders the Respondent to repay to the Applicants the total sum of £38,139.87 by way of Rent Repayment Order.

(2) The Tribunal also orders the Respondent to reimburse the Applicants' fees paid on application and in respect of the hearing, in the sum of £320.

(3) The above sums, totalling £38,459.87 must be paid by the Respondent to the Applicants within 28 days after the date of this determination.

Introduction

1. By application received on 1 March 2024, the Applicants applied for a rent repayment order ("***RRO***") against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("***the 2016 Act***").

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

3. The Applicants seek rent repayment orders totalling £83,805.48 for the period 9 June 2022 to 8 June 2023.

4. The Respondent served a detailed statement of case and an accompanying witness statement in response to the application, raising in particular the defence of reasonable excuse.

5. The parties each filed bundles in advance of the hearing. The Applicants' initial bundle numbered some 423 pages, and the Respondent's some 130 pages. The Applicant then filed a responsive statement of an additional 4 pages.

6. Whilst the Tribunal makes it clear that it has read each party's bundles, the Tribunal does not refer to every one of the documents in detail in this Decision, it being impractical and unnecessary to do so. Where the Tribunal does not refer to specific documents in this Decision, it should not be mistakenly assumed that the Tribunal has ignored or left them out of account.

7. This Decision seeks to focus solely on the key issues. The omission to refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. Not all of the various matters mentioned

in the bundles or at the hearing require any finding to be made for the purpose of deciding the relevant issues in this application. The Decision is made on the basis of the evidence and arguments the parties presented, as clarified by the Tribunal in the hearing, and is necessarily limited by the matters to which the Tribunal was referred.

The Hearing

8. The hearing proceeded by video link, with the prior agreement of all parties, for the principal reason that each of the Applicants is currently resident overseas.

9. The Applicants were represented at the hearing by Mr Peter Eliot, of Justice for Tenants. The Respondent was represented by Mr Andrew Carter of counsel.

10. Each of the Applicants gave evidence, and was cross-examined by Mr Carter. Ms Saraf then gave evidence, and was cross-examined by Mr Eliot. We are grateful to all witnesses for their evidence, and would add that we make allowance for the fact that each gave evidence via video link.

11. In consequence of legal arguments raised by Mr Carter at the commencement of the hearing, without prior notice to Mr Eliot, at the conclusion of the evidence we heard oral submissions before adjourning with directions to the Respondent to serve written closing submissions by 17 January and for the Applicants' response by 31 January 2025, and giving permission for any written response of the Respondent to the Applicants' submissions to be served by 7 February 2025. The Tribunal then reconvened to consider those submissions, which was not possible until 9 March 2025 due to various professional commitments, which have further delayed the formulation of this written decision. We apologise to the parties for the delay.

Relevant statutory provisions

Housing and Planning Act 2016 (*"the 2016 Act"*)

12. Section 40

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

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

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

	Act	***section***	***general description of offence***
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	Housing and Planning Act 2016	section 21	breach of banning order

Section 41

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

(2) A tenant may apply for a rent repayment order only if – (a) the offence relates to housing that, at the time of the offence, was let

to the tenant, and (b) the offence was committed in the period of 12 months ending with the day on which the application is made.

Section 43

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

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

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

Section 44

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

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

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

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

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

Housing Act 2004 (*"the 2004 Act"*)

13. Part 2 of the 2004 Act relates to the designation of areas subject to additional licensing of houses in multiple occupation (HMOs).

14. Section 72 specifies a number of offences in relation to the licencing of houses.

Section 72

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part … but is not so licensed.

(5) In proceedings against a person for an offence under subsection (1) … it is a defence that he had a reasonable excuse … for having control of or managing the house in the circumstances mentioned in subsection (1) … .

15. Section 61(1) provides:

(1) Every HMO to which this Part applies must be licensed under this Part unless—

(a) a temporary exemption notice is in force in relation to it under section 62, or

(b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4.

16. Section 55 provides for HMOs to be licensed by local authorities in circumstances including, by section 55(2)(b), any HMO in an area designated by the authority under section 56 as subject to additional licensing, by relation to any description of HMO specified in such designation.

17. Other relevant sections of the 2004 Act include:

Section 263

(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises – (a) receives … rents or other payments from … persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or (b) would so receive those rents or other payments but for having entered into an arrangement … with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments …

The Property

18. The Property is a self-contained flat on the 5th floor of a 6 storey Edwardian mansion block, situated on the west side of Bloomsbury in central London. It comprises 4 bedrooms and 4 bathrooms, each with a shower and wc, one containing a bathtub, with a shared kitchen and reception room. It is situated within the London Borough of Camden.

The Licensing Regime

19. On 08 July 2020 the London Borough of Camden Council in the exercise of its powers under section 56 of the 2004 Act designated the entirety of the district of the London Borough of Camden for additional licensing, which applied to all HMOs occupied by 3 or more persons comprising 2 or more households. That designation came into force on 08 December 2020 and shall cease to have effect on 08 December 2025.

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

21. While the Applicants were each close friends with one another, it was also agreed between the parties that during the relevant period of 9 June 2022 to 8 June 2023 the Property was occupied by at least three persons living in two or more separate households, and occupying it as their main residence.

Factual Background

22. The Property is situated close to the principal campus of University College, London. Each of the Applicants was a student from overseas, studying law at that university, and variously undertaking mini-pupillages with sets of barristers' chambers from time to time. Ms Lee and Ms Choy are each from Hong Kong, and Ms Lum from Malaysia, and they met one another through the UCL Christian Union. Their evidence was that through living together they became close friends.

23. The Respondent, Ms Saraf, is a classically trained Indian dancer. The Property was purchased for her as a gift by her now-retired father. She has never lived there, and at all times the Property has been let by agents on her behalf.

24. The Applicants' evidence was to the effect that a family friend of Ms Choy found the Property available to let through Parkes Estates, the Respondent's agent, and suggested that it might be suitable for the three young women to occupy whilst studying at the university.

25. Prior to entering into the tenancy, the Applicants sent a series of enquiries to Parkes, and it was explained that only Ms Lee could sign the anticipated tenancy agreement, as she was the only one of the three who had a Biometric Residence Permit, by virtue of having lived and studied in the UK during the previous year, which the others had not done. Ms Olga Dorofiychuk of Parkes advised that Ms Choy and Ms Lum, absent such permit, would not be named tenants but would, rather, have the status of *"permitted occupiers"*.

26. On this basis, Ms Lee explained, she signed the tenancy agreement. This was an assured shorthold tenancy dated 22 July 2021 for a term of one year commencing on 18 August 2021, for a total annual rent of £75,400, payable in advance and in one instalment.

27. The first year's rent of £75,400 together with a deposit, totalling £82,700 was paid, in full, by Ms Choy's father Mr Choy Chi Fai, on 12 August 2021 by direct bank transfer to Parkes. The parties agreed that Ms Lee and Ms Lum would repay their share over the year, and in accordance with that agreement, Ms Lee's mother reimbursed Ms Choy's mother, while Ms Lum paid rent directly to Ms Choy.

28. The Respondent's uncontested evidence was that, the rent having been paid to Parkes, after deduction of that business's commission the net balance was paid to JNSS, a company owned and controlled by her mother and father. JNSS dealt with repair and maintenance issues at the Property, and used the Respondent's mother's email address as a point of contact, albeit that the main contact was an employee named Ms Ruchita Daga.

29. Ms Choy as named tenant and Ms Saraf as landlord then signed a renewal agreement on 30 May 2022, by which a further year's tenancy was granted from 18 August 2022 to 17 August 2023, at an increased rent of £85,800 per annum. As before, Ms Choy's father transferred the entire sum to Parkes on 22 June 2022, and the first and third Applicants reimbursed their slightly increased shares of the rent as in the previous year.

30. Following concerns regarding their responsibility for the condition of the property, addressed in more detail below, the Applicant sought the advice of the Citizens Advice Bureau, during which the issue of the need for a licence was revealed in the course of correspondence with Camden Council. The Applicants did not inform the agents or the Respondent, prior to vacating the Property at the conclusion of their tenancy.

Preliminary analysis

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

32. It is not in dispute that the Respondent was the landlord for the purposes of section 43(1) of the 2016 Act. She is the registered proprietor of the leasehold title, is named as landlord in the tenancy agreement made with Ms Lee dated 22 July 2021, and in the renewal agreement dated 30 May 2022.

The Respondent's Primary Case

33. The next question is whether the Respondent was a *"person having control of or managing"* the Property within the meaning of section 263 of the 2004 Act. The Respondent has not sought to argue that she was not a person ultimately having control of or managing the Property or that the rent paid was not the *"rack-rent"* as defined in section 263.

34. The Respondent's counsel however contends on her behalf that money paid to the Respondent by way of rent did not meet the statutory definition of *"rent paid by the tenant"* within the meaning of s.40(2) of the 2016 Act, where all monies were paid by Ms Choy's father. Accordingly, Mr Carter contends, an RRO is not available on the facts of this case.

35. In advancing this submission, Mr Carter relies on the judgment of the Court of Appeal in ***Jepsen and others v Rakusen*** **[2022] 1 WLR 324**, which was concerned with the issue of whether a superior landlord could be made liable for a rent repayment order. In considering the

obligation to *"repay"* contained in s.40(2), Arnold LJ observed as follows, at §27:

"Counsel for Mr Rakusen also submitted the word "repay" in section 40(2)(a) ***must refer to the landlord repaying the rent paid to that landlord by the tenant, rather than referring to money paid by the tenant to a different landlord****. Counsel for the respondents submitted that it was possible to speak of rent being repaid to a tenant even if the person being required to repay it was not the person to whom it was originally paid by the tenant. I accept that both interpretations of the word "repay" are possible, but it seems to me that the first interpretation is the more natural one in this context. This supports the conclusion to be derived from the references to "the landlord under a tenancy" and "tenant".* (emphasis added)

36. Mr Carter submits that the natural meaning of the words *"paid by the tenant"* is consequent upon a direct payment relationship between landlord and tenant. He refers us also to the concurring judgment of Andrews LJ in this regard, at §§50-51:

"Turning to section 40(2)(a), the target of the RRO may be required to "repay an amount of rent paid by a tenant". ***The natural construction of that phrase is that he should have to pay back the rent paid to him by a tenant under the tenancy of housing of which he is that person's landlord.*** *That interpretation is consistent with the identification of the relevant "tenancy of housing" reached by reading the opening words of section 40(2) together with paragraph (b). It also explains the use of the word "repay" in that subsection and "pay" in paragraph (b). There is nothing in the language of paragraph (a) to indicate that the "tenancy of housing" should have some different meaning when the tenant is seeking the RRO.*

51. There was no need for the draftsman to include the words "under the tenancy," in paragraph (a), as they are necessarily implicit. Their omission does not point towards a wider construction that would make the target of the RRO liable to pay back to the tenant rent paid to someone else under a sub-tenancy, which he never received in the first place. ***As paragraph (b) illustrates, the draftsman has taken pains to make it clear when the identity of the recipient of a payment is irrelevant; yet the words "to any person" do not appear after "paid" in paragraph (a).****"*

37. Mr Carter submits that the Court of Appeal observed that the draftsman had used simple and direct language carefully to target rogue landlords in particular circumstances, and where there is doubt, it should be resolved in favour of landlords owing to the penal nature of RROs.

38. By this analysis, the identity of the payer has been statutorily defined, the submission continues. As was said in ***Rakusen***, it would have been

easy for the draftsman to expand moneys subject of an RRO to rent *"paid under the tenancy"* or *"by or on behalf of the tenant"*, or adopting the formulation at s40(2)(b) *"by any person."* Mr Carter further draws our attention to the decision of the Court of Appeal having been upheld on appeal to the Supreme Court in ***Rakusen v Jepsen* [2023] 1 WLR 1028** which upheld the Court of Appeal's observation as to the direct relationship of landlord and tenant at §31, and the distinction between *"pay"* and *"repay"* at §32.

39. Therefore, Mr Carter submits, the natural words of s40(2)(a) require that the **tenant** pay the landlord. It is insufficient to find liability that the tenant undertakes a *liability* to pay the landlord, or takes a liability to another who pays the landlord. In this regard he cites ***Kowalek v Hassanein Ltd [2022] 1 WLR 4558*** where the Court of Appeal held that the time of payment is a relevant limitation on the availability of an RRO.

40. Accordingly, Mr Carter submits, where by reason of a private arrangement between a tenant and third party, the third party pays, there is no scope for RROs because the rent is not *"an amount of rent* ***paid by the tenant****."* Where, here, there were arrangements for both Ms Lee and Ms Lum to repay Ms Choy's father, he suggests that there was a simple loan by him to them. He suggests that the evidence discloses that Ms Lee's mother *"paid rent"* to Ms Choy's mother [AB18 ¶15] and Ms Lum paid Ms Choy directly, the latter employing the words *"in return"* which is asserted to be redolent of exchange. What is clear, he concludes, is that neither Ms Lee nor Ms Lum regarded Mr Choy father as their agent, such that payment would be "*by*" the tenants.

41. The first difficulty with Mr Carter's ingenious submission is that it runs directly contrary to the terms of the tenancy agreement signed by his client, clause 7.1 of the 3rd schedule to which provides, insofar as is relevant:

> *"…**any Rent paid by any third party will be accepted from that person as the Agent of the Tenant** and will not confer on the third party any rights as the Tenant."*

42. ***Rakusen,*** in both manifestations referred to, was concerned with circumstances where the superior landlord had granted a 36-month tenancy to a company, which paid rent to the superior landlord, and then entered into separate sub-letting agreements with the applicants who paid rent to it. It was held that the statutory framework did not permit RROs to be made against superior landlords in such circumstances.

43. In ***Rakusen*** there were two separate rents under consideration: that paid by the intermediate company to the superior landlord, and that paid to the intermediate company by the applicant tenants. The passages cited by Mr Carter are concerned with identification of the rent for the

purposes of Chapter 4 of the 2016 Act and which of the two successive landlords should be regarded as the landlord for such purposes.

44. The facts of ***Rakusen*** may be readily distinguished from those of the present case, where there was only one landlord: the Respondent. She had not granted an intermediate tenancy to a third party that, in turn, let the Property to the Applicants.

45. The Applicants arranged for rent to be paid to the Respondent's agent in accordance with the terms of the tenancy agreement, *which was by virtue of clause 7.1 of that agreement expressly received as paid by the agent of the tenant.*

46. ***Kowalek****,* insofar as is relevant for this issue, was concerned with the question of whether a payment made at a time when a landlord was no longer committing an offence could be taken into account when assessing the amount of an RRO relating to rent which fell due when the offence was still being committed. The Court of Appeal agreed with the conclusion of the Upper Tribunal (Lands Chamber) that rent not paid during the period specified in s.44(2) of the 2016 Act cannot be included when considering the amount payable under an RRO, which was supported both by a literal reading of the wording of the section, and the policy underlying the legislation.

47. The issues in ***Kowalek*** had no direct application to the present case, having been concerned with wholly distinct questions.

48. The Tribunal accordingly concludes that ***Rakusen***, both in the Court of Appeal and in the Supreme Court, and ***Kowalek*** in fact provide no authority for the surprising proposition that rent paid on behalf of a tenant, or group of tenants, by a third party, expressly referred to in the tenancy agreement as received from an agent of those tenants, is not rent susceptible to an order for repayment under an RRO.

49. The Tribunal has knowledge and experience of these matters, and finds that students and other young adults not uncommonly have rent, or contributions to their rent, paid on their behalf by parents, grandparents, scholarship funds or other benefactors. Were Mr Carter's submissions to be correct, none of those sums could be recoverable by way of an RRO, irrespective of how egregiously a landlord had behaved in failing to license premises. We hold that that is not the state of the law.

50. We therefore find that the rent paid by Mr Choy Chi Fai was paid on behalf of, and as agent for, the Applicants together, in satisfaction of their contractual obligations, or of Ms Choy's contractual obligation. As such, on normal principles of agency, substantially reinforced by clause 7.1 of the tenancy agreement, it was paid as agent of the tenant(s), and we

conclude that this comes within the definition of rent susceptible to an RRO within the meaning of s. 40(2)(a) of the 2016 Act.

The Respondent's Secondary Submission

51. Having rejected those contentions, we turn to Mr Carter's secondary submission, to the effect that where the only named tenant on the tenancy agreement was Ms Lee, Ms Choy and Ms Lum were merely *'permitted occupiers'* of the Property during the relevant period, not themselves tenants. Therefore, he contends, it is only Ms Choy's one third share of the rent paid that is susceptible to an RRO, and the claims of the other Applicants must fail.

52. The evidence clearly discloses that Ms Dorofiychuk of Parkes Estates, agents for the Respondent, expressly agreed to occupation of the Property by the Second and Third Applicants. In this, she acted within authority specifically granted by clauses 7.1 and/or 7.2 of the tenancy agreement (as opposed to the 3rd schedule, referred to above)

53. Having consented to such occupation, rent was paid and accepted by the Respondent's agent in very substantial sums, not from the First Applicant, but from the father of the Second Applicant. It cannot be contended that this was a mistake, where the second payment was made in more or less identical circumstances.

54. The 2004 Act establishes that an HMO does not require a distinct letting to a series of named tenants: section 254(2) provides that a building or part of a building meets the *"standard test"* for an HMO if the living accommodation is occupied by persons who do not form a single household, and that rent or other consideration is to be provided in respect of at least one of those persons' occupation.

55. Section 262 of the 2004 Act further provides that a person is to be regarded as an occupier for the purposes of section 254(2) whether they are a tenant or a licensee.

56. The distinction between the two categories of occupation was definitively stated by the House of Lords in ***Street v Mountford*** **[1985] AC 809**, where it was held that the fundamental characteristic that distinguishes a tenancy from a licence is exclusive possession of premises for a term. Those elements appear to be amply satisfied on the facts of the present case.

57. Even if the Tribunal is wrong in that analysis, section 56 of the 2016 Act provides that the term *"tenancy"* as employed therein includes licenses.

58. Further, clause 1.14 of the tenancy agreement provides that the terms *"permitted occupier"* and *"licensee"* are synonymous:

'"Permitted Occupier", or "Licensee" means any person permitted by the Landlord to live in the Property but not named as the Tenant in the Tenancy Agreement. That person will be bound by all the obligations of the Tenancy Agreement but will have no rights as the Tenant and will not be liable to pay rent;'

59. Addressing the latter sub-clause quoted, even were the Second and Third Applicants to have some diminished status, we find that this submission cannot avail the Respondent in any event. Being predicated upon the assertion that only Ms Lee was the tenant, and where we have found that the rent was paid by Ms Choy's father on behalf of the tenant or tenants, the entirety of the sum paid is susceptible to an RRO, subject to the other issues the Tribunal must consider, whether paid on behalf of one tenant, or three (including licensees).

Preliminary Conclusions

60. We are, accordingly, satisfied that the Respondent was the owner and that she received rent from Mr Choy, paid over on behalf of all the Applicants. The Respondent was therefore at the relevant time at the very least a person managing the Property. We have already found that the Respondent was the landlords of the Property, and that they managed it, in the manner defined by section 263(2) of the 2004 Act, albeit that day-to-day management was devolved to Parkes.

The defence of "reasonable excuse"

61. Under section 72(5) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a dwelling which is licensable under Part 3 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.

62. Ms Saraf relies heavily upon this defence, stating that she has always relied upon professional help for her letting of the Property, at considerable expense: Parkes' management commission was 8% inclusive of VAT, in addition to various further charges for preparation of documents and so on. She had no intention of letting the Property as an HMO, which is why the additional HMO service from Parkes was declined.

63. In cross-examination, the Respondent explained that there were two separate management agents, JNSS and Parkes. Parkes' responsibilities included finding suitable tenants and arranging for them to move in, sign tenancy agreements and so on. JNSS, owned and controlled by her parents, served as the main port of call regarding issues of repair and maintenance, and received rent on her behalf from Parkes, after deduction of commission.

64. It can be seen from email exchanges concerning leaks at the Property between Parkes on the one hand and Ms Daga of JNSS on the other that the Respondent's parents not only cc'd, but were on occasions directly contacted by representatives of Parkes. It is clear that in those messages the presence of multiple tenants in the Property was mentioned. Indeed, in WhatsApp messages with Ms Daga of JNSS, all three tenants - or occupiers - discussed issues concerning the Property.

65. The Tribunal notes the geographical location of the Property in proximity to the university, the fact that Ms Lee was a student, and the requirement made of Ms Choy and Ms Lum to provide various forms of identification to Parkes before their own occupation was permitted. We conclude that Parkes acted in the role of letting agent, while JNSS acted as managing agent on behalf of the Respondent, and that each through their respective personnel were well aware that the Property was occupied by three students, not just Ms Lee.

66. We find that the Respondent has not discharged the evidential burden of demonstrating that she was unaware that there were three tenants or licensees in the Property at all material times. While she may have had little to do with Parkes, we find that the proximity identified by the Upper Tribunal in ***Irvine v Metcalfe*** **[2023] UKUT 283 (LC)** is properly to be attributed where her parents were, effectively, the managing agents, and were well aware of the true position.

67. In ***Aytan v Moore*** **[2022] HLR 29**, the Upper Tribunal held that:

> *"...a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themself of the licensing requirements without relying upon an agent, for example because the landlord lived abroad."*

68. Applying the three tests adumbrated in ***Aytan***, we do not accept that either Parkes or JNSS were under a contractual duty to advise the Respondent of her regulatory duties. We do not find that there are reasons to imply such terms into her contract with either, whether based on business efficacy or the officious bystander tests. We also consider that the other tests are not met. We discern no specific reason why the Respondent should have relied upon the competence and experience of either agency as to her regulatory responsibilities, and we discern no reason why the Respondent could not have informed herself of them. We found her to be an intelligent and articulate woman (as indeed were all the parties) who could have easily joined a landlords' association and read its bulletins, engaged with local authority landlords' fora, or simply

read LB Camden's website. None would be a particularly onerous burden for a landlord, particularly of property generating income exceeding £80,000 a year.

69. Ultimately, it was the Respondent's responsibility to obtain a licence and there is nothing in the explanation provided which in our view is sufficient to amount to a complete defence. We find that the Respondent has not satisfied us, on a balance of probabilities, that she had a reasonable excuse for failing to license the Property.

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

The offence

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

72. Section 72(1) states that *"A person commits an offence if he is a person having control of or managing a HMO which is required to be licensed under this Part … but is not so licensed"*, and for the reasons given above we are satisfied (a) that the Respondents were, together, "person(s) managing" the Property for the purposes of section 263 of the 2004 Act, (b) that the Property was required to be licensed throughout the period of claim and (c) that it was not licensed at any point during the period of claim.

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

74. We accordingly find that the Respondent committed the offence under s.72(1) of the 2004 Act.

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

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

76. We see no reason not to exercise our discretion to make an RRO, a discretion to be exercised against making an order very rarely: ***LB Newham v Harris*** **[2017] UKUT 264 (LC)**; ***Ball v Sefton MBC*** **[2021] UKUT 42 (LC)**.

The Amount of the RRO

77. The amount of rent to be ordered to be repaid is governed by section 44 of the 2016 Act. Under sub-section 44(2), the amount must relate to rent paid by the tenants in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. Under sub-section 44(3), the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of housing benefit or universal credit paid in respect of rent under the tenancy during that period.

78. In this case, the Applicants' claims relate to a period not exceeding 12 months: £83,805.48 for the period 9 June 2022 to 8 June 2023.

79. However, as explained above, Mr Choy Chi Fai paid the first lump sum rental payment on 12 August 2021, before the tenancy commenced (on 18 August 2021), before any of the Applicants moved into the Property and, therefore, before the offence commenced.

80. While we have rejected Mr Carter's principal submission based upon ***Kowalek***, that case is however authority for the proposition that the time of payment is a limitation on the availability of an RRO. Following ***Kowalek*****,** an RRO must (i) relate to rent paid both for the period of the offence and (ii) that it must be paid during the period when the offence was occurring. It follows that no part of the rent comprised within the first payment made on 12 August 2021 may be included within the total rent calculation.

81. By the conclusion of the hearing, the Applicants through their counsel conceded that the application of this principle must remove the sum of £14,460.27 from the total rent under consideration for the relevant period, so that the total sum in issue was reduced to £69,345.21, being the rent paid in advance on 22 June 2022 for the period 18 August 2022 (when the second period of the tenancy commenced) to 08 June 2023, the last day of the period for which the RRO is claimed in the application.

82. This sum is calculated by dividing the total rent for the second term of £85,800 by 365 days, to give a daily rental rate of £236.07, and then multiplying that by 295 days, between 18/08/22 and 08/06/23. £236.07 x 295 days =£69,345.21.

83. We are satisfied on the basis of the evidence that the Applicants were in occupation for the whole of the period to which each of their separate rent repayment applications relate and that the Property required a licence for the whole of that period. Therefore, the maximum sum that can be awarded by way of rent repayment is the sum of £69,345.21, this being the amount paid by the Applicants by way of rent in respect of the period of claim and paid during that period.

84. Under sub-section 44(4), in determining the amount of any rent repayment order the tribunal must, in particular, take into account (a) the conduct of the landlord and the tenant, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of an offence to which the relevant part of the 2016 Act applies.

85. In considering the quantum of an RRO, the Tribunal directs itself in accordance with the guidance in ***Acheampong v Roman and others [2022] UKUT 239 (LC)***, where the Upper Tribunal recommended a four-stage approach to determining the amount to be repaid, which is paraphrased below:-

(a) ascertain the whole of the rent for the relevant period;

(b) subtract any element of that sum that represents payment by the landlord for utilities that only benefited the tenant;

(c) consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made and compared to other examples of the same type of offence; and

(d) consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

86. Adopting the ***Acheampong*** approach, the whole of the rent in this case means the whole of the rent paid by the Applicants, being £69,345.21.

Utilities

87. In relation to utilities, clause 3 of the tenancy agreement provides that the tenant(s) are responsible for paying for water supply, gas, television license, broadband, electricity and so on.

88. Accordingly, nothing falls to be deducted under this head.

Seriousness

89. In ***Acheampong v Roman*** at §20(c), Judge Cooke held that the Tribunal must consider how serious the housing offence forming the basis of the application is, both compared to other types of offences in respect of which a rent repayment order may be made, and compared to other examples of the same offence. As the issue was put in §21 of the judgment, this *"…is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence?"*

90. Failure to license leads – or can lead – to significant health and safety risks for often vulnerable tenants, and sanctions for failure to license have an important deterrent effect on future offending as well as encouraging law-abiding landlords to continue to take the licensing system seriously and to inspire general public confidence in the licensing system. In addition, there has been much publicity about licensing of privately rented property, and there is an argument that good landlords who apply for and obtain a licence promptly may feel that those who fail to obtain a licence gain an unfair benefit thereby and therefore need to be heavily incentivised not to let out licensable properties without first obtaining a licence.

91. Furthermore, even if it could be argued that the Applicants did not suffer direct loss through the Respondent's failure to obtain a licence, it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If landlords can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show that they have suffered actual loss, this will significantly undermine the deterrence value of the legislation.

92. Against that expression of policy concerns, it is nevertheless the case that the offence under s.72(1) of the 2004 Act is significantly less serious than those in rows 1, 2 and 7 in the table in section 40 of the 2016 Act, and we take that into account, following the guidance the Upper Tribunal in ***Dowd v Martins*** **[2023] HLR 7**, where offences of failing to licence in accordance with section 72(1) of the 2004 Act were expressed as being "*…generally less serious than others for which a rent repayment order can be made.*"

93. The nature of a landlord has been held to be relevant to the seriousness of the offence. In some cases, it has been argued that there is a distinction to be drawn between "professional" and "non-professional" landlords, seriousness being aggravated in the case of the former. The proper approach is as set out by the Deputy President in ***Daff v Gyalui*** **[2023] UKUT 134 (LC)**, at paragraph 52:

"The circumstances in which a landlord lets property and the scale on which they do so, are relevant considerations when determining the amount of a rent repayment order but the temptation to classify or caricature a landlord as "professional" or "amateur" should be resisted, particularly if that classification is taken to be a threshold to an entirely different level of penalty. … The penalty appropriate to a particular offence must take account of all of the relevant circumstances."

94. As to the condition of the Property, we consider that it has been refurbished, decorated and maintained to a generally high standard.

95. In order to assess the starting point at stage (c), we take account of the now substantial guidance in case law from the Upper Tribunal, including cases in which the Upper Tribunal has substituted its own assessments. In particular, we have considered ***Acheampong*** itself, ***Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8**; ***Aytan v Moore* [2022] UKUT 27 (LC)**; ***Hallett v Parker* [2022] UKUT 239 (LC)**; ***Hancher v David and Others* [2022] UKUT 277 (LC)**; and ***Dowd v Martins and Others* [2022] UKUT 249 (LC)**. The range of percentage of the maximum possible RRO awarded range from 25% to 90% (i.e. at stage (d) – most of the cases precede ***Acheampong***).

96. The Applicants highlight the case of ***Newell v Abbott* [2024] UKUT 181**, where the Upper Tribunal awarded 60% of the rent received to the tenants from a landlord of a single property based upon a lack of licensing due to a lack of attention or inadvertence, where the accommodation was generally of a good standard.

97. The Respondent highlights ***Hallett v Parker* [2022] UKUT 239 (LC)** where, on the facts, an award of 25% of the rent was made.

98. We find that the Respondent is a landlord of a single property who failed to license based upon a lack of attention or inadvertence.

Section 44(4) – Conduct

99. At stage (d), we must consider what effect the matters set out in Section 44(4) of the 2016 Act have on our conclusions thus far. Section 44(4) provides that in determining the amount of an RRO, within the maximum, the Tribunal should, in particular, take into account the conduct of the landlord and the tenant, and the financial circumstances of the landlord.

100. As Judge Cooke noted in ***Acheampong***, there is a close relationship in terms of conduct, at least of the landlord, between stages (c) and (d). Insofar as we have already made findings in relation to stage (c) which

may also be said to relate to the conduct of the Respondent, we do not double-count them in considering the section 44(4) issues.

101. The Applicants appear to have lived in the Property more or less happily for around 2 years, subject to persistent problems with Saniflow toilets, and a short-lived episode of leaks into the flat below, traced to a failure of silicone sealant in a bathroom. It does not reflect particularly well on the Respondent that her agents delayed substantially in providing effective repairs to the toilets, albeit there were plenty of them in the Property, and failed to resolve the silicone issue so that the Applicants themselves did so, at their own expense.

102. In light of our findings of fact, and against the very substantial sums paid by way of rent, we assess the stage (c) starting point at 50% of the total rent.

103. At stage (d), avoiding double-counting, we find that the Applicants were paying for the Property as a very high-end letting, and were entitled to a significantly better service from the Respondent's' agents than they in the event obtained, in particular in relation to the problems with the toilets.

104. Taking account of those matters, we make a small adjustment of 5% in the Applicants' favour.

105. In so determining, we reject the Applicants' submission as to 85% of rent, and the Respondent's of 25% of the rent received from Ms Lee alone, in the sum of approximately £5,000.

Financial Circumstances of the Landlord

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

107. The Respondent did not claim that her financial circumstances were relevant to our determination, and besides her assertion that she earns between £1,200 to £2,000 per month from her career as a dancer, which plainly omits the rent from the Property, there was nothing in her evidence or the facts more generally to alert us to any particular risk of hardship.

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

108. The Respondents have not been convicted of a relevant offence, but it is clear from the Upper Tribunal decision in ***Hallett v Parker*** (see above) that this by itself should not be treated as a credit factor.

Other Factors

109. It is apparent from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal *"must, in particular, take into account"* the specified factors.

110. The Applicants submit that, as the total rent was paid in full and that the ***Kowalek*** reduction explained in §§79-81 is *'artificial'*, and based upon a *'technicality'*, this should be taken into account in making an RRO as a higher proportion of the rent than might otherwise be the case. We disagree, and consider that the approach we have taken amply fits the justice of the case, in particular based on our review of the key cases in ***Newell***: see §116, below.

111. In this case we are not aware of any other specific factors which should be taken into account in determining the amount of rent to be ordered to be repaid.

Amount to be Repaid

112. The four-stage approach recommended in *Acheampong* has been set out above. The amount arrived at by considering the first stage is 69,345.21.

113. No sums are required to be deducted by stage (b) in this case.

114. Considering the further matters required by stages (c) and (d), the Tribunal's conclusion is that the appropriate amount is reduced to 55% of that sum, and there is nothing further to add or subtract for any of the other s.44(4) factors.

115. Accordingly, taking all of the factors together , the rent repayment order should be for 55% of the maximum amount of rent payable. The amount of rent repayable is, therefore, £69,345.21 x 55% = £38,139.87.

116. While this is a very substantial amount, we have nevertheless reconsidered our conclusions against the guidance provided by the Upper Tribunal, and in particular where it has substituted percentage reductions in making a redetermination. The key cases are set out in a helpful fashion in the course of the redetermination in ***Newell*** , referred to above, at §96. We do not repeat that analysis, but have been closely guided by it.

Reimbursement of Tribunal Fees

117. The Applicants applied for the reimbursement of the application and hearing fees paid by them, under Rule 13(2) of the Rules. In the light of our findings, we consider it just and equitable to allow that application.

Name: Judge Mark Jones **Date: 29 April 2025**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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

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

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

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