FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00KF/HMF/2021/0008 & 9**
HMCTS code (audio, video, paper)	**:**	**V: CVPREMOTE**
Property	**:**	**68 Queens Road, Southend-on-Sea, Essex SS1 1PZ**
Applicant	**:**	**Connor Saunders**
Respondents	**:**	**1. Ronald Jordan** **2. Beverley Jordan**
Type of application	**:**	**Applications by tenant for a rent repayment order** - ss 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal	**:**	**Judge David Wyatt** **Miss M Krisko BSc (Est Man) FRICS** **Judge Walder**
Date of decision	**:**	**13 January 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing. The form of remote hearing was V:CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents we were referred to are described in paragraph 8 below. We have noted the contents.

Decision

The tribunal:

(1) does not make a rent repayment order; and

(2) makes no order in respect of costs.

Reasons for the decision

Applications

1. On 21 June 2021, the tribunal received two applications under section 41 of the Housing and Planning Act 2016 (the "**2016 Act**") from the Applicant tenant for a rent repayment order ("**RRO**") against the Respondents and Darren Clements in respect of the Property.

2. The Respondents are the freehold owners of the Property. Darren Clements of Letting Expert (Southend) Limited, previously of Peak Property, was their letting agent/property manager. The Property is a terraced building with two storeys (ground and first floors). At the relevant times, it was a house in multiple occupation ("**HMO**") under section 254 of the Housing Act 2004 (the "**2004 Act**"). In particular, each of the six bedrooms was let separately to individual tenants, who shared basic amenities.

3. The Respondents had let Room 2 at the Property to the Applicant. He moved in on 1 September 2018. For the purposes of the RRO applications, he occupied under: (a) an assured shorthold tenancy agreement dated 20 May 2019 for a term from 1 August 2019 to 30 June 2020 at a rent of £510 per month; and (b) a further tenancy agreement dated 9 March 2020 for a term from 1 July 2020 to 31 May 2021 (later extended to 31 July 2021) at a rent of £520 per month.

4. The Applicant alleged that until 5 May 2021 (when an HMO licence application fee was paid, as explained below), the Respondents were committing an offence under section 72(1) of the 2004 Act (of control or management of an HMO which was required to be licensed but was not so licensed). The first RRO application was made in respect of the period from 1 August 2019 to 30 June 2020, seeking £5,610 (£510 per month for 11 months). The second RRO application was made in respect of the period from 1 July 2020 to 5 May 2021, seeking £5,268.38 (£520 per month for 10 months "*and four nights*").

Procedural history

5. A procedural judge gave case management directions on 28 July 2021. These removed Mr Clements from the proceedings, explaining that a RRO can only be made against the landlord. They also referred the parties to the decision of the Upper Tribunal in Ficcara & Others v James [2021] UKUT 38 (LC). That decision confirms [at paras. 31-40] that 12 months' rent is the maximum a landlord can be ordered to repay on an application under section 41 of the 2016 Act, irrespective of the number, timing or duration of the offences committed.

6. In August 2021, the Respondents' solicitors applied under rule 9(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "**Rules**") to strike out the proceedings for want of jurisdiction. With

that application, they produced an HMO licence proposed and granted by the local housing authority, Southend-on-Sea Borough Council (the "**Council**") after the relevant time. They contended this licence was conclusive evidence of the licensing position at the relevant time. Following a response from the Applicant and a reply from the Respondents, the procedural judge declined to strike out the proceedings for the reasons given on 10 September 2021.

7. In September 2021, the Respondents' solicitors asked that the proceedings be referred to the President of the Property Chamber with a request that they be considered for transfer to the Upper Tribunal under Rule 25. For the reasons given in the decision dated 21 September 2021, the procedural judge declined to do so. Following applications by the Applicant, the procedural judge by summons required John Brassel, a Regulatory Services Manager for the Council, to attend the hearing and ordered him to provide information and documents in advance.

8. Pursuant to the case management directions (as extended), the Applicant produced a bundle of the documents they relied on (217 pages) and the Respondents produced a bundle of the documents they relied on (205 pages). On 15 December 2021, the tribunal received a skeleton argument and bundle of authorities from Ms Brooke Lyne, Counsel for the Respondents. Shortly before the hearing, the tribunal received a skeleton argument and bundle of authorities from Mr Christopher Hopkins, Counsel for the Applicant, and a copy of the decision in Williams v Parmar & Ors [2021] UKUT 0244 (LC) from Ms Lyne. At the hearing on 16 December 2021, the Applicant was represented by Mr Hopkins and gave evidence. John Brassel gave evidence. The Respondents were represented by Ms Lyne. The First Respondent (Ronald Jordan) and Mr Clements gave evidence. There was no inspection; we were satisfied that an inspection was not necessary to resolve the issues in this case. The parties confirmed that (after a break to give them time to consider this and consult their respective advisers) they had no objection to Judge Walder (a member of the same chambers as Ms Lyne) sitting as a wing member of the tribunal as part of his induction to the Property Chamber. We were satisfied this was appropriate.

Power under the 2016 Act to make a RRO

9. Chapter 4 of Part 2 of the 2016 Act confers power on the tribunal to make a RRO (here, an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant) where a landlord has committed an offence under section 72(1) of the 2004 Act (or any of the other offences specified in section 40 of the 2016 Act). By section 41, a tenant may apply for a RRO only if the offence relates to housing that, at the time of the offence, was let to that tenant, and the offence was committed in the period of 12 months ending with the day on which the application was made. By section 43, the tribunal may make a RRO if it is satisfied, beyond reasonable doubt, that the landlord has committed the alleged offence.

The alleged offence and defences – section 72 of the 2004 Act

10. By section 72(1) of the 2004 Act: "*a person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) and is not so licensed.* This is followed by defences under:

    (i) section 72(4) - that, at the material time, an application for a licence had been: "*… duly made in respect of the house under section 63 … and … was still effective (see subsection (8))…*". By section 63, amongst other things, such application must be made: (1) to the local housing authority; and (2): "*…in accordance with such requirements as the authority may specify…*". By section 63(3), the authority: "*… may, in particular, require the application to be accompanied by a fee fixed by the authority …*"; and

    (ii) section 72(5) - that the relevant person: *"… had a reasonable excuse … for having control of or managing the house in the circumstances mentioned in subsection (1) …*".

11. As mentioned above, we would only have power to make a RRO if we were satisfied beyond reasonable doubt that the landlord had committed the alleged offence under subsection (1). However, because the defences in subsections (4) and (5) are separate from the elements of the offence, we decide whether the Respondents have either defence on the balance of probabilities.

The issues

12. At the start of the hearing, we confirmed we would not take the approach suggested in the Applicant's bundle, of dealing only with the first RRO application and allowing the second to be reserved. We would deal with both applications together, on the understanding that (following Ficcara) the parties agreed the maximum the Respondents could be ordered to repay was an amount relating to the rent paid by the Applicant in respect of any 12 months during the period from 1 August 2019 to 5 May 2021. It was not disputed that the rents had been paid as alleged by the Applicant. Mr Hopkins confirmed accordingly that the Applicant's primary claim was for £6,130, an amount equal to the rent for the 11 months from 1 August 2019 at £510 per month (£5,610) plus the first month's rent under the subsequent tenancy at £520 per month.

13. It was not disputed that the Property was required to be licensed from 1 October 2018 to 5 May 2021. The Respondents had been letting the Property since about 2016. The effect of the mandatory HMO licensing order in force until 1 October 2018 was that the Property did not need to be licensed because it had fewer than three storeys. The effect of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018, which substantially extended the types of

licensable HMO, was that the Property was required to be licensed from 1 October 2018. Ms Lyne confirmed that (rightly, in our view) the Respondents did not now contend the Property had been licensed during the relevant period by a licence proposed and issued after the relevant period. The parties agreed the issues for us to decide were:

(i) whether/when the Respondents' application for an HMO licence was "*duly made*" for the purposes of the defence under section 72(4) of the 2004 Act;

(ii) if not, whether/when the Respondents had a reasonable excuse for the purposes of the defence in section 72(5); and

(iii) whether (as sought by the Respondents' solicitors) to make costs orders under Rule 13 in relation to two case management matters (summarised in the costs section below).

Basic evidence

14. Mr Clements produced e-mails showing that from June 2018 he had sought information from the Council about how they would require HMO licence applications to be be made. He said the Council provided no information until about the last week of September 2018, so landlords then had to rush to make their applications at the same time. On 24 September 2018, he sent an e-mail to his landlord clients confirming the licence application fee set by the Council was £920 and suggesting they contact the Council to pay by telephone. The e-mail warned his clients they needed to pay the fee and complete and return the application form to Private Sector Housing at the Council by the following Friday. Mr Jordan confirmed he had been warned by Mr Clements that he needed to make the application and pay the fee. Mr Clements said there were then problems with landlords attempting to pay the fee by telephone. He referred to an (unnamed) landlord who had contacted the Council the week before 1 October 2018 to pay the licence fee by telephone. He produced an e-mail of 26 September 2018 to the Council expressing concern that the officer this landlord had spoken to was said to have been unaware of the new licensing requirements and refused to take payment.

15. On 27 September 2018, Mr Clements sent a partially completed application form to the Respondents, asking them to sign, scan and upload the application form and pay the fee using the Council's website, providing a link for this. That evening, Mr Jordan e-mailed a scanned signed copy of the application form to Mr Clements, saying he was "*having a bit of trouble*" with the Council's website but would try again the next day. Mr Jordan said he had made numerous attempts to submit the form and pay the relevant fee. He said eventually he submitted it on 28 September 2018 and "*it looked like the fee had gone through*". On 4 October 2018, Mr Clements sent additional documents to the Private Sector Housing e-mail address for the Council (headed: "*68 Queens Road - Your request for additional information when applying for an HMO*

licence") for the attention of Tara Boyle, copied to the Respondents. These included a floor plan, gas safety certificate, electrical certificate, energy performance certificate and smoke alarm certificate.

16. On 14 May 2019, Mr Clements e-mailed the Council listing properties for which an HMO licence was awaited, including 68 Queens Road. He said it seemed only one of these licences had been granted in the eight months since the expansion of mandatory licensing. On 13 July 2020, Mr Clements e-mailed the Council referring to 25 outstanding HMO licences, including: "*…68 Queens Road, Southend on Sea SS1 1PZ*". On 26 November 2020, Mr Clements e-mailed the Council asking about the current status of HMO licences for properties including "*68 Queens Road*". On 13 January and 31 March 2021, Mr Clements e-mailed the Council asking about progress on outstanding licences, attaching lists which included: "*…68 Queens Road, Southend on Sea SS1 1PZ*". Mr Clements gave examples of a number of properties (without providing the addresses of the properties themselves) where he said the landlords had been waiting a long time for the Council to process their applications for HMO licences, detailing the periods involved.

17. On 6 April 2021, Mr Clements e-mailed Elizabeth Georgeou, the Head of Regulatory Services at the Council. He said there were still 15 outstanding HMO licences for his clients, saying there had been a "*reasonable trickle*" of licences being issued over time but that seemed to have stopped. He referred to a freedom of information request which he said indicated 16 licence applications had been outstanding for more than 24 months. He pointed out that landlords had paid £920 or more per licence and expressed concern this was an under-resourced area which urgently required attention. On 20 April 2021, Mr Brassel responded. He explained the changes to mandatory licensing from 1 October 2018 created a "*surge*" of applications and it had not been possible to recruit suitably experienced officers; a "*backlog of applications ensued*". He commented on the specific properties which had been listed by Mr Clements, saying for the first time that in relation to the Property (and apparently some other properties): "*no application has been received*".

18. Mr Brassel confirmed the Council had then been provided with a copy of the scanned signed application form dated 27 September 2018 and the e-mail of 4 October 2018 which had apparently responded to a request from the Council for additional documents. On 30 April 2021, Mr Clements also submitted a new licence application form to give up to date information. He paid the then current application fee of £955 on 5 May 2021. On 14 June 2021, the Council gave notice of its intention to grant an HMO licence, allowing the requisite 14 days for representations. On 7 July 2021, Mr Brassel signed and the Council issued an HMO licence for the Property, permitting occupation by up to six persons, which states: "*This Licence is granted 01st October 2018. It shall come into force on this day and shall remain in effect for a period of five years until 30th September 2023 unless previously revoked.*"

Was the application duly made (s.72(4))?

19. Ms Lyne referred us to Middlesex CC v Minister of Local Government and Planning & Ors [1953] 1 Q.B. 12 and R. (Saint John the Evangelist College in the University of Cambridge) v Cambridgeshire CC [2017] EWHC 1753 on the meaning of "*duly made*", acknowledging these decisions were not on point. We did not find them particularly helpful, because they turn on different issues and legislation.

20. The defence in section 72(4) refers to section 63, which (as noted above) provides for requirements specified by the local housing authority. In Kowalek v Hassanein Limited [2021] UKUT 143 (LC) at [28], the Upper Tribunal commented in passing about the potential meaning of "*duly made*" in relation to the selective licensing provisions under the 2004 Act: "*…The qualification … "duly made" may have to be considered if it gives rise to an issue in another case, but it may be intended to exclude, for example, an application submitted without a necessary fee having been paid…*". Mr Hopkins also referred to Parmar at [17] where, after referring to section 63, the Chamber President concludes the alleged offence under section 72(1) is not committed at a time when the relevant person: "*…has made to the local housing authority an application for a licence that complies with the requirements and pays the fee that the authority has specified and the application has not yet been decided…*".

21. Mr Brassel confirmed his role is to manage the Council's Private Sector Housing team, whose work includes administration of mandatory licensing of HMOs. He was referred to different notices displayed on the Council's website at different times:

    (i) the first and second, from October 2017 and September 2019, referred to the licence fees at the relevant times (£900/£920 respectively) and warned: "*The Council has powers and duties to act should you operate a licensable HMO but fail to make a complete application with fee within a reasonable or requested period…*";

    (ii) the second, from August 2021, reads: "*Your application will not be considered valid until a completed application form, appropriate fee and all up to date safety certificates and documentation listed below…have been provided. Failure to complete the application process to the necessary standard could result in prosecution for failure to licence*".

22. Mr Brassel gave evidence that between 1 October 2018 and 5 May 2021 the Council had no policy or practice different from that described in the 2021 extract above. The Council considered it the responsibility of the landlord to make payment. The only recorded receipt of an application fee was on 5 May 2021. Mr Brassel agreed that on the face of the Council's policy it "*would seem*" the application could not have been "*valid*" until that date. In about April 2021, when copies of the signed

application form dated September 2018 and follow-up e-mail of 4 October 2018 were provided, the Council had accepted the application was probably made in time. When the Respondents had been asked for proof of payment of the application fee, they discovered it had never left their account and Mr Clements paid the current fee on their behalf on 5 May 2021. Mr Brassel confirmed the Council had decided to backdate all HMO licences to the date of an application if it appeared to have been sent in "*good faith*", even if information/documentation was outstanding on that date (as apparently it was here between 1 and 4 October 2018) in view of the "*excessive*" delays caused by the relevant officers' "*lack of capacity*" to process applications.

23. Ms Lyne suggested that arrangements for local authority licensing application fees were in some disarray in 2018, as a result of the well-known decision in R. (Gaskin) v Richmond upon Thames LBC [2018] EWHC 1996. She pointed out the regime for failure to licence was punitive and created strict liability. Accordingly, she said, we should take a generous approach to interpretation of the defences. She contended the application was duly made when Mr Jordan attempted to make payment using the Council's website, suggesting this was comparable to tendering a cheque. She highlighted the differing information given on the Council's website, referring in 2018 and 2019 to application with the fee within a "*reasonable or requested*" period. She submitted that the Council had not in practice applied the policy described by Mr Brassel. The Council had a rush of applications and had struggled for a long time to process them, so decided to backdate them, but had given no clear statement of policy at the relevant time.

Conclusion

24. The Council suggested they had (at some point after 5 May 2021 and for the reasons outlined above) decided to treat the application as valid and duly made on 27 September 2018. In the circumstances, we understand why they attempted to do so. However, this was flatly contradicted by Mr Brassel's evidence about the Council's policy and his insistence that, throughout the relevant period, the Council required payment of the fee and the application form. The information provided on the Council's website from 2017 did not warn that an application would not be "*valid*" without the fee (in the way it did by 2021). However, this appears to be referring to the Council's enforcement policy at that time, not specifying the Council's requirements for an application. Moreover, Mr Jordan accepted he knew (from the information provided in late September 2018 by the Council to Mr Clements) that the Council required payment of the fee with the application before the deadline of 1 October 2018.

25. Mr Hopkins pointed out that, in addition, the suggestion the application was duly made on 27/28 September 2018 is not consistent with the fact the Council required supporting documents which were not provided until 4 October 2018. However, we put no weight on that, since it is not

clear when and how the requirement for these additional documents was specified.

26. In our assessment, if the Council was attempting after 5 May 2021 to change the requirements it had specified for the purposes of section 63 of the 2004 Act, that did not take effect retrospectively. Similarly, it was not contended that the licence issued in July 2021 created a licence retrospectively when none existed at the relevant time. There was no suggestion any information or documentation was outstanding after 4 October 2018, although of course Mr Clements provided updated information in his additional application form on 30 April 2021. In the circumstances, we consider the application was not duly made until 5 May 2021, when the application fee was paid.

Did the Respondents have a reasonable excuse (s.72(5))?

27. In Ball v Sefton MBC [2021] UKUT 42 (LC), the Upper Tribunal noted [at 16] that: "*…The responsibility for complying with the requirements to obtain a licence for an HMO falls squarely on the landlord in control of the HMO.*" Mr Hopkins also referred to the guidance for local authorities published by DLUHC, formerly MHCLG, entitled: "*Houses in multiple occupation and residential property licensing reform…*" (as updated on 9 October 2019). This indicates extending mandatory HMO licensing from 1 October 2018 was expected to: "*…help ensure [HMOs] are not overcrowded and do not pose risks to the health or safety of occupiers or blight the local communities in which they are located.*"

28. The Respondents have been landlords for about 10 years. They have two other properties, one of which was acquired recently. They had started renting "*ordinary*" properties, not HMOs. They have always employed a property agent, have their properties regularly inspected and look after maintenance. They were well aware by 24 September 2018 that they needed to pay the application fee and submit the application form before 1 October 2018. Mr Jordan said that, when he made his initial attempts on 27 and 28 September 2018, he would get to a certain point and the Council's system would crash. The last time, it did not crash and the application and payment seemed to him to have gone through. He accepted that £920 was a sizeable amount and he could have checked bank statements to ensure this had left the Respondents' account, but had not done so until late April or early May 2021. He received statements directly from the agents for the rent received. Until late April 2021, he knew Mr Clements had provided further documents requested by the Council and then was chasing the Council for progress but there was a backlog and nothing had come back from the Council. He said the Property had an exemption from council tax throughout as an HMO occupied by students and he had no reason to think the HMO licensing payment and application had not been accepted in September 2018.

29. Mr Clements acknowledged he had never specifically checked with the Council that they had received the application fee. He had not until

April/May 2021 suggested to Mr Jordan that he check the payment had gone through. He referred to his chasing e-mails to the Council. He was concerned about what was happening with HMO licences; that was clear from his e-mails. In 2019 there were some 37 applications outstanding with the Council for his landlord clients. It became clear there were "*huge*" delays in processing applications. He acknowledged there was a long gap between his own chasing e-mails of 14 May 2019 and 13 July 2020. He could see slow progress being made on granting licences during this period, as mentioned in his contemporaneous e-mails. He said at the hearing that he thought he had also spoken to officers at the Council in the interim, but accepted he had provided no evidence of this in his statement or otherwise. If the Council had replied to any of his e-mails before he raised his concerns with the senior officer at the Council, he would have discovered much sooner that the Council could not trace the application or the payment.

30. Mr Clements said when the Council began to engage with him (from 20 April 2021) they had been unable on a first attempt to trace the application fees for five of the outstanding applications for his clients. After enquiries with the relevant landlords, the Council had traced all the application fee payments except this one. When it came to light that the Council could not trace payment, Mr Jordan had been asked to check his accounts and found that the licence fee had not left the account. As a result, Mr Clements made payment for the Respondents on 5 May 2021, after deciding himself to provide the updated licence application form to give the current details for his company, the current tenants and so on, since some of the information in the original application from September 2018 was by then out of date.

31. Mr Brassel was taken to a screen print apparently from the Council's website for HMO licence applications. This showed what appear to be entries for several payment forms submitted by Mr Jordan and then a final entry referring to payment. Mr Brassel was unable to comment on this; he did not know how the payment process worked. When application forms are received, the staff in the Private Sector Housing team carry out a technical assessment; they rely on information from colleagues in a different team about payments received. Now, as part of the initial process on receipt of applications, they check whether fees have been received. Mr Brassel confirmed that, even now, there were problems with the payment element of the Council's website.

32. Mr Brassel acknowledged that a person would reasonably think, from the e-mail of 4 October 2018, that the application had been received and accepted. He acknowledged the wording on the Council's website in 2018 and 2019 ("*…with fee within a reasonable or requested period…*") was later tightened up (as set out above). He did not deny that 16 HMO licence applications had been outstanding for more than 24 months. He was not aware of the Council having sent any reply to any of the chasing e-mails from Mr Clements until Mr Brassel replied on 20 April 2021, let alone any request for payment. He accepted that until 20 April 2021 the

landlord's agents would have had reason to think the application was being processed. He agreed the application seemed to have been lost in the Council's system. He accepted the first time the Council had said this was on 20 April 2021.

33. Mr Hopkins reminded us it was for the Respondents to show on the balance of probabilities they have a reasonable excuse throughout the very long period involved in this case. They were well aware the payment had to be made. He submitted they were experienced landlords checking rent receipts and, given the problems with the Council's website, should have checked that the fee payment had left their account. They had not been sufficiently diligent to have a reasonable excuse. Two and a half years had gone by without the Respondents checking whether the problem was at their end, rather than with the Council. The landlord is responsible for submitting an application which complies with the requirements of the local housing authority. The authority does not need to check whether fees are paid or other requirements have been complied with and notify the landlord before the landlord becomes responsible.

Conclusion

34. We doubt that a landlord could ordinarily have a reasonable excuse for failing to pay a specified application fee, particularly in view of the limited nature of the specific defence in section 72(4). This case is exceptional, in view of the communications from the Council at the relevant times together with the difficulties created by the Council's systems and lack of capacity to prepare for the expansion of mandatory HMO licensing, process HMO licence applications within a reasonable time or answer relevant correspondence.

35. In our assessment, Mr Jordan was a candid and reliable witness. We accept his evidence that (after several attempts) he had submitted the application form and given his payment details to the Council using their payment form, and believed he had made the requisite payment, on 28 September 2018. Ordinarily, since he knew there were problems with the Council's website, the Respondents may not have had a reasonable excuse after a reasonable period for checking the payment had left the Respondents' bank account. However, they knew that promptly following the application and apparent payment the Council had requested additional documents from Mr Clements to support the application and these had been sent to the Council on 4 October 2018. We agree with Mr Brassel that it would have been reasonable to think the application had been received and accepted. Further, the Respondents knew there were delays in processing applications; on 14 May 2019, Mr Clements had written to the Council about a large backlog of HMO licence applications awaiting processing by the Council, including the application for the Property, as noted above. At the start of the relevant period on 1 August 2019, the Respondents had heard nothing since the request answered on 4 October 2018 and nothing in response to the chasing e-mail of 14 May 2019 about the backlog at the Council. In the

circumstances, it would have been reasonable to have taken it that the payment had been received, or would be processed by the Council when they had the capacity to process the application documents.

36. Mr Clements continued to chase in 2020 and 2021 and the Council appeared to be slowly working their way through the outstanding applications in no explained order. The Respondents reasonably relied on their agent, who did leave long periods between some of his written chasing correspondence. However, we accept this was sufficiently diligent in view of the agent's long list of applications submitted to the Council before 1 October 2018 which were still outstanding after a long period of time, when they could see licences on their list eventually being granted. We accept that, until the Council responded on 20 April 2021, the Respondents reasonably believed they had complied with the Council's requirements. As soon as the Council said they could not trace the application or the fee, the Respondents (or Mr Clements on their behalf) acted promptly to submit a copy of the original application and correspondence, then provide updated details (on 30 April 2021) and, after arranging for the Council and Mr Jordan to investigate their payment records as summarised above, pay the fee on 5 May 2021.

37. In the unusual circumstances of this case, we are satisfied that the Respondents had a reasonable excuse for having control of or managing the Property without a licence throughout the period from 1 August 2019 to 5 May 2021.

Review

38. In view of this defence we cannot make a RRO, because we are not satisfied that the relevant offence was committed. Even if we are wrong and the Respondents did not have a reasonable excuse, for the reasons outlined below we would not have made a RRO in this case.

39. As noted above, it is clear from the 2016 Act that the tribunal has discretion as to whether to make a RRO if satisfied beyond reasonable doubt that the relevant offence has been committed. The tribunal must in determining the amount of an RRO take into account, in particular, the matters set out in section 44 of the 2016 Act. In Vadamalayan v Stewart [2020] UKUT 183 (LC), the Upper Tribunal confirmed [at para. 19] its understanding that, in making the 2016 Act, Parliament intended a: "*…harsh and fiercely deterrent regime of penalties for the HMO licensing offence…*". In other decisions, the Upper Tribunal has given further guidance on applications for RROs. These decisions are mentioned in Parmar, where the Chamber President notes [at 43] specific factors which appear appropriate to take into account when deciding whether to make a RRO and describes [at 50 to 53] the type of exercise to be undertaken, noting that the reasons for introduction of the broader regime of RROs in the 2016 Act will: "*…generally justify an order for repayment of at least a substantial part of the rent*".

40. The Respondents did not criticise the conduct of the Applicant, which counts in favour of his application; he was a good tenant. The Applicant confirmed he had no criticism of the Property or the conduct of the Respondents, save for the licensing issue. The Council eventually granted an HMO licence for the same number of occupiers without requiring any work, documentation or anything else. The Property appears from the photographs to have been in very good and clean condition. We take it the Respondents have the resources to satisfy the RRO sought by the Applicant, since no evidence of their financial circumstances was provided. There was no evidence of any previous non-compliance, let alone previous convictions, of the Respondents. In real terms, these were good landlords, who had attempted to comply with the Council's HMO licensing requirements, letting a good property.

41. In the circumstances summarised in this decision, even if the Respondents did not have a reasonable excuse because they could have done more to check the Council had received (or acted upon) what they had endeavoured to provide through the Council's defective systems, or to chase the Council in writing in relation to any period or periods, it would not be appropriate to make an order. In particular, having heard from Mr Jordan, we are satisfied that a RRO is not needed to punish the Respondents, deter them from further offences, dissuade other landlords from breaching the law or remove the financial benefit of offending. That view is consistent with the approach taken by the Council in attempting to backdate the HMO licence (and other licences where they were satisfied the application had been made in time); Mr Brassel said on 20 April 2021 this was intended to avoid any "*increased legal exposure*" for such applicants. In this exceptional case, we do not consider it appropriate to order the Respondents to repay any of the rent they received from the Applicant.

42. We do not propose to examine in any detail the new point suggested by Ms Lyne during her oral submissions, to the effect that rent paid by a parent on behalf of a student tenant (as in this case) was not rent "*paid by the tenant*" for the purposes of section 44 of the 2016 Act. In view of the findings we have made, that is not necessary, but the argument does not appear to have any real prospect of success. The Applicant was the tenant and his parent the guarantor under the tenancy agreements; his parents simply paid the rent on his behalf.

Costs

43. The tribunal may make an order in respect of costs only in the circumstances set out in Rule 13(1). The Respondents' solicitors relied on Rule 13(1)(b)(ii), which applies: "*…if a person has acted unreasonably in bringing, defending or conducting proceedings in … a residential property case…*". Ms Lyne acknowledged that, following Willow Court Management Co (1985) Ltd v Alexander [2016] UKUT 290 (LC), this is a high bar, but alleged the Applicant had acted unreasonably in conducting the proceedings. The Respondents sought their costs of dealing with the

Applicant's "*unjustified and unnecessary*": (a) filing of a further response in relation to the Respondents' application to strike out the applications; and (b) application for a witness summons for Mr Clements.

44. We are not satisfied that the Applicant acted unreasonably (in the Willow Court sense) in relation to these matters. The Respondents' strike-out application was made on dubious grounds, added time and costs and was refused (disregarding the contents of the further response from the Applicant). On the evidence produced, the application for a witness summons for Mr Clements should not have added substantially more costs than taking the preferable approach of communicating to agree what documents Mr Clements would provide; the parties then did so over a very short period of time, as Mr Hopkins pointed out. The Respondents' solicitors responded to these matters at some length, but that was a matter for them. In general, all the parties took a rather disproportionate approach, taking up the resources of the other parties and the tribunal with some applications and correspondence which were perhaps ill-considered. They should all have done more to co-operate with each other and focus on resolving this matter more cost-effectively. In the circumstances, we consider each party should bear their own costs.

Name: Judge David Wyatt **Date:** 13 January 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

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