FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UD/HMF/2020/0013 and CHI/43UD/HMF/2020/0028
Property	**:**	130 Guildford Park Avenue, Guildford, Surrey, GU2 7NN
Applicant	**:**	Hermione Berrick, Hannah Eiseman, Grace Eakin, Sarah Bell Harriet Pack
Representative	**:**	Alastair Mcclenahan, Justice for Tenants
Respondent	**:**	Mr Rufus Slade and Mrs Sue Slade
Representative	**:**	Ms Byroni Kleopa, Counsel
Type of Application	**:**	Application by Tenant for a Rent Repayment Order- section 40 to 46 Housing and Planning Act 2016
Tribunal Member(s)	**:**	Judge J Dobson Mr P Smith FRICS Mr T Sennett FCIEH
Date and venue of hearing	**:**	11th March 2021
Date of Decision	**:**	31st March 2021

DECISION

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SUMMARY OF THE DECISION

1. **The Tribunal is satisfied beyond reasonable doubt that the Respondents landlords committed an offence under Section 72(1) of the Housing Act 2004.**

2. **The Tribunal has determined that it is appropriate to make a rent repayment order.**

3. **The Tribunal makes rent repayment orders in favour of the Applicants, in the overall sum of £17,007.13, to be paid within 28 days to the individual Applicants in the following sums:**

Hermione Berrick	**£3506.69**
Hannah Eiseman	**£3506.75**
Grace Eakin	**£3506.69**
Sarah Bell	**£3243.50**
Harriet Pack	**£3243.50**

4. **The Tribunal determines that the Respondents pay the Applicants an additional £300 as reimbursement of Tribunal fees to be paid within 28 days. The sum is to be paid as £60 to each Applicant.**

The Issues in the Case

5. There are two particular issues in this case, over and above those usual in such cases, previously identified as follows:

   i) Does the local council, Guildford Borough Council ("the Council"), have the power to and is the Council entitled to backdate the licence for a House in Multiple Occupation ("HMO"), the HMO Licence, and

   ii) If the Council does have the power and is so entitled, does that mean that the Property was licensed at the relevant time for the purpose of this application or does it not.

6. It is notable in that regard that despite the several years since the introduction of HMO licensing, neither party was able to identify any case authority which provided a specific answer to those questions.

7. Assuming an offence to have been committed, the more usual questions arose of whether the Tribunal should exercise its discretion to make a rent repayment order and the amount of such order applying decisions of the Upper Tribunal to the facts of the case arise.

Applications and Background

8. By an application dated 23rd April 2020 and so made well in time, the first four named Applicants applied for a rent repayment order in respect of the

rent paid during the period 27th July 2019 to 30th March 2020 against the Respondents on the ground that the Respondents had committed an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act")- having control or management of an unlicensed HMO- for failing to have a Licence for 130 Guildford Park Road, Guildford, Surrey ("the Property"). By a separate application dated 29th September 2020, the fifth named Applicant also applied for a rent repayment order against the Respondents on the same ground.

9. The Property is a three-storey townhouse with five rooms described as bedrooms, an upstairs bathroom and a ground floor shower room, together with a living room and a kitchen. The Respondents are the owners. The Applicants were nursing students attending the university, to which the Property was conveniently close.

10. The five Applicants and the Respondents, both named as landlords, entered into a single written tenancy agreement ("the Tenancy Agreement") for the whole Property for a term commencing on 27th July 2019 and lasting for 11 months and 23 days, ending 20th July 2020. The overall monthly rent was £2,800.00, for which the Applicants where jointly and severally liable.

11. The sums paid to the rent month by month by each of the Applicants were:

Hermione Berrick	£577.33
Hannah Eiseman	£577.34
Grace Eakin	£577.33
Sarah Bell	£534.00
Harriet Pack	£534.00

12. That rent was paid directly to the Respondents for the months July to September 2019 inclusive and then from October 2019 was paid by the other Applicants to Ms Eiseman, who then made a payment of the full monthly rent to the Respondents. The total rent for which a rent repayment order is sought is £22,676.16 (explained as eight months plus 3 days, those three days being 27th to 29th March 2020).

13. The Applicants vacated the Property on 4th July 2020. Their earlier intentions, at least on the part of the first four named Applicants, to renew the tenancy and remain in the Property and any matters related to that are dealt with below to the extent relevant.

The law and jurisdiction in relation to RROs

14. Rent repayment orders are one of a number of measures introduced with the aim of discouraging rogue landlords and agents and to assist with achieving and maintaining acceptable standards in the rented property market. The relevant provisions relating to rent repayment orders are set out in sections 40 -46 Housing and Planning Act 2016 ("the 2016 Act"), not all of which relate the circumstances of this case.

15. Section 40 gives the Tribunal power to make a rent repayment order where a landlord has committed a relevant offence. Section 40 (2) explains that a rent repayment order is an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant (or where relevant to pay a sum to a local authority).

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

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

18. It has been confirmed by case authorities that a lack of reasonable doubt, which may be expressed as the Tribunal being sure, does not mean proof beyond any doubt. Neither does it preclude the Tribunal drawing appropriate inferences from evidence received and accepted. The standard of proof relates to matters of fact. The Tribunal will separately determine the relevant law in the usual manner.

19. Where the application is made by a tenant, and the landlord has not been convicted of a relevant offence, section 44 applies in relation to the amount of a rent repayment order, setting out the maximum amount that may be ordered and matters to be considered. If the offence relates to HMO licensing, the amount must relate to rent paid by the Applicants in a period, not exceeding 12 months, during which the Respondents were committing the offence.

The history of the case

20. In brief summary, on receipt of the application made by the first four named Applicants, the Tribunal issued Directions, providing for further details of the Applicants' case, the Respondents case and a final hearing. The fifth named Applicant subsequently issued her application, represented by Justice for Tenants, not at that stage the representatives of the other Applicants.

21. The Respondent applied to strike out the application by the first four Applicants, which application was refused. It was not apparent to the Tribunal at that time that the first four named Applicants had failed to serve a statement of case and supporting evidence.

22. The Tribunal processed the application by the fifth named Applicant after that, issuing Directions seeking the final hearing of that in very short order

but to tie in with the final hearing of the first application received. In the event, that was not practical. Further Directions were issued in relation to the two applications in combination and for responding to those. The applications were listed for final hearing by way of video proceedings, the hearing which took place. Those Directions identified the two particular issues stated above.

The hearing

23. Three of the Applicants attended the hearing, which was ample. The Applicants were all represented by Mr Mcclenahan. Oral evidence was given by Ms Pack alone. The Applicants principal written evidence consisted of the matters of fact contained in what was more of a statement of case than a witness statement, signed by Ms Pack. The Tribunal accepted that as providing evidence, containing as it did matters of fact and being signed with a statement of truth. Other documents were relied on, including an exhibit constructed by the Applicants stating events in relation to the showers at the Property- see below.

24. The Respondents both attended. They were represented by Ms Kleopa of Counsel. Oral evidence was given by Mr Slade. The written evidence on behalf of the Respondent consisted of the matters of fact contained in a detailed Statement of Response, signed by Mr Slade, together with other documents relied on by the Respondents. The Tribunal took the same view as it did with the Applicants' statement.

25. A significant amount of the hearing was spent in legal submissions, principally in relation to the issues identified above and the Licence date. The evidence received and the submissions made are not summarised in this part of the Decision. They are dealt with as and when the issues to which they were relevant are considered below.

26. Three preliminary matters were addressed. The Respondent sought to rely on additional evidence in respect of the Council's Regulatory Enforcement Policy. The Applicant did not oppose that. Whilst the evidence was considerably late and no written application had been made, the Tribunal allowed its inclusion in light of the Applicant's agreement to that. The Applicant also sought to rely on additional evidence, namely the Council's HMO register. That was again considerably late but was made by way of a written application, albeit one that could only be dealt with on the day of the final hearing. The Respondent opposed that application. The Tribunal heard from both representatives before deciding to allow the inclusion of that further evidence.

27. The Respondent's Counsel also relied on a Skeleton Argument, albeit one filed just before 5pm on 10th March 2021, the day before the hearing whereas the Directions has stated that any such document must be filed and served at least 48 hours in advance of the hearing. It was pure fortune that the case officer had seen that the Skeleton Argument had been received and had provided it to the Tribunal members. The Tribunal did consider the Skeleton Argument despite the above, on this occasion.

28. There were, unfortunately, a number of connection problems, afflicting principally the Applicants' representative and the Respondents, and pauses in the hearing in consequence. To the credit of the participants, patience and adaptability was shown and the hearing completed.

Has a HMO licensing offence been committed?

29. It is fundamental to determination of the application for the Tribunal to determine whether a relevant offence, in this case as to HMO licensing, has been committed. The matter is in dispute in this case because of the argument as to the backdated Licence. The Tribunal deals with this question step by step with headings distinguishing the different aspects.

The need for a Licence

30. It was not in dispute that pursuant to the Housing Act 2004 ("the 2004 Act") and the regulations made under it that the Property required a Licence in order to be occupiable by these Applicants. It was common ground that the Respondents properly held a HMO Licence granted by the Council for the Property from November 2007 until 30th June 2018 but that the Licence was not then renewed.

31. Section 72(1) of the 2004 Act provides that:

    "A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed..... but is not so licensed".

32. That offence is one of those listed in section 40 of the 2016 Act in respect of which the FTT may make a rent repayment order. The Respondent accepted that they were "in control of" the Property and that if there were no Licence in place, the Respondents committed the offence.

33. It was agreed that the current Licence was granted on 2nd September 2020. That Licence was dated from 1st July 2018 until 30th June 2023. It was also agreed by the parties that the Council wrote to the Respondents on 19th February 2020 informing them that the Licence had expired on 1st July 2018 and that if an application was not now made to renew the Licence, action would be taken by the Council. Further that the Respondents applied to renew the Licence on 27th March 2020 but that the application was received by the Council on 30th March 2020, the relevant date for these purposes. Whilst not the Respondents written case, it was conceded by Ms Kelopa at the hearing that the last day before the application is treated as made was 29th March 2020.

The first specific issue- the power to backdate the Licence

34. The Applicants argued that section 68 of the 2004 Act makes provision for a licence being granted in the future contains no authority for the backdate of a licence. They also argue that the Council should not be able to

prejudice the rights of tenants by such a backdate. The Respondents' submission was that it is not unlawful for the Council to backdate the HMO Licence but rather is a matter for the individual Council and the policy that it adopts. The Respondents' position is that the 2004 Act contains no prevention of the backdate of a licence and the Council has no specific HMO licensing policy and/ or other policy which prohibits it from backdating the Licence.

35. It is notable that the provision of the statute is expressed in the future tense. It is also relevant that the landlord is protected from an earlier time because of the provision in section 72(4) that:

    "In proceedings against a person for an offence under subsection (1) (2) or (3) it is a defence that at the material time-
    (a) ....
    (b) an application for a licence has been duly made.............."

36. During that time the landlord does not have a licence. Parliament has decided that once the landlord has taken the necessary steps by way of making a valid licensing application and that this application has been received by a Local Housing Authority, the offence ceases to be committed. The landlord does not commit an offence during that time because of the protection provided, not because the licence starts at the time of the receipt of the application - the licence does not start then.

37. It is therefore difficult to identify any intention in the statute that the start dates on the face of licences might be backdated by Councils. The scheme appears to approach matters from the perspective that a licence will commence on a date after it has been processed. It may be the specific reason for protection following an application being received is a reflection of the fact that the landlord has done all that he or she can and so vulnerability to action based on the commission of an offence is something that the landlord cannot resolve. That provision makes much more sense if the licence will only start later, on issue: it fits less easily with a position where the local authority could date the licence from the date of the application or even earlier.

38. The Tribunal considers that the matters above and those set out in relation to the second issue- see below- fly in the face of the Council having the power and entitlement to backdate the start date shown on the Licence. The Tribunal considers that the same matters are such that even if the Council has the theoretical power to backdate, there must be a significant question about the Council's entitlement to exercise the power by backdating the Licence or any Licence. However, given that the question that the Tribunal seeks to answer is that of whether a licensing offence has been committed and the effect of the answer to the second issue is that there was, irrespective of the answer to the first question, and despite the Tribunal having identified the two issues, the Tribunal does not answer the question in relation to the first issue.

39. The question of whether the Council, or any other Council, has power in principle to backdate a HMO Licence- or to use the wording adopted above, the power to backdate the start date shown on a licence- and the question of whether is entitled to exercise that power at all and, if so, in what circumstances, is a question of potentially wide significance. Even the immediate Council is not involved in this case, which arises between private individuals, and has made no representations on a question which may affect not only the Council but others. It may be that representations could be sought from the Council, which may be received. There be issues as to the parties being able to respond, as to whether a further hearing may be required and similar. All of that may well result in additional costs and would certainly result in appreciable delay.

40. The Tribunal has concluded that the outcome of this case is not dependent on the answer to the first issue and that it is one better answered in another case in which the answer is determinative in the event of such a case arising.

The second specific issue- what effect does a backdate have for a rent repayment order?

41. This second specific issue may be better expressed as being what effect would a later backdate (if there can be one) of the start date on a HMO Licence have on the commission of an offence for the purpose of an application for a rent repayment order?

42. The Applicants' position may be summarised as being that the later grant of the Licence cannot alter the position which existed at the time of rent being paid. The Applicant's best point, made particularly in the Applicants' Response document, is that, as matter of simple fact, from 27th July 2019 until 30th March 2020 the Applicants were living in the Property there being no Licence in place or applied for (and it might have been added, paying rent for the Property).

43. The Applicant's representative also suggests that the legislation should be interpreted in a way that works for all parties. The Tribunal has little doubt that the Respondents would not consider the approach proposed as working for them but in any event, that is not the appropriate way to approach the consideration of Parliament's intention in enacting the particular provisions.

44. There is additionally merit in the Applicants' argument that there would be a risk, if the Respondents' position were accepted that there can be a backdate and that negates any licensing offence until the grant of a licence, of landlords taking a chance on getting caught committing an offence, then rectifying the position and seeking a backdated licence, reducing the incentive to comply with measures intended to improve standards and the deterrent effect of the legislation.

45. The Respondent asserts that the Licence by being backdated covers the period of the claim. More particularly, the Respondent's position may be

summarised as being that the grant with the backdate retrospectively means that the Tribunal should treat the situation as if there was always a licence in force and so there can be no offence of failing to hold a HMO Licence. The Respondents accept in their statement of case that “in reality there was a period of time in which the Property was unlicensed”.

46. The Respondent’s Counsel quotes section 68(3) of the 2004 Act, which reads as follows:

    “A licence (a) comes into force at the time that is specified in or determined under the licence for this purpose, and (b) unless previously terminated by section (7) or revoked under section 70 or 70A continues in force for the period that is so specified or determined.”

47. The Respondent therefore says that the Licence came into force on 1st July 2018 because that is the start date specified in the Licence, adopting its position that the Council was able to grant a valid licence with that start date.

48. The Tribunal notes that the way that the Licence deals with its period is

    “Licence Period:

    Commence: 01-07-2018 Expiry: 03-06-2023”

49. Interesting as the Respondent’s Counsel’s arguments are, they cannot be accepted as correct either as a general proposition or in the particular circumstances relevant to this Property and these parties.

50. In respect of the particular argument of the Respondent that the Licence “came into force” on 1st July 2018, the Tribunal does not agree. The Tribunal determines that the Licence came into force on the date of its issue. It was not in force before then.

51. Irrespective of whether a licence may be given a start date earlier than the date on which it came into force and may on its face cover that earlier date and onwards, the given licence cannot have come into force on that earlier date because no application had been made for it and no decision had been made as to whether it should be granted. Insofar as relevant, the Licence itself does not stated when it came into force. “Commence” does not, the Tribunal determines equates to “comes into force”.

52. The Respondent’s position conflates the start of the period shown as covered by the Licence as granted, whether validly or otherwise, with the “commence” date, i.e. the date on which the Licence came into force. The Tribunal determines that position to be wrong.

53. Until the date of the application made by the landlord being received that date, rent is received by the landlord, there is no protection for the landlord and there is no licence in place. The licence is not then in force.

On any date prior to receipt of the application for a licence by a local authority, the landlord is committing an offence.

54. The relevant offence is having control of an HMO:

“Which is required to be licensed ………… but is not so licensed”.

55. The Tribunal considers that wording to be quite clearly in the present tense. The Property “is not so licensed” means exactly that.

56. The Respondent’s argument requires the position actually existing at the time to be capable of being subsequently transformed into there being a lack of an offence after all by a later grant of a backdated licence entirely wiping the slate clean and erasing the commission of an offence which had plainly been committed until that point. The commission of an offence or lack of it would be dependent upon the vagaries of the approach of the particular local authority, indeed of the particular local authority officer, as to whether or not to backdate a licence when such licence was later issued.

57. The Tribunal cannot accept that Parliament intended that the commission or otherwise of an offence by a landlord would be determined by an event at later time, which might or might not then prevent an offence ever having been committed after all, at least in the absence of very clear wording to demonstrate that specific intention. Such very clear wording is noticeably lacking.

58. Neither can the Tribunal accept that it would have been intended that a determination by the Tribunal on one date- in this instance prior to September 2020- could lead to a finding that there was no Licence, as there was not, and so an offence was committed and hence there was an entitlement to a rent repayment order but in contrast, a determination by the Tribunal from 2nd September 2020 onwards would lead to a decision that no offence had been committed, again unless there were very clear wording to so indicate that to have been the intention of Parliament. There was not.

59. The Tribunal considers the need for Parliament’s intention to have been clear that its intention was that which the Respondents submit given that it is offensive to common sense that whether the Respondents committed an offence from September 2019 to March 2020 depends upon the decision taken by a third party, the Council, as to the start date of the Licence some months after the relevant events took place and after the Applicants ceased to occupy the Property (although the second of those has no particular significance in itself). An objective observer would, the Tribunal considers, find it startling that it could not be known whether, or not, an offence had been committed on a past date because the position might be changed at some future date.

60. It is for those sorts of reasons that legislation only rarely has retrospective effect and only then where it is stated explicitly to do so. It is an important principle that one should be able to know the legal position at the time of

doing a given thing and the status should not be able to change later. That is principally to avoid rendering unlawful something which was lawful at the time of doing it.

61. The Tribunal realises that the issue of a licence in a particular instance by a local authority is not entirely on all fours with that. It would in this case, if the Respondent were correct, make something that had been done lawful rather than later making something done unlawful. However, the usual approach to legislation is another weight to be added in favour of the Applicant's case that an offence is committed, or not committed, at the time in question because of the presence or absence of a licence at that given point in time.

62. The Tribunal also returns to the fact that a landlord does not commit an offence upon having submitted an application for a licence, because that application provides the landlord with a defence. That provides certainty as to whether or not there is an offence committed, with the answer not being dependent upon the vagaries of when the given officer at the given local authority grants it and issues a licence. The provision avoids the answer varying from one case to the next, provided that an application has been made. The Tribunal finds that to also be consistent with the approach taken by it above to the date when the Licence came into force and to run contrary to the Respondent's argument.

63. The Tribunal further notes that section 73(4) of the 2004 Act refers to a defence "at the material time", section 73(8) refers to "a particular time" and section 73 talks about an application "is still effective". All of those indicate that one must look at the situation on the day in question and not what the situation might become at a later time. The Tribunal does not accept the Respondent's argument that may confuse time in the 2004 Act and the relevant period in the 2016 Act.

64. All of the above weighs heavily against seeking to read the 2004 Act in the manner sought by the Respondent where clear evidence that such manner was intended is lacking. It should be said that it all also supports Licences not being able to be backdated.

65. There was, the Tribunal considers, either an offence committed because there was no Licence in existence at the relevant time or there was no offence because there was a Licence in existence at the relevant time. There was not a Licence in existence at the time. There was only one in existence later when that was issued and then came into force. As Mr Mcclenahan argued, if one were looking at the situation on any given day from 27th July 2019 to 29th March 2020, the Property is required to be licensed but is not so licensed.

66. The Tribunal repeats the Respondent's statement of case "in reality there was a period of time in which the Property was unlicensed". That reality should not be obscured by treating the Licence as being in force before it actually was.

67. The Tribunal accordingly holds that the backdate of the Licence by the Council at a later time, assuming that the Council could validly backdate such Licence, does not alter the fact that there was no Licence in existence at the time of the Applicants' occupation of the Property, such that an offence was committed by the Respondents.

68. For the avoidance of doubt, the Tribunal has not given any weight to the statement in the Council's correspondence 18th December 2020 that the dates on the Licence "do not negate that there was a period of time the dwelling was not licensed" and has undertaken its own analysis.

69. The Tribunal is satisfied, beyond reasonable doubt, that unless the Respondent have a defence of reasonable excuse the Respondents have committed an offence pursuant to section 72(1).

Is there a defence of reasonable excuse?

70. Ms Kleopa argued that in the event that the Respondent would otherwise have committed an offence under section 72(1) of the 2004 Act, there was a reasonable excuse pursuant to section 72(5).

71. The standard of proof in relation to that is the balance of probabilities. If the Tribunal makes findings of fact, it does so on the basis of which of two matters it finds more likely. It does not need to be sure in the manner that it does with facts upon which the commission of an offence is based.

72. The Respondents' representative's argument was that the Respondents had made an unfortunate mistake- they had simply forgotten to renew the Licence. It is said that they are not professional landlords and do not employ a managing agent and further that there is not a pattern of behaviour that should be punishable by a rent repayment order.

73. Reference is made to illness of Mr Slade diagnosed in February 2020 and to hospital admission for surgery with a two-week recovery period. It is said that when the Council wrote to the Respondents by letter 19th February 2020 reminding of the failure to renew the Licence, prompt action was taken.

74. The Tribunal determines that the above does not amount to a reasonable excuse.

75. The Tribunal accepts as a matter of fact that the Respondents did not intend there to be a period in which the Property was not licensed and that the Respondents did in fact forget to renew the Licence. That evidence was not challenged by the Applicants and, in particular, no ulterior motive for the delay in licensing was put to the Respondents. However, the case is that the Respondents simply forgot, no more and no less. Mr Slade, to his credit was candid that the onus was on him to apply and he did not expect a reminder. No reason has been identified as to why the Respondents could not have remembered or that they were in any way prevented from

applying for the renewal of the Licence. Lack of intent to fail to renew does not turn forgetting into a reasonable excuse.

76. As the Respondents own two properties rented out- see below- and that apparently provides most of their income, it may be arguable that they are professional landlords. In addition, 10% of the rent payable is apparently paid to an agent.

77. In terms of the period from the diagnosis of illness in February 2020 and the hospitalisation of Mr Slade for two weeks 17th February 2020 onward, the Tribunal finds that for the short period up to receipt of the reminder letter from the Council, the illness does not provide a reasonable excuse because, all else aside, there is no suggestion that the Respondents in any way intended to apply for the renewal of the Licence and that the illness of Mr Slade had any effect.

78. In relation to the period after receipt of the letter from the Council, which the Tribunal will take to be two days after its production and so 21st February 2020- applying the usual time allowed for postal service of court documents and in the absence of any witness evidence as to the date of receipt or post-marked envelope- the illness could potentially have an impact on the renewal of the application. That is therefore relevant to the period 21st February 2020 to 27th March 2020.

79. The Tribunal considered carefully the question of there being sufficient to found a defence of reasonable excuse for at least some of the period 21st February 2020 to 27th March 2020, being sympathetic to Mr Slade's medical condition. However, the Tribunal has concluded that there is not.

80. The defence fails primarily because there is also no suggestion of any medical problem encountered by Mrs Slade during 21st February 2020 to 27th March 2020, or any argument advanced that she could not have submitted the application for a licence during the balance of Mr Slade's hospitalisation or thereafter. Mr Slade was from mid- March 2020 able to respond in relation to difficulties with both showers at the Property- see below- including arranging contractors and attending at the Property on at least three occasions from 16th March 2020 and hence, insofar as relevant, the argument is that much poorer for the second half of the period.

81. The Respondents assert that an application was made promptly after the reminder and that the Council accepted in correspondence 4th December 2020 that the application had so been made promptly. The Tribunal broadly accepts that assertion, although it takes the Respondent no further than limiting the period of the potential rent repayment order.

82. The Tribunal should add that the Respondent's representative submitted that reasonable excuse could encompass the backdate by the Council- if the Respondents' primary arguments about the backdate failed, which they have. The Tribunal does not accept that to be a sustainable argument and that the backdate and reasonable excuse have any connection- and the answer is unaffected by the lack of an answer to the first specific issue.

The dates of the Licence granted by the Council

83. The Tribunal briefly refers to the fact that the parties did not agree as to the current dates of the Licence. It was agreed that the Council had reconsidered the Licence on or about 4th December 2020 and at that time particularly considered whether to amend the dates on the Licence such that it would start on 2nd September 2020. Detailed oral submissions were made by both representatives, further to written ones from both sides.

84. The matter might have been of some significance and have needed addressing at greater length in this Decision. If the Tribunal had determined that the relevant date in relation to the commission of the offence was the date that the Licence was stated on its face to run from, a change to that date from 1st July 2018 to 2nd September 2020 would itself have determined the answer to whether an HMO licensing offence was committed. In the event, the date does not have that significance for the reasons explained above and so need not be addressed at length.

85. For completeness, the Tribunal considers that the Council considered altering the date from 1st July 2019 but did not then do so, such that the Licence remained as originally issued. Oddly, they considered altering so that the Licence commenced on 30th March 2020, the date of receipt of the Respondents' application, the logic of which is hard to identify and which still involved a degree of backdate from the date of actual issue.

86. Correspondence was sent to the Respondents with a draft amended licence. The Applicants' representatives had written to the Council by email dated 3rd December 2020, which appears to have prompted that reconsideration. The Respondents replied on 17th December 2020 arguing that there was no power to vary the Licence as nothing had altered since it was granted. The Council replied to that on 18th December 2020, stating that there is "absolutely not need to vary the HMO license", by which the Tribunal finds they meant from that issued in September 2020. It should be added that the approach taken by the Council hints at it perceiving that it had power to, and was entitled to exercise the power, backdate the Licence, although the Tribunal did not read much into that as potentially assisting with determining the first particular issue identified.

87. The Tribunal accepts that the Council's HMO register- which states that the Licence ends September 2025, whereas a Licence cannot be granted for more than five years- provides evidence to the contrary. It is evidence of some note given that it is the public record available and so where one would be most likely to look to establish whether a property is licensed: it is important that the record is accurate. It is not easy to reconcile the date on the register with the date on the Licence, although neither is it easy to reconcile the date on the Licence with the statement by the Council that there was a period without a Licence. However, the register contrasts with the other available evidence, which the Tribunal prefers. In the circumstances of the "commence" date stated on the Licence not

determining the answer to the relevant offence being committed, it is not necessary to set out the consideration of the evidence in detail.

The decision in respect of making a rent repayment order

88. Given that the Tribunal is satisfied, beyond reasonable doubt, that the Respondents committed an offence under section 72(1) of the 2004 Act, a ground for the making of a rent repayment order has been made out.

89. Pursuant to the HPA 2016, a rent repayment order “may” be made if the Tribunal finds that a relevant offence was committed. Whilst the Tribunal could determine that a ground for a rent repayment order is made out but not make such an order, such circumstances will be rare and in the normal course, it will be plain that a rent repayment order should be made.

90. That the very clear purpose of the HPA 2016 is to support good landlords and to crack down on rogue landlords and the fact that the imposition of a rent repayment order is penal, to discourage landlords from breaking the law, and not to compensate a tenant- who may or may not have other rights to compensation- must, the Tribunal considers, weight especially heavily in favour of an order being made if a ground for one is made out.

91. The Tribunal can identify no reason why this should be a rare case in which an offence has been committed but a rent repayment order should not be made. The Tribunal exercises its discretion to make a rent repayment order in favour of the Applicants.

The amount of rent to be repaid

92. Having exercised its discretion to make a rent repayment order, the next decision is how much should the Tribunal order. 100% of the rent paid is the mandatory amount if there had been an actual conviction unless there are exceptional circumstances. In the absence of conviction, the relevant provision is section 44(3).

93. Therefore, the amount ordered to be repaid must “relate to” rent paid in “a period, not exceeding twelve months, during which the landlord was committing the offence”. In this instance, the period for which an order is sought is less than twelve months. The Tribunal cannot order more to be repaid than was actually paid out by the Applicants to the Respondent during that period.

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

Relevant caselaw

95. The Tribunal has had particular regard to the decisions of the Upper Tribunal within the last twelve months, during which period several decisions have been made in relation to rent repayment order cases, in

particular four decisions in relation to amount of such an order in cases where the application does not follow the landlord being convicted of an offence.

96. The first two, namely *Vadamalayan v Stewart and others* (2020) UKUT 0183 (LC) and *Chan v Bilkhu* [2020] UKUT 3290(LC) were mentioned by the Applicants' representative in the Skeleton Argument prepared on behalf of the Applicants. The third, *Ficarra and others v James* (2021) UKUT 0038 (LC) was referred to by the Tribunal during the hearing and the advocates were given the opportunity to makes any relevant submissions.

97. The judgement in the fourth case post-dated the hearing in this application by one day and so inevitably was not referred to. That is *Awad v Hooley* [2021] UKUT 0055 (LC). The Tribunal considers that *Awad* does not add anything on which further submissions are required from the parties' representatives, in light of the relevant contents of the judgements in each of those cases, as explained below.

98. Section 44 identifies factors to be considered in respect of an application such as this one which is made by a tenant. Section 44 does not when referring to the amount include the word "reasonable" in the way that the previous provisions in the 2004 Act did. Judge Cooke stated clearly in her judgement in *Vadamalayan* that there is no longer a requirement of reasonableness. For the avoidance of doubt, the Respondent did not pay the utilities. The Upper Tribunal additionally made it clear that the benefit obtained by the tenant in having had the accommodation is not a material consideration in relation to the amount of the repayment to order.

99. Judge Cooke noted (paragraph 19) that the rent repayment regime was intended to be harsh on landlords and to operate as a fierce deterrent.

100. The judgment also held in clear terms, and perhaps most significantly, that the Tribunal must consider the actual rent paid- and not simply any profit element which the landlord derives from the property, to which no reference is made in the 2016 Act.

101. The Upper Tribunal confirmed the approach to be taken and as indicated in *Vadamalayan* in its decision, also of Judge Cooke, in *Chan*.

102. In *Vadamalayan*, the Upper Tribunal also said as follows:

> "That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent."

103. The above statement was generally treated as suggesting the starting point was the award of the full rent paid. That is rather than the statement having related to awards being made with consideration of the actual rent as opposed to profit derived from renting out.

104. In *Ficarra*, the Deputy President, Martin Rodger QC, observed in paragraph 50 as follows:

> "The concept of a starting point is familiar in criminal sentencing practice, but since the rent paid is also the maximum which may be ordered the difficulty with treating it as starting point is that it may leave little room for matters which section 44(4) obliges the FTT to take into account, ands which Parliament clearly intended should play an important role"

105. The Deputy President continued in paragraph 51 by stating:

> "It has not been necessary or possible in this appeal to consider whether, in the absence of aggravating or mitigating factors, the direction in section 44(2) that the amount to be repaid must relate to the rent paid during the relevant period should be understood as meaning that the amount must equate to that rent. That issue must await a future appeal. Meanwhile *Vadamalayan* should not be treated as the last word on the exercise of discretion which section 44 clearly requires."

106. The Judge noted that:

> "neither party was represented in that case and the Tribunal's main focus was on clearing away the redundant notion that the landlord's profit represented a ceiling on the amount of the repayment."

107. He also stated prior to that and in paragraph 32:

> "One would naturally expect that the more serious the offence, the greater the penalty."

108. In *Awad*, Judge Cooke noted that as there had been a number of decisions about the amount of rent repayment orders pursuant to section 44 of the 2016 Act, it may be helpful for her to summarise the position. The summary is briefer than that set out above but the two are consistent. Much of the summary comprises quotation of *Ficarra*, most of which is quoted above.

109. Judge Cooke continued in paragraph 40 by stating that she agreed with the above analysis, noting that *Awad* could not be the last word on the matter either. It is largely for that reason that the Tribunal considered it unnecessary to obtain further submissions from the parties in relation of the effect of *Awad* on this case.

110. The Judge then stated;

> "The only clue that the statute gives is the maximum amount that can be ordered, under section 44(3). Whether or not the maximum is described as the starting point, it clearly cannot function in exactly the same way as a starting point in criminal sentencing, because it can only go down: however badly a landlord has behaved it cannot go up. It will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4). The statute gives no assistance as to what should be ordered

in those circumstances; nor can this Tribunal in the absence of a suitable appeal".

111. Whilst neither *Ficarro* or *Awad* therefore provide a definitive statement that the full rent paid is not the "starting point" but rather is the maximum possible, it is apparent that the emphasis was firmly placed on considering the factors in the 2004 Act and moves away from the apparently perceived effect of *Vadalamayan*.

112. The Tribunal considers that it follows from all of the above Upper Tribunal authority that the Tribunal should not approach the amount of a rent repayment order by looking to award repayment of the rent in full in the absence of a sufficient reason to reduce it. Rather, considering the full rent paid as opposed to the landlord's profit element or some other lower figure, the Tribunal should then consider in the round the level of rent repayment order that imposes the appropriate level of penalty on the landlord in light of all of the factors relevant. That is not the "reasonable" figure- and may or may not appear reasonable as compared to other types of awards or penalties- but which is the appropriate figure applying the relevant factors.

113. The Tribunal needs to do so in the particular circumstances of the given case, where each case will continue to be different to others. Such an exercise of discretion is a regular occurrence in the work of the Tribunal.

114. Whilst the Applicants' representative argued the Tribunal should award the maximum amount of rent repayment in the absence of conduct on the part of the Applicants to merit a reduction, relying on *Vadalamayan*, the Tribunal does not accept that was the effect of *Vadalamayan* and is certainly not the position following *Ficarra* and *Awad,* which re-emphasise the Tribunal's discretion to award the sum considered appropriate, applying the provisions of the 2004 Act.

The relevant factors and the appropriate award

115. Section 44(3) of the 2016 Act requires the Tribunal to, in particular, take into account the conduct of the landlord and the tenant, the financial circumstances of the landlord and whether the landlord has at any time been convicted of an offence to which Chapter 4 of the HPA 2016 applies. Whilst the listed factors must therefore be taken into account, and the Tribunal should have particular regard to them, they are not the entirety of the matters to be considered- other matters are not excluded from consideration. Any other relevant circumstances should also be considered, requiring the Tribunal to identify whether there are such circumstances and, if so, to give any appropriate weight to them.

<u>Financial circumstances</u>

116. In terms of the financial circumstances of the landlord, the Respondents' representatives' Skeleton Argument indicates that the

Respondents are retired and that the rental income is used to supplement what is described as minimal pension.

117. It was established in the course of the hearing that the Respondents also own and rent out the similar property next door. The Respondents had not seen fit to mention that in their written case. The clear suggestion in that written case of modest income of which the rent achieved on the Property comprised the main part was plainly not correct. The Respondent's written case was at best unclear as to level of income. At worst it was deliberately misleading. The Tribunal has insufficient evidence on which to make a finding as to the one of those that is correct.

118. No evidence has been provided as to the level of the Respondent's pensions or otherwise as to the Respondents' financial resources. No bank statements or any other financial evidence at all was provided to the Tribunal. Ms Kleopa suggested that there ought to have been a financial statement from the Respondents but no details or statement were included in the bundle and none has otherwise been identified as filed and served.

119. However, it is also apparent that the rent achievable on the two properties rented out, for four occupiable bedrooms and up to five occupants will be most of that paid by the Applicants and then doubled (the Respondent said that the property next door is rented to four persons- and so does not require a licence). The Tribunal finds that the rental income achieved on the two properties in combination during the relevant period is likely to have been in the region of £5000.00 per month (£2800 plus rent on the other property). That in itself, and ignoring any other sources of income, is not an insignificant monthly sum.

120. It is apparent that the Respondents therefore own, in addition to their own home, two further properties which have capital value. Whilst no evidence was provided of the specific value of the two properties rented out or the Respondents' home, the Tribunal finds from its own experience of property prices generally and of Guildford and its surroundings that the combined value will be considerable, probably closer to £2million then £1million.

121. The fact that the Property is said to be mortgaged, in a sum not revealed and requiring payments said to be £1400.00 per month but not evidenced, is of no relevance to the level of rent, applying Vadalamayan, albeit it reduces the money available to the Respondents to otherwise spend. Neither is the 10% commission said to be paid to a letting agent but not evidenced. The Tribunal observes that, assuming as it does that the 10% commission is indeed paid, where the agent does not apparently manage the Property, such level of commission is startlingly high. The level of commission and regularity of it is, in the Tribunal's experience, far more consistent with the agent being a managing agent. As the level of commission is irrelevant for the purposes of this case, no more merits saying on that matter.

122. The mortgage would plainly impact on the net income of the Respondents and the net equity in the Property. The Tribunal has no information about any mortgages on the Respondents' home or the other tenanted property and does not assume any mortgages of significance about which it has not evidence. If the Respondents would in fact need to borrow money to pay the rent repayment order, such borrowing would be a very small fraction of the capital value of the three properties, including their home, owned by the Respondents, who are not hard up by anyone's reckoning.

123. The Tribunal has no difficulty in finding that the Respondents' financial circumstances are no reason to reduce the level of rent repayment order otherwise appropriate. Potentially, the financial circumstances are a reason to increase it, although in the event the Tribunal has concluded that in the context of other factors they do not on this occasion.

Conduct

124. There are number of allegations by the Applicants in relation to the Respondents' conduct. The majority of the oral evidence heard, and so most of the morning of the hearing, related to this aspect.

125. The first of the Applicant's representative's assertions of an element of conduct related to the repair of a fence to the rear of the Property, that blew down in the storms in January 2020. The repair was not completed until April: the Respondents contended the number of fences damaged in the area meant it was difficult to engage a contractor sooner. It was not clear as to the extent of the Respondents efforts and whether the Applicants' perspective as to security was given weight. However, the Tribunal does not consider that there is sufficient evidence as to the circumstances of this element to give it weight as to conduct relevant to the amount of the rent repayment order.

126. The most significant element of conduct relates to the leak from the upstairs shower. Contrary to the Respondents' assertion that the leak was first reported in March 2020, and that the lockdown was relevant, the Tribunal finds that a leak was reported by email from Grace Eakin on 11th November 2019, in which it was stated that the leak was producing trails of water to the ceiling of the bedroom below, although at that time perceived to be caused by the washing machine rather than the shower. The Tribunal accepts that Mr Slade attended the next day, ruled out the washing machine as the cause of the leak and asked the Applicants to monitor the first- floor shower, which in itself was beyond criticism. Mr Slade said he asked them to take care when using the shower.

127. The Tribunal accepts that a follow up email was sent on 18th November 2019, again by Grace Eakin, and not responded to, that Mr Slade was shown the shower on 16th January 2020 when also attending in relation to the fence, that he attended unannounced on 19th January 2020 and removed the bath panel and that he attended unannounced again on 25th January 2020 but without identifiably resolving any issue. The Tribunal

accepts that the Applicants chased again by telephone in early March 2020. Mr Slade in oral evidence said that this was not the first time that a tenant had reported leaks but that they were almost always because of how the items was used. The Tribunal infers that perspective significantly coloured the Respondent's approach to this repair.

128. The Tribunal finds that the situation was most unpleasant for Grace Eakin, who occupied the ground floor bedroom, into which the first-floor shower was leaking. The leak appears from photographs to have caused staining to her bedroom ceiling and water droplets- the Tribunal has no other specific evidence as to impact.

129. The Tribunal finds that the manner in which the Respondents dealt with the shower left something to be desired and did cause additional distress to the Applicants, accepting the evidence of Ms Pack in that regard. The Tribunal accepts that the Respondents' suggestion on 16th March 2020 of checking the shower leak by Mr Slade taking a shower quite reasonably caused the Applicants some consternation- and accepts Ms Pack's written evidence that she said so- and the change to Mrs Slade doing so, albeit in her bathing suit, did not entirely resolve that. It is difficult to understood how the Respondents can have considered that an appropriate approach or to be an effective way of identifying the cause of the problem, even more so where a plumber had been contacted to attend. Mr Slade accepted, in response to the Tribunal's question, that he had no relevant expertise.

130. The Tribunal accepts the Applicants were uncomfortable with the Respondents' approach and said so. The Tribunal accepts that the Respondents may not have appreciated the effect on the Applicants rather than intending any such effect but the approach taken was poor and there was a failure to have regard to the Applicants. The Tribunal also accepts the written comments exhibited to the Applicant's statement of case, which were not challenged, that the Respondents told the Applicants that the problem was caused by condensation, and finds the conclusion reached by the Respondents implausible and without expertise.

131. The Tribunal further accepts Ms Pack's evidence that Mr Slade was dismissive when he was telephoned on, the phone log indicates, 21st March 2020 to inform him of the ongoing leaking. At this point the downstairs shower could not be used following the electrician attendance- see below- and so the first- floor shower was the only one available. A shower guard was fitted by the Respondents but did not, somewhat inevitably in light of the later opinion of the plumber who attended, resolve the problem and again appears to have reflected an assumption that the issue was the Applicants' manner of use of the shower.

132. The Tribunal does not find that there was unauthorised entry into the Property by the Respondents on or about 23rd March 2020 as alleged. The Tribunal finds Ms Pack to have given honest evidence that she did not expect the Respondents to enter the Property whilst she was alone there and whilst the other Applicants had gone out shopping. However, Ms Pack

could not gainsay the evidence of Mr Slade that two of her housemates had agreed that the Respondents could return to the Property after collecting supplies for the shower from B & Q and use their key to obtain access. She was also unable to comment in relation to a specific dispute about social distancing during another attendance by the Respondents, which the Tribunal considers was in any event not significant to the level of order.

133. No dispute arose about the fact that it was not until 24th March 2020 when the plumber instructed by the Respondents attended and Ms Pack stated that he identified that water was getting behind the tiles, which was not challenged (and meant the problem had nothing identifiably to do with how the shower was used). Only then was appropriate repair work undertaken. Despite no lockdown to prevent appropriately urgent attention having been given to repair of the leak, it had not been appropriately attended for approximately four months after the email 18th November 2019. The Tribunal finds that there was bound to be an element of time involved in attending to the leak and considering potential but that the time should have been a much shorter one.

134. The next matter is that the electrics at the Property were agreed as having been identified on 20th March 2020 to not meet required standards- the Applicants' case was that the downstairs shower was dangerous to use and repair works were required. The Applicants were not aware of any issue with electrics to the ground floor shower until then, which the Tribunal finds unsurprising. Mr Slade orally explained, correctly, that an electrical inspection is required every five years as part of the application to renew the Licence and hence an electrician was booked to undertake one. He said that the last one had been six or seven years ago. He did not accept the shower to be dangerous but said it was found unsatisfactory and was turned off as a precaution. The condition until then was not known and is not the relevant point. It should be made clear that it does not follow that the problem would have been identified in July 2018 if the Licence had been renewed when it ought to have been- there is no evidence to demonstrate when the electrical problem arose and when it would first have been identified on an inspection.

135. The repairs were not undertaken until 9th July 2020, whereas the Tribunal accepts the Ms Packs' oral evidence that they vacated the Property on 4th July 2020. That is the relevant point. The Tribunal finds that the Respondents did not treat the matter as appropriately significant and the Tribunal infers did not make much effort to have the ground floor shower fixed with the Applicants in situ when there was a first floor one . Mr Slade said in evidence that the particular regulations to which the electrical inspection refers were not in force until January 2019 and that the electrician told him that the electrics would have passed previous requirements. The Tribunal finds there to be insufficient evidence as to that being correct but equally that it has no relevance to the actual problem at the actual time.

136. The Tribunal accepts that the Covid-19 pandemic is very likely to have impacted on the availability of contractors to undertake the necessary work

and their ability to access the Property. Given that there was one working shower still at the Property, the Tribunal finds that the disrepair of the ground floor shower caused inconvenience, but the Tribunal accepts that the work could not be categorised as necessary and urgent with inevitable impact during lockdown. However, that does not entirely explain the extent of delay.

137. There was one and not two usable showers in the Property from March 2020 until the Applicants vacated the Property, a period of approximately four months. No doubt that was relevant on practical level, the five occupiers, nursing students at that, had half of the shower facilities for which they were paying. In closing submissions, the Applicants' representative submitted the ground floor one had been used the most due to the leak from the first- floor shower. That may or may not be the case but the Tribunal is unable to identify any evidence advanced on which the submission can be based and so takes no account of it.

138. Secondly, the Property was not able to be licensed until the electrics problem had been resolved. The Property could not be granted a Licence with unsafe electrics, where only on 9th July 2020 was an electrical safety certificate obtained. Consequently, although an application had been made for the Licence in March 2020, the Property remained unlicensed throughout the Applicants' tenancy.

139. The Applicants also alleged in Ms Pack's oral and written evidence that the electrician told the Applicants why the Property had failed the electrics assessment and then went outside and told the Respondents. They then allege that Mr Slade spoke to the Applicants saying that he had six months to undertake the repair. The Tribunal accepts the evidence and finds that Mr Slade was not frank with the Applicants. The Tribunal finds that Mr Slade did not know that he had six months to undertake the repair as he stated and at best was reckless as to whether the information he gave to the Applicants was correct and also accepts that the Applicants checked with the Council and were, somewhat inevitably, told otherwise.

140. In specific relation to the cover being left off the controls following the contractor undertaking works, the Tribunal does not find that to be additional relevant conduct.

141. The Tribunal finds that the manner of dealings with the first-floor shower, probably coupled with the issue with the ground floor shower significantly and unsurprisingly damaged relations between the parties and affected the Applicants in their occupation of the Property.

142. Ms Kleopa argued in her Skeleton Argument that it is notable that the Applicants have not brought a claim for damages for disrepair. The Tribunal disagrees. The Tribunal has not found that of assistance one way or the other in assessing the evidence. There may be many reasons for the lack of such a claim. The Tribunal also observes that the decision by the Applicants to pursue compensation and any entitlement to compensation

that they may have is a separate matter to the level of penalty it is appropriate to impose on the Respondents.

143. The Applicants also made a general assertion that the behaviour of the Respondents had been intimidating, unpleasant and rude. There was an example given in Ms Pack's evidence of what was said to be rudeness to her- shouting at her to keep her distance- and it was said there had been another incident in relation to others of the Applicants, although no direct evidence was given and so the Tribunal could not be satisfied about that incident. The Tribunal accepts the evidence of Ms Pack in relation to the incident involving her such as it was but does not regard it as relevant behaviour and is mindful that the date was during the first national lockdown when many people were concerned about distance. No sufficient detail was given of any other incidents to satisfy the Tribunal.

144. It was asserted that Mr Slade did not give the required advanced notice before attending, which in part related to the shower referred to above. He admitted that, giving evidence that he/ he and his wife attended when in the area. The Tribunal finds that he meant no harm and perceived his approach to be practical. However, he failed to consider the tenancy terms and that the Property was occupied by young women for whom this was their first rented property and so the Respondents turning up unannounced was cause for concern. He ought to have.

145. The final element of conduct of the Respondents is that they failed to protect the Applicants' deposit of £4200 within 30 days of receipt in accordance with section 213 of the 2004 Act. The Respondents' representative submitted that was again a "mere oversight". However, that makes two contended oversights and both in relation to fundamental protections for tenants pursuant to legislation. That does demonstrate a sloppy approach to, compliance with the responsibilities of a landlord.

146. The Tribunal accepts that no loss was suffered by the Applicants and the required protection was put in place, albeit several months late and only in April 2020 (the Respondents' agent being wrong to state in correspondence in January 2020 that the deposit was protected), which post-dated the correspondence about renewal of the Licence and, it was not disputed, correspondence from Ms Pack's father.

The terms of the Licence

147. The Applicant's representative asserted in oral closing the Licence terms when the Licence was issued would have precluded the letting to the Applicants which took place.

148. The Licence permits five persons to occupy the Property but only by use of four bedrooms. The Applicant's representative explained, and the Tribunal accepts, that the fifth bedroom, occupied during the tenancy by Ms Pack, was too small, post The Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licence) (England) Regulations

2018, applicable from October 2018, to then be accepted by the Council as a bedroom.

149. Ms Kleopa made the sound point that the issue was raised briefly in oral closing submissions at the hearing but appears nowhere in the Applicants' evidence or otherwise their written case. No application had been made to amend or to adduce additional evidence. The Tribunal has determined that it should not take account of an argument entirely absent until the very last point made in the Applicants' closing submissions, made after the Respondent's closing submissions, and which the Respondent had necessarily not been able to consider in advance of or at any earlier point in the hearing and obtain anything relevant to respond to it. The Tribunal considers that its approach is in keeping with case authorities.

150. The issue is not a new one to the Tribunal and orders have been made in other cases of licensing offences in respect of rooms which could not be rented out pursuant to the October 2018 regulations. It may well be that in other circumstances it would have been appropriate to give weight to this aspect of the case in relation to the level of award but given the above determination, there is no merit in further discussion on the point.

Other consideration

151. Adding the offence and the conduct together, the Applicants resided in and paid rent for a house unlicensed, without a secured deposit for most of the time, with a leaking first floor shower for approximately three months longer than they ought, an unsafe electric shower for at least part of the time and with other issues having arisen with the manner of dealing with the Applicants. That the Respondents attended to the deposit and in due course repaired the showers does not amount to any more than the Respondents fulfilling their obligations, but not in a timely manner and in the case of the ground floor shower, only after the tenants left. That does not give positive weight to their position. It is also of some relevance that the period once the upstairs shower had been fixed and the deposit secured is not part of the period for which the Applicants did or could seek a rent repayment order. It should however be borne in mind that there were no identifiable repairs issues or issues of dealing between the parties for approximately the first four months.

152. The Tribunal does not consider that there is any conduct on the part of the Applicants which might properly go to reduce the level of award otherwise appropriate- there is nothing to suggest that they were other than exemplary tenants. However, the Tribunal does not consider that such conduct, which ought to be expected, should increase the level of award otherwise appropriate.

153. The Tribunal does not consider that the fact that the Applicants would have been content to renew their tenancy in January 2020 takes the Respondent anywhere. The problem with the first-floor shower was then recent, where the Applicants case was, reasonably that they had not expected delay; the Applicants were unaware of the lack of a HMO Licence

and hardly surprisingly their perspective may have been changed by becoming aware (indeed their email 22nd April 2020 gives that as the specific reason for not renewing); the Applicants may not have realised that the deposit was not protected and so on.

154. Neither does the application for a rent repayment order by the Applicants in April 2020 take matters anywhere for the Respondent. The Applicant were entitled to seek an order in relation to the time for which the Property was not licensed. The Tribunal rejects the Respondents' assertion that the Applicants have been opportunistic and is disappointed that the Respondents have made such an assertion. The Applicants were perfectly entitled to remain in the Property until the end of their tenancy on 20th July 2020 and it is understandable that they did not seek to obtain other accommodation during the period of tenancy agreement by which they were bound, in the middle of an academic year and in lockdown. Notably, the Applicants continued to pay rent April 2020 onwards, for which a rent repayment order cannot be obtained.

155. There is no evidence to suggest that the Respondent has received any previous convictions in respect of any relevant offence.

156. It is of some relevance that the Respondents had been able to rent out the Property for some twenty months between their previous licence ending and the Licence being applied for.

157. Albeit that there are much worse examples of rogue landlords than the Respondents, including with much worse behaviour about wider and/ or more substantial matters and for longer periods, the Respondents did commit an offence. In addition, there were instances of conduct which caused difficulty to the Applicants in the ways described above or otherwise were in breach of requirements or otherwise unsatisfactory. The Tribunal considers those must go to increase the amount of the repayment order appropriate. The Respondents' efforts to minimise significant failings do not improve their position at all. The Tribunal does not find that the Respondents' financial position should, on balance and in this instance, increase the level of order appropriate from that otherwise appropriate for the offence and conduct.

158. The Respondent's contention that the Applicant's did not suffer prejudice by the failure to renew the Licence also has no relevance to the level of penalty appropriately imposed on the Respondent: it might well if the Tribunal had been considering the appropriate level of a payment of compensation.

The amount of the repayment

159. Having considered the cases presented, the findings made and the factors specifically referred to in section 44 of the 2016 Act, and no others having been advanced, the Tribunal determines that the appropriate level of rent repayment order is 75% of the rent paid during the period from commencement of the tenancy until 29th March 2020. The award cannot

properly be anything like the nominal one, if any, argued for by the Respondents.

160. The Applicants had clearly identified that the sizes of the rooms occupied by each of them differed and they agreed to pay different contributions towards the rent. Whilst the rent was payable jointly and severally and most of it paid to the Respondents by Ms Eiseman, neither party has submitted that the rent should not be treated as paid by each Applicant individually in the sum actually paid, whether via Ms Eiseman, effectively acting as agent for that purpose, or otherwise for this case. The Tribunal considers treating the rent payments separately Applicant by Applicant is the appropriate approach to take.

161. The total rent paid by each of the Applicants during the relevant period was:

Hermione Berrick	£4675.59
Hannah Eiseman	£4675.67
Grace Eakin	£4675.59
Sarah Bell	£4324.67
Harriet Pack	£4324.67

162. Therefore, the rent to be repaid is apportioned to reflect the level of rent paid by each of the Applicants, being 75% of that rent in each instance.

163. The level of rent repayment order in favour of each Applicant is therefore as follows:

Hermione Berrick	£3506.69
Hannah Eiseman	£3506.75
Grace Eakin	£3506.69
Sarah Bell	£3243.50
Harriet Pack	£3243.50

<u>Application for refund of fees</u>

164. The Applicants asked the Tribunal to award the fees paid in respect of the application should they be successful, namely reimbursement of the two £100 issue fees (strictly they referred to "fee" singular) and the £200 hearing fee.

165. An application fee having needed to be paid in order to bring the claim and the Applicants having been successful in the proceedings, the Tribunal considers that it is appropriate to order and the Tribunal does order the Respondent to refund £100 to the Applicants.

166. However, there was no need for two separate applications to be made and for two different application fees to be incurred. The Applicants chose to proceed in that manner but there is no good reason for the Respondents to have to pay both of those fees.

167. The Applicants necessarily paid the hearing fee for the hearing held and having been successful, it is also appropriate to order the Applicants to be refunded from the Respondent the £200 hearing fee paid.

168. Given that the Applicants have acted together in due course and the Tribunal has no information as to from whom the different fees came, the appropriate approach is to order that the fees refunded be paid to the Applicants equally, in the hope that the Applicants will make any adjustments that they consider they ought between themselves.

Costs

169. The Respondents, in their Statement of Response, set out a wish to apply for an order that the Applicants pay the legal costs incurred by them in relation to the applications.

170. The Tribunal stated in the hearing that if the Respondents continued to wish to pursue that application, they should do so following receipt of this Decision. That remains the position.

171. Accordingly, if the Respondents do wish to pursue the question of a costs order in light of this Decision, they should so confirm within 28 days of the date of receipt of this Decision, at which time any appropriate further Directions will be given.

Rights of appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28- day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.