FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2022/0063**
Property	**:**	**56 Vermeer Court, 1 Rembrandt Close, London E14 3XA**
Applicants	**:**	**Stepan Sinkov, Yi Jing Kong and Ilaria Capitani**
Representative	**:**	**Cameron Neilson of Justice for Tenants**
Respondent	**:**	**Joanne Qiong Jia**
Representative	**:**	**Courtenay Barklem of Counsel instructed by Thea Limited Solicitors**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge P Korn** **Mrs L Crane CEnvH MCIEH**
Date of Hearing	**:**	**24 January 2023**
Date of Decision	**:**	**20 February 2023**

DECISION

Description of hearing

This was a face-to-face hearing.

Decisions of the tribunal

(1) The tribunal orders the Respondent to repay to the Applicants the following sums by way of rent repayment:-

- to Stepan Sinkov the sum of £2,501.68;
- to Ilaria Capitani the sum of £2,228.20; and
- to Yi Jing Kong the sum of £2,240.00.

(2) The tribunal also orders the Respondent to reimburse to the Applicants jointly the application fee of £100.00 and the hearing fee of £200.00 paid by them.

(3) The above sums must be paid by the Respondent to the Applicants within 21 days after the date of this determination.

Introduction

1. The Applicants have applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("**the 2016 Act**").

2. The basis for the application is that the Respondent was controlling and/or managing a house in multiple occupation (an "**HMO**") which was required under Part 2 of the Housing Act 2004 ("**the 2004 Act**") to be licensed at a time when it was let to the Applicants but was not so licensed and that the Respondent was therefore committing an offence under section 72(1) of the 2004 Act.

3. Mr Sinkov's claim is for repayment of rent paid during the period from 17 July 2020 to 12 March 2021 in the amount of £6,254.19. Mr Kong's claim is for repayment of rent paid during the period from 27 October 2019 to 25 February 2020 and the period from 17 July 2020 to 12 March 2021 in the aggregate amount of £8,400.00. Ms Capitani's claim is for repayment of rent paid during the period from 17 July 2020 to 12 March 2021 in the amount of £5,570.49.

Applicants' case

4. In written submissions, the Applicants state that the Property was situated within an additional licensing area as designated by the London Borough of Tower Hamlets. The additional licensing scheme came into force on 1 April 2019 and will cease to have effect on 24 March 2024. The Property is a 3-bedroom self-contained flat on the top floor of a 7-storey building with a shared kitchen and bathrooms. It was occupied by at least three people at all points during the relevant periods of 27/10/2019 to 25/02/2020 and 17/07/2020 to 12/03/2021. Each tenant occupied their own room on a permanent basis under a separate tenancy agreement. There were communal cooking and toilet

and washing facilities, with each tenant paying rent and occupying their rooms as their only place to live.

5. Stepan Sinkov lived at the Property from 17/07/2020 to 16/06/2021, Yi Jing Kong lived at the Property from 20/06/2019 to 12/03/2021 and Ilaria Capitani lived at the Property from 04/07/2020 to 17/04/2021. The appropriate HMO licence was not held during the relevant period, and no licence application was made at any point during the Applicants' respective tenancies.

6. Joanne Qiong Jia is believed by the Applicants to be an appropriate Respondent for this application because she is named as the landlord in the tenancy agreements and is the beneficial owner of the Property as shown by the land registry title deed. She was also a "person having control" of the Property within the meaning of section 263 of the Housing Act 2004 as she is the person who received or would receive the rack-rent if the Property was let. She also received or would receive rent from tenants in an HMO and was therefore also a "person managing" the Property within the meaning of section 263.

7. None of the Applicants were in receipt of a housing element of Universal Credit or Housing Benefit during their tenancies. The Applicants have provided a spreadsheet with details of rental payments made as well as copy bank statements and banking screenshots.

8. The Applicants state that they have conducted themselves well, have complied with the terms of their tenancy and paid rent and have complied with their legal obligations. By contrast, in their submission, the Respondent has broken various laws, with serious consequences for the occupiers' safety and quality of life. She failed to make available her name, address and telephone contact number contrary to section 3 of the Management of Houses in Multiple Occupation (England) Regulations 2006 ("**the 2006 Regulations**"). She failed to provide a carbon monoxide detector contrary to section 4 of the 2006 Regulations. She failed to provide an electrical certificate contrary to section 6 of the 2006 Regulations, and the electrical wiring was old and fraught and there was some evidence that the broken wires were simply taped together.

9. In Ms Capitani's room there were issues with the curtains as the railings had fallen off the wall and the issue took months to resolve, leaving her with very little privacy. In addition, the lights in Ms Capitani's room did not work at the beginning of her tenancy.

10. The Respondent also failed to protect the Applicants' rent deposit in line with Section 213 of the 2004 Act as the deposit was only placed in a deposit scheme a year after it was meant to be placed in the scheme.

Respondent's case

11. The Respondent accepts that she was the person managing and having control of the Property during the relevant period, that she did not have an HMO licence during that period and that a licence was required. However, she claims the defence of reasonable excuse under section 72(5) of the 2004 Act.

12. The grounds for her defence can be summarised as follows. She was not aware that the Council had introduced the additional licensing requirements until she received a copy of the letter that the Council sent to her new tenants in November 2021. She had been letting the Property since 2013, before the additional licensing requirements were proposed and introduced, and had taken care to make sure that she knew all the requirements that applied at the time to the letting of a property. She was working abroad and so had no way of seeing any official notices of the additional licensing requirement that were published by the Council. Although Yi Jing Kong told her that a Council officer had called round to do a doorstep survey on 16 November 2020, he said that his conversation with the officer had left him with the impression that no licence was required, but that the Council would be contacting the Respondent for more information. Also, even though the Council officer found out that the Property was being let to three people and was given the Respondent's e-mail address during the doorstep survey, the Council did not give her tenants any written information to explain the licensing requirement and nor did it try to contact her by any method until a year later, in November 2021. As soon as her new tenants had sent her a copy of the warning letter sent by the Council in November 2021, she contacted the Council to understand whether the requirement for a licence applied to the Property and then made the application for a licence promptly.

13. In the alternative, the Respondent states that she is not a rogue landlord and that the purpose of the rent repayment legislation is to target rogue landlords. The Council did not consider her to be a rogue landlord, as it did not send her warning letters following the first doorstep visit in November 2020, which in her submission is because the Council did not feel that the situation at the Property was at all unsafe. Furthermore, the Applicants' evidence does not show the Respondent to have been a rogue landlord, nor does it show any safety issues or any bad management by her.

14. Since first letting out the Property in 2013 the Respondent has bought a new build flat in Manchester and another three properties in the London Canary Wharf area as buy-to-let investments but has made no profit out of these properties. Her primary source of income is from her full-time job.

15. Before she arranged the first lettings of the Property, she took advice from a friend who runs a residential lettings business and from her letting agent at the time. She made sure that an electrical certificate and a gas certificate were obtained, and the letting agent gave copies of the certificates to the new tenants. She was told by both her friend and the letting agent that the national requirements for HMO licences only applied to properties with five or more residents.

16. She used various letting agents and websites to advertise the rooms in the flat to new tenants. Where a letting agent found a tenant, they arranged viewings, obtained references for the tenants and carried out all the required checks on the tenants' right to rent. She started working abroad from 2017 and became permanently based in China in 2019. She left some of her belongings in her house in 14 Winifred Road and arranged for her neighbour to check the house every three months and forward any letters to her in China. However, due to Covid-19 her neighbour was unable to arrange forwarding letters for 9 months in 2020 and 2021.

17. She carried on managing the Property from abroad. Mr Sinkov moved into the master bedroom on 17 July 2020. During the Applicants' occupation of the Property she made payments of service charge for the Property. She arranged gas safety certificates in August each year. The boiler was inspected in August 2019. She also arranged electrical safety inspections at least every five years. She states that her active management of issues raised by the Applicants when they were living in the Property is shown in the e-mails included in their bundle. The Applicants seemed very happy with her quick replies and her efforts to find a suitable workman to sort out any issues.

18. Regarding the curtain rail, none of the previous tenants in the top room had any problems with it, and Ms Capitani did not report any concerns about the curtain rail being loose. The problem with the lighting that was reported on 4 August 2020 took a little longer than normal to resolve because the initial lockdown March to July 2020 due to Covid-19 and the self-isolation rules had created a shortage of electricians and a backlog of appointments. The problem with the lighting was not dangerous in her view, so it was not possible to obtain a priority appointment. When her main agent found that he was not able to arrange an electrician visit for some time, she asked Sam of Blackstone Residential to send someone, and a man called Federico attended some time between 13 and 18 August 2020 to fix the lights and put Ms Capitani's curtain rail back up. He also checked the bathroom extractor fan and advised that a new one was needed and then returned to replace the fan sometime between 19 and 24 August 2020.

19. On 17 March 2021, Ms Capitani emailed the Respondent to say that she wished to move out on 17 April 2021. Her tenancy agreement was supposed to continue until 3 July 2021 but with a right to serve 60 days'

notice to end it earlier. Ms Capitani asked her to waive the requirement for 60 days' notice and she agreed. Then towards the end of April 2021 she received a reference request for Mr Sinkov from a letting agency. When he told her on 2 May 2021 that he was planning to move out before 1 June 2021 she decided not to require him to carry on paying rent until the end of his tenancy on 16 July 2021, even though his tenancy agreement required 42 days' notice to end the arrangement early. Then, after he moved out, he asked the Respondent to return his deposit and she asked him to request it back from DPS. DPS then informed him that they did not hold his deposit and the Respondent sent the deposit to DPS and they paid it out to Mr Sinkov in full.

20. In relation to the lack of a licence, when on 20 December 2021 the Council confirmed that a licence was required the Respondent made an online application that same day, but when she tried to make the payment an error message said that payment had failed. The application was saved but could not be submitted until payment was made. She tried again to make the payment several times on subsequent days, and then on 9 February 2022 she asked a friend to log into her saved application and make the payment for her, and so her application was finally submitted on 9 February 2022.

Follow-up by Applicants

21. The Applicants counter that the Property satisfied the conditions for an additional licence from 1 April 2019, and they cast doubt on the Respondent's contention that she did not become aware of her licencing obligations until April 2021 after the Council visited the Property for the second time. This, in their submission, evidences the Respondent's failure to take any or reasonable steps taken to keep informed of her licencing obligations. The Respondent has therefore not demonstrated the proactive approach to such obligations to be reasonable expected of a landlord as set out in the decision of the Upper Tribunal in *Chan v Bilkhu & Anor (2020) UKUT 289 (LC)*.

22. The Applicants also refer to an email sent to Yi Jing Kong on 7 March 2019 regarding the valuation surveyor for the Property in which the Respondent asks the Applicants to *"remember that you are a group of friends"*, which in their submission shows the Respondent leaning on the Applicants to 'prevaricate' as to their household dynamics so as to circumvent the mortgage conditions of renting the Property and wilfully mislead the surveyor.

23. The Applicants contend that the Respondent cannot claim a reasonable excuse defence on the basis that she was out of the country. She is a professional landlord and should have controls and management structures in place for the adequate management of her properties. In addition, the fact that the Respondent spends most of her time in China does not in their submission constitute a reasonable excuse defence.

Information can be obtained in a variety of ways and if someone is renting out property in England it is incumbent upon them to stay abreast of regulations, rules, and licensing designations to ensure that they will not be renting out that property in a way which gives rise to one or more criminal offences and places their tenants at risk of harm.

Cross-examination of witnesses at hearing

Mr Sinkov (one of the Applicants)

24. In cross-examination Mr Sinkov said that he had not arranged for a professional clean of his room when he vacated but that he had returned the room to its original condition. It was also put to him that the Respondent had managed various issues perfectly well, and he accepted some of the detailed points that were put to him.

Mr Kong (one of the Applicants)

25. In cross-examination Mr Kong said that the problem with the Respondent was not so much with response times but rather with the length of time that it took to get things properly fixed. Other points of detail were put to him, and he conceded certain points. Regarding his exchange of emails on 16 November 2020 with the Respondent regarding the visit of the Council, Mr Barklem put it to him that what he told the Respondent was misleading on the key question of whether the Property needed a licence, but Mr Kong did not accept this.

26. Mr Barklem also put it to Mr Kong that there was no legal requirement to have a carbon monoxide detector.

Ms Jia (the Respondent)

27. In cross-examination the Respondent denied that she was an experienced landlord; she was just an investor in property. She confirmed that she did not have an agent to keep her informed of her legal obligations and nor was she part of any landlord forums and nor did she have any other sources of information as to her legal obligations. She did not look for information on the Council's website.

28. Regarding postal correspondence, the Respondent said that whilst in China she had arrangements for her UK neighbour to forward to her letters that went to her UK address. During the Covid-19 pandemic no correspondence was forwarded for 9 months, but she said that this was not a problem because things were generally sent by email.

29. On the issue of HMO licensing, the Respondent said that she knew about the concept of HMO licences but did not think that the Property

itself was an HMO. She accepted that she had not contacted the Council until 20 December 2021 to find out about the Property's HMO status but said that this was because she had understood from her email exchange with Mr Kong that the Council would contact her.

Submissions at hearing

30. In additional to the defence of reasonable excuse, Mr Barklem for the Respondent said that in respect of Mr Kong (one of the Applicants) there was not a continuous timeline of occupation. There were two distinct time periods for Mr Kong and under section 41 of the 2016 Act he was out of time to make an application in respect of the first period. In response, Mr Neilson for the Applicants cited the decision of the Upper Tribunal in *Irvine v Metcalfe and others (2021) UKUT 0060 (LC)* as authority for the proposition that a tenant can claim for a non-continuous period.

31. With regard to the defence of reasonable excuse itself, Mr Barklem submitted that if the tribunal did not accept that the Respondent had a complete defence the circumstances of her failure to license the Property were such that at the very least they should count as mitigation. In response, Mr Neilson reiterated the Applicants' position on reasonable excuse.

32. Regarding the Respondent's submission that service charges paid by her should be deducted from any rent repayment amount, Mr Neilson for the Applicants said that the decision of the Upper Tribunal in *Acheampong v Roman and others (2022) UKUT 239 (LC)* shows that only expenditure that exclusively benefits the tenants can be deducted.

33. With regard to the seriousness of the offence, Mr Neilson accepted that it was not the most serious offence listed in section 40 of the 2016 Act but neither was it the least serious. He proposed a 90% starting point based on seriousness. In relation to the Respondent's financial circumstances, the Applicants had no detailed information but it was common ground that she owned 6 properties. It was accepted that she had no previous convictions.

34. Mr Barklem for the Respondent said that the Respondent was thwarted by Mr Kong's own actions as he gave her misleading information as to what the Council had said regarding the need or otherwise for a licence. On the issue of seriousness of the offence (if proven), Mr Barklem said that one needed to look at the purpose of the legislation, which was to protect tenants from rogue landlords and dangerous properties, and the Respondent was not a rogue landlord.

Relevant statutory provisions

35. Housing and Planning Act 2016

Section 40

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

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to – (a) repay an amount of rent paid by a tenant …

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

	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

Section 41

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

(2) A tenant may apply for a rent repayment order only if – (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and (b) the offence was committed in the period of 12 months ending with the day on which the application is made.

Section 43

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

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

(3) The amount of a rent repayment order under this section is to be determined in accordance with – (a) section 44 (where the application is made by a tenant) …

Section 44

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

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

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.

Housing Act 2004

Section 72

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

(5) In proceedings against a person for an offence under subsection (1) … it is a defence that he had a reasonable excuse … for having control of or managing the house in the circumstances mentioned in subsection (1) … .

Section 263

(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.

Tribunal's analysis

36. The Respondent has accepted that the Property was not licensed at any point during the period of the claim and that it was required to be licensed. She also does not deny that she was the landlord for the purposes of the 2016 Act, nor that she was a "person having control" of the Property and/or a "person managing" the Property, in each case within the meaning of section 263 of the 2004 Act.

37. We are satisfied based on the evidence before us, including the supporting documentary evidence, that the Property required a licence under the local housing authority's additional licensing scheme throughout the period of the claim. We are also satisfied on the evidence that the Respondent had control of and/or was managing the Property throughout the relevant period and that the Respondent was "a landlord" during this period for the purposes of section 43(1) of the 2016 Act.

The defence of "reasonable excuse"

38. Under section 72(5) of the 2004 Act, it is a defence that a person who would otherwise be guilty of the offence of controlling or managing a house which is licensable under Part 2 of the 2004 Act had a reasonable excuse for the failure to obtain a licence. The burden of proof is on the person relying on the defence.

39. In written submissions the Respondent states that she had a reasonable excuse for failing to obtain a licence. She was not aware of the additional licensing requirements until she received a copy of the letter that the Council sent to her new tenants in November 2021. She had been letting the Property since 2013, before the additional licensing requirements were introduced, and at that stage had taken care to make sure that she knew all the legal requirements. She was working abroad when the new requirements were introduced. She was aware that a

Council officer had visited the Property in November 2020 but had been given the impression by Mr Kong that he had been told that no licence was required. Also, the Council did not try to contact her directly until a year later. Once the Council had sent her a warning letter she made a licence application.

40. In the case of *Aytan v Moore and others [2022] UKUT 027 (LC)*, the Upper Tribunal considered the defence of "reasonable excuse" in circumstances where the landlord's excuse was not merely that they did not know that a licence was required but also that they had been relying on their agent to inform them about licensing requirements. In that case the Upper Tribunal concluded that there was no evidence before it to demonstrate that a reasonable landlord could safely have relied on the agent in those circumstances. Similarly in *Chan v Bilkhu & Anor (2020) UKUT 289 (LC)*, the Upper Tribunal said that a landlord needs to demonstrate a proactive approach to keep itself informed of its licensing obligations. In *Thurrock Council v Daoudi (2020) UKUT 209 (LC)*, the Upper Tribunal said at paragraph 27 that *"No matter how genuine a person's ignorance of the need to obtain a licence, unless their failure was reasonable in all the circumstances, their ignorance cannot provide a complete defence"*.

41. In the present case the Respondent is not even claiming that she was relying on an agent to advise her; her argument seems to be simply that she did not know that the Property needed a licence, that she was abroad at the relevant time and that the Council should have informed her. However, mere ignorance of the position, if the Respondent was indeed ignorant, does not amount to a reasonable excuse. The failure to obtain a licence where one is needed is a criminal offence, and it was incumbent upon the Respondent to take reasonable steps to satisfy herself as to the legal requirements relating to the letting of the Property. There is no evidence before us that she took any steps whatsoever to do so or that he joined any forums or had any other system for keeping up to date with the law. The fact that she was abroad did not prevent her from checking the Council website or from obtaining information online from other sources or appointing an agent with responsibility for ensuring that she was letting out the Property in a legally compliant way. In addition, the Respondent had a portfolio of properties and therefore she could be expected to know about the need to have systems in place to ensure that she was acting in a legally compliant manner.

42. As regards what the local housing authority did or did not tell her, the local housing authority has a responsibility to advertise the introduction of a new licensing scheme in general terms. However, she has not argued that it failed to do so and appears instead to be implying that a landlord is not liable for this offence unless the local housing authority has informed the landlord personally of the current licensing requirements, which is not the case.

43. As for the suggestion that the Respondent was misled by Mr Kong in reporting what the Council had said, we agree that Mr Kong could have been clearer and more helpful. But there is no credible evidence that he deliberately misled her and – looking at the email exchange as a whole – he gave her enough information that a prudent landlord would have followed the matter up with the Council rather than making no contact for over a year and seemingly making no attempt to inform herself by any other means as to the current licensing requirements.

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

The offence

45. Section 40 of the 2016 Act confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence listed in the table in sub-section 40(3), subject to certain conditions being satisfied. The offence of control or management of an unlicensed HMO under section 72(1) of the 2004 Act is one of the offences listed in that table.

46. Under section 41(2), a tenant may apply for a rent repayment order only if the offence relates to housing that, at the time of the offence, was let to the tenant and the offence was committed in the period of 12 months ending with the day on which the application is made. Having determined that the Respondent did not have a reasonable excuse for failing to license the Property, we are satisfied beyond reasonable doubt that an offence has been committed under section 72(1), that the Property was let to the Applicants at the time of commission of the offence and that – subject to the point addressed in the following paragraph – the offence was committed in the period of 12 months ending with the day on which the application was made.

47. However, there is a question in relation to the first period of claim for Mr Kong. The other Applicants' claims relate to one continuous period, but Mr Kong's claim relates both to the period 27 October 2019 to 25 February 2020 ("**the First Period**") and the period 17 July 2020 to 12 March 2021 ("**the Second Period**"). The Respondent accepts that the claim for the Second Period was made in time but submits that the First Period was out of time. The application was made on 10 March 2022, and therefore it follows that the First Period ended more than 12 months before the date of the application.

48. Mr Kong submits that this does not invalidate the claim for the First Period, and his authority for this submission is the decision of the Upper Tribunal in *Irvine v Metcalfe*. That case concerned a situation in which there needed to be 5 people in occupation for an HMO licence to be required. It seems that there were 5 occupiers between at least May 2018 and early March 2019, there "may then have been a gap of a

couple of weeks when there were four, or perhaps three people in the property", and then from the end of March until at least August 2019 there were again five people in the property. Our reading of the Upper Tribunal's decision in that case is that it chose not to make an express ruling as to whether the whole of a non-continuous period can be used to calculate the amount of rent repayment in the circumstances of that particular case, including the Upper Tribunal's lack of certainty as to the basis of the First-tier Tribunal's calculations.

49. In the present case, first of all it is common ground that the two periods are not continuous. Secondly, the gap is more than a couple of weeks. Thirdly, and most significantly in our view, the Upper Tribunal in *Irvine v Metcalfe* was not considering whether the application was out of time. It is clear that if on 10 March 2022 Mr Kong had made an application just in respect of the First Period he would have been out of time. *Irvine v Metcalfe* is not authority for the proposition, which we do not accept, that making an application in respect of the Second Period retrospectively renders the application in respect of the First Period valid by somehow causing it to cease to be out of time. This is particularly so when there is no confusion or disagreement on the point that there was a gap of nearly 5 months between the end of the First Period and the start of the Second Period.

50. Accordingly, Mr Kong is out of time to make a claim in respect of the First Period.

Process for ascertaining the amount of rent to be ordered to be repaid

51. Based on the above findings, we have the power to make rent repayment orders against the Respondent, save in respect of the first period of Mr Kong's claim.

52. The amount of rent to be ordered to be repaid is governed by section 44 of the 2016 Act. Under sub-section 44(2), the amount must relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence. Under sub-section 44(3), the amount that the landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of housing benefit or universal credit paid in respect of rent under the tenancy during that period.

53. In this case, each Applicant's claim relates to period not exceeding 12 months. There is no evidence that any part of the rent was covered by the payment of housing benefit and the Respondent does not dispute that the rental amounts claimed were in fact paid by the Applicants.

54. On the basis of the Applicants' evidence, which is not disputed by the Respondent, we are satisfied that the Applicants were in occupation for

the whole of the period to which the rent repayment application relates and that the Property required a licence for the whole of that period.

55. Therefore, in relation to Mr Sinkov and Ms Capitani, the maximum sum that can be awarded by way of rent repayment is £6,254.19 for Mr Sinkov and £5,570.49 for Ms Capitani. We have disallowed Mr Kong's first period of claim, for the reasons given above. The claim in respect of Mr Kong's second period, based on the undisputed calculations in the hearing bundle, is for £5,600.00 and therefore this is the maximum sum that can be awarded by way of rent repayment to Mr Kong.

56. Under sub-section 44(4), in determining the amount of any rent repayment order the tribunal must, in particular, take into account (a) the conduct of the landlord and the tenant, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of an offence to which the relevant part of the 2016 Act applies.

57. The Upper Tribunal decision in *Vadamalayan v Stewart (2020) UKUT 0183 (LC)* is one of the authorities on how a tribunal should approach the question of the amount that it should order to be repaid under a rent repayment order if satisfied that an order should be made. Importantly, it was decided after the coming into force of the 2016 Act and takes into account the different approach envisaged by the 2016 Act.

58. In her analysis in *Vadamalayan*, Judge Cooke states that the rent (i.e. the maximum amount of rent recoverable) is the obvious starting point, and she effectively states that having established the starting point one should then work out what sums if any should be deducted. She departs from the approach of the Upper Tribunal in *Parker v Waller (2012) UKUT 301*, in part because of the different approach envisaged by the 2016 Act, *Parker v Waller* having been decided in the context of the 2004 Act. Judge Cooke notes that the 2016 Act contains no requirement that a payment in favour of a tenant should be reasonable. More specifically, she does not consider it appropriate to deduct everything that the landlord has spent on the property during the relevant period, not least because much of that expenditure will have repaired or enhanced the landlord's own property and/or been incurred in meeting the landlord's obligations under the tenancy agreement. There is a possible case for deducting utilities, but otherwise in her view the practice of deducting all of the landlord's costs in calculating the amount of the rent repayment should cease.

59. In Judge Cooke's judgment, the only basis for deduction is section 44 of the 2016 Act itself, and she goes on to state that there will be cases where the landlord's good conduct or financial hardship will justify an order less than the maximum.

60. Since the decision in *Vadamalayan*, there have been other Upper Tribunal decisions in this area, notably those in *Ficcara and others v James* (2021) UKUT 0038 (LC) and *Awad v Hooley (2021) UKUT 0055 (LC)*. In *Ficcara v James*, in making his decision Martin Rodger QC stressed that whilst the maximum amount of rent was indeed the starting point the First-tier Tribunal (FTT) still had discretion to make deductions to reflect the various factors referred to in section 44(4) of the 2016 Act. In addition, he stated that neither party was represented in *Vadamalayan*, that the Upper Tribunal's focus in that case was on the relevance of the amount of the landlord's profit to the amount of rent repayment and that *Vadamalayan* should not be treated as the last word on the exercise of discretion required by section 44.

61. In *Awad v Hooley*, Judge Cooke agreed with the analysis in *Ficcara v James* and said that it will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4).

62. In *Williams v Parmar & Ors [2021] UKUT 244 (LC)*, Mr Justice Fancourt stated that the FTT had in that case taken too narrow a view of its powers under section 44 to fix the amount of the rent repayment order. There is no presumption in favour of the maximum amount of rent paid during the relevant period, and the factors that may be taken into account are not limited to those mentioned in section 44(4), although the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

63. Mr Justice Fancourt went on to state in *Williams* that the FTT should not have concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord", and so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment if what a landlord did or failed to do in committing the offence was relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise.

64. In *Wilson v Arrow and others [2022] UKUT 027 (LC)*, which was heard by the Upper Tribunal together with *Aytan v Moore and others*, the Upper Tribunal concluded that the compelling factor was the absence of important fire safety features, in particular fire doors and alarms, which gave rise to a dangerous situation for the tenants throughout the time they lived at the property until the problems were finally remedied. The Upper Tribunal regarded this as a very serious matter and made only a 10% deduction from the rent to be repaid.

65. In *Hallett v Parker and others [2022] UKUT 165 (LC)*, the Upper Tribunal did not accept a submission that the fact that the local authority has decided not to prosecute the landlord should be treated as

a "credit factor" which should significantly reduce the amount to be repaid.

66. In its decision in *Acheampong v Roman and others [2022] UKUT 239 (LC)*, the Upper Tribunal recommended a four-stage approach to determining the amount to be repaid, which is paraphrased below:-

(a) ascertain the whole of the rent for the relevant period;
(b) subtract any element of that sum that represents payment by the landlord for utilities that only benefited the tenant;
(c) consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made and compared to other examples of the same type of offence; and
(d) consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

67. Adopting the *Acheampong* approach, the whole of the rent in this case means the whole of the rent paid by the Applicants out of their own resources, which is the whole of the rent in this case as no part of the rent was funded by housing benefit.

68. There is no evidence of the Respondent having paid any utilities and so there is nothing to subtract in this regard. However, the Respondent states that she paid block and estate service charges in this case and that these should be deducted from any rent repayment award. However, the four-stage approach in *Acheampong* only allows for deduction of items paid for by the landlord that only benefited the tenant and is also specifically limited to utilities. Whilst it is conceivable that with further information a tribunal might be able to break down any service charge payments made and might at least consider deducting those aspects which could be demonstrated only to benefit the tenant, on the basis of the information before us we do not consider that these service charges can be deducted as there is insufficient evidence that any specific payments only benefited the Applicants. Accordingly, no deduction can be made for service charges paid by the Respondent.

69. As regards the seriousness of the offence, whilst it could be argued based on the maximum criminal penalty available that there are offences covered by section 40(3) of the 2016 Act which can give rise to a greater criminal sanction, a failure to license is still a serious offence. Failure to license leads – or can lead – to significant health and safety risks for often vulnerable tenants, and sanctions for failure to license have an important deterrent effect on future offending as well as encouraging law-abiding landlords to continue to take the licensing system seriously and to inspire general public confidence in the licensing system. Taking these factors together, we consider that the

starting point for this type of offence should be 70% of the maximum amount of rent payable.

70. As for the seriousness of this offence compared to others of the same type, in our view it was not at the more serious end of the scale. On this point, there is a large degree of overlap between the seriousness of the offence and how good or poor the landlord's conduct was. The landlord's conduct is referred to below.

71. As regards the specific matters listed in section 44, the tribunal is particularly required to take into account (a) the conduct of the parties, (b) the financial circumstances of the landlord, and (c) whether the landlord has at any time been convicted of a relevant offence. We will take these in turn.

Conduct of the parties

72. The Applicants' conduct has generally been good. There have been no complaints from the Respondent about non-payment of rent or about non-compliance with their obligations under their tenancy agreements, save for what we consider to be minor points on the evidence before us. There is the issue of whether Mr Kong misled the Respondent when reporting on his discussions with the Council, but having heard his evidence we do not consider that there is enough evidence to support the proposition that he deliberately tried to mislead her, albeit that his emails could be seen as slightly misleading. More importantly, though, the Respondent will – or should – have understood from the email exchange that the Council was asking questions about HMO licensing, and a prudent landlord would have followed this point up, either direct with the Council or by doing some research, in order to ascertain the correct legal position.

73. As regards the Respondent's conduct, she failed to obtain a licence over a considerable period of time and failed to take steps to inform herself of the legal position despite having a small portfolio of properties. However, whilst the circumstances of her failure do not constitute a reasonable excuse, it is nevertheless accepted in partial mitigation that she was out of the country at the relevant time, the additional licensing scheme was not in force when she first started renting out the Property, and the Covid-19 pandemic may have made communication slightly harder.

74. In relation to the various complaints made by the Applicants in respect of the Property and the Respondent's conduct in relation to the Property, whilst the Respondent was not a perfect landlord we consider that the Applicants have overstated the seriousness of the issues that they faced. The Respondent does seem to have been relatively responsive, and although there is some evidence of a failure fully to fix some problems quickly we do not accept that the Applicants have

shown the Respondent to be a particularly poor landlord. In relation to other issues, on the minus side she delayed registering the Applicants' rent deposit, but on the plus side she waived the strict notice requirements for two of the Applicants. The exact significance of the email dated 7 March 2019 regarding the valuation surveyor is in our view not clear on the evidence before us.

Financial circumstances of the landlord

75. There is no evidence before us regarding the Respondent's financial circumstances other than the fact that she had a portfolio of a few properties.

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

76. The Respondent has not been convicted of a relevant offence.

Other factors

77. It is clear from the wording of sub-section 44(4) itself that the specific matters listed in sub-section 44(4) are not intended to be exhaustive, as sub-section 44(4) states that the tribunal "must, in particular, take into account" the specified factors. We are not persuaded that there are any other specific factors which should be taken into account in determining the amount of rent to be ordered to be repaid.

Amount to be repaid

78. One point worth emphasising is that a criminal offence has been committed. There has been much publicity about licensing of privately rented property, and no mitigating factors are before us which adequately explain the failure to obtain a licence. The Respondent claims ignorance of the position, but this is not a sufficient excuse; it is incumbent on those who let out properties to acquaint themselves with the relevant legislation, the purpose of which is to guarantee tenants certain minimum standards of safety and comfort.

79. We are also aware of the argument that good landlords who apply for and obtain a licence promptly may feel that those who fail to obtain a licence gain an unfair benefit thereby and therefore need to be heavily incentivised not to let out licensable properties without first obtaining a licence. In addition, even if it could be argued that the Applicants did not suffer direct loss through the Respondent's failure to obtain a licence, it is clear that a large part of the purpose of the rent repayment legislation is deterrence. If landlords can successfully argue that the commission by them of a criminal offence to which section 43 of the 2016 Act applies should only have consequences if tenants can show

that they have suffered actual loss, this will significantly undermine the deterrence value of the legislation.

80. The four-stage approach recommended in *Acheampong* has already been set out above. The amount arrived at by going through the first two of those stages is £6,254.19 for Mr Sinkov, £5,570.49 for Ms Capitani and £5,600.00 for Mr Kong (see paragraphs 55, 67 and 68 above). As for the third stage, this is partly covered by paragraph 69 above which gives a starting point of 70% of the maximum amount of rent as a starting point, subject to the question of how serious the particular offence was in this case. Although, as noted above, it is in this case difficult to separate out the seriousness of the offence from the Respondent's conduct, in our view this was not at the higher end of the scale in terms of seriousness of offence and on this basis we would reduce the starting point to 40% of the maximum amount of rent.

81. Returning to the specific factors to be taken into account under section 44(4) of the 2016 Act, the fourth stage of *Acheampong*, the Applicants' conduct has been broadly satisfactory. The Respondent's conduct in failing to obtain a licence was poor, but there is some mitigation and – as noted above – whilst she was not the perfect landlord her conduct as landlord was not particularly poor. As the standard of the Respondent's conduct in this case is connected to the level of seriousness of the offence in this case and to avoid double-counting, 40% remains the starting point after considering conduct.

82. The Respondent has not at any time been convicted of a relevant offence, but it is clear from the Upper Tribunal decision in *Hallett v Parker* that this by itself should not be treated as a credit factor. We have no evidence regarding the Respondent's financial circumstances other than the fact that she has a modest property portfolio, which has already been taken into account in connection with the level of seriousness of her failure to obtain a licence.

83. Therefore, taking all of the factors together, we consider that the rent repayment order should be for 40% of the maximum amount of rent payable. Accordingly, we order the Respondent to repay to the Applicants the following sums:-

- To Mr Sinkov, £6,254.19 x 40% = £2,501.68
- To Ms Capitani, £5,570.49 x 40% = £2,228.20
- To Mr Kong, £5,600.00 x 40% = £2,240.00.

Cost applications

84. The Applicants have applied under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for an order that the Respondent reimburse the application fee of £100.00 and the hearing fee of £200.00.

85. As the Applicants have been successful in their claim, albeit that there has been a deduction from the maximum payable, we are satisfied that it is appropriate in the circumstances to order the Respondent to reimburse these fees.

86. Any further cost applications must be emailed to the tribunal, with a copy to the other party, by **6 March 2023**. Any submissions in response to any further cost applications must be emailed to the tribunal, with a copy to the other party, by **20 March 2023**.

Name: Judge P Korn **Date:** 20 February 2023

RIGHTS OF APPEAL

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

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

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

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