



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

Case Reference : **LON/00BG/HMF/2021/0182**

HMCTS code (paper, video, audio) : **V: VHSREMOTE**

Property : **65 Clearbrook Way, London E1 0SD**

Applicants : **Ms Abigail Blain, Ms Florence Gardner-Hillman and Ms Sacha Vietoris**

Representative : **Ms Elizabeth Dwomoh of Counsel**

Respondent : **Ms Kerry Prevost-Cooper**

Representative : **Ms Chelsea Brooke-Ward of Counsel**

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

Tribunal Members : **Judge P Korn
Mr A Fonka MSc. MCIEH CenvH**

Date of Hearing : **3rd February 2022**

Date of Decision : **24th February 2022**

DECISION

Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: VHSREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in electronic bundles, the contents of which we have noted. The decisions made are set out below under the heading “Decisions of the tribunal”.

Decisions of the tribunal

- (1) The tribunal orders the Respondent to repay to the Applicants jointly by way of rent repayment the total sum of £11,086.69, that sum to be divided equally between the Applicants.
- (2) The tribunal also orders the Respondent to reimburse to the Applicants the application fee of £100.00 and the hearing fee of £200.00 paid by them.

Introduction

1. The Applicants have applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 (“**the 2016 Act**”).
2. The basis for the application is that the Respondent was controlling and/or managing a house in multiple occupation (“**HMO**”) which was required under Part 2 of the Housing Act 2004 (“**the 2004 Act**”) to be licensed at a time when it was let to the Applicants but was not so licensed and that she was therefore committing an offence under section 72(1) of the 2004 Act.
3. The Applicants’ claim is for repayment of rent paid during the period from 29th August 2020 to 14th August 2021 in the amount of £22,173.37 to be divided equally between the Applicants.

Applicants’ case

4. In written submissions the Applicants state that on 15th July 2020 the Respondent granted the Applicants a 12-month fixed term assured shorthold tenancy of the Property commencing on 28th August 2020. At all material times during the course of their tenancy the Property was occupied by three persons and was an HMO that was required to be licensed under the local housing authority’s additional licensing scheme.

5. The Applicants note that in written submissions the Respondent seeks to argue that she has a defence of reasonable excuse under section 72(5) of the 2004 Act for controlling and/or managing an HMO which was required to be licensed but was not so licensed. They note that her defence is based on the fact that she was unaware that the local housing authority's additional licensing scheme was extended to cover the area in which the Property is situated because the designation was not advertised and because she was not contacted by the local housing authority to notify her of the change. Additionally, she claims that when she let her property to the Applicants her letting company, Openrent Platform, did not notify her that the Property was required to be licensed.
6. The Applicants argue that the relevant test, in accordance with the decision of the Upper Tribunal in *Thurrock Council v Palmview Estates [2020] UKUT 355 (LC)*, is whether in all the relevant circumstances the Respondent as the person having control of or managing an unlicensed HMO had a reasonable excuse for doing so, and they submit that the Respondent did not have a reasonable excuse. First of all, Openrent Platform was not engaged by the Respondent to act as her managing agent, and she has not provided any evidence to show that Openrent Platform had assumed responsibility for managing the Property on her behalf and ensuring licensing of the same. Furthermore, even if she was able to prove that Openrent Platform had assumed that responsibility, this would still not amount to a defence of reasonable excuse although it could be relevant to the issue of mitigation.
7. Secondly, the Applicants submit that it is not a reasonable excuse to fail to obtain a licence simply because a person is unaware of the need to have one. The Respondent is the landlady of a Property that she knew to be an HMO, and the responsibility for ensuring that she was up to date with the regulatory requirements for the letting of such premises was hers alone.
8. The Applicants have also made submissions regarding the Respondent's conduct. In her witness statement, Ms Blain states that the Applicants had many problems during the tenancy. These began with issues such as missing lightbulbs and plugs and squeaking doors, but then the problems became more serious. The intercom system was completely broken and after apparently being fixed early in the tenancy it remained partially broken for the duration of the tenancy. There were multiple issues with gas leaks and gas safety checks which resulted in the gas being turned off for several days. Three tiles under the sink fell down and were not fixed by the Respondent despite repeated requests. There was also damp in the cupboards which the Respondent failed to remedy.

9. The most serious issue was a leak which began in the kitchen under the washing machine. The leak caused the floor to warp, but there was no visible water coming into the flat. Ms Blain alerted the Respondent but says that the Respondent then accused her of causing the leak by flooding the washing machine. Gradually, the condition of the floor became worse until the entire kitchen and living room floors had warped to the point that the downstairs of the flat was, in her view, a health and safety hazard. The floor became so warped that it caused various other problems referred to in Ms Blain's statement. The Respondent was uncommunicative and later said that she was having issues securing builders. Those contractors who came to look at the problem came at unsociable times of the day, and one did not wear a mask despite the Covid pandemic. The building work was noisy and made working from home impossible. The leak was finally fixed over three months after the issue was first reported.
10. Ms Gardner-Hillman, in her witness statement, states that the Property was not cleaned prior to the Applicants moving in and that they had a leaky tap and a gas leak. The gas certificate was out of date and the Respondent was hostile and defensive about this. Ms Vietoris, in her witness statement, corroborates various points made by the other Applicants.
11. On the question of what the amount of the rent repayment should be, the Applicants have made reference to the decisions of the Upper Tribunal in *Vadamalayan v Stewart [2020] UKUT 0183 (LC)* and *Williams v Parmar [2021] UKUT 0244 (LC)*. They state that in *Vadamalayan* the Upper Tribunal determined that any rent repayment order should be calculated by starting with the total rent paid by the tenant within the relevant period and then making any relevant deductions are under section 44(3) and (4) of the 2016 Act, taking into account the conduct of the parties, the Respondent's financial circumstances and whether there has been a conviction of the respondent for the offence. They go on to state that in *Williams* the Upper Tribunal held that there was no presumption in favour of awarding the maximum amount and that a tribunal could, in an appropriate case, order less than the maximum amount if the landlord's offence was relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the rent repayment order should be, a tribunal should take into account the purposes intended to be served by the jurisdiction to make a rent repayment order, namely to punish offending landlords, to deter landlords from further offences, to dissuade other landlords from breaching the law and to remove from landlords the financial benefit of offending.
12. On the issue of the parties' conduct, the Applicants submit that their own conduct is beyond reproach. As for the Respondent, she has not been convicted of a prior offence but there have been serious issues with disrepair at the Property, especially in relation to supply of gas and

the flooring at the Property following a leak that rendered the Property virtually uninhabitable. They also state that the Respondent has, on occasions, responded slowly to the need for repairs.

Respondent's case

13. The Respondent accepts that the Property required a licence for the whole of the period of claim and was unlicensed for the whole of that period. She also accepts that she was a person having control of and/or managing the HMO during that period. She also agrees that the Applicants paid a total of £22,173.37 in rent in respect of that period.
14. However, the Respondent notes that under section 72(5) of the 2004 Act, she will not have been guilty of an offence under section 72(1) if she can demonstrate that she had a reasonable excuse for not having licensed the Property, and she submits that she did have a reasonable excuse on the basis that she was not aware of the extension to the geographical reach of the Additional Licencing Scheme (“ALS”) operated by the London Borough of Tower Hamlets (“**the Council**”), which was extended to cover the area of Stepney Green from 1st April 2019. She states that she was told by the Council that she should have received notification of the extension of the ALS but avers that she was not notified and that she only became aware of the position as a result of the current proceedings. As soon as she realised, she applied for a licence without delay.
15. The Respondent goes on to state that if a landlord is to be liable for failure to obtain a licence where there has been no notification to them by the local authority of the need for such a licence this suggests that landlords are required to be ‘psychic’.
16. The Respondent notes that under section 56 of the 2004 Act before designating an ALS the local authority must “*take reasonable steps to consult persons who are likely to be affected by the designation*” and she submits that the Council wholly failed in that regard. She refers to the decision in *R (on the application of Moseley (in substitution of Stirling deceased)) (AP) v London Borough of Haringey* [2014] 1 WLR 3947, a case concerned with a scheme relating to Council Tax Benefit, quoting various aspects of their Lordships’ reasoning. She also refers to the decision in *R (on the application of Canstantinos Regas) v London Borough of Enfield* [2014] EWHC 4173 (Admin), which related to the designation of an ALS, stating that His Honour Judge McKenna concluded that a failure to consult those outside the borough invalidated the consultation. Similarly, in relation to the case of *R (on the application of PEAT and Ors) v Hyndburn Borough Council* [2011] EWHC 1739 (Admin) she states that the court held that for the local authority to satisfy the requirements of section 56 of the 2004 Act they must consult with those affected.

17. In addition, the Respondent states that she used a company called Openrent Platform. Whilst she accepts that Openrent were not the managing agents for the Property, they did provide an online portal with step-by-step guidance akin to a checklist, and this had not alerted the Respondent to any change in the geographical location as to where licensing requirements applied.
18. In her witness statement, the Respondent gives a detailed narrative in relation to the various matters complained about by the Applicants. Prior to the Applicants moving in, she had arranged the pre-tenancy clean at the earliest opportunity after the previous tenants had vacated the Property but the Applicants wanted to move in sooner. She said that the Property would not be professionally cleaned until after they had moved in due to difficulties in securing a cleaner because of lack of availability due to Covid, but they insisted on moving in. The Applicants were also made aware of the damage caused by previous damp in the cupboard from the roof prior to moving in. This was Swan Housing's responsibility and she was already in discussions with them to fix it but the works were held up initially by Covid. There were numerous calls between herself and Swan Housing, and between herself and the Applicants trying to find a suitable date.
19. Regarding the intercom, as far as she was aware it worked intermittently when the Applicants moved in and the previous tenant had been liaising with Swan Housing via email to arrange a date for their contractor to fix it. She followed this up with Swan Housing on numerous occasions. Prior to the Applicants moving in, she arranged for a plumber to undertake the gas certification process via the Openrent platform. This was requested on 21st August 2020, which was two months ahead of its being required but she knew that plumbers were very busy during Covid and did not want to risk the certification lapsing. The Respondent's witness statement also contains a chronology in relation to the gas meter issue and the kitchen water leak issue, and she refers to the offer of a rent reduction.
20. As regards the Respondent's financial circumstances, the Respondent has provided a statement detailing her income and expenditure, also stating that her son has a diagnosed sensory processing disorder and is being assessed for autism and that mainstream schools will struggle to support him.
21. The Respondent has no previous convictions.

Cross-examination of witnesses at the hearing

22. Ms Blain was cross-examined on her evidence. She accepted that the Respondent had said that she would not be able to carry out checks or cleaning before the Applicants moved in as the old tenants had only just moved out and the Applicants wanted to move in early. She also

accepted that lightbulbs were the Applicants' responsibility. Regarding the intercom, Ms Blain accepted that the Respondent had told her that she could not fix it herself as it was Swan Housing's responsibility to fix it and that the Respondent had contacted Swan Housing to ask them to do so. There followed some discussion at the hearing as to which of the parties was more proactive on this issue and how helpful or otherwise the Respondent had been in different situations when a problem had arisen.

23. In relation to the gas safety checks, Ms Blain accepted that she had no evidence that checks were not carried out on time. She also accepted that the gas meter itself was the responsibility of the utility provider and that the Respondent was dependent on the utility provider to resolve the gas leak issue. There was a general discussion at the hearing regarding response times in relation to the various problems at the Property which needed fixing and as to the competence of the Respondent's contractors. It was put to Ms Blain that the response times were not unreasonable in the context of the Covid pandemic and the backlog of work caused by lockdowns, but she did not accept this. She also expressed the view that the Respondent's main contractor often only did half a job and that the Respondent should have realised this.
24. Regarding the suggestion that the Respondent had accused Ms Blain of causing the leak in the kitchen, it was put to Ms Blain that the Respondent was merely asking a question rather than making an accusation, but Ms Blain disagreed as the same question had been asked a few times. There followed various questions on her narrative as to how quickly and competently the Respondent had dealt with the leak. Ms Blain accepted that the Applicants were offered a partial rent refund. Ms Vietoris was also cross-examined on some of the same points as Ms Blain, but it was common ground that Ms Blain was the main witness having stayed at the Property on her own whilst many of the problems were occurring.
25. The Respondent was cross-examined on her evidence. She said that there had been no problems with the gas meter prior to the Applicants moving in. She accepted that she had not inspected the Property properly but said that this was because of the Covid pandemic and the health concerns and practical concerns of visiting the Property with her two young children. In relation to the gas leak issue, she did not come to inspect because she knows nothing about gas and so she sent her gas engineer instead. She accepted that she had not arranged alternative heating when the gas was switched off but she was not asked to do so and it was early September.
26. In relation to the electrical safety certificate, the Respondent said that she had one but accepted that she should also have shown it to the Applicants. In relation to the water leak, it was put to her that her

responses were weak and that there was unacceptable delay, but she did not accept this. As a general point regarding the works that needed doing, the Respondent said that it was very difficult to find reliable builders during the pandemic and she did not want to send a contractor to the Property who she did not even know she could trust.

27. The Respondent accepted that the Council did not agree that there had been insufficient consultation in relation to additional licensing and that the Council's position was that it had previously sent out leaflets and contacted known landlords. When questioned as to what she does to keep abreast of legal changes she said that she goes through a checklist of national requirements. She had no idea that there were, or could be, separate local requirements or that the Property could be an HMO in these circumstances. It was noted that she works for a local authority herself, but when asked whether she should have been proactive to find out local requirements she said that she would not have known how to do so.
28. Regarding Openrent's checklist, it was put to the Respondent that this was merely a list of possible services that they could offer, but she said that this was not how she had interpreted it.

Other follow-up points at the hearing

29. Counsel for each of the parties made brief representations on the Upper Tribunal decision in *Aytan v Moore and others [2022] UKUT 27 (LC)* and the High Court's decision in *The Queen (on the application of Croydon Property Forum Limited) v The London Borough of Croydon [2015] EWHC 2403 (Admin)*. These cases will be referred to below.

Relevant statutory provisions

30. Housing and Planning Act 2016

Section 40

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

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

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

Section 41

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

Section 43

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

Section 44

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

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

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

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

Housing Act 2004

Section 56

- (1) A local housing authority may designate either – (a) the area of their district, or (b) an area in their district, as subject to additional licensing in relation to a description of HMOs specified in the designation, if the requirements of this section are met.
- (3) Before making a designation the authority must ... take reasonable steps to consult persons who are likely to be affected by the designation ...

Section 72

- (1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part ... but is not so licensed.
- (5) In proceedings against a person for an offence under subsection (1) ... it is a defence that he had a reasonable excuse ... for having control of or managing the house in the circumstances mentioned in subsection (1)

Tribunal's analysis

31. The Respondent has accepted that the Property was not licensed at any point during the period of the claim and that it was required to be licensed. She also does not deny that she was the landlord for the purposes of the 2016 Act, nor that she was a “person having control” of the Property and/or a “person managing” the Property, in each case within the meaning of section 263 of the 2004 Act.
32. We are satisfied based on the evidence before us that the Property required a licence under the local housing authority's additional licensing scheme throughout the period of the claim. We are also satisfied on the evidence that the Respondent had control of and/or was managing the Property throughout the relevant period and that the Respondent was “a landlord” during this period for the purposes of section 43(1) of the 2016 Act.

The defence of “reasonable excuse”

33. Under section 72(5) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing an HMO which is licensable under Part 2 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.
34. The Respondent submits that she did have a reasonable excuse in that she was not aware of the extension to the geographical reach of the additional licencing scheme and received no notification of the extension of the scheme from the Council. She also submits that the Council wholly failed to comply with its duty under section 56 of the 2004 Act to “take reasonable steps to consult persons who are likely to be affected by the designation” before designating an additional licensing scheme. Furthermore, she used a company called Openrent Platform which provided an online portal with step-by-step guidance akin to a checklist which had not contained anything to alert her to any change in the geographical location as to where licensing requirements applied.
35. Turning to the cases quoted by the Respondent, *R (on the application of Moseley (in substitution of Stirling deceased)) (AP) v London Borough of Haringey* concerned a scheme for the payment of Council Tax benefit and we do not accept that the very general comments of their Lordships cited by the Respondent in what is a very different context are of much assistance in the present case.
36. *R (on the application of Canstantinos Regas) v London Borough of Enfield*, on the other hand, concerned a judicial review claim in respect of a local authority’s decision to designate its entire borough for additional licensing and selective licensing. The Respondent places particular emphasis on the following statement of His Honour Judge McKenna in that case: “I have reached the conclusion in the present case that the class of persons likely to be affected by the designation plainly included those residents, businesses, landlords and agents who live or operate in immediately adjoining parts of other local authority areas. To my mind it is plain that these groups were likely to be affected and should have been consulted”. However, it is hard to see in what way this statement or any other part of the judgment in *Regas* supports the Respondent’s position, as His Honour Judge McKenna’s point was that a whole category of people had not been consulted in that case. He was not suggesting that if a local authority consults a relevant group but does not personally contact every single person within that group it has failed to discharge its duty under section 56.
37. *R (on the application of PEAT and Ors) v Hyndburn Borough Council* concerned a judicial review claim in respect of a local authority’s decision to designate certain areas for selective licensing. In his

decision, Mr Justice McCombe referred to the need for a local authority to take reasonable steps to consult with the persons likely to be affected by the designation, but in the present case we have no evidence whatsoever from the Respondent to demonstrate that the Council did not take reasonable steps; the most that she has established is that she was not personally informed.

38. *The Queen (on the application of Croydon Property Forum Limited) v The London Borough of Croydon* concerned the lawfulness of a local authority's decision to designate its whole borough for selective licensing in the context of the way in which it conducted its consultation process. In that case Sir Stephen Silber (sitting as a High Court Judge) stated that the local authority had a comparatively wide discretion as to how the consultation process was conducted. Again, we have no evidence from the Respondent in this case to demonstrate that the Council did not consult in a reasonable manner.
39. We do not accept, therefore, that the Respondent has come anywhere close to demonstrating that the Council was in breach of its duty under section 56(3) of the 2004 Act. There are various possible ways to take reasonable steps to consult persons who are likely to be affected by a licensing designation, and we do not accept that the mere fact that a local authority has failed to write personally to every single landlord who may be affected places that local authority on breach of section 56(3).
40. We also do not accept the Respondent's other arguments on the reasonable excuse defence. Mere ignorance of the position, if the Respondent was indeed ignorant, is insufficient to constitute a "reasonable excuse" defence under section 72(5). It was incumbent upon the Respondent to satisfy herself as to the legal requirements relating to the letting of the Property, and it is not enough simply to state that the Council did not personally notify her or to claim reliance on a firm of managing agents (if that had been the position here) or still less to seek to rely on an organisation that was clearly not a firm of managing agents and was merely providing a list of possible services via an online portal. If the position were otherwise, the 2016 Act would lose much of its force.
41. The case of *Aytan v Moore* concerned an appeal against a decision by the First-tier Tribunal on an application for a rent repayment order. In that case the Upper Tribunal said that "*a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not*

inform themselves of the licensing requirements without relying upon an agent, for example because the landlord lived abroad". In the present case, not only was Openrent not a managing agent but none of the other factors set out above applies either.

42. In conclusion, therefore, we therefore do not agree that the Respondent had a reasonable excuse for the purposes of section 72(5).

The offence

43. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. The offence of control or management of an unlicensed HMO under section 72(1) of the 2004 Act is one of the offences listed in that table.
44. Under section 41(2), a tenant may apply for a rent repayment order only if the offence relates to housing that, at the time of the offence, was let to the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made. Having determined that the Respondent did not have a reasonable excuse for failing to license the Property, we are satisfied beyond reasonable doubt that an offence has been committed under section 72(1), that the Property was let to the Applicants at the time of commission of the offence and that the offence was committed in the period of 12 months ending with the day on which the application was made.

Amount of rent to be ordered to be repaid

45. Based on the above findings, we have the power to make a rent repayment order against the Respondent.
46. The amount of rent to be ordered to be repaid is governed by section 44 of the 2016 Act. Under sub-section 44(2), the amount must relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. Under sub-section 44(3), the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of universal credit paid in respect of rent under the tenancy during that period.
47. In this case, the claim does relate to a period not exceeding 12 months. There is also no suggestion that universal credit had been paid in respect of the rent.
48. On the basis of the Applicants' evidence, which in this respect is not disputed by the Respondent, we are satisfied that the Applicants were

in occupation for the whole of the period to which the rent repayment application relates and that the Property required a licence for the whole of that period. There is also no dispute between the parties as regards the amount of rent paid by the Applicants in respect of this period and no suggestion that there is any separate period in respect of which there exist any rent arrears.

49. Under sub-section 44(4), in determining the amount the tribunal must, in particular, take into account (a) the conduct of the landlord and the tenant, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of an offence to which the relevant part of the 2016 Act applies.
50. The Upper Tribunal decision in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* is one of the authorities on how a tribunal should approach the question of the amount that it should order to be repaid under a rent repayment order if satisfied that an order should be made. Importantly, it was decided after the coming into force of the 2016 Act and takes into account the different approach envisaged by the 2016 Act.
51. In her analysis in *Vadamalayan*, Judge Cooke states that the rent (i.e. the maximum amount of rent recoverable) is the obvious starting point, and she effectively states that having established the starting point one should then work out what sums if any should be deducted. She departs from the approach of the Upper Tribunal in *Parker v Waller (2012) UKUT 301*, in part because of the different approach envisaged by the 2016 Act, *Parker v Waller* having been decided in the context of the 2004 Act. Judge Cooke notes that the 2016 Act contains no requirement that a payment in favour of a tenant should be reasonable. More specifically, she does not consider it appropriate to deduct everything that the landlord has spent on the property during the relevant period, not least because much of that expenditure will have repaired or enhanced the landlord's own property and/or been incurred in meeting the landlord's obligations under the tenancy agreement. There is a possible case for deducting utilities, but otherwise in her view the practice of deducting all of the landlord's costs in calculating the amount of the rent repayment should cease.
52. In Judge Cooke's judgment, the only basis for deduction is section 44 of the 2016 Act itself, and she goes on to state that there will be cases where the landlord's good conduct or financial hardship will justify an order less than the maximum.
53. Since the decision in *Vadamalayan*, there have been other Upper Tribunal decisions in this area, notably those in *Ficcara and others v James (2021) UKUT 0038 (LC)* and *Awad v Hooley (2021) UKUT 0055 (LC)*. In *Ficcara v James*, in making his decision Martin Rodger QC stressed that whilst the maximum amount of rent was indeed the

starting point the First-tier Tribunal (“FTT”) still had discretion to make deductions to reflect the various factors referred to in section 44(4) of the 2016 Act. In addition, he stated that neither party was represented in *Vadamalayan*, that the Upper Tribunal’s focus in that case was on the relevance of the amount of the landlord’s profit to the amount of rent repayment and that *Vadamalayan* should not be treated as the last word on the exercise of discretion required by section 44.

54. In *Awad v Hooley*, Judge Cooke agreed with the analysis in *Ficcara v James* and said that it will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4).
55. In *Williams v Parmar & Ors [2021] UKUT 244 (LC)*, Mr Justice Fancourt stated that the FTT had in that case taken too narrow a view of its powers under section 44 to fix the amount of the rent repayment order. There is no presumption in favour of the maximum amount of rent paid during the relevant period, and the factors that may be taken into account are not limited to those mentioned in section 44(4), although the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.
56. Mr Justice Fancourt went on to state that the FTT should not have concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the “conduct of the landlord”, and so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment if what a landlord did or failed to do in committing the offence was relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise.
57. The landlord in the *Williams* case was a first offender with no relevant convictions but was also a professional landlord. There was nothing in her financial circumstances or conduct that Mr Justice Fancourt felt justified reducing the amount of the rent repayment order. The landlord only applied for a licence after an environmental health officer had visited and itemised deficiencies of the Property and the absence of a licence. The Property would not have obtained a licence without further substantial works, had the landlord applied for one, and her February 2020 application was in due course refused because the works had not been done. There were serious deficiencies in the condition of the property, which affected the comfort of all the tenants. Mr Justice Fancourt went on to conclude in the circumstances of that case that it was not necessary or appropriate to mark the offending of the landlord with a rent repayment order in the maximum adjusted amount (after taking into account certain undisputed reductions). Leaving to one side the separate position of one particular tenant in that case, he made a

rent repayment order of 80% of the agreed adjusted starting point in respect of the other tenants.

58. Therefore, adopting the approach of the Upper Tribunal in the above cases, in particular the latest case of *Williams*, and starting with the specific matters listed in section 44, the tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence. We will take these in turn.

Conduct of the parties

59. The Applicants' conduct has been good, and there is no suggestion otherwise by the Respondent.
60. As for the Respondent's conduct, she has failed to license the Property, which is a very serious matter. However, the failure to license, whilst not being a failure for which she had a reasonable excuse for the purposes of section 72(5), was not as culpable as it could have been. She is not someone with a property portfolio and there is no evidence that her failure to license the Property was deliberate. Also, she applied for a licence as soon as she became aware of the position.
61. As regards the other aspects of the Respondent's conduct, the position is more complicated. As she readily admits, there was a series of problems at the Property, and the most major ones caused understandable and significant distress to the Applicants, particularly to Ms Blain who was living at the Property by herself for long periods without these problems being properly resolved. However, it is not automatically the case that any delay in resolving a property issue is indicative of poor conduct on the part of the landlord. In this case, some of the problems are partially explained by the Applicants' wish to move in early before the Respondent had an opportunity to do a full check. Also, where for example a leak occurs and it is difficult to fix, it does not necessarily follow that the landlord is at fault. In addition, we accept that the pandemic has had some impact on landlords' ability to get problems resolved, whether because problems have occurred during a whole or partial lockdown, or because lockdown has led to a backlog or because some contractors are ill or isolating, and we also note the Respondent's offer of a rent reduction. Nevertheless, our overall assessment of the evidence is that there were times when the Respondent was not showing enough 'ownership' of the problem or sufficient urgency and that she should have recognised the limitations of her main contractor somewhat sooner than she did.

Financial circumstances of the landlord

62. The Respondent has provided a statement detailing her income and expenditure, also stating that her son has a diagnosed sensory processing disorder and is being assessed for autism and that mainstream schools will struggle to support him. There is no independent supporting evidence behind her statement, which therefore reduces its weight, but the Applicants have not produced anything to indicate that the Respondent's financial circumstances are better than as stated by her.

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

63. The Respondent has not been convicted of any relevant offence (or any other offence to our knowledge).

Other factors

64. It is clear from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal "must, in particular, take into account" the specified factors. One factor identified by the Upper Tribunal in *Vadamalayan* as being something to take into account in all but the most serious cases is the inclusion within the rent of the cost of utility services. However, in the present case the Respondent is not arguing that any deductions need to be made for utility costs, and nor has she argued that there are any other specific deductions that should be made.
65. In the absence of any evidence to the contrary, we are not persuaded that there are any other specific factors which should be taken into account in determining the amount of rent to be ordered to be repaid.

Amount to be repaid

66. The first point to emphasise is that a criminal offence has been committed. There has been much publicity about licensing of privately rented property, and no mitigating factors are before us which adequately explain the failure to obtain a licence. The Respondent claims ignorance of the position, but this is not a sufficient excuse; it is incumbent on those who let out properties to acquaint themselves with the relevant legislation, the purpose of which is to guarantee tenants certain minimum standards of safety and comfort.
67. We are also aware of the argument that good landlords who apply for and obtain a licence promptly may feel that those who fail to obtain a licence gain an unfair benefit thereby and therefore need to be heavily

incentivised not to let out licensable properties without first obtaining a licence.

68. Secondly, there is no evidence before us that the Applicants' conduct has been anything other than good. Thirdly, even if it could be argued that the Applicants did not suffer direct loss through the Respondent's failure to obtain a licence, it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If landlords can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show that they have suffered actual loss, this will significantly undermine the deterrence value of the legislation.
69. On the other hand, aside from the very important fact of her failure to obtain a licence, there are some mitigating factors in this case. The Respondent is not someone with a property portfolio, the evidence does not indicate that the offence was deliberate and it seems that the Respondent obtained a licence as soon as she knew one was required. Furthermore, she has not at any time been convicted of a relevant offence. In addition, the evidence before us indicates that the Respondent's financial circumstances are not particularly good. As for her conduct in relation to property issues, we do consider that there were some failings on her part, as noted above, but we do not accept that the position was as bad as has been suggested by the Applicants.
70. Therefore, and in particular taking into account the recent decision in *Williams*, in our view there is significant scope for deductions from the *Vadamalayan* starting point of 100% of the amount of rent claimed. Taking all the circumstances together, as summarised above, we consider that a 50% deduction would be appropriate in this case. To deduct any more in these circumstances would in our view serve to downplay the seriousness of the offence and weaken the deterrence value of the legislation.
71. As the amount claimed is £22,173.37, a 50% deduction would reduce this to £11,086.69. Accordingly, we order the Respondent to repay to the Applicants the total sum of £11,086.69, that sum to be divided equally between the Applicants.

Cost applications

72. The Applicants have applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the Tribunal Rules**") for an order that the Respondent reimburse the application fee of £100.00 and the hearing fee of £200.00.
73. As the Applicants have been successful in their claim, albeit that there has been a deduction from the maximum payable, we are satisfied that

it is appropriate in the circumstances to order the Respondent to reimburse these fees.

74. The Applicants have also indicated that they may wish to make a cost application under paragraph 13(1) of the Tribunal Rules. There was some discussion at the end of the hearing as to the relatively high bar for such a cost application. However, if the Applicants do wish to make such an application they must do so **by 10th March 2022**, sending their written submissions to the tribunal by email with a copy to the Respondent. If such an application is made then the Respondent may respond to it, and any such response must be sent to the tribunal by email **by 24th March 2022** with a copy to the Applicants.

Name: Judge P Korn

Date: 24th February 2022

RIGHTS OF APPEAL

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