FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/HMF/2022/0044**
Property	**:**	**Flat 1, 25B Copperfield Street, London SE1 0EN**
Applicants	**:**	**(1) Mr. Simone Roma** **(2) Ms. Danila Francis** **(3) Ms. Beatrice Botto** **(4) Mr. Felix Nooteboom** **(5) Mr. Max Hibling**
Representative	**:**	**Mr. C. Neilson of Justice For Tenants**
Respondents	**:**	**(1) Mr. Andre Charles Trepel** **(2) Ms. Arune Buragaite** **(3) Trepel (No. 1 London) Ltd.**
Representative	**:**	**Mr. J. Meethan (of counsel) instructed by Brian O'Connor & Co. for the First and Third Respondents only**
Type of Application	**:**	**Application for a rent repayment order by tenants**
Tribunal	**:**	**Tribunal Judge S.J. Walker** **Mr. S. Wheeler MCIEH, CEnvH**
Date and Venue of Hearing	**:**	**11 October and 10 November 2022 – Alfred Place**
Date of Decision	**:**	**20 January 2023**

DECISION

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(1) The Tribunal makes Rent Repayment Orders under section 43 of the Housing and Planning Act 2016 requiring the First Respondent to pay the following;

To the First and Second Applicants £4,269.98
To the Third Applicant £3,300
To the Fourth Applicant £3,740
To the Fifth Applicant £2,746.58

(2) The application for an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imbursement by the First Respondent of the fees of £300 paid by the Applicants in bringing this application is granted. Payment is to be made within 28 days.

(3) The Applications against the Second and Third Respondents are dismissed

Reasons

The Application

1. The Applicants seek rent repayment orders pursuant to sections 43 and 44 of the Housing and Planning Act 2016 ("the Act") for various periods commencing in September or October 2020 and all ending on 19 February 2021.

2. The application was made on 14 February 2022, so is in time, and alleges that the Respondents have committed an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act") – having control or management of an unlicensed House in Multiple Occupation ("HMO").

Procedural Background

3. When the application was made it was accompanied by an application under rule 20 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules") for an order requiring the Respondents to answer a number of questions and provide certain specified evidence in relation to their respective interests in the property.

4. Directions in this case were made by Judge Tagliavini on 23 May 2022. They required the Applicants to prepare a bundle of documents by 4 July 2022. The Respondents were directed to provide a bundle in response by 15 August 2022.

5. Judge Tagliavini considered the application under rule 20 of the Rules and refused it on the grounds that it had been made prematurely, adding that the Applicants were at liberty to renew their application at a more appropriate date, for instance, after receipt of the Respondent's response.

6. The Applicants provided a bundle as directed. This comprised 496 pages. References to page numbers in what follows are to that bundle. By 8 September 2022 none of the Respondents had provided any response at all. The Applicants wrote to the Tribunal to inform it of this.

On 28 September 2022 the Tribunal wrote to the Respondents requiring them to notify the Tribunal by 3 October 2022 (a) whether or not they had complied with the directions and if not, why not, (b) what action they intended to take to remedy the breach, and (c) to state why their further participation should not be barred for failure to comply with directions.

The Hearing

7. The hearing was attended by all the Applicants other than Mr. Nooteboom, the Fourth Applicant. They were represented by Mr. Neilson from Justice for Tenants.

8. By the morning of the hearing there had still been no response from any of the Respondents. However, shortly before the hearing was due to commence, the Tribunal was informed that Mr. Trepel, the First Respondent, had attended and that he was represented by Mr. Meethan of counsel, who also appeared on behalf of the Third Respondent.

9. Mr. Meethan provided the Tribunal with a skeleton argument which made it clear that the First and Third Respondents had no positive case to advance and that they simply intended to put the Applicants to proof of their case. This was the first time that any of the Respondents had engaged with the Tribunal in any way. There was still no response from the Second Respondent, and she did not attend the hearing.

10. The Tribunal asked Mr. Meethan why the Respondents had not provided a response to the Tribunal's letter of 28 September 2022. He said that his instructions were that there were other proceedings involving another flat in the building which had been stayed pending the appeal to the Supreme Court in the case of Rakusen -v- Jepsen and that his client's understanding was that this case had also been stayed.

11. Mr. Meeethan again made it clear that the First and Third Respondents did not propose to provide any evidence for the Tribunal to consider and that they wished to proceed solely on the basis that they would seek to put the Applicants to proof. They sought to participate in the hearing to the extent that they would be able to cross-examine the witnesses and make submissions.

12. Bearing in mind the earlier application by the Applicants for an order under rule 20 of the Rules, the Tribunal first asked Mr. Neilson whether the Applicants wished to proceed with the hearing or to renew that application. His response was that the Applicants wished to continue with the hearing.

13. Mr. Neilson then invited the Tribunal to use its powers under rule 8(2)(e) of the Rules to prevent the Respondents from cross-examining the witnesses or making submissions. He argued that the Respondents had clearly failed to comply with the Tribunal's directions and that allowing them, in effect, to ambush the hearing at this stage was unfair.

14. This application was opposed by Mr. Meethan, who argued that the nature of the case was not unpredictable and that it raised no unusual or unexpected arguments. He argued that, in any event, the Applicants bore the burden of proving their case and that to allow cross-examination and the making of submissions in those circumstances was not unfair or disproportionate.

15. The Tribunal considered these arguments and concluded that, even at this very late stage, it would be disproportionate to prevent the Respondents from testing the evidence put forward by the Applicants and making submissions. It therefore decided to refuse the Applicants' application. However, this decision was subject to two conditions. Firstly, the Tribunal made it clear that the cross-examination of witnesses by the Respondents should not be used as a means of introducing any new documentary evidence by the back door. Secondly, it decided that in fairness to the Applicants, who at this stage would still be unaware of any arguments which the Respondents may seek to put forward, they should be entitled to provide written submissions to the Tribunal in response to any oral submissions made to the Tribunal by the Respondents. The Tribunal therefore gave permission to the Applicants to present written submissions after the conclusion of the hearing. It directed that these should be provided by 1 November 2022.

16. The hearing then proceeded, with evidence being given by the four applicants who were present and with submissions being made by both parties. In the course of the hearing the Tribunal was also provided with a bundle of authorities from the Applicants which comprised 141 pages.

17. On 27 October 2022 the Tribunal received 17 pages of additional submissions from the Applicants. The Tribunal reconvened on 10 November 2022 when it considered the evidence previously presented to it and the submissions it had received both orally and in writing. Unless otherwise stated, references to paragraph numbers in what follows are to the paragraphs in those submissions.

The Legal Background

18. The relevant legal provisions are partly set out in the Appendix to this decision.

19. The Tribunal may make a rent repayment order when a landlord has committed one or more of a number of offences listed in section 40(3) of the Act. An offence is committed under section 72(1) of the 2004 Act if a person has control or management of an HMO which is required to be licensed but is not. By section 61(1) of the 2004 Act every HMO to which Part 2 of that Act applies must be licensed save in prescribed circumstances which do not apply in this case.

20. Section 55 of the 2004 Act explains which HMOs are subject to the terms of Part 2 of that Act. An HMO falls within the scope of Part 2 if it is of a prescribed description (a mandatory licence) or if it is in an area for the time being designated by a local housing authority under section 56 of

the 2004 Act as subject to additional licensing, and it falls within any description of HMO specified in that designation (an additional licence).

21. For the purposes of mandatory licences, the prescribed descriptions are to be found in the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018. Under that Order an HMO falls within the prescribed description if it is occupied by five or more people, and is occupied by people living in two or more single households, and, among other things, it meets the standard test under section 254(2) of the 2004 Act.

22. A building meets the standard test if it;

> "*(a) consists of one or more units of living accommodation not consisting of a self-contained flat or flats;*
> *(b) the living accommodation is occupied by persons who do not form a single household …;*
> *(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it;*
> *(d) their occupation of the living accommodation constitutes the only use of that accommodation;*
> *(e) rents are payable or other consideration is to be provided in respect of at least one of the those persons' occupation of the living accommodation; and*
> *(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.*"

23. By virtue of section 258 of the 2004 Act persons are to be regarded as not forming a single household unless they are all members of the same family. To be members of the same family they must be related, a couple, or related to the other member of a couple.

24. With regard to additional licensing, there was no dispute that the property was in the London Borough of Southwark and that the whole of that borough was subject to an additional licensing scheme which designated all HMOs other than those subject to mandatory licensing as requiring a licence (see page 266). It follows that under this designation a licence was required if the property was occupied by 3 or more persons provided that the standard test set out above was met. This designation came to an end on 31 December 2020.

25. An offence under section 72(1) can only be committed by a person who has control of or manages an HMO. The meaning of these terms is set out in section 263 of the 2004 Act as follows;

> "(1) *In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.*

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–

(a) receives (whether directly or through an agent or trustee) rents or other payments from–

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

26. It is a defence to a charge of an offence under section 72(1) of the 2004 Act that a person had a reasonable excuse for committing it.

27. By virtue of the decision of the Court of Appeal in the case of Rakusen -v- Jepsen and others [2021] EWCA Civ 1150 an order may only be made against the immediate landlord of a tenant.

28. An order may only be made under section 43 of the Act if the Tribunal is satisfied beyond reasonable doubt that an offence has been committed.

29. By section 44(2) of the Act the amount ordered to be paid under a rent repayment order must relate to rent paid in a period during which the landlord was committing the offence, subject to a maximum of 12 months. By section 44(3) the amount that a landlord may be required to repay must not exceed the total rent paid in respect of that period.

30. Section 44(4) of the Act requires the Tribunal to have regard to the conduct of the landlord and tenant, the financial circumstances of the landlord and whether or not the landlord has been convicted of a relevant offence when determining the amount to be paid under a rent repayment order.

The Applicants' Case

31. The Applicants' case was that they became tenants of the property at the following times.
    (a) Mr. Roma and Ms. Francis on 18 July 2020
    (b) Mr. Nooteboom on 19 September 2020
    (c) Ms. Botto on 29 September 2020; and

(d) Mr. Hibling on 27 October 2020

It follows that their case was that an offence under section 72(1) of the 2004 Act began to be committed on 19 September 2020, which was when the property was first occupied by 3 people in more than one household. Such an offence continued to be committed until 31 December 2020 when the additional licensing designation came to an end.

32. However, when Mr. Hibling moved into the property on 27 October 2020 the property started to be occupied by 5 people and so a mandatory licence was required. This remained the case until 19 February 2021 when Mr. Nooteboom left the property, leaving only 4 tenants remaining. As there was no longer a requirement to have an additional licence, the offence under section 72(1) came to an end on that day.

33. The amounts sought by the Applicants will be dealt with below.

The Respondents' Case

34. Although the First and Third Respondents put forward no evidence and in paragraph 18 of his skeleton argument Mr. Meethan stated that they had no positive case to advance, nevertheless it was clear from the skeleton argument that, in fact, their case was that the First Respondent was not the landlord of any of the Applicants, that the Third Respondent was the landlord of the First and Second Applicants, and that the landlord of the other applicants was the Second Respondent (who played no part in the proceedings) (see paras 2 to 4 and 9 to 13 of the skeleton argument).

Issues and Findings

35. There was no dispute that the property was in the London Borough of Southwark and that there was an additional licensing designation in place until the end of 31 December 2020. This is made clear by the evidence at pages 266 to 274.

36. There was no challenge to the Applicants' description of the property, which is set out in their witness statements. The Tribunal accepted that it is a flat located on the ground floor and consists of 4 bedrooms, 3 bathrooms, a living-room / kitchen, a patio, and a laundry room with a sauna and jacuzzi. It was satisfied that the kitchen was shared by all occupants of the flat (see, for instance, pages 330 to 331) and so it was satisfied that all occupants shared a basic amenity (see section 254(8) of the 2004 Act).

37. There was no dispute that during the period in question no HMO licence was in place or had been applied for. This is confirmed by the evidence at page 255.

The Identity of the Landlord

38. Perhaps the most contested issue in this case was the identity of the Applicants' immediate landlord. In considering this question the Tribunal first considered the cases of Ms. Botto, Mr. Nooteboom and Mr. Hibling. The case put forward by Mr. Meethan was that their landlord

was the Second Respondent, Ms Buragaite, as this was what was stated on their tenancy agreements, and that the Tribunal should not seek to go behind what was on the face of the documents. In fact, he went so far as to argue that these applicants were prevented from arguing that their landlord was anyone other than what was stated on the face of the agreement, as a tenant was estopped from denying the title of their landlord.

39. It is true that if a person grants a lease of land to which they have no title the tenant cannot deny that a lease exists and is bound by its terms. However, this principle does not prevent the Tribunal from enquiring as to the real, rather than the purported, identity of the landlord and from enquiring as to whether the purported landlord is acting for a principal, whether disclosed or not. This is made clear by the decision of the Upper Tribunal in the case of Cabo -v- Dezotti [2022] UKUT 240 (LC).

40. The Third, Fourth and Fifth Applicants each entered into assured shorthold tenancy agreements. These are at pages 118 to 123, 126 to 131 and 134 to 139. In each case the agreements are said to be made between the Second Respondent – who is expressly stated to be an agent – and the tenant (pages 118, 126 and 134). The identity of the person for whom the Second Respondent is acting as an agent is not stated in any of the agreements. In each case it states that the Agent is the "*person or company responsible for letting or managing the property*". In each case clause 1.12 of the lease states that a reference to the Agent includes a reference to the person entitled to the immediate reversion to the lease. In each case clause 2.1 states that the Agent lets the property "*at the request of the Guarantor*" but the guarantor is not identified. Clause 4.1 of each lease required rent to be paid to the Second Respondent. In clause 10 of each agreement there are covenants which impose obligations on the agent – see clauses 10.1, and 10.4 for example – and clauses which impose obligations on "*the landlord"* - see clauses 10.2 and 10.3 – though the landlord is again not defined in the document. Each agreement is signed by the Second Respondent who is again here described as the Agent.

41. These aspects of the agreements clearly suggest that the Second Respondent is acting on behalf of some other unidentified person and that she is not, herself, the landlord.

42. This perception is also supported by correspondence between Ms. Francis, the Second Applicant, and the Second Respondent. In text messages between the two about the hot water the Second Respondent said that she would speak with "Andre" about this and the next day said that "the landlord" had already contacted the engineer (page 421). There is a similar reference at page 423 to Andre. Then at page 430 the Second Respondent again said that she spoke to the landlord before Christmas.

43. On the basis of this evidence, the Tribunal was satisfied that the Second Respondent was acting as an agent for an undisclosed principal. It then considered who that principal was.

44. In doing so the Tribunal bore in mind a number of factors as follows.

45. Firstly, the only evidence of any proprietary interest in the property was the evidence that Mr. Trepel is the registered proprietor (page 255).

46. Secondly, the oral evidence of both Ms. Botto and Mr. Hibling was that they regarded Mr. Trepel as their landlord and Ms. Buragaite as the agent or house manager. They also said that they were told by Ms. Buragaite that Mr. Trepel was the landlord. Their evidence was also that they corresponded directly with Mr. Trepel about issues concerning the property. For example, Mr. Hibling in his witness statement – which he adopted in oral evidence – stated that Andre – which clearly means Mr. Trepel – informed him that he would not raise the rent for six months as compensation for problems with the installation of a boiler in his room (page 342).

47. Thirdly, despite the terms of the leases requiring rent to be paid to the Second Respondent, rent was in fact paid by each of these applicants to Mr. Trepel himself (see, for example, pages 146, 179 and 205).

48. The Tribunal then considered the position of Mr. Roma and Ms. Francis, the First and Second Applicants. They had a different tenancy agreement which pre-dated those of the other Applicants. This is at pages 55 to 58. In this agreement the landlord is said to be Trepel (No. 1 London) Ltd. – the Third Respondent. The document is signed by Mr. Trepel who is there stated to be a director of Trepel (No. 1 London Ltd.).

49. The Applicants argued that in this case too, the purported landlord was acting on behalf of an undisclosed principal, namely Mr. Trepel. In considering this argument the Tribunal bore in mind the following.

50. Firstly, despite purporting to act as a director of the Third Respondent, Mr. Trepel was not, in fact, an officer of that company and nor was he a person with significant control of it. This is shown by the Companies House evidence at page 328, which shows that the only director of the company is Ms. Dominika Jurdakova. (This would appear to be Mr. Trepel's partner – see page 483.) He therefore had no authority to act on behalf of that company.

51. Secondly, as previously identified, the only evidence of a proprietary interest in the property was that which showed that Mr. Trepel is its registered proprietor.

52. Thirdly, Mr. Trepel himself in an e-mail to Mr. Roma and Ms. Francis described the occupants of the property as "*my tenants*" (page 482).

53. The First and Second Applicants accepted that their rent was paid to Trepel No. 1 London Ltd rather than to Mr. Trepel. However, it was clear from both their oral and written evidence that they corresponded with Mr. Trepel in the belief that he was their landlord. Ms. Francis' oral

evidence, which the Tribunal accepted, was that Ms. Buragaite described Mr. Trepel as the landlord and that she had been introduced to Mr. Trepel by the previous agent, Mr. Peter Molnar. The correspondence also showed that Mr. Trepel was dealing with such issues as the provision of keys and that he was making decisions in relation to the reduction in the amount of rent due in to pay for obtaining keys (see pages 418 to 419).

54. The Tribunal also bore in mind the oral evidence of Mr. Hibling that he had only recently heard of Trepel No. 1 London Ltd. and that of Ms. Botto that she had not heard of that company until after she had moved out. There was nothing in any of the documentation which showed any link between the Third Respondent and the tenancies held by the Third, Fourth and Fifth Applicants.

55. The Tribunal also bore in mind that the First Respondent, despite being present at the hearing, had declined to provide any evidence himself as to the true position.

56. On the basis of this evidence available, and in the absence of any explanation from Mr. Trepel, the Tribunal concluded that he was, in fact, an undisclosed principal in relation to all the tenancies in question. It was satisfied that both Ms. Buragaite and, to the extent that it was in fact acting at all, given that Mr. Trepel had no authority to bind it, Trepel No. 1 London Ltd., were doing so on behalf of the true landlord, the First Respondent, Mr. Trepel. It was satisfied, therefore, that Mr. Trepel was the immediate landlord of all five Applicants.

Management and/or Control

57. Having concluded that Mr. Trepel was the immediate landlord in all cases, the Tribunal then considered whether he was either a person having control of the property or whether he was managing it.

58. In order to be a person in control of the property Mr. Trepel must be the person who receives the rack-rent of the premises or who would so receive it if the premises were let at a rack-rent (section 263(1) of the 2004 Act).

59. The Tribunal was satisfied that Mr. Trepel received rent from the Third, Fourth and Fifth Applicants as shown in the evidence already referred to above. Even if this was not the rack-rent, he was still in receipt of rent and the Tribunal concluded that if the rent charged to those Applicants was a rack-rent then he would have received that rent.

60. The Tribunal was, therefore, satisfied that Mr. Trepel was a person having control of the property for the purposes of the 2004 Act.

61. To be a person managing the property Mr. Trepel must be firstly, either an owner or lessee of the premises. There is no doubt that he is the owner.

62. Secondly, he must either receive some rent or payment from those in occupation or must be a person who would so receive those rents but for having entered into an arrangement with another person, who is not an owner or lessee of the premises, by virtue of which that other person receives the rent or payments.

63. As already explained, the Tribunal was satisfied that Mr. Trepel received rent from the Third, Fourth and Fifth Applicants. This, in its view, is sufficient to establish that he was a person managing the property. It is not necessary to show that rent or payments were received from all the occupiers so long as some rents or payments were received.

64. In any event, the Tribunal concluded, on the basis of the evidence before it, and in the light of its conclusion that Trepel No. 1 London Ltd. was acting on his behalf, that to the extent that payments were made to the company rather than to him personally, this can only have been by virtue of an arrangement he had entered into with the company under which it received the rent. There was no evidence that the company was either an owner or lessee of the property. Therefore, in relation to the First and Second Applicants Mr. Trepel was a person managing the property by virtue of section 263(3)(b) of the 2004 Act.

65. The Tribunal also concluded that the Second Respondent, although not the immediate landlord of the Applicants, was a person having control of the premises as she initially received the rent from the Third, Fourth and Fifth Applicants albeit as agent for the First Respondent.

66. Similarly, it concluded that the Third Respondent was also a person having control of the premises as it received the rent from the First and Second Applicants.

Occupation

67. It was argued on behalf of the First and Third Respondents that there was insufficient evidence to show that the Applicants were in fact in occupation for the periods claimed and, in particular, that absences from the property by one or other of the Applicants meant that they were not, in fact, in occupation.

68. In approaching this question, the Tribunal accepted the arguments put forward by Mr. Neilson at paras 30 to 33 as to the definition of the terms "occupier" and "occupying the premises as a residence". The Tribunal took the approach set out in the case of Schon -v- London Borough of Camden (1986) 18 HLR 341 that a person may occupy premises as their residence even if physically absent provided that the absence is not, and is not intended to be, permanent and as long as their belongings remain in the premises.

69. Mr. Roma's written evidence, which was not challenged, was that he moved into the property on 18 July 2020 together with Ms. Francis. They were living together as a couple. His oral evidence was that there was a period of about 2 months over Christmas 2020 until the end of

January 2021 when he was in the property alone. He said that the others had gone away for holidays and were unable to return because of Covid restrictions. He specifically stated that Mr. Nooteboom went to visit his parents in the Netherlands and that he had left all his belongings behind.

70. Ms. Francis' oral evidence was that Mr. Nooteboom moved in after they had and that he had moved out in February 2021. She said she was away over the Christmas holidays and that she was unwell in the period immediately after Christmas and she had problems getting back because of the lockdown after Covid. She left her belongings in the flat and intended to return to it as she was living with Mr. Roma.

71. There was no dispute that Ms. Botto moved into the property on 29 September 2020. Her written evidence was that she remained in occupation until 6 June 2022 (page 332). Her oral evidence was that she was away in Italy for 2 months over Christmas 2020 and that she had been unable to return because of Covid. She had left all her belongings in the property. In cross-examination she said that she went to Italy to stay with her parents and that she had left about 20 December 2020 and returned in February 2021. Rent was paid until at least January 2022 (page 146).

72. Mr. Nooteboom's written evidence was that he started occupying the property on 19 September 2020 and that he was a tenant until 19 February 2021 (page 338). This is consistent with the witness statements of the other Applicants. Mr. Hibling in his witness statement said that Mr. Nooteboom moved out on 19 February 2021 (page 341). The evidence also shows that he paid rent to Mr. Trepel on 18 January 2021 (page 182).

73. It was not disputed that Mr. Hibling began occupying the property on 27 October 2020, as stated in his witness statement (page 340). His oral evidence was that in late December 2020, when the tier 4 Covid restrictions began, he moved to stay with family in Kent. Initially he was unable to return because of Covid restrictions and then he delayed his return for 2 or 3 weeks because there was inadequate heating at the property. He stated in his witness statement that he remained in occupation until 31 October 2021 (page 341) and his bank statement shows a standing order in favour of Andre Trepel being paid until August 2021 (page 190).

74. The Tribunal accepted that all of the Applicants apart from Mr. Roma had spent periods away from the property over Christmas 2020 and into the following year and that these absences were for periods of up to 2 months. However, it was satisfied that in each case they had neither intended to leave permanently nor in fact left permanently. In each case they intended to, and did, return and as evidence of this they had all left their belongings in the property while they were away.

75. On the basis of this evidence the Tribunal was satisfied to the criminal standard that the number of people in occupation of the property from

19 to 28 September 2020 was 3, that from 29 September to 26 October 2020 it was 4, following the arrival of Ms. Botto, and that from 27 October 2020 onwards it was 5 with the arrival of Mr. Hibling. The number of occupants then fell back to 4 after 19 February 2021 when Mr. Nooteboom left.

76. The Tribunal also accepted that the property was the main residence of each of the Applicants during the periods in question. Ms. Francis' oral evidence was that none of the Applicants had a second home and no evidence has been provided to suggest otherwise.

Has an Offence Been Committed?

77. On the basis of the findings set out above the Tribunal was satisfied that for the period from 19 September 2020 until 27 October 2020 the property was an HMO which was required to have an additional licence but did not, that for the period from 27 October 2020 until 19 February 2021 the property was an HMO subject to mandatory licensing which did not have a licence, and that throughout both periods no licence had been applied for.

78. Therefore, subject to the following paragraph, any person who was either in control of or managing the property during that time was committing an offence under section 72(1) of the 2004 Act.

79. Although it was not expressly raised by any of the Respondents, the Tribunal nevertheless bore in mind its obligation to consider whether or not a defence of reasonable excuse applied in this case. In its view it did not. There was nothing in the evidence before it to suggest that there was any basis for concluding that any of those controlling or managing the property had a reasonable excuse for not obtaining a licence. In the case of the First Respondent the Tribunal also bore in mind the evidence that he is a director of a company (Copperfield Properties Ltd) (page 306) whose objects are the letting and operating of own or leased real estate (page 304).

80. It follows therefore, that the Tribunal was satisfied that throughout the periods claimed all three Respondents were guilty of offences contrary to section 72(1) of the 2004 Act.

Jurisdiction to Make an Order

81. In the light of the case of Rakusen and the Tribunal's findings set out above that Mr. Trepel was the immediate landlord of all the Applicants, the Tribunal concluded that it had jurisdiction to make an order under section 43 of the Act against the First Respondent only. It therefore dismissed the Applicants' applications in respect of the Second and Third Respondents.

Amount of Order

82. The Tribunal therefore went on to consider the amount, if any, which it should order the First Respondent to pay. In doing this it had regard to the approach recommended by UT Judge Cooke in the decision of

Acheampong -v- Roman and others [2022] UKUT 239 (LC) @ para 20. The first step is to ascertain the whole of the rent for the relevant period.

Rent

83. At pages 142 to 145 there is a schedule of the rent paid by the Applicants. The Tribunal was satisfied that this schedule accurately reflected the documentary evidence of payment at pages 146 to 251. Paragraphs 36 to 42 deal further with the question of the rent paid.

84. With regard to Mr. Roma and Ms. Francis, their contractual rent was £1,200 per month. This was paid by Mr. Roma on behalf of them both. The amount initially stated to be recoverable was £5,738.60. However, this was reduced by £203.33 as this sum had been paid before 19 September 2020 and so could not be included as rent paid during the relevant period (see para 39). At the end of the period, although rent for a whole month was paid on 26 January 2021, only 25 days fall within the relevant period, so a pro-rata calculation needs to be performed.

85. The schedule of payments shows that the monthly payments made were on occasions greater than the contractual rent. On one occasion there was an excess of £8, which has not been explained, and on three other occasions there was an excess of £10.40. This is said to be the cost of internet provision.

86. The Tribunal did not accept that the additional £10.40 charge for internet was rent for the purposes of this application. There was no mention of this charge in the tenancy agreement, and it was clearly a charge for services over and above the charge made under the terms of that tenancy. The submissions are clear that this sum was also included in the reduced sum of £911.62 paid on 29 November 2020 and should be removed from that figure too.

87. Deducting the additional sums results in rent payments of £1,200 on 30 September, 1 November, 23 December 2020 and 25 January 2021, and of £901.22 on 29 November 2020. The January sum must be reduced pro rata. £1,200 per month produces a daily rate of £39.45. As 25 days fall within the relevant period the total is 25 x £39.45 = £986.25. The total rent paid by the First and Second Applicants in the relevant period is, therefore;

30 September	£1,200
1 November	£1,200
29 November	£ 901.22
23 December	£1,200
25 January	£ 986.25
Total	£5,487.47

88. Ms. Botto's contractual rent was £1,100 per month. The evidence shows that four payments were made, the first two of £1,100, the third of £1,120.80 and the third of £900. The additional sum of £20.80 paid with the third payment is said to be made in respect of two months of internet access at £10.40 per month. For the same reasons as set out

above with regard to the first two applicants, the Tribunal considered that this did not amount to rent. The total rent paid by Ms. Botto in the relevant period is, therefore, £4,200.

89. Mr. Nooteboom's contractual rent was £950 per month. Again, the submissions on behalf of the Applicants seek to include payments of £10.40 per month in respect of internet payments. As already explained, the Tribunal did not accept that these amounted to rent. It is argued that other additional sums were sums paid to the cleaner in pursuance of clause 9.3 of the lease (page 129). This clause required the tenant to pay £20 a month directly to the cleaner plus the price of products. The bank statements show that all additional sums were in fact paid to Mr. Trepel (pages 179 to 182). In any event, the Tribunal was not satisfied that these payments amounted to payments of rent. It therefore concluded that the total rent paid was £950 x 5 = £4,750.

90. In the case of Mr. Hibling, his rent was £930 per month. No extra payments were made by him. As with the First and Second Applicants, the final rent payment needs to be reduced on a pro-rata basis as only part of it covers the period during which the offence was being committed. The figure sought by Mr. Hibling for this period was £703.23 and the Tribunal had no reason to disagree with that calculation. Thus the total rent paid by Mr. Hibling in the relevant period was £3493.23.

Utilities

91. In the case of each of the Applicants, the terms of their tenancies were such that gas, electricity and water charges were included within the rent. No evidence was provided by the Respondents in respect of the costs of those services. Following the approach in Acheampong the Tribunal therefore set out to make an informed estimate.

92. In reaching its conclusions the Tribunal bore in mind the following. The property is a ground floor flat. Being in the lower part of the building there is likely to be less heat loss through the roof. However, the Tribunal had no evidence about the size of the property, other than the number of rooms, nor of its type of construction, and there was no evidence about the type of windows. There had been no inspection. The oral evidence of the Applicants showed that the property benefited from gas central heating and gas water heating. It had a total of 3 bathrooms, each of which contained a radiator. It accepted Mr. Hibling's oral evidence that the Applicants had no control of the thermostat for the central heating. The relevant period included the months of November, December and January.

93. The Tribunal also accepted the clear and repeated evidence of the Applicants that the heating system broke down in late November / early December 2020 and remained out of action until at least the middle of January, when a new boiler was installed in Mr. Hibling's room (see also page 342). It accepted the evidence, made clear by Mr. Hibling in his oral account, that to deal with this problem the Respondents provided portable heaters for each bedroom. Whilst less gas would clearly be used

when the boiler was not working, this reduction is likely to have been more than offset by the additional costs of the alternative heating provided.

94. The Tribunal also took account of the fact that some of the Applicants were away from the property for some of the time. It considered that this was unlikely to reduce the amount spent on heating when the boiler was working, as there was no control of the thermostat. At times when supplementary heating was being used, it accepted that the individual bedrooms of those absent would be unlikely to have been heated while they were away.

95. In his submissions Mr. Nielson addressed the question of water charges (paras 45 to 51). The Tribunal accepted those arguments, namely, that as the water supply was unmetered (as explained by Mr. Hibling) and so it was not possible to ascertain what expenditure was dependent on the Applicants' consumption and what was payable in any event, no reduction could be made.

96. Taking the limited evidence as a whole and doing its best, having regard to its own expertise, the Tribunal made the following informed estimate as to the likely cost of the utilities provided by the Respondents for the benefit of the Applicants during the relevant period. It concluded that the likely costs of gas and electricity at the prices current at the time would amount to roughly £75 per month for the whole flat. This would equate to £15 per month per occupant. (The Tribunal accepted that the First and Second Applicants shared a room, but considered that any savings would be offset by the additional costs arising from the greater size of that room and the en-suite bathroom provided.)

97. The Tribunal therefore - whilst accepting that the periods of occupation were not necessarily whole months but considering that given the lack of precision involved in making the estimates in question it was reasonable to make calculations to the nearest number of whole months for each occupant - reduced the amount which could be ordered to be paid in respect of the Applicants as follows

98. Mr. Roma & Ms. Francis – 5 months at £30 per month = £150
Ms. Botto – 5 months at £15 per month = £75
Mr. Nooteboom – 5 months at £15 per month = £75
Mr. Hibling – 4 months at £15 per month = £60

Seriousness of Offence

99. As required by the approach recommended in the case of Acheampong the Tribunal then considered the seriousness of the offence both as compared to other types of offence and then as compared with other examples of offences of the same type. From that it determined what proportion of the rent was a fair reflection of the seriousness of the offence.

100. In his submissions, which the Tribunal took into account, Mr. Nielson argued for a starting point of 100% on the basis of the aggravating factors present (paras 56 to 58). The Applicants' statement of case sets out many factors which it is argued amount to aggravating features for this purpose. On the other hand Mr. Meethan argued that many of these features could not be taken into account because they occurred outside the period during which the offence was being committed or there was insufficient evidence of them. He drew attention to the lack of any expert report about the condition of the property. He accepted that the lack of heating at times was probably the most serious feature.

101. The offence in question is one contrary to section 72(1) of the 2004 Act. This is, when compared with offences such as unlawful eviction, a more minor offence.

102. However, when considering the seriousness of this offence when compared with other failures to licence, the Tribunal considered it to be a relatively serious offence. It bore in mind the fact that The First Respondent is clearly a professional landlord, as shown by his holding directorships or other positions of responsibility in companies whose business is letting and operating real estate (see pages 291 to 329). This is clearly an aggravating feature. The other significant aggravating feature in the view of the Tribunal was the fact that it would very likely have been difficult for a licence to have been obtained for the property without works being undertaken, meaning that by letting the property without a licence the First Respondent was able to avoid expenditure which he would otherwise have to have incurred and it would also increase the hazards for the tenants.

103. The reasons why the Tribunal considered this to be the case are as follows. Firstly, the evidence was that there were no fire doors in the property. It is unlikely an HMO licence would have been granted without these being installed. Secondly, it was clear that the property was not being managed in accordance with the management regulations which would apply if a licence were in place. This is shown by the failure to keep the central heating and hot water services working and also by the problems caused by disrepair to the roof of the property during the relevant period as set out in the written evidence of all the Applicants. Thirdly, the Tribunal was satisfied on the basis of the oral evidence it heard, that no gas or electricity safety certificates had been provided. It was also satisfied that it was unlikely that a gas safety certificate had been obtained – or indeed would have been obtained – without improvements. This was because the condition of the gas cooker – which had no proper control knobs (see page 369) – would have precluded the granting of such a certificate.

104. Taking all the evidence as a whole the Tribunal considered that the seriousness of the offence was such that the starting point – for the purposes of paragraph 20(c) in Acheampong was 75% of the rent.

Section 44(4)

105. The Tribunal then considered whether any decrease – or increase – was appropriate by virtue of the factors set out in section 44(4) of the Act. There was no suggestion that there had been any bad conduct by the Applicants, and there was no evidence about the First Respondent's financial circumstances. In their statement of case the Applicants sought to place reliance on a conviction of Mr. Trepel (pages 289 to 290). It was clear to the Tribunal that this was in relation to a planning matter and not an offence to which the relevant provisions of the Act applied and so it took no account of it. No other previous convictions were referred to.

106. This, then, left the question of whether the First Respondent's conduct should lead to a change in the amount to be ordered.

107. In considering that question further issues arose. Firstly, it was argued by Mr. Meethan that no account could be taken of the Respondents' conduct outside the period during which the offence was being committed. Mr. Nielson disagreed and set out his arguments at paragraphs 59 to 66. Whilst the Tribunal did not necessarily accept the whole of the argument put forward by Mr. Nielson, especially the reliance on the case of Kowalek -v- Hassanein [2021] UKUT 143 (LC), it did agree that conduct outside the relevant period could be taken into account. In doing so it bore in mind the approach taken by the Upper Tribunal in the case of Awad -v- Hooley [2021] UKUT 0055 (LC) where it was made clear that poor conduct by a tenant outside the specific period during which the offence was being committed could be taken into account.

108. It had also been argued by Mr. Meethan that a less serious view should be taken of alleged poor conduct of the Respondents, such as failure to repair the heating system, if the tenants were not actually present at the time. This was dealt with by Mr. Nielson at paragraphs 67 to 69. Again, the Tribunal accepted the Applicants' approach. The purpose of the order is not to compensate an applicant for loss but to deter landlords from poor behaviour.

109. Numerous alleged instances of poor behaviour were relied on by the Applicants, but it is not necessary to particularise them all here. They were all taken into account by the Tribunal, as were the arguments put forward by Mr. Meethan.

110. By far the worst, in the view of the Tribunal, were the failure to repair the heating and hot water system, meaning that for a significant period the occupants were left without not only heating but also hot water, and the failure to keep the roof of the building in repair. There is substantial unchallenged evidence that the roof of the building was in very poor condition well before and well after the relevant period and that there were numerous instances of water ingress, including an occasion when the electricity had to be turned off for safety reasons.

111. Taking this poor conduct into account the Tribunal concluded that it was necessary to increase the amount of the order to be made to 80% of the possible maximum rather than 75%.

112. It follows that in the case of each Applicant the total sum to be ordered to be paid is 80% of the total rent paid (as determined above) less the amount of the utilities (also as determined above).

113. This results in the following;

	Rent	Less Utilities	x80%
Mr. Roma & Ms. Francis	£5,487.47	£5,337.47	£4,269.98
Ms. Botto	£4,200	£4,125	£3,300
Mr. Nooteboom	£4,750	£4,675	£3,740
Mr. Hibling	£3,493.23	£3433.23	£2,746.58

114. The Tribunal therefore decided to make rent repayment orders in the following amounts;
To the First and Second Applicants - £4,269.98
To the Third Applicant £3,300
To the Fourth Applicant £3,740
To the Fifth Applicant £2,746.58

115. The Applicants also sought an order under rule 13(2) of the Rules for the re-imbursement of the fees paid for bringing the Application. The Tribunal concluded that, given that the Applicants had succeeded in their application, it was just and equitable to make such an order.

Name: Tribunal Judge S.J. Walker **Date:** 20 January 2023

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

Appendix of relevant legislation

Housing Act 2004

Section 72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(2) A person commits an offence if–

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) A person commits an offence if–

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse–

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

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(1) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either–

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(2) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(3) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

263 Meaning of "person having control" and "person managing" etc.

(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–

(a) receives (whether directly or through an agent or trustee) rents or other payments from–

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 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
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

(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).

Section 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.

Section 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).

Section 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.

Section 52 Interpretation of Chapter

(1) In this Chapter—

"offence to which this Chapter applies" has the meaning given by section 40;

"relevant award of universal credit" means an award of universal credit the calculation of which included an amount under section 11 of the Welfare Reform Act 2012;

"rent" includes any payment in respect of which an amount under section 11 of the Welfare Reform Act 2012 may be included in the calculation of an award of universal credit;

"rent repayment order" has the meaning given by section 40.

(2) For the purposes of this Chapter an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent.