



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/00AY/HMF/2019/0018**

**Property** : **6 Sunset Road, London SE5 8EA**

**Applicants** : **Laura Northover, Hannah  
Blackmore, Christopher Spedding,  
Alexander Wells and Savannah  
James-Bayly**

**Representative** : **In person**

**Respondent** : **Khalida Hashimi**

**Representative** : **Richard Granby of Tanfield  
Chambers**

**Type of Application** : **Application for Rent Repayment  
Order under the Housing and  
Planning Act 2016**

**Tribunal Members** : **Judge P Korn  
Mr M Mathews FRICS**

**Date and venue of  
Hearing** : **11<sup>th</sup> September 2019 at 10 Alfred  
Place, London WC1E 7LR**

**Date of Decision** : **21<sup>st</sup> October 2019**

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**DECISION**

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## **Decisions of the tribunal**

- (1) The tribunal orders the Respondent to repay to the Applicants jointly the sum of £4,000.00 by way of rent repayment.
- (2) The tribunal also makes an order under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 requiring the Respondent to reimburse to the Applicants half of the £100 application fee (i.e. £50) and half of the £200 hearing fee (i.e. £100) paid by them in respect of this application.

## **Introduction**

1. The Applicants have applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 (“**the 2016 Act**”).
2. The Applicants jointly entered into an assured shorthold tenancy agreement with the Respondent on 9<sup>th</sup> April 2018 in respect of the Property, and a copy of the tenancy agreement is in the hearing bundle.
3. The basis for the application is that, according to the Applicants, the Respondent was controlling an unlicensed house in multiple occupation which was required to be licensed at a time when the Property was let to the Applicants and was therefore committing an offence under section 72(1) of the Housing Act 2004.
4. The claim is for repayment of rent paid during the period 1<sup>st</sup> October 2018 to 7<sup>th</sup> April 2019 totalling £19,446.82 in aggregate.

## **Agreed points**

5. At the hearing it was confirmed or established that the following points were agreed:-

(a) that the Property was not licensable at the date on which the tenancy was granted but became licensable on 1<sup>st</sup> October 2018 on the coming into force of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 and then continued to require a licence throughout the remainder of the period of the rent repayment claim; and

(b) that the Property was not so licensed during the period 1<sup>st</sup> October 2018 to 7<sup>th</sup> April 2019.

The above points are therefore not in dispute, and in any event we are satisfied that they are accurate on the basis of the relevant legislation and the evidence before us.

## **Applicants' case**

6. The Applicants' case is straightforward. In written submissions they state that the Property was rented to them without the appropriate HMO licence for the period 1<sup>st</sup> October 2018 to 7<sup>th</sup> April 2019 and that the total rent paid by them in respect of this period amounted to £19,446.82. The Respondent was a person having control of or managing an HMO required to be licensed but which was not licensed and therefore she was during the period in question committing an offence under section 72(1) of the Housing Act 2004. An application for a licence was not made until 26<sup>th</sup> June 2019.
7. The Applicants first knew that the Property required a licence on 22<sup>nd</sup> January 2019 when the Respondent's husband Mr Hashimi texted Laura Northover (one of the Applicants) to arrange for a mortgage adviser to view the Property and the mortgage adviser then mentioned on her visit that changes were needed to bring the Property up to HMO licensing standards. According to the Applicants' understanding, the Property did not have the required number of bathrooms or the correct wiring or electrical specifications, the fire detection system was inadequate, the fire alarms were not linked and fire doors were not in place.
8. The Applicants note Mr Hashimi's own witness evidence that in order to carry out the works his only choice was to evict them as they had refused him and the contractors access to the Property, but this was simply not the case as is shown by an exchange of text messages between Ms Northover and Mr Hashimi which indicates a minimum of three occasions on which the Applicants provided access and co-operation.
9. The Applicants further submit that the notice requiring them to vacate the Property constituted unlawful eviction, arguing that a landlord cannot serve a valid notice if the property should be licensed but is not.
10. Insofar as the Respondent wishes to argue that responsibility rested with her managing agent, Haart, the Applicants do not accept this. The tenancy agreement was with the Respondent and there is nothing in the Respondent's management agreement with Haart to suggest that Haart took over responsibility for ensuring compliance with the law.
11. After the Applicants vacated the Property, the Respondent did not immediately apply for a licence but instead re-listed the Property on 'Spare Room' as a six-bedroom property and did not apply for a licence until 26<sup>th</sup> June 2019.
12. The Applicants make certain other points about the condition of the Property. They state that when they first began their tenancy there

were a huge number of repairs which had been promised to them but which had not been carried out, and they have provided some copy correspondence in support of this point. The Property was also meant to be furnished but there were no sofas, no dining area furniture and no bed for the fifth bedroom, and they eventually had to buy their own. In addition, on the determination of the tenancy the Respondent tried to withhold their entire deposit but was only awarded £175 after the Applicants disputed the position with the Deposit Protection Scheme.

### **Cross-examination of Ms James-Bayly**

13. Ms James-Bayly, one of the Applicants, conceded in cross-examination that the Applicants did not know what the Respondent and her managing agents had discussed between them in relation to the Property. As regards the advertisement on 'Spare Room', she accepted that there was no evidence identifying the Respondent as the landlord of the property in question. She also acknowledged that Global Shared Ltd, not the Respondent, is the current licence holder and that the Applicants have no evidence as to the Respondent's means.

### **Mr and Mrs Hashimi's witness evidence**

14. The Respondent has given a brief witness statement in which she states that her understanding of the facts is consistent with the contents of what turned out to be the first of two witness statements given by Mr Hashimi.
15. In his first witness statement Mr Hashimi states that he and his wife live and work in Cyprus and felt it best to instruct managing agents to look after the management of the Property. He states that it would be unfair to penalise the Respondent for the failings of the managing agents. The managing agents were instructed because they were highly regarded and experienced, and the Respondent entered into a management agreement with them. She could have approached a managing agent who was not a member of The Association of Residential Letting Agents and paid a lower commission but she did not do so.
16. Mr and Mrs Hashimi rely on the income from the Property to support their children aged 1, 11 and 14. Mr Hashimi is currently unemployed, the Respondent looks after the children full time and neither of them is on welfare benefits.
17. Mr Hashimi became aware of the licensing problem in January 2019 when the mortgage adviser visited the Property. He contacted Haart but they were not very helpful. Unsure what to do, he instructed Haart to serve the Applicants with a notice to vacate in order to obtain vacant possession so that any necessary works could be carried out. He then

granted a new tenancy of the Property to a company called Global Shared Ltd and with their help arranged for contractors to provide quotations for the necessary work to the Property. Mr Hashimi then instructed Global Shared Ltd to apply for an HMO licence, which they did. A licence was issued on 2<sup>nd</sup> August 2019.

18. Regarding the Applicants' letter of complaint sent to Haart about the state of the Property, he states that Haart did not share the contents of the letter with him. In any event, if the Applicants were unhappy with the state of the Property prior to going into occupation they could have found an alternative property. Also, when the Applicants vacated the Property there was significant damage which did not exist when they moved in.
19. In his supplemental witness statement he states that the notice served on the Applicants to vacate was not challenged at the time. He also adds that he has no recollection of the 'Spare Room' advertisement. The Property was in fact subsequently rented to four people for £2,800, which was considerably less than the rent paid by the Applicants.
20. Mr and Mrs Hashimi do have another property at 30 Downsview Road, London SE19 and they live at this property when in England and rent part of it out to a third party.
21. During the course of cross-examination Mr Hashimi said that he and/or the Respondent had been a landlord in the United Kingdom since 2008. It was also put to him that communication had not just been between the Applicants and the managing agents but that there had been some direct communication between the Applicants and himself, which he accepted.

### **Respondent's case**

#### Reasonable excuse

22. The Respondent relies on the statutory defence of "reasonable excuse" provided by section 72(5) of the Housing Act 2004. The Respondent submits that once the defence of reasonable excuse has been raised evidentially it is for the other party (in this case, the Applicants) to demonstrate to the criminal standard – meaning beyond reasonable doubt – that the excuse is not reasonable: see *Encyclopaedia of Housing Law and Practice 1-4182.158* and the decision in *Westminster City Council v Mavroghenis (1983) 11 H.L.R. 56 DC*.
23. "Reasonable excuse" has not been defined in the context of the Housing Act 2004 but it has been considered in the context of tax law in the Upper Tribunal (Tax and Chancery Chamber) decision in *Christine Perrin v The Commissioners for Her Majesty's Revenue and Customs*

*(2018) UKUT 156 (TCC)* and in the First-tier Tribunal (Tax Chamber) decision in *Schotten & Hansen (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs (2017) UKFTT 0191 (TC)*.

24. The Respondent's unchallenged evidence in this case is that at the relevant time she lived and worked in Cyprus. Her husband states that she was dependent on the managing agents (Haart) for ensuring that the Property was let lawfully. Her contract with Haart was subject to the code of practice for residential lettings which requires agents to comply with licensing obligations and to advise landlords of all necessary licensing requirements. Haart is a reputable and regulated firm of managing agents and the Respondent relied on them. The law changed part way through the tenancy and there was no evidence before the tribunal as to how the Respondent would have found out about the change in the law.
25. In late January when the Respondent did know about the change in the law she took action with reasonable speed by serving a section 21 notice on the tenants and then taking back possession when the notice expired.

#### Alternative arguments

26. If the tribunal is against the Respondent on the defence of "reasonable excuse" the Respondent acknowledges that the tribunal then needs to consider quantum, i.e. how much rent to order the Respondent to repay, and the Respondent has therefore also addressed the issue of quantum.
27. There is a minor dispute as to the amount of rent received by the Respondent for the period 6<sup>th</sup> March to 5<sup>th</sup> April 2019, as the Applicants' position is that they paid £3,003.08 and the Respondent's position is that she only received £2,901.00.
28. The Respondent notes that the Applicants have made certain claims regarding the condition of the Property but she submits that this is largely secondary. Of more relevance is the fact that she appointed a reputable agent, she protected the tenants' deposit, she took action on becoming aware of the statutory requirements. In addition, she does not accept the suggestion, unsupported by evidence, that the Property was unsafe simply because works were required by the local housing authority before it would grant an HMO licence.
29. Furthermore, the Respondent has not been convicted of an offence and the Applicants have not challenged Mr Hashimi's witness evidence regarding the Hashimis' financial and other circumstances. The Respondent states that she is dependent on the income from the

Property (plus the income from another property), and there is no evidence before the tribunal that there is any equity in either property.

**Applicants’ response on “reasonable excuse” and generally**

30. In relation to the “reasonable excuse” defence, the Applicants noted the tax cases being relied on by the Respondent but argued that they were not analogous to the present case. The tax cases related to reliance on the level of training of an accountant in respect of accountancy issues, whereas here the issue was the extent to which it was reasonable to rely on managing agents for expert knowledge of the law. In any event, the Respondent had a responsibility to be informed about the law. The information was readily available online, even from abroad, and it would be unfair on tenants if a landlord could simply evade responsibility by claiming that it was relying on its managing agent.
31. The Applicants did not accept that they had been evicted in order that the Respondent could carry out the required works. They also argued that they had not benefited from the protection of living in a licensed property. The Respondent has been a landlord for 11 years. She has legal responsibilities and needs to be proactive about finding out what the law is. In addition, although the change in law only came into force in October 2018 it was introduced before the tenancy started. The Property continued to be used as an unlicensed HMO up to 26<sup>th</sup> June 2019.
32. In addition, it was simply not the case that the Applicants refused access for the works to be done. They gave the Respondent options but were just told to move out.

**Relevant statutory provisions**

33. Housing and Planning Act 2016

Section 40

- (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.
- (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to – (a) repay an amount of rent paid by a tenant ...
- (3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed

by a landlord in relation to housing in England let by that landlord.

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

#### Section 41

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



### Section 43

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

### Section 44

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

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

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

landlord has at any time been convicted of an offence to which this Chapter applies.

### Housing Act 2004

#### Section 72

- (1) A person commits an offence if he is a person having control of or managing 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) ... .

### **Tribunal's analysis**

34. The Applicants have provided evidence that, and the Respondent accepts that, the Property required a licence throughout the period in respect of which the Applicants are claiming a rent repayment and that it was not so licensed. In addition, the Respondent does not dispute the fact that the Applicants had a tenancy agreement and that they paid rent to the Respondent. The Respondent also accepts that she was the Applicants' landlord during the relevant period.

#### The defence of "reasonable excuse"

35. 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 licensable but unlicensed HMO had a reasonable excuse for the failure to obtain a licence. Mr Granby has referred the tribunal to the Upper Tribunal (Tax and Chancery Chamber) decision in *Christine Perrin v The Commissioners for Her Majesty's Revenue and Customs* and to the First-tier Tribunal (Tax Chamber) decision in *Schotten & Hansen (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs*, although he accepts that neither decision is binding on this tribunal. He has also referred to the decision in *Westminster City Council v Mavroghenis* as authority for the proposition that once the defence of reasonable excuse has been raised evidentially it is for the other party to demonstrate to the criminal standard (beyond reasonable doubt) that the excuse is not reasonable.
  
36. Dealing first with the standard of proof, we do not accept that the decision in *Westminster City Council v Mavroghenis* is authority for the proposition that once the defence of reasonable excuse has been raised it is for the other party to demonstrate to the criminal standard that the excuse is not reasonable. In that case, *Watkins LJ* – giving the

decision of the Divisional Court – stated that “*It is sufficient for the prosecution to prove ... (the burden ... resting on the prosecution to do so) that ... the defendant, without reasonable excuse, failed to comply with the regulations*”. He does not, though, go on to state that the burden of proving the absence of a reasonable excuse must be discharged to the criminal standard.

37. We note that in the tax cases cited by the Respondent the statutory wording specifically places the burden of proof on the taxpayer to satisfy the relevant tribunal on an appeal that there is a reasonable excuse for the failure. The burden was also on the defendant to demonstrate that they had a reasonable excuse in the case of *R v Brown (Daniel William) 1971 55 Cr. App. R. 478* (not cited by either party), where the Court of Appeal held that the standard of proof for the defendant was the civil standard. Whilst it does not follow that standard of proof should necessarily be the same where the burden is on the prosecution to **disprove** reasonable excuse – assuming that the burden of disproving reasonable excuse does indeed rest on the prosecution in this case – we are not persuaded in the absence of clear authority that the Applicants in this case should be required to disprove the defence of reasonable excuse beyond reasonable doubt.
38. We turn now to the tax cases cited by the Respondent. In *Christine Perrin*, the appellant had incurred financial penalties for late filing of her self-assessment tax returns and sought to rely on the statutory defence of having had a reasonable excuse for the failure. The legislation in the case of these penalties goes into some detail as to what does not constitute a reasonable excuse, which is not necessarily relevant to the reasonableness or otherwise of an excuse in a different context. In its decision, the Upper Tribunal (Tax and Chancery) stated that the concept of reasonable excuse was wider than the occurrence of some unforeseeable or inescapable event and that the issue was whether the excuse was objectively reasonable. That had to be judged on the facts, and one factor was whether it was objectively reasonable for the taxpayer in question to have been ignorant of the requirement in question and – if so – for how long.
39. In *Schotten & Hansen*, the appellant had incurred financial penalties for late filing of Contractors Monthly Returns and again sought to rely on the statutory defence of having had a reasonable excuse for the failure. Again, the legislation in the case of these penalties goes into some detail as to what does not constitute a reasonable excuse, which again is not necessarily relevant to the reasonableness or otherwise of an excuse in a different context. In its decision, the First-tier Tribunal (Tax Chamber) stated that a reasonable taxpayer with limited knowledge of the UK tax system and of the Employers and Construction Industry Scheme in particular having employed reputable accountants would have been entitled to rely on those accountants to draw attention to any relevant tax compliance obligation. It therefore considered that it was reasonable for the appellant to assume that the accountants

would have the capacity to, and would, advise on any relevant compliance issues.

40. The Respondent invites us to draw an analogy between the appellant's reliance on its accountant in *Schotten & Hansen* and the Respondent's own reliance on its managing agents in this case. The Respondent also invites us to apply the decision in *Christine Perrin* and to conclude that, amongst other considerations, it was reasonable for her to have been ignorant of the requirement to obtain a licence. We do not accept the Respondent's arguments. First of all, we are not bound by the decisions in the above two cases, although that is not in any way to suggest that the law has been incorrectly applied to the facts of those cases against the relevant tax legislation. Secondly, the legislation in the case of those tax penalties goes into some detail as to what does not constitute a reasonable excuse, and this is not necessarily relevant to the reasonableness or otherwise of an excuse in the context of our case.
41. Thirdly, we do not accept that reliance on a reputable firm of accountants in *Schotten & Hansen* for technical support in respect of a difficult area of tax is analogous to the Respondent's alleged reliance on her managing agents in this case and nor do we accept that ignorance of the law was objectively reasonable in this case. It was not reasonable to place total reliance on managing agents in relation to the issue of whether a licence was needed, in the sense that this is not a reasonable way to treat the managing agents' role and nor is it reasonable to abdicate responsibility for the important question of whether one's property needs a licence to protect the rights of one's occupiers. In any event there is no real evidence in our view that such total reliance was indeed placed on the managing agents or accepted by them.
42. In addition, the fact that the Respondent spends most of her time in Cyprus is not a reasonable excuse. Information can be obtained in a variety of ways, including via the internet, and if someone is renting out property in England – particularly someone who has been doing so since 2008 – it is incumbent upon them to check the rules in order to ensure that they will not be renting out that property in a way which gives rise to one or more criminal offences. As for the point that the Property did not require a licence when it was first rented out, that is a fair point and is relevant to mitigation (as to which, see later) but in our view it does not suffice to constitute the defence of reasonable excuse. The law changes periodically, and again it is incumbent on people who rent out properties to ensure that they are not committing any criminal offences; if this were not the case then landlords could simply evade sanctions through not bothering to acquaint themselves with changes in the law, changes which in the context of this legislation are primarily designed to protect the safety and wellbeing of tenants.
43. In conclusion, we do not accept that the Respondent had a reasonable excuse for failing to obtain a licence.

### The offence

44. 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. The offence of having control of or managing an unlicensed HMO is one of the offences listed in that table.
45. 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. Having determined that the Respondent did not have a reasonable excuse for having control of or managing the house in the circumstances mentioned in section 72(1) of the 2004 Act, we are satisfied beyond reasonable doubt that an offence has been committed by the Respondent under section 72(1), 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 the application was made.
46. Under section 43, the First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence listed in the table in sub-section 40(3). We are satisfied beyond reasonable doubt that the Respondent has committed such an offence.

### Amount of rent to be ordered to be repaid

47. Based on the above findings, we have the power to make a rent repayment order against the Respondent.
48. 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 tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. Under sub-section 44(3), the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of universal credit paid in respect of rent under the tenancy during that period.
49. In this case, the claim does relate to a period not exceeding 12 months during which the landlord was committing the offence, and there is no evidence of any universal credit having been paid. Therefore, the maximum amount repayable is the whole of the amount claimed, i.e. £19,446.82.

50. Under sub-section 44(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 the relevant part of the 2016 Act applies.
51. The Upper Tribunal decision in *Parker v Waller and others (2012) UKUT 301 (LC)* is a leading authority on how a tribunal should approach the question of the amount that it should order to be repaid under a rent repayment order if satisfied that an order should be made. The case was decided before the coming into force of the 2016 Act but in our view the basic principles that it lays down apply equally to rent repayment orders under the 2016 Act, subject obviously to any relevant differences in the statutory wording.
52. In his analysis, based in that case on section 74 of the 2004 Act, the then President of the Upper Tribunal, George Bartlett QC, discussed the purpose of rent repayment orders in favour of occupiers. Under section 74 the amount payable is “such amount as the tribunal considers reasonable in the circumstances” and section 74 goes on to specify five matters in particular that should be taken into account, including the conduct of the parties and the financial circumstances of the landlord. This contrasts with rent repayment orders in favour of a local authority in respect of housing benefit under the 2004 Act, where an order for the full amount of housing benefit must be made unless by reason of exceptional circumstances this would be unreasonable. There are therefore different policy considerations under the 2004 Act depending on whether the order is in favour of an occupier or in favour of a local authority.
53. The President of the Upper Tribunal went on to state that in the case of a rent repayment order in favour of occupier there is no presumption that the order should be for the total amount of rent received by the landlord. The tribunal must take an overall view of the circumstances.
54. Section 44 of the 2016 Act, by contrast, does not state that the amount repayable to an occupier should be such amount as the tribunal considers reasonable in the circumstances, but neither does it contain a presumption that the full amount will be repayable.
55. Starting with the specific matters listed in section 44, the tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence. We will take these in turn.

### Conduct of the parties

56. We have considered the written and oral evidence presented to us.
57. The Applicants have given evidence that according to their understanding there were various problems with the Property, including inadequate number of bathrooms, incorrect wiring/electrical specifications and inadequate fire detection system. These points are plausible but unproven. The Applicants also state that when they first began their tenancy there were a huge number of repairs which had been promised to them but which had not been carried out, and they have provided some copy correspondence in support of this point. The Respondent has not plausibly contested these points, and instead her explanation seems to be that her managing agents did not communicate with her on these issues. However, as pointed out by the Applicants, there was at least some direct correspondence between the Applicants and the Respondent's husband on certain of their concerns.
58. The Applicants' evidence that they were unlawfully evicted is weak, but there is some evidence to suggest that the Respondent could have tried harder to allow them to stay whilst the necessary works were carried out. The Applicants' submissions as to the Respondent's failure promptly to obtain a licence after the Applicants vacated rely on a degree of speculation and have not been properly substantiated.
59. We also note that on the determination of the tenancy the Respondent tried to withhold the Applicants' entire deposit but was only awarded £175 after the Applicants disputed the position with the Deposit Protection Scheme. This casts doubt on Mr Hashimi's assertion that when the Applicants vacated there was significant damage to the Property which did not exist when they moved in.
60. The evidence indicates that the Applicants' conduct has been good.
61. We note the submission on behalf of the Respondent that she appointed a reputable agent, although the Respondent seems now to accept that the managing agent provided a poor service. We also note the submission that the Respondent protected the tenants' deposit and took action on becoming aware of the statutory requirements.

### Financial circumstances of the landlord

62. We have not been provided with any specific information as to the Respondent's financial circumstances, save that she owns another property in the United Kingdom in addition to this one. The Respondent states that she is dependent on the rental income from both properties. She and Mr Hashimi have three children between the ages of 1 and 14, Mr Hashimi is currently unemployed, the Respondent

looks after the children full time. and neither of them is on welfare benefits. The Applicants did not offer any evidence to challenge any of these submissions.

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

63. There is no evidence that the Respondent has been convicted of a relevant offence.

Other factors and continuation of analysis

64. It is clear from applying the principles set out in the decision in *Parker v Waller* and 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. One factor identified by the Upper Tribunal in *Parker v Waller* as being something to take into account in all but the most serious cases is the inclusion within the rent of the cost of utility services, but it is common ground in the present case that the rental payments do not include any charges for utilities. On the facts of this case we do not consider that there are any other specific factors which should be taken into account in determining the amount of rent to order to be repaid. Therefore, all that remains is to determine the amount that should be paid based on the above factors, including the circumstances of the failure to obtain a licence.
65. The first point to emphasise is that, notwithstanding our comments above regarding the parties’ conduct, it remains the case that the Respondent has committed a criminal offence. Whilst the Applicants did not bring any specific evidence as to the information that would have been available to the Respondent, there has generally been a fair amount of publicity about HMO licensing and the Respondent should have acquainted – and updated – herself as to the rules governing the renting out of property in England, especially as to any legislation making it a criminal offence to fail to observe requirements designed to protect the safety and wellbeing of her tenants.
66. It is arguable that the Applicants have suffered no material loss directly through the Respondent’s failure to obtain a licence and that therefore a rent repayment order would represent a windfall for the Applicant. To some extent this is true, but 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, then this will significantly undermine the deterrence value of the legislation. There has been much publicity about HMO licensing, and



landlords need to ensure that they are aware of their responsibilities and do not commit criminal offences.

67. At the same time, we need to take into account other relevant factors. First of all, whilst we do not accept that the Respondent had a reasonable excuse for failing to obtain a licence, we do accept that the circumstances in which that failure took place offer some level of mitigation. In particular, the legislation did not require the Property to be licensed when it was first rented out to the Applicants. In addition, the Respondent is generally based in Cyprus and there is no evidence before us that the Respondent is a sophisticated professional landlord, albeit that she has been a landlord since 2008. In addition, whilst it did not constitute a reasonable excuse to do so, it is possible that she did assume that the managing agents would tell her what she needed to know as regards the legislation.
68. In addition, we must take into account the evidence as to the conduct of the parties, the financial circumstances of the Respondent and the fact that the Respondent has not at any time been convicted of a relevant offence.
69. Taking all of the above circumstances into account, we consider in this case that it is not appropriate to order the repayment of either the whole or close to the whole of the amount sought by the Applicants. The circumstances of the failure to obtain a licence are fact-specific and we consider that they entitle the Respondent to be treated more leniently than would otherwise have been appropriate. Other factors in the Respondent's favour are her financial circumstances and the fact that she does not appear to be a professional landlord (in each case on the facts available to us). There is also the fact that the Respondent has not at any time been convicted of a relevant offence and the fact that she and her husband have come across fairly well in the context of these proceedings. Against that, apart from the fact of the commission of a criminal offence, is the Applicants' own good conduct, the Respondent's lack of plausibility on the question of damage to the Property, the Applicants' concerns about certain safety and other issues and the failure of the Respondent and/or her managing agents to address the Applicants' legitimate concerns.
70. The tribunal has wide discretion as to the amount payable, and taking all of the above factors into consideration we determine that the appropriate amount to order the Respondent to repay to the Applicants in the particular circumstances of this case is £4,000.00.
71. There is a small disagreement between the parties as to precisely how much rent has been paid, but in our view this is immaterial in the context of our overall assessment.

### **Cost applications**

72. The Applicants have applied for an order under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that the Respondent be required to reimburse to the Applicants the application fee of £100.00 and the hearing fee of £200.00 paid by them in respect of this application.
73. The Applicants' conduct in connection with this application has been good and we have found that the Respondent has committed a criminal offence and that a rent repayment order should be made. In addition, the Respondent did not engage with the process until quite late. On the other hand, there are some mitigating factors in this case such that the award is considerably less than the amount sought by the Applicants.
74. In the circumstances, we consider it appropriate that the Respondent should be required to reimburse half of the application fee and half of the hearing fee.

**Name:** Judge P Korn

**Date:** 21<sup>st</sup> October 2019

### **RIGHTS OF APPEAL**

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.