FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/43UG/HMF/2021/0019
Type of Application	:	For a rent repayment order under section 41 of the Housing and Planning Act 2016
Premises	:	16 Langham Place, Egham, Surrey, TW20 9EB
Applicants	:	Ben Thomas Charlie Forkes George Marten Otul Adoh Panashe Mwenye
Represented by	:	George Marten
Respondent	:	Mr Alireza Malekzadeh Ms Zohreh Rabbani
Tribunal	:	Judge M Davey Mr M Ayres FRICS Ms J Dalal
Date and venue of hearing	:	9 December 2021, by HMCTS Video
Date of decision with reasons	:	22 December 2021

Decision

The Tribunal determines that the Application fails because it is made later than 12 months after the Respondent had committed a relevant offence.

Reasons for decision

The Application

1. These are the reasons for the decision of the First Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") on an Application made to the Tribunal, by Messrs Thomas, Forkes, Marten, Adoh and Mwenye ("the Applicants" or "the Tenants"), under section 41 of the Housing and Planning Act 2016 ("the 2016 Act"). The Tribunal received the Application on 29 July 2021. (The date is wrongly stated to be 27 July 2021 in the Directions of 13 September 2021, as to which see paragraph 6 below).

2. The Applicants seek a Rent Repayment Order ("RRO") under section 43 of the 2016 Act in respect of the premises at 16 Langham Place, Egham, Surrey TW20 9EB ("the property"). The Applicants held the property on an assured shorthold tenancy granted to them as joint tenants for the period from 1 August 2019 to 31 July 2020.

3. The Tenants entered into occupation under an agreement, which stated that the landlord was Mr Alireza Malekzadeh. The estate agents, Nevins and Wells, drew up the agreement. However, the owner of the property at all times has been Mr Malekzadeh's then wife, Ms Zohreh Rabbani. Following their separation, Ms Rabbani took over management of the property from 10 September 2019 when a new tenancy agreement was entered into with the Applicants for the same period as the initial agreement (i.e. 1 August 2019 to 31 July 2020) and under which Ms Rabbani was named as the landlord.

4. Both Mr Alireza Malekzadeh and Ms Zoreh Rabbani are named as Respondents in the Application. The Tribunal is satisfied that Ms Rabbani ("the Landlord") was the landlord of the property at all material times and therefore if the Tribunal were to make a rent repayment order it would be against her as landlord.

5. In their Application the Applicants asked the Tribunal to make an order in respect of the sum of £27,861.50, being the total rent allegedly paid by the Applicants to the Landlord in respect of the period 1 August 2019 to 31 July 2020. Although the rent payable under the tenancy was £2,500 per month, Ms Rabbani reduced the rent to £2,250 for the month of April 2020. This made the total rent payable for the term to be £29,750. Although the rent was described as a total sum, the

Applicants apportioned the sum amongst themselves according to room size and they paid (or should have paid) their share individually on the specified date each month to the Landlord.

Directions

6. Judge J Dobson issued Directions to the Applicants and Respondents on 13 September 2021. Those Directions set out the steps that the parties to the Application needed to take and a timetable relating thereto. They required the Applicants to send their statement of case to the Respondents by 5 October 2021, the Respondents to send to the Applicants their statement of case in reply by 2 November 2021 and the Applicants to send any statement in reply to the Respondents by 16 November 2021. They also required the Applicant to send the agreed bundle of documents for the hearing to the Tribunal (and Respondents) by 30 November 2021. The hearing was fixed for 9 December 2021. The first two statements and the bundle were delivered in time. However, on 30 November 2021 the Applicants applied for an extension of time with regard to their response in reply and permission to introduce witness statements and further evidence from the Applicants. The Tribunal did not accept this request, which had come far too late in the day. However, the Applicants were told that it was open to them to make oral submissions on the day of the hearing as to matters covered by the Application and the case for the Respondents

The Hearing

7. The hearing was held by video link. Mr Marten and Mr Mwenye were present as were Mr Alireza Malekzadeh and Ms Zohreh Rabbani. By prior permission of the Tribunal also present was their son, Mr Amir Malekzadeh, who relayed to the Tribunal oral submissions by his mother, whose first language was not English.

The Law: A summary

The licensing scheme

8. On 6 April 2006, Part 2 of the Housing Act 2004 ("the 2004 Act") introduced a regime for the licensing of certain houses in multiple occupation ("HMOs") as defined in the Act. The Act made some HMOs subject to a mandatory licensing scheme.

9. Section 254(1) of the 2004 Act (meaning of "house in multiple occupation") provides that for the purposes of the Act a building or part of the building is a house in multiple occupation if (a) it meets the conditions in subsection (2) ("the standard test"); (b) it meets the conditions in subsection (3) ("the self-contained flat test"); (c) it meets the conditions in subsection (4) ("the converted building test"); (d) an HMO declaration is in force in respect of it under section 255; or (e) it is a converted block of flats to which section 257 applies.

10. Section 55(1) of the 2004 Act provides so far as relevant that "This Part provides for HMOs to be licensed by local housing authorities where – (a) they are HMOs to which this part applies (see subsection (2)) and (b) they are required to be licensed under this part (see section 61(1))."

11. Section 55(2) provides that "This Part applies to the following HMOs in the case of each local housing authority – (a) any HMO which falls within any prescribed description of HMO."

12. Article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England)(Order) 2018/221 provides that (as from 1 October 2018) an HMO is of a prescribed description (for the purposes of being an HMO in respect of which a licence is necessary) if it (a) is occupied by five or more persons; (b) is occupied by persons living in two or more separate households and (c) meets the standard test or the self contained flat test or the converted building test in section 25 of the 2004 Act.

13. Section 61 of the Act provides that "(1) Every HMO to which this Part applies must be licensed under this Part unless — (a) a temporary exemption notice is in force in relation to it under section 62, or (b) an interim or final management order is in force in relation to it under Chapter 1 of Part 4. (2) A licence under this Part is a licence authorising occupation of the house concerned by not more than a maximum number of households or persons specified in the licence."

14. The 2004 Act contains criminal and civil sanctions for non-compliance. Section 72(1) of the 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 under this Part (see section 61(1)) that is not so licensed."

15. A person who is convicted of this offence is liable on summary conviction to an unlimited fine (section 72(7) of the 2004 Act). Since 10 March 2017 the local authority may impose a civil penalty of up to £30,000 as an alternative to prosecution. (Sections 72(7A) and 249A of the 2004 Act added by the 2016 Act) if it is satisfied beyond reasonable doubt that the person's conduct amounts to a relevant offence (which includes the offence in section 72(1) of the Act). Where a fixed penalty is imposed on a person under section 249A that person may not be convicted of an offence under section 72(1) in respect of the conduct amounting to an offence.

16. It is a defence to proceedings under section 72(1) that (a) the person in question had given a temporary exemption notification (under section 62 of the 2004 Act) or had made an application for a licence (under section 63 of the 2004 Act) and the notification or application was still effective or (b) that he had a reasonable excuse for not having a licence (section 72(4)(5) of the 2004 Act).

Rent repayment orders

17. Furthermore, a local housing authority ("LHA"), or an occupier of part of an unlicensed HMO, who has paid universal credit or periodical payments respectively, in respect of such occupation, during a period whilst an offence under section 72(1) of the 2004 Act was being committed, may seek to recover those payments by way of a RRO (Section 73 of the 2004 Act and Chapter 4 of Part 2 of the 2016 Act).

18. For this purpose, section 73(1) of the 2004 Act provides that "an unlicensed HMO" is a licensable HMO which is not licensed and where the landlord (a) has not given a temporary exemption notification under section 62(1) of the Act, which is still effective, or (b) has not made an application for a licence under section 63 of the Act, which is still effective.

19. Section 41(2) of the 2016 Act provides that a tenant may apply to the Tribunal for a RRO only if (a) the offence relates to housing that at the time of the offence was let to the tenant and (b) the offence was committed in the period of 12 months ending with the day on which the application is made.

20. Section 43(1) of the 2016 Act provides that the Tribunal may make a RRO if satisfied beyond reasonable doubt that a landlord has committed one of the specified offences whether or not the landlord has been convicted. Where the landlord is found by the Tribunal to have committed an offence under section 72(1) of the 2004 Act and the Tribunal decides to make an order in favour of a tenant the amount payable must relate to rent paid by the tenant in respect of a period not exceeding 12 months during which the landlord was committing the offence. (Section 44(2) of the 2016 Act).

21. The amount that the landlord may be required to repay must not exceed the rent paid in respect of the period less any universal credit paid to any person in respect of rent under the tenancy during that period. (Section 44(3) of the 2016 Act).

22. In determining the amount the Tribunal must in particular take into account (a) the conduct of the landlord and the tenant (b) the financial circumstances of the landlord and (c) whether the landlord has at any time been convicted of one of the specified offences (section 44(4) of the 2016 Act).

The Property

23. The Tribunal did not inspect the property but it is not disputed that it is a converted and centrally heated 5 bedroom house with an open plan fully equipped kitchen/living area and two en-suite bedrooms on the ground floor and a bathroom and three bedrooms on the upper floor.

There is also a garden to the property. The Landlord described the property as high quality student accommodation.

The Applicants' case

24. The Applicants were represented at the hearing by one of their number, Mr George Marten. Another Applicant, Mr Paneshe Mwenye, also attended the hearing and helped present the case for the Applicants.

25. Mr Marten and Mr Mwenye explained that four of the Applicants were final year students in Egham, at Royal Holloway, University of London, who finished their courses and graduated in the summer of 2020. The fifth Applicant, Mr Mwenye stated that he was a student until the end of 2019 when he left Royal Holloway intending to apply elsewhere in the next academic year.

26. Mr Marten explained that the Applicants had brought the Application because, by an email dated 8 March 2021, Mr Graeme Cooke, an environmental health officer at Runnymede Borough Council, the Local Housing Authority (the LHA") explained that the LHA had determined that the property should have been licensed under the 2004 Act from 1 August 2019 to 31 July 2020 and had imposed a Financial Penalty on the Landlord which had been paid.

27. After investigation and correspondence with Ms Rabbani, the LHA had issued a Fixed Penalty Notice under section 249A of the Housing Act 2004, for the sum of £500, which was paid by Ms Rabbani. The LHA had been satisfied beyond reasonable doubt that because the property was an unlicensed HMO throughout the term of the tenancy this amounted to an offence by the Landlord under section 72(1) of the 2004 Act.

28. Mr Marten confirmed that the Applicants were seeking repayment of the total rent paid. He accepted at the hearing that a sum of £550, which the Applicants claim to have been paid to the Landlord by Mr Mwenye, had for whatever reason not been paid into her account and the Applicants accordingly reduced the claim by that amount.

The case for the Respondents

29. Mr Malekzadeh directed his written statement to the matters of the conduct of the Applicant Tenants and the Landlord. He stated that, neighbours in Langham Place would often contact him to express their deep concerns, grievances and frustration with what he described as "the awful antisocial behaviour of the tenants." Mr Malekzadeh also stated that he had seen the state of the property after the Tenants had left and that he had "never seen any tenant mistreat rented property as much as these tenants had throughout this tenancy." He further stated that he was also very aware of what he described as "the terrible way in which these tenants treated Zorah [his ex-wife]." He said that this was especially difficult for her as she was dealing with the stress of the

breakdown of their marriage and her ill-health, which has continued to this day. He said that in his opinion distress from the tenancy made her illness significantly worse.

30. Mr Malekzadeh said he knows that the Landlord was a caring landlord throughout the tenancy because she often got in touch with him about solving any issues that the Tenants had and she always placed great importance on the health and safety of her tenants.

31. In her statement and oral submission the Landlord also addressed the matters of the conduct of the Landlord and the Tenants. With regard to the former she stated that since she had taken over the management of the property in September 2019 she had taken the role of the landlord very seriously and had done her utmost to make sure the property was kept in good condition and the health and safety of her tenants was maintained. She said that she had always tried to be an attentive caring landlord and gave the following examples of the same in her written statement.

32. On 14 September 2019, the lead Tenant requested a new microwave, hoover, bed and sofa. The Landlord purchased these items within a week of that request and also arranged for a handyman to go to the property and set up the bed for the Tenant.

33. On 14 June 2020 there was a problem with the drainage whereby a blockage from the neighbour's kitchen was leading to leaks to the Landlord's property and foul smells. The Landlord immediately acted to get this matter sorted and a solution was achieved within a matter of days despite the fact that the area was still in lockdown.

34. Ms Rabbani said that there were several other instances of smaller works, such as fixing door handles and issues with the garden fence when again she acted quickly to send handymen to fix the problem.

35. Ms Rabbani said that another example of the type of landlord she was is that during the tenancy she decided to give the Tenants a 10% discount on their rent for the month of April 2020 to help alleviate some financial pressure during the pandemic.

36. With regard to the conduct of the Applicants, Ms Rabbani made a number of allegations. She first stated that the Tenants had been a nuisance to all the neighbours in Langham Place and caused them a great deal of distress. She included by way of example a message that was sent from a neighbour at 14 Langham Place who described how bad "this antisocial behaviour" consisting of "illegal gatherings, violence and copious drug consumption" had been throughout the Covid-19 lockdown. She said that the neighbour had mentioned her intention to file a joint police report, with the occupier of 11 Langham Place, against the Tenants.

37. The Landlord also included an exchange with another neighbour from 18 Langham Place, on 6 December 2019, who described "another wild party that the tenants had held, where the police had been called in response to the tenants harassing and being abusive to the neighbours after having thrown up on people's cars and front doors." The Landlord said that these were just two examples of many during the period of the tenancy "where the tenants had exhibited this type of anti-social behaviour, with complete disregard for other peoples' property, peace of mind and safety."

38. The second allegation referred to damage to the house. The Landlord says that the property was treated with a complete lack of respect throughout the tenancy. She said that when the Tenants moved out they had left the property in an appalling state. She said that the damages were outlined in detail in the checkout report sent to the Tenants on 10 August 2020. She received a message from the lead Tenant, Benjamin Thomas, on 30 July 2020 where he describes the house to be a complete mess, apologises and goes on to mention that the house is far beyond repair before their check-out the next day. Ms Rabanni says that the overall cost of the damage to the property was £3,162.

39. The third allegation related to the fact that not all the rents had been paid. Ms Rabanni said that there had been an underpayment of £1,888.50 and that this overdue sum had now increased to £1,961.61 with accumulated interest. She said that Panashe Mwenye had only paid £600 rent from the start of April 2020 till the end of the tenancy even though he should have paid £2,047.50 for this period (which includes the 10% discount in April 2020).

40. The Landlord says that most of the payments that were made by Tenants were usually late and that on multiple occasions the Tenants paid more than a month later than the rent was due. She said that these late payments had placed her under great deal of financial difficulty at the time because the property was her only source of income and she had trouble keeping up with her own bills and mortgage payments throughout the tenancy.

41. Finally the Landlord said that the biggest problem with regard to the tenancy was the way in which she had been treated and spoken to by the Tenants. She said that she had always tried to be a kind and fair landlord but that the Tenants had taken advantage of her inexperience as a landlord and her accommodating nature. She gave instances of electronic messages threatening legal proceedings and complaints to the Council and the University when all she was seeking to do was arrange a viewing of the property after the easing of Covid 19 restrictions and making a request for overdue rent.

42. The Landlord said that all of the misconduct that she described had added to the stress and overall poor health that she was struggling with at the time.

43. With regard to the financial circumstances of the Landlord, Ms Rabbani said that the tenancy had been a big financial burden for her. She said that not only did she suffer cash flow problems due to late payments and unpaid rents but also the damages caused to the property had left her having to cover a large bill for the repairs. She produced tax returns for the last three years, which she claimed to show that the property was her only source of income and that any type of rent repayment order would place her in a very difficult financial situation. She said that when taking account of unpaid rent and damage to the property, legal advice and the HMO Penalty, the net income for the period of the tenancy was only £10,872.28, which is substantially lower than the rent she should be obtaining from the property under the tenancy agreement.

44. Finally, Ms Rabbani made an important written submission. She stated that shortly after the pandemic began in March 2020, three of the tenants, namely George Martin, Otula Adoh and Benjamin Thomas, moved out of the property. She said that therefore, whilst five people are named on the tenancy agreement, for the last four months of the tenancy only two tenants, Panashe Mwenye and Charlie Forkes were in occupation of the property. She said Benjamin Thomas confirmed that on 11 June 2020 he and two others had already moved out and he confirmed that they had moved out for the last four months of the tenancy. Panashe corroborated this fact by confirming that only he and Charlie were living in the house in April 2020. The Landlord therefore submits that for one third of the duration of the tenancy it could not be classified as an HMO because there were only two Tenants living in the property.

The Applicants' response

45. Mr Marten stated that the Landlord had violated the tenancy agreement because she had not complied with the requirement to register the deposit taken from the Tenants. He said that this was being dealt with under a separate dispute procedure for which a hearing was scheduled for 27 January 2022

46. Mr Marten said that on moving in an inventory had never been provided by the Landlord, despite the estate agents having been asked for one by the Tenants. He also says that the photographic evidence provided in the bundle by the Landlord, as to the alleged state of the property and garden at the start of the tenancy, does not reflect the actual state of the property, which was covered in dust. He said that there were also a number of items left by a previous family member occupier, including four large packing cases in the dining room. Panashe Mwenye said that these were only removed a week after a report of the same to the Landlord. (In response the Landlord drew

attention to the fact that on 2 August 2019 one of the tenants had stated on the tenancy agreement that he had checked the house and all was "OK").

47. Mr Marten further stated that rubbish had accumulated early in the tenancy because there were insufficient refuse disposal bins provided for five occupiers.

48. With regard to the Landlord's allegations as to the Tenants' conduct, the Applicants state that these were partially inaccurate and in some cases exaggerated. They accept that they had a party in December 2019, of which they had failed to notify neighbours, and that the police had attended following complaints from neighbours. However, they say that the Tenants, who had remained inside at all times, did not cause any disturbance outside the property. Mr Marten however conceded that they could have managed the party more effectively. They deny that they had been abusive to neighbours and had personally apologised to neighbours afterwards for any disturbance caused by the party. They say that nevertheless it is wrong for the Landlord to draw an inference as to the characters of the Tenants from this occasion or to assert that they were bad neighbours throughout the tenancy. The Applicants said that the last party was a barbecue and passed without incident. They say that they had a good relationship with neighbours and were not aware of police involvement save for the December party.

49. Mr Marten questioned the list of alleged damage to the property and says that because no inventory had been provided it was impossible to know the baseline from which alleged damages could be inferred at the end of the tenancy. However, the Applicants did acknowledge that some damage had been caused.

50. Mr Mwenye explained that whilst he acknowledged that Ms Rabbani had been under a lot of stress he had also had serious health problems during the tenancy. He had been in dispute with the university as to his entitlement to re-register as a student following some failed examinations and had ceased to be a student from January 2020. Because of circumstances at home he said that it had been necessary for him to remain at the property during the pandemic lockdown period during which time he needed to work to make ends meet and pay his rent. He acknowledged underpayment of rent and said that he had encountered difficulty in receiving furlough payments, which led to him seeking to engage with his MP and the Council at the time. Although he said during the hearing that he had found it frustrating at times to deal with the Landlord he acknowledged later that in general communications with her were fine and she was pleasant to deal with.

51. Mr Mwenye said he felt hurt by suggestions that he had bullied the Landlord and said that some of the messages cited by her were produced without explanation of the context or chain of which they were part. Nevertheless, he acknowledged that some messages were

with hindsight regrettable and he could only put it down to his mental state at the time.

52. Mr Mwenye explained that he had become ill and from July 16 to around 6 August 2020 he was in hospital. It became clear that he would not be returning to the property and his mother collected his belongings. The significance of this is dealt with below.

53. By the end of the hearing Mr Marten acknowledged that any rent repayment order should not be for the full amount of rent paid in the light of the evidence provided by the Respondent. He was however unable to suggest how much he believed the Tribunal should order to be repaid.

Discussion and determination

54. Rent repayment orders are one part of a wide ranging set of laws, the aim of which is to discourage "rogue" landlords and agents and to assist with achieving and maintaining acceptable standards in the rented housing market. In the Upper Tribunal decision of *Vadamalayan v Stewart and others* [2020] UKUT 0183 (LC) Judge Cooke stated "my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence."

55. However, it is essential that before considering whether it should make a rent repayment order under section 43 of the 2016 Act the Tribunal must be satisfied that an application for an order is validly made under section 41 of the Act. If not the Tribunal does not have jurisdiction to make an order and that will be the end of the matter. In the present case the Application was made on 29 July 2021. That was the date on the Application and the Tribunal is able to confirm that it was received that day.

56. As stated in paragraph 17 above, section 41(2) of the 2016 Act provides that a tenant may apply to the Tribunal for a RRO only if (a) the offence relates to housing that at the time of the offence was let to the tenant and (b) the offence was committed in the period of 12 months ending with the day on which the application is made.

57. Thus any offence must have been committed in that 12 month period. It is for this reason that the Application Form states on the front page

"**IMPORTANT NOTE:** The application must be made not later than 12 months after the date of the alleged offence."

58. In the present case the 12 month period ran from 30 July 2020 to 29 July 2021. We know that the tenancy ended on 31 July 2020. It follows that if the requirement in section 41(2) were to be satisfied at the time of the Application on 29 July 2021, the Landlord must have been committing the offence on 30 or 31 July 2020.

59. We have not been provided with the Notice imposing a Financial Penalty on Ms Rabbani under section 249A of the 2004 Act, but we do know that the LHA was satisfied that the property was unlicensed between 1 August 2019 and 31 July 2020. We know that Ms Rabbani did not challenge the proposed penalty of £500 and indeed paid the penalty demanded. She accepts that she had committed an offence under section 72(1) of the 2004 Act and also accepts that the reason she had not applied for a licence was that she was completely unaware of the need for a licence and had never before, or since, let the property to more than four occupiers.

60. However, in her submissions in response to the present Application she states that for the last four months of the tenancy the property was only occupied two of the five tenants and she submits that it was therefore not a licensable HMO during that period. If this submission is correct it would mean that the HMO was not licensable on 30 or 31 July 2021 and therefore the Application would be out of time, even if Ms Rabbani had committed the offence at some earlier date.

61. The Tribunal is satisfied that this consequence was not in the mind of the Applicants or the Respondents, neither of them being legally represented. The Applicants rely on what they were told by the LHA and its officer's finding that the property was unlicensed throughout the tenancy. Ms Rabbani's submission about the number of occupiers falling below five appears to relate to whether a rent repayment order should include rent paid during a period of the tenancy when the property was arguably not an HMO.

62. Nevertheless, as noted above, the Tribunal must be satisfied that it has jurisdiction to entertain the Application and this matter was raised with the parties at the start of the hearing.

63. The Tribunal acknowledges the finding of the LHA with regard to imposing a financial penalty on Ms Rabbani but in deciding whether section 41 of the 2016 Act is satisfied the Tribunal must make its own determination as to whether an offence was being committed at the relevant time. We do not know what discussions took place between Ms Rabbani and the LHA. Furthermore, although she accepts that she had committed an offence under section 72(1) her submission as to the number of occupiers who were present during the crucial period of considering a rent repayment order, logically raises the critical issue as to whether the Application is made in time.

64. The resolution of that issue turns upon whether or not the property was a licensable HMO on 29 or 30 July 2019 in respect of which a rent repayment order may be made. The Applicants submit that it was, because the tenancy was granted to five tenants and the tenancy was still in existence until the end of 31 July 2020 during which period they all had a legal right to occupy the property whether they actually lived

there or not. They in effect submit that because they had a right to remain to the end they still occupied the property.

65. The Respondent says that an occupier must live at the property to be an occupier and because an HMO is only licensable when five or more persons occupy the property, it cannot remain a licensable HMO thereafter for any time when the number of occupiers is below five. This might be considered to be an unattractive argument given that the tenants remained liable for the rent and utilities bills throughout the tenancy. However, it is an objective matter of law and fact as to whether the property remained licensable or not, which begs the question of what is required for an HMO to be licensable.

66. As we have seen Article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England)(Order) 2018/221 provides that (as from 1 October 2018) an HMO is of a prescribed description (for the purposes of being an HMO in respect of which a licence is necessary) if it (a) is occupied by five or more persons; (b) is occupied by persons living in two or more separate households and (c) meets (i) the standard test under section 254(2) of the 2004 Act; (ii) the self-contained flat test under section 254(3) of the 2004 Act but is not a purpose built flat situated in a block comprising three or more self-contained flats; or (iii) the converted building test under section 254(4) of the 2004 Act.

67. The definition of an HMO in section 254 of the 2004 Act requires that it consist of units of living accommodation which are occupied by persons who do not form a single household and is occupied by those persons as their only or main residence.

68. The key issue is what is meant by "occupied as their only or main residence". Section 262(6) of the 2004 Act defines "occupier" in relation to premises as meaning a person who "(a) occupies the premises as a residence, and (b) (subject to context) so occupies them whether as a tenant or other person having an interest in the premises or as a licensee; and related expressions are to be construed accordingly.

69. The Tribunal is satisfied that a temporary absence from a property by an occupier cannot be said to mean that they no longer occupy the property as a residence during their absence. A tenant may go away for any number of reasons for a period time. He or she might be on holiday, visiting family or friends, in hospital etc. Such an absence would not mean that they cease to occupy the property.

70. It is well known that in March 2020 the world was turned upside down by the Covid-19 pandemic. Three of the students in the present case left the property around March/April of that year and returned to their family homes taking their study materials, clothes and other personal possessions with them. The first to leave was Ben Thomas followed by George Marten and Otula Adoh. Their courses were no longer being

provided on campus and there seemed little point to those tenants in remaining at the property in such uncertain times. Although Mr Marten says that the tenants who left say that they had intended to return when circumstances materially changed, that change did not happen. Because the Covid restrictions were not relaxed until after the Applicants' courses had ended they did not return to live in the property. When he left, George Marten locked the door to his room and the other rooms were left free for the remaining Tenants to use. George came back at the end of his tenancy with his keys and Ben Thomas returned at the end to collect his bicycle as did Otula Adoh to collect some belongings.

71. Two tenants remained physically present after the others had left. They were Charlie Forkes and Paneshe Mwenye. Paneshe said that he had to continue working and would not want to go home and present a risk to his mother who had health problems. However, Paneshe Mwenye became ill and from July 16 to around 6 August 2020 he was in hospital. Given that his tenancy was due to end on 31st July 2020, it became clear that he would not be returning to the property and his mother collected his belongings.

72. The question therefore is whether the number of "occupiers" had fallen below five during the last three days of the tenancy such that the property thereby ceased to be a licensable HMO?

73. The Tenants had a legal right to remain until the end of the tenancy but it is tolerably clear that by the last week of the tenancy only one Tenant was present and intended to remain until the end. The others had removed their belongings and had clearly ceased to occupy the property in any meaningful sense other than having a legal right to remain to the end, albeit not intending to return to live in the property. Physical absence without a manifest intention to return does not amount to occupation.

74. In these circumstances the Tribunal is not satisfied beyond reasonable doubt, for the purposes of section 41 of the 2016 Act, that a relevant offence was being committed on the 30 or 31 July 2020. This is because it is not satisfied that all five tenants can be said to have been occupying the premises as their only or main residence at that time, which is a requirement for the property to be a licensable HMO.

75. This means that the Application was not valid and accordingly it is not necessary for the Tribunal to determine whether it is satisfied that the Landlord has committed a relevant offence at any other time during the tenancy and if so whether it should make an order and for what amount.

76. It is unfortunate that it has been necessary for the parties to go through the stressful process of an application, made in good faith and responded to in equal good faith, only to discover that the Application is out of time. However, that is the consequence of the limitation period

in section 41 of the 2016 Act and the consequential need for the Tribunal to be satisfied as to whether the Application was made in time if it is to progress any further.

Fees application

60. The Applicants have applied for an order under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that the Respondent be required to reimburse to the Applicants the application fee of £100.00 and the hearing fee of £200.00 paid by them in respect of this Application.

61. The Applicants have not succeeded in establishing that the Application was validly made and in the circumstances therefore, we consider it appropriate that the Respondent should **not** be required to reimburse the application and hearing fees.

Right to 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, that 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.

Annex: The Law

Housing and Planning Act 2016

40 Introduction and key definitions

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

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

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

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

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the

premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

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

(2) A tenant may apply for a rent repayment order only if —

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

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

(3) A local housing authority may apply for a rent repayment order only if—

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

43 Making of rent repayment order

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

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

(3) The amount of a rent repayment order under this section is to be determined in accordance with—

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

44 Amount of order: tenants

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

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

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

(3) The amount that the landlord may be required to repay in respect of a period must not exceed—

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account—

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord, and

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

49 Helping tenants apply for rent repayment orders

(1) A local housing authority in England may help a tenant to apply for a rent repayment order.

(2) A local housing authority may, for example, help the tenant to apply by conducting proceedings or by giving advice to the tenant.