FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/26UE/HMF/2020/0005**
HMCTS code (audio, video, paper)	**:**	**A:BTMMREMOTE**
Property	**:**	**79 Sullivan Way, Elstree Borehamwood Hertfordshire WD6 3DG**
Applicant	**:**	**Lawrence Ntiamoah**
Representative	**:**	**Thomas Beyebenwo**
Respondent	**:**	**Shylaja Chintaphanti**
Representative	**:**	**Amarender Kondate**
Type of application	**:**	**Application by a tenant for a rent repayment order** – s.40, 41, 43 & 44 of the Housing and Planning Act 2016
Tribunal members	**:**	**Judge David Wyatt Mary Hardman FRICS IRRV (Hons)**
Date of decision	**:**	**4 November 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote audio hearing. The form of remote hearing was A:BTMMREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents we were referred to are in the Applicant's bundle of 59 electronic pages and the Respondent's bundle of 126 electronic pages, together with the further documents described in paragraph 5 below, the contents of which we have noted.

Decisions of the tribunal

The tribunal:

(1) declines to make a rent repayment order;

(2) makes the findings set out under the various headings in this decision; and

(3) declines to make a costs order.

Procedural history

1. On 18 February 2020, the Applicant tenant applied to the tribunal for a rent repayment order under Chapter 4 of the Housing and Planning Act 2016 (the "**2016 Act**").

2. On 12 May 2020, the tribunal gave case management directions. These permitted electronic bundles, requiring the Applicant to produce his bundle of documents and the Respondent to produce her bundle in answer. The Applicant was given permission to produce a reply.

3. There was no inspection. The directions noted that the tribunal considered an inspection of the Property was not necessary and required the parties to write to the tribunal if they disagreed; neither did so.

Hearing

4. The hearing was conducted by telephone on 24 September 2020. Mr Beyebenwo represented the Applicant, who attended to give evidence with his wife, Emelia Awuah Boakye, and Andrew Philip Chittenden of Hertsmere Borough Council. The Respondent was represented by Mr Kondate (her husband) and they both gave evidence, as did Lorendana Croitoru Lolea (who had been a tenant of the Property at the relevant time, and dialled in from Romania).

5. At the hearing, we were told that the Applicant had produced a second bundle in reply to the Respondent's bundle, with a further witness statement from the Applicant, a statement from Mrs Boakye and exhibits. This second bundle had not reached us, but the Respondent had received their copy at the time. The parties agreed that a copy would be sent to us by e-mail immediately after the hearing, that Mr Kondate could send the Applicant and the tribunal copies of his bank statements for this year immediately after the hearing, and that they were content for us to form our own view on the documents in the second bundle and the contents of those bank statements. On that

basis, we allowed Mr Beyebenwo to call evidence from Mrs Boakye and to cross-examine the Respondent's witnesses by reference to documents in the second bundle. As arranged, we received the second bundle (of 16 pages) and the bank statements (23 pages) by e-mail that afternoon, shortly after the hearing. We have read these documents and are satisfied that we know which documents were being referred to at the hearing.

6. The documents in the Applicant's first bundle sought to claim, from the Respondent, council tax that the Applicant had paid. At the hearing, we explained that we did not have jurisdiction in these proceedings to order repayment of council tax, only rent. The Applicant accepted this.

7. The Respondent's lawyers had in their written submissions challenged the admissibility of the witness statements relied upon by the Applicant, saying they did not contain a statement of truth in the form now required by CPR 22.3. At the hearing, we explained that the CPR do not apply to these proceedings and rule 18 of the Tribunal Procedure (First-tier tribunal) (Property Chamber) Rules 2013 (the "**2013 Rules**") allows us to admit evidence whether or not it would be admissible in a civil trial. We were satisfied that it was appropriate to admit the evidence from the Applicant's witnesses; they contained simple statements of truth and the witnesses confirmed at the hearing that they were their statements.

8. The Respondent had arranged for Murali Desham, who was said to have witnessed signatures on the tenancy agreement (examined below), to attend the hearing. At the hearing, we were not willing to hear oral evidence from this person, because the Respondent had not complied with the requirement in the directions for a written statement from any witness to be sent to the Applicant in advance. We can now see that the Respondent arranged for this person to attend the hearing because the documents in the Applicant's second bundle challenged her to do so. However, at the hearing, Mr Beyebenwo did not ask to question this person.

Power under the 2016 Act to make a rent repayment order

9. The Applicant alleged that the Respondent had committed an offence under section 72(1) of the Housing Act 2004 (the "**2004 Act**"), of control or management of an unlicensed HMO.

10. Chapter 4 of the 2016 Act confers power on the tribunal to make a rent repayment order (here, an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant) where a landlord has committed this offence (or any of the other offences specified in section 40).

11. By section 41 of the 2016 Act, 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 that tenant, and the offence was committed in the period of 12 months ending with the day on which the application was made.

12. By section 43, the tribunal may make a rent repayment order if it is satisfied, beyond reasonable doubt, that the landlord has committed the alleged offence. Where the tribunal decides to make a rent repayment order in favour of a tenant, the amount is to be determined in accordance with section 44.

Outline of the case

13. The Property is a four-bedroom semi-detached house, which has not been converted into separate units. The ground floor has a living room and kitchen, the first floor has three bedrooms and the converted loft contains another bedroom. The Applicant said that he lived at the Property with his spouse (Mrs Boakye), their two children and the other tenants, a couple with their own children. He said the local authority had investigated, had told him the house was overcrowded/unlicensed and had advised him to make an application for a rent repayment order.

14. The Respondent did not dispute that the Property became "*licensable*" when the Applicant's children moved into the Property. Her husband (Mr Kondate) had managed the tenancy and the Property on her behalf. They always understood that if they rented the Property to more than four people from more than one household they would need to apply for an HMO licence. They said they did not want this type of letting, because they did not have the time or experience to manage a Property with occupants from different households. The Respondent's case was that she and Mr Kondate had always been clear with the tenants that no more than four residents were permitted, and had stipulated this in the tenancy agreement. She argued that she had a reasonable excuse for the alleged offence because she had taken that precaution, had not become aware until January 2020 that the Applicant's children were living at the Property and on 1 February 2020 had given the Applicant and Mrs Boakye notice to quit.

15. The relevant issues are examined below, but we need first to deal with a dispute between the parties about the authenticity of the tenancy agreement relied upon by the Respondent.

Tenancy agreement

16. In his first bundle, the Applicant produced a largely illegible copy of a one-page document which he said was the tenancy agreement. It

appears to have been signed by him, Mrs Boakye, Miss Lolea and her husband (Marian Catalin Croitoru), and the Respondent. It appears to be dated "*31/05/2017*" and about the only legible parts are references to 1800 (the rent was £1,800 per month) and to "*… terms and conditions of the …*".

17. In her bundle, the Respondent produced a copy of an eight-page assured shorthold tenancy agreement dated 1 June 2017 in the names of the same people, with the Respondent as the landlord and the others as the "*Tenant*". In section 3, headed "*THE TENANT'S OBLIGATIONS*", the "*Tenant*" agrees (on the sixth page):

Overcrowding	Not to allow more than **4 persons** to reside at the Premises
Lodgers and Sub-Letting	Not to take in any lodgers. Not to grant a sub-tenancy of the whole or any part of the Premises.

18. In their witness statements in reply and at the hearing, the Applicant and Mrs Boakye insisted that the Respondent's document was a fabrication. They said they had only signed the one-page document and although it referred to "*terms and conditions*" none had been attached and they had not asked to see them. The Applicant said there had been no witness. Mrs Boakye told us she was shocked to see her signature on the long tenancy agreement document in the Respondent's bundle. She said that she had never signed anything like that and she did not remember signing anything in more than one place. The Applicant said he thought he had to sign the one-page document or leave, so did not ask about the terms and conditions. Mrs Boakye said that the Applicant and the other tenants had already signed the one-page document before she came over from Italy, so she did not ask for the terms and conditions. She said she would have trusted her husband to tell her anything she needed to know; she did not ask any questions. The Applicant said that the horizontal lines which could be seen on the document, above and below the tenants' signatures, demonstrated that their signatures had been cut and pasted from a different document.

19. Miss Lolea could not remember whether she had signed one document or two, but she said that it was a "*lot of paper*", not a single page. She thought she had signed a first page and a last page, and all the dates were 1 June 2017. Mr Kondate told us that both documents were genuine and neither he nor the Respondent could have cut and pasted anything. He said that the single page was a rent deposit document and the other was the tenancy agreement. He said that he had submitted a copy of the tenancy agreement to the mortgage company when the Respondent remortgaged the Property. He said that he had created a "*Right house*" business logo on the rent deposit document because their

bank told them they had to open a business account for the rents. He said he could not produce the originals because he had handed them over to the local authority. He said that when the tenancy agreement was signed by the first three tenants, his friend was there and witnessed their signatures. He was not saying that his friend also witnessed the later signature by Mrs Boakye.

The tribunal's decision

20. We are satisfied that the tenancy agreement produced by the Respondent is genuine. We do not need to decide whether any or all of the signatures were witnessed by Mr Kondate's friend. The evidence from Miss Lolea (in particular) and from Mr Kondate was far more credible. Further, on careful review of the slightly clearer copy of the single page document produced by the Applicant himself in his second electronic bundle, it is clear this is a rent deposit document, as Mr Kondate told us, not a tenancy agreement. Aside from the illegible parts, it reads: "*I confirm that I have received … Deposit in respect of the Tenancy Agreement dated 31/05/2017 the sum of £1800 from the above named Tenant … this … will be refunded … of the end of the Tenancy subject to the terms and conditions of the …*".

21. We do not think there is anything in the difference of one day between the dates of the documents. The horizontal lines referred to by the Applicant appear to be nothing more than the usual signature boxes (they have linking vertical lines), which are often used in legal documents. Further, the signature boxes and writing of the names and the signatures in the single page document are different from the longer document; there is no indication that they were cut and pasted. Mr Beyebenwo asked why Mr Kondate did not mention in his own witness statement the purported witness to the tenant's signatures, but there was no reason for him to do so. At that time, the Applicant had not made his allegation that the tenancy agreement was a fabrication.

The alleged offence

22. By subsections 72(1) and (5) of the 2004 Act:

> "*(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 (see section 61(1)) and 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—*

(a) *for having control of or managing the house in the circumstances mentioned in subsection (1) …*"

23. By section 77 of the 2004 Act, "HMO" means "*a house in multiple occupation as defined by sections 254 to 259*".

24. As mentioned above, we would need to be satisfied beyond reasonable doubt that the landlord had committed the alleged offence. However, because in section 72 the defence is separate from the components of the offence, we are to decide the question of whether the Respondent had a reasonable excuse on the balance of probabilities.

Was the alleged offence committed?

25. As the freehold owner receiving the rent, the Respondent was clearly the person having control of and/or managing the Property as defined in section 263 of the 2004 Act. The Respondent accepted that the Property was not licensed at the relevant time, but produced evidence of a temporary exemption notice granted by Hertsmere Borough Council on 30 June 2020 until 31 August 2020. She had applied for this on 18 June 2020 to give more time for one of the couples at the Property to leave.

26. We understood the Applicant's case to be (by reference to the views expressed to him by the local authority) that the Property was an HMO under the standard test (under section 254 of the 2004 Act) and it was required to be licensed because it had six occupiers.

27. By section 254(2):

> "*A building or part of a building meets the standard test if—*
>
> *(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;*
>
> *(b) the living accommodation is occupied by persons who do not form a single household (see section 258);*
>
> *(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);*
>
> *(d) their occupation of the living accommodation constitutes the only use of that accommodation;*
>
> *(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and*

(f) *two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities*."

28. By subsection 254(8), "basic amenities" means a toilet, personal washing facilities or cooking facilities.

Was the Property an HMO?

29. On the facts considered below, we are satisfied beyond reasonable doubt that the Property was an HMO between October 2017 and July 2020. The Respondent did not dispute this. By reference to each component of the standard test under section 254(2): (a) the living accommodation is not divided into self-contained flats; (b) it was occupied by two couples who did not form a single household; (c) at least one adult from each couple occupied as their sole or main residence; (d) their occupation of the Property constituted the only use of it; (e) a rent was payable; and (f) while it appears they had their own toilets and personal washing facilities, the two households shared the cooking facilities in the communal ground floor kitchen.

Was the HMO required to be licensed, and if so did the Respondent have a reasonable excuse?

30. By section 61 of the 2004 Act, every HMO to which Part 2 applies must be licensed unless a temporary exemption notice is in force in relation to it. By section 55, Part 2 applies to any HMO which falls within a "*prescribed description*". The relevant prescribed description from 1 October 2018 is in the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018. It describes an HMO which: (1) is occupied by five or more persons; (2) is occupied by persons living in two or more separate households; and (3) meets the standard test under section 254(2), or one of the other tests specified in the Order. Since (2) and (3) have already been established, the remaining issues for us to decide are:

a) whether the Property was occupied by five or more persons; and

b) if so, since that would mean the HMO was required to be licensed, whether the Respondent had a reasonable excuse.

The law in relation to occupation (residence)

31. By section 254 of the 2004 Act, "occupier" in relation to premises means a person who occupies them as a residence, and related expressions are to be construed accordingly. The word "residence" is not defined in the Act. The authorities on the meaning (in different contexts) of expressions such as "*a private residence*" were reviewed in

Nemcova v Fairfield Rents Limited [2016] UKUT 303 (LC). Some of those authorities suggest that such expressions involve the use of the property, at least in some way, as a home, pointing to the significant difference between holiday lets for a week or two and a tenancy for several months, but the Upper Tribunal observed (at para. 48 in Nemcova) that:

> "*A person may have more than one residence at any one time – a permanent residence that he or she calls home, as well as other temporary residences which are used while he or she is away from home on business or on holiday … it is necessary, in my judgment, that there is a connection between the occupier and the residence such that the occupier would think of it as his or her residence albeit not without limit of time*."

32. Section 258 of the 2004 Act provides for children to be included as part of a household. While section 264 gives power to prescribe rules which may provide for persons under a particular age to be disregarded or treated as constituting a fraction of a person, no such rules have been made. The High Court in Paramaguru v London Borough of Ealing [2018] EWHC 373 (Admin) confirmed (in relation to "*residents*" under planning law, but by reference to the relevant provisions of the 2004 Act) that a child of whatever age is to be treated as one person.

The law in relation to reasonable excuse

33. In relation to the reasonable excuse defence under subsection 72(5) of the 2004 Act, the Respondent referred to Mohamed & Another, R (on the application of) v London Borough of Waltham Forest [2020] EWHC 1083 (Admin). In that case, the High Court observed (at para. 44) that if a defendant did not know of the facts which meant that a property had become an HMO which was required to be licensed: "*… for example because it was let through a respectable letting agency to a respectable tenant with proper references who had then created the HMO behind the defendant's back …* ", then: "*… that would be relevant to the defence*".

34. Similarly, in Thurrock Council v Daoudi [2020] UKUT 209 (LC) the Upper Tribunal held (at para. 26, in a case about financial penalties but examining the relevant reasonable excuse defence):

> " *… There may be cases in which an ignorance of the facts which give rise to the duty to obtain a licence may provide a defence of reasonable excuse under section 72(5). In I R Management Services Ltd v Salford City Council [2020] UKUT 81(LC) an experienced letting agent responsible for the management of a property comprising only two bedrooms mounted a reasonable*

> *excuse defence on grounds that he had been unaware that the property had come to be occupied by more than one household, making it an HMO. The FTT in that case was not persuaded of the letting agents' lack of knowledge but, if it had been, his ignorance of the need to obtain a licence in those circumstances would have been capable of supporting the statutory defence …*"

The evidence in relation to these issues

35. The Respondent had purchased the Property as a buy-to-let investment in April 2014. This is their first and only rental property. Initially, they simply rented the Property to OGAS UK Property Services ("**OGAS**") under a tenancy which ran from 1 December 2014 and expired on 31 May 2017 (after OGAS gave notice to terminate) at a monthly rent of £1,800. OGAS sublet to the Applicant and others; the Applicant said he took up occupation from 2016. The Applicant did not allege there were too many residents during this period; he referred to up to four occupiers at any one time (himself, Miss Lolea, a man named Andrew Harvey and "*…one other guy who was occupying the loft*"). He said one of the tenants in the loft moved out and was replaced by another.

36. OGAS informed the Respondent in April 2017 that they were terminating their tenancy. The Respondent understood that OGAS had given the occupants notice to quit. She and Mr Kondate decided to advertise the Property to let themselves. They produced a copy of what they said was their online letting advertisement for the Property, which states: "*Maximum Tenants: 4*". The Applicant said he had not seen this advertisement at the time.

37. Miss Lolea and the Applicant said that Mr Kondate had come to the Property to introduce himself, and Miss Lolea had suggested that they become direct tenants so they did not have to leave. The Applicant said that Mr Kondate had suggested the Applicant pay £1,100 for the first floor and Miss Lolea pay £700 for the loft, keeping at the same rent of £1,800 per month which had been charged since 2014. The tenancy agreement was signed by the Applicant, Miss Lolea and Mr Croitoro (her husband) in May/June 2017. The parties agreed that Mrs Boakye did not sign at that time because she was still in Italy. She came about two months later and signed the agreement. Mrs Boakye said her flight was on 13 July 2017 and about a week or two after that Mr Kondate came to the Property so that she could sign the tenancy document.

38. The Applicant said that he had agreed with Mr Kondate about his wife and children coming to live at the Property. The Applicant and Mrs Boakye told us that their two daughters (who at the time would have been 9/10 and 14/15 years old) came back from Italy with Mrs Boakye and were at the Property when Mr Kondate came (in July/August 2017) so that Mrs Boakye could sign the tenancy agreement. They both said

that Mr Kondate had seen and "*said hello*" to their daughters; Mrs Boake said they smiled but did not answer because at that time they could not speak English. Mrs Boakye said that Miss Lolea had seen them and greeted them on that day as well.

39. Miss Lolea said that, after the tenancy agreement had been signed, a man called Andrew moved into the spare room on the first floor. She had asked the Applicant about this; she said he answered that he did not need to tell Mr Kondate anything, as it was his room. The Applicant told us this was the same Andrew who had been a tenant through OGAS in the past. He said that Andrew's girlfriend had thrown him out, so the Applicant allowed him to stay for a "*couple of days*". He confirmed he had not told the landlord. We asked him about this, since Miss Lolea said in her witness statement that Andrew had been there for a few months. The Applicant then accepted that it had been a few months, not a couple of days. Miss Lolea said she thought that the Applicant's children arrived about a month after Mrs Boakye, when it was colder outside, and Andrew left at that time. Mrs Boakye said that was wrong, she would not have left them to travel alone or with anyone else, they were minors. Miss Lolea said that the Applicant had never previously mentioned his children moving into the Property, only his wife. She said that after they arrived she asked the Applicant whether he had asked the landlord about his daughters. She said the Applicant had told her that his children were his family and could stay with him. Miss Lolea did not think that the Respondent or Mr Kondate were told about the Applicant's children. The Applicant said these were all "*lies*".

40. Miss Lolea said that she was about five months pregnant when she signed the tenancy agreement in May/June 2017. She did not mention her pregnancy, but agreed that by then people might be able to see that she was pregnant. In October 2017, she had called Mr Kondate to ask if her mother in law could stay for a few days to help with her baby, who had just been born after a C section. She told him she was "*not feeling good with the C section*", particularly because the house had a lot of stairs, and asked if her mother in law could sleep in their bedroom. She said she told Mr Kondate that her baby would be going to Romania after a few months. As planned, they were in Romania in December. Mrs Boakye said that Miss Lolea had asked her about schools for her baby, so he must have been there some of the time (as she had told us) or potentially at the Property more in the future. Miss Lolea said that in her baby son's first year, he spent some time in Romania with Miss Lolea's mother for holidays and more time at the Property, but after that first year about half of his time was spent at the Property and half in Romania staying with her mother. Because of the pandemic in addition to the time he would already have been away, he had spent about 10 months of the last year (i.e. the latter part of 2019 and most of 2020) in Romania. Mr Kondate said that he had the impression from Miss Lolea that her baby would be in Romania "*most of the time*".

41. Mr Kondate and the Respondent said they had not been told about the Applicant's children. Mr Kondate said that he had specifically pointed out to the Applicant and Miss Lolea when they were discussing the proposed tenancy in April/May 2017 that they could not have more than four residents at the Property. Mr Kondate said he did not see the Applicant's children at the Property in 2017 or 2018. He told us that they had inspected the Property two or three times (about once each year) and very briefly. The Respondent worked full time as a teacher, Mr Kondate was a contractor who worked abroad and they had their own children; neither of them had much time, he said. Until 2019, they never noticed children during their visits and only visited on weekends. They did not see any toys or children's clothes in the communal living room. The house was always very tidy downstairs, with a sofa and a dining table. They never went upstairs into people's bedrooms. When any work needed doing, Mr Kondate sent tradespeople.

42. Mr Kondate accepted that he did see one of the Applicant's daughters in 2019, but he said he assumed they had come to visit. Since January 2020, when the Council inspected, he had seen them many times. The Applicant produced several text messages which it appears he sent to Mr Kondate from March 2019. These messages are complaints from the Applicant, initially that Miss Lolea's husband (Marian Catalin Croitoro) was smoking in the house and later that he/Miss Lolea were letting friends sleep over. The messages include references to the Applicant's "*family*" and the following lines: "*…I have told them I live with my wife and daughters so I don't want strangers in that house. That's how they give out the address to friends who later indulged in crimes and the police keep looking for them. I don't want a situation where one of his friends will impregnate my daughter and disappear…*". Mr Kondate appears to have replied to one of these messages: "*I will ask them to leave*". Further, a message which seems to be from Mr Kondate to Miss Lolea says: "*… Lawrence said catalin smoking inside the house but it is not acceptable…he got children and u also small kid.. is not good for them as well …*".

43. At that time, Mr Kondate said, he was working in Luxembourg. He accepted that maybe he should have questioned what was going on with the children but his was a hectic lifestyle then. He said that later in 2019 Miss Lolea told him she was going to move out, and was looking for another Property. He said that he explained to the Applicant that he could not afford to let the Property for £1,100 per month because that was significantly less than the monthly mortgage payments. The Applicant confirmed that Mr Kondate had asked him to leave if he could not pay the total rent of £1,800 per month in future. He could not afford that, so approached the Council for housing assistance. Miss Lolea confirmed to us that in November 2019 she gave Mr Kondate her formal notice to leave the Property, but due to personal circumstances she was then unable to leave and decided to stay longer.

44. Mr Chittenden introduced himself as the team leader of the private sector housing enforcement unit of Hertsmere Borough Council. His authority became interested in the Property after two families approached them for housing assistance. He said that the Applicant was the second, having been given notice of "*eviction*".

45. When he then inspected in January 2020, he found the Applicant, his partner and their two children, and another couple (with no other children). The inspection had been attended by Mr Kondate, who had told Mr Chittenden on the day that he was not aware that the two children lived there. The Respondent had said the same thing when he later conducted a follow-up interview with her. Mr Chittenden confirmed that, while the Council had identified some works needed for the Property to comply with the management regulations for HMOs, the Property was tidy and the Respondent had carried out those works as requested. Apart from having seen the Applicant's children, he had seen nothing indicating that children were living at the Property, particularly downstairs. He would not expect to, because the ground floor was the shared communal area. The first-floor bedrooms contained the belongings showing that children were staying there. He confirmed that the Council had advised the Applicant to make this application for a rent repayment order. They had also more recently imposed a financial penalty, although he understood that was being appealed.

46. On 1 February 2020, the Respondent gave the Applicant and Mrs Boakye formal notice to quit on 30 April 2020. They signed the notice, apparently agreeing to leave on this date.

47. Miss Lolea's second baby was born in June 2020. She knew she had to leave when the second baby was on the way, so after her initial notice in November 2019 and then inability to leave, she had given notice to quit again in April 2020. Her departure was then delayed again, this time by the Covid-19 pandemic. On 17 June 2020, the Respondent received another notice to quit from Miss Lolea and her husband, to terminate the tenancy agreement on 30 July 2020. Miss Lolea confirmed that they left at the end of July; her flight to Romania was on 4 August.

48. The Applicant confirmed that he, his wife and his children are still living at the Property. He complained that some of Miss Lolea's belongings had been left behind and claimed she was pretending to have left, the landlord had funded them and wanted the Applicant and his family to leave so that she could move back in.

49. Mr Kondate said that the Respondent had appealed against the financial penalty imposed by the Council, but that was only about two weeks before the hearing. He was planning to start possession proceedings after the prohibition ended in September 2020.

The tribunal's decision

50. The Applicant left it to the tribunal to decide which 12-month period we should focus on. We have chosen the period which seems to be most appropriate (which happens to be the period most favourable to him), being the 12 months leading up to 18 February 2020, when he made his rent repayment order application.

Occupation as a residence

51. The Respondent did not deny, and we are satisfied beyond reasonable doubt, that five or more persons were occupying the Property as a residence during this period. The Applicant did not follow the invitation in the case management directions to produce a schedule of occupancy to show the dates he said each person was in occupation, but we are satisfied that the daughters of the Applicant and Mrs Boakye did occupy the Property as a residence most of the time, attending schools in the area. Accordingly, the HMO was required to be licensed at least for most of this period. We accept Miss Lolea's evidence that her son would also have been in occupation for half, or less, of this period.

Reasonable excuse

52. Before we look at the relevant period of 12 months from 19 February 2019, we need to consider the preceding period, from the start of the tenancy in 2017 until early 2019. We find that, until 2019, the Respondent did not know about the Applicant's children. The evidence from Miss Lolea, Mr Kondate and the Respondent about the Applicant's daughters in 2017 and 2018 is more credible. It is also consistent with the evidence from Mr Chittenden that there were no indications from the communal ground floor of children in residence. In the circumstances (including the basis on which the tenancy was negotiated and the restrictions in the tenancy agreement), the Respondent had a reasonable excuse in relation to her ignorance of residence by the Applicant's children throughout this earlier period.

53. We accept that Mr Kondate had the impression that Miss Lolea's son would be in Romania with Miss Lolea and/or her mother, not residing at the Property, for most of the time. Despite the tender age of the child, that was a reasonable understanding; Miss Lolea and her husband only had the one room in the loft at the Property. It seems that, when Miss Lolea was away with her son, her husband was working here, staying at the Property and at least on occasion allowing a friend to stay over.

54. In the circumstances, the Respondent had a reasonable excuse at least throughout those times when Miss Lolea's young son was away during, and probably for most of, the period to February 2019.

55. We are satisfied that the Respondent still had a reasonable excuse in relation to the Applicant's children from the start of the relevant period (19 February 2019) until the end of April 2019. She did not know about the Applicant's daughters, at least to begin with, and it is not clear when in 2019 Mr Kondate saw one of the daughters. During this period, Mr Kondate had enough information from the Applicant's complaints by text message to put him on notice that the Applicant might have breached the tenancy agreement and brought his daughters to live at the Property, not just to visit. However, those text messages were equivocal (referring to his *family* and saying he had *told the other tenants* that his daughters lived at the Property) and said rather strange things. It would have been reasonable not to read everything in them literally. Further, both the Applicant and Mr Kondate were focussed on pressing the other tenant to stop smoking upstairs, and the Applicant's concerns about friends of the other tenant staying over. The Applicant and Mrs Boakye have different last names, so it would have been reasonable at first to think that the children lived with a former spouse elsewhere and were only visiting. It was reasonable for the Respondent to have taken until the end of April 2019 to investigate, discover residence by the Applicant's daughters and take steps, or prepare to take steps, to resolve the problem.

56. We are not satisfied that the Respondent had a reasonable excuse for the six-month period from May to October 2019 inclusive. Mr Kondate may have asked Miss Lolea to leave (as one of his text messages may have been saying he would), and if she and her husband had left that would have resolved the problem. He thought on cross-examination that in about July or August 2019 he had become more concerned and asked the tenants to leave, but he seemed to be trying to explain what he thought he would have done, not what he remembered doing. He said he thought he had sent text messages at that time, asking the tenants to leave, but he had not produced copies. He produced no evidence to show that he had done enough for it to be reasonable for the Respondent to, during this period, rely on waiting for Miss Lolea and her husband to leave voluntarily following any such request(s).

57. However, we accept the evidence from Miss Lolea that she gave notice in November 2019 to leave the Property. There are some references to her notice being given in December rather than November, but we are satisfied that November is more likely, given the timing of subsequent developments and the fact that she would then have been about two months' pregnant with her second child (who was born in June 2020). In December 2019, the Respondent and Mr Kondate discussed this with the Applicant and said they could not afford to continue the tenancy if the rent was reduced to £1,100, so he would need to leave if he could not pay £1,800 per month. The Applicant then approached the local authority for housing assistance and that led to the investigation and inspection in January 2020. On 1 February 2020, the Respondent then gave the Applicant and Mrs Boakye their formal notice to quit.

58. In the circumstances, we are satisfied that the Respondent had a reasonable excuse for the period from November 2019 onwards. It was reasonable to think that Miss Lolea and her husband would leave, stopping the breach of the tenancy agreement and the continuing duty to licence the Property, because they had given notice to quit. When in January 2020 she was still there and saying she could not leave after all, and the Council inspected, the Respondent gave the Applicant and Mrs Boakye formal notice to quit. The Applicant and Mrs Boakye signed that notice, apparently agreeing to leave. When in April/May 2020 they did not leave, the Respondent could not commence possession proceedings because of the Covid-19 restrictions.

59. For the purposes of our analysis of this rent repayment order application (where there is no dispute that the same rent of £1,100 was paid by the Applicant for each of the relevant 12 months), we consider that the Respondent had a reasonable excuse for half of the relevant 12 months:

a) She had a reasonable excuse for a total of six months in relation to the Applicant's children, as explained above.

b) The Applicant's case relied on residence by the four adults and his own children, not Miss Lolea's son. However, for completeness and given the comments made by Mrs Boakye (as described above), we have also considered what the Respondent knew or ought to have known about him. Miss Lolea's son would only have been in occupation for about six months, or less, during the relevant 12 months. Despite the prompt for the Applicant in the case management directions, no evidence was produced to show when he was in occupation. The Applicant and Mrs Boakye made no complaints about noise from or any other indications of occupation by Miss Lolea's son, who would have been one/two years old at that time. He was not there in January 2020 when the Council inspected. On the evidence provided, Miss Lolea's son might well not have been in occupation at all between February and April 2019. His occupation thereafter is immaterial, because there was no reasonable excuse from May 2019 until November 2019, when it became reasonable to rely on Miss Lolea leaving. Further, as we have explained above, it was reasonable for the Respondent to think that Miss Lolea's son was not in occupation for most of the relevant 12 months. Accordingly, we are satisfied that this would not reduce the proportion of the relevant period for which the Respondent had a reasonable excuse.

Should we exercise our discretion to make a rent repayment order?

60. It is clear from the wording of the 2016 Act that the tribunal has a discretion as to whether to make a rent repayment order if satisfied

beyond reasonable doubt that the relevant offence has been committed. We exercise our discretion taking into account the context and purpose of the relevant provisions.

61. The regime for HMO licensing is important. It is intended to ensure adequate protection for residents by requiring licenses for a wide category of HMOs. This should help to avoid potential problems/risks before they occur/arise and enable local authorities to monitor and manage housing matters much more effectively. This is just as, if not more, important for children as for adults, as noted in Paramaguru (cited above).

62. One of the purposes of the relevant provisions of the 2016 Act was to drive compliance by creating more punitive consequences for the relevant offence (and others), through a more robust regime for rent repayment orders and the new provisions for local authorities to impose financial penalties. The Upper Tribunal in Vadamalayan v Stewart [2020] UKUT 183 (LC), in the context of what deductions can be made from a rent repayment order where the tribunal decides to make one in favour of a tenant, confirmed its understanding that in making the 2016 Act Parliament intended a: "*…harsh and fiercely deterrent regime of penalties for the HMO licensing offence*."

63. Bearing this in mind, we assume that a rent repayment order should be made in anything but an exceptional case.

The tribunal's decision

64. In all the circumstances, we have decided not to make a rent repayment order. This is a truly exceptional case. In our assessment, the Applicant gave false evidence to seek to deceive us or otherwise to persuade us to make a rent repayment order. It is likely that he did so because he could not explain why he should be entitled to a rent repayment order when the relevant offence would not have been committed but for the breach(es) by the Applicant (and the other tenants) of the obligation in the tenancy agreement not to allow more than four residents. We refer in particular to the evidence from the Applicant and Mrs Boakye about the tenancy agreement and what was agreed at the start of the tenancy, and that Mr Kondate had seen their daughters when Mrs Boakye had signed the tenancy agreement in 2017. Their evidence seemed to have been elaborated with details (which in our assessment were untrue) to make it more convincing, such as Mr Kondate saying hello to the daughters and them being unable to answer. This is exceptional and ought to be reason enough to decline to make a rent repayment order in favour of the Applicant.

65. In addition, the other circumstances are also exceptional. The Respondent and Mr Kondate had (perhaps unwisely) been persuaded to allow the Applicant, Miss Lolea and their spouses to take on the

tenancy in 2017 (at the same rent as in 2014) rather than letting to a single family as they had intended. There was no problem at that time. The Respondent did not introduce any more tenants or make any more money from the Property. The problem was mainly created because the Applicant and Mrs Boakye brought their two daughters to live at the Property, in breach of their promise in the tenancy agreement not to do so. They knew they were not allowed to have five residents in the Property, so the Applicant did not tell the Respondent about his children, just as he did not tell her that he had brought "Andrew" in to stay at the Property for the first few months of the tenancy. He did not let the Respondent know what he had done until 2019 (when the Applicant referred to his daughters while complaining to Mr Kondate about other matters), let alone ask for permission. The position in relation to Miss Lolea's young son is unclear, because the Applicant did not rely on his occupation or produce sufficient evidence in relation to his occupation during the relevant period, as explained above.

66. The following are secondary considerations, but we consider them together with the weightier matters described above. If the Respondent had taken firm action by (say) serving formal notice to quit sooner and following that up, she would probably have had a reasonable excuse for the entire period. The Respondent and Mr Kondate are first-time landlords, although we cannot give them much credit for that; they should have used a good letting agent or other professional to give them good advice in the first place or seek to ensure compliance by managing the tenancy more actively. They are not experienced landlords and have no other rental properties. There is no indication (from the minor works requested by the Council and promptly carried out, or otherwise) to indicate that the tenants were exposed to any risks from the failure to licence. None of the tenants had any complaints about them as landlords; Miss Lolea said that she hoped her new landlords would be as good. The Applicant and his family are still living at the Property, paying £1,100 rather than the contractual rent of £1,800 per month. Despite their earlier apparent agreement to leave in April 2020, it seems that in fact they will not leave until the Respondent can obtain a possession order.

If we had made a rent repayment order

67. If we had exercised our discretion to make a rent repayment order, it would have been in relation to the rent of £6,600 paid by the Applicant for the six-month proportion of the relevant period for which the Respondent did not have a reasonable excuse. By section 44 of the 2016 Act, where we decide to make a rent repayment order in favour of a tenant, in determining the amount we must, in particular, take into account: (a) the conduct of the landlord and the tenant; (b) the financial circumstances of the landlord; and (c) whether the landlord has at any time been convicted of any of the offences set out in section 40.

68. We would take into account the exceptional conduct of the Respondent and the Applicant. The Respondent sought in negotiating the tenancy and in the terms of the tenancy agreement to ensure that this situation would not arise, did nothing to cause the problem and simply did not act quickly enough when she ought to have investigated and discovered the breach and taken steps to resolve the problem. In relation to the relevant period, the Applicant was the main cause of the problem, in breach of his obligations under the tenancy agreement, and then (in our assessment) repeatedly gave untrue evidence, probably to seek to persuade us to make a rent repayment order despite this. To avoid repetition, please refer to the summary above of the parties' conduct.

69. The Respondent's financial circumstances are not exceptional, but we would take them into account. We accept their evidence at the end of the hearing that their financial circumstances are relatively limited. They accepted that they had received £13,200 in rent from the Applicant for each 12 months of the tenancy (as arranged with Mr Kondate, he paid the total rent for both tenants by bank transfer(s), collecting the balance from the other tenants, with £1,100 each month coming from him). They told us that their mortgage of the Property was about 70% of its value and their mortgage of their own home was about 90% of its value. They said that after the last few months they did not have any real savings left, or other assets. None of this evidence in relation to capital was challenged by Mr Beyebenwo.

70. They said that they were currently relying on the salary the Respondent earned as a teacher. Mr Kondate had lost his job contract as a result of the pandemic; he produced a copy of the termination letter. He said he had no other income; he was hoping once the pandemic was over to get his old job back, but he did not know how long that might be. They were also receiving £1,100 per month from the Applicant towards the rent for the Property and when they were able to obtain a possession order they expected to be able to let the Property for the market rent of £2,000 per month. The Respondent said that their aim from letting the Property was not to make a large profit, but to repay the mortgage loan over time. They had applied for a mortgage holiday in May and it had been granted from June for three months. Mr Beyebenwo challenged their evidence about their income, submitting that their income and expenditure schedule was unreliable, they had not given a true reflection of their income and the mortgage holiday had probably been made with the hearing of the rent repayment order application in mind. We gave permission for Mr Kondate to send us his bank statements for the period requested by Mr Beyebenwo (January 2020 to date).

71. We have reviewed the statements and they are consistent with the evidence from the Respondent about their income; the only other credits of any substance appear to be loans or possibly transfers from a savings account. Even if we disregard or reduce those outgoings which might be queried (such as private lessons for their children and pension premiums), they will be losing money each month or at least have no

surplus income at least until Mr Kondate secures more work. They would probably have to borrow to comply with a rent repayment order, but we heard nothing to say that they could not borrow and repay the debt over time in the future. The costs of the works they have carried out and their insurance costs are not significant, because those are essentially costs of maintaining their assets.

72. We would also bear in mind that the Respondent has not been convicted of any offence. The financial penalty imposed by the local authority is said to be subject to appeal and does not change our assessment.

73. In all the circumstances, if we had made a rent repayment order, we would have reduced the amount to nil, even if the starting point had been a full twelve months' rent in the sum of £13,200, let alone £6,600. The main reason is the conduct of the Applicant in respect of his evidence in these proceedings. Even if that were not enough by itself, the more detailed matters described above in relation to the conduct of the Applicant and the Respondent would be good reasons for reducing the amount to nil if we had decided to make an order.

Costs

74. In her statement of case (prepared by lawyers who did not represent her at the hearing), the Respondent asked for an order for her costs under rule 13 of the 2013 Rules. The statement of case said that it was unreasonable for the Applicant to make this application, having deliberately withheld information and caused the Property to become licensable. We pointed out at the hearing that this is a high bar; when considering whether a party has acted unreasonably, the Upper Tribunal in Willow Court Management Company 1985 Ltd v Alexander [2016] UKUT 0290 cites with approval the judgment of Sir Thomas Bingham MR in Ridehalgh v Horsefield [1994] Ch 2005. It does so at paragraph 24 of its decision in these terms:

> *"'"Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?".*

75. The Respondent made no further submissions about this at the hearing. While it was wrong for the Applicant to give the evidence which we have decided was untrue, that has backfired and on the information provided to us it did not add to the costs incurred by the Respondent because it was given in reply and at the hearing. As to whether the

Applicant acted unreasonably in bringing the application at all, we have found that the Respondent became aware of the issue in 2019 and was not diligent enough to have a defence of reasonable excuse throughout. The local authority advised the Applicant to make this application, although we do not know what information that advice was based on. The application might have been opportunistic, but it was not unreasonable (in the Willow Court sense) for the Applicant to make it. Even if it was unreasonable in that sense, we consider that the fair outcome in the circumstances is for each party to bear their own costs. Accordingly, we decline to make a costs order against the Applicant on this occasion.

Name: Judge David Wyatt **Date:** 4 November 2020

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.

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.

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.

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.

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.

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