



Neutral Citation Number: [2023] UKUT 283 (LC)

Case No: LC-2020-401

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT Ref: LON/00BA/HMK/2019/57

Royal Courts of Justice

30 November 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – unlicensed HMO – RRO made by FTT against superior landlord in rent to rent scheme – appeal dismissed by Upper Tribunal – decision set aside on review and appeal redetermined – defence of reasonable excuse – adequacy of reasons – appeal allowed – application redetermined and order for lesser amount substituted – s.72(5), Housing Act 2004; s.40, Housing and Planning Act 2016

BETWEEN:

MRS LOUISE IRVINE

Claimant

-and-

DR ANTHONY METCALFE (1)

JODI PATTERSON (2)

MARCUS MILLS (3)

TIMOTHY WESTON (4)

ISABELLA MCGREGOR (5)

HARRY JOHNSON (6)

DANIELLA ZUCCALA (7)

Respondents

**Re: 20 Hailsham Road,
Tooting, London SW17**

Martin Rodger KC, Deputy Chamber President

23 November 2023

John Yianni, instructed by Murray Hay, Solicitors, for the appellant
George Penny, instructed by Flat Justice, for the respondents

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The following cases are referred to in this decision:

Acheampong v Roman [2022] UKUT 239 (LC)

English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605; [2002] 1 WLR 2409

Goldsbrough v CA Property Management Limited and Gardner [2019] UKUT 311 (LC)

Irvine v Metcalfe [2021] UKUT 60 (LC)

London Corporation v Cusack-Smith [1955] AC 337

Rakusen v Jepsen [2023] UKSC 9; [2023] 1 WLR 1028, [2023] 3 All ER 95, [2023] HLR 21

R (Cart) v The Upper Tribunal [2011] UKSC 28; [2012] 1 AC 663

1.

Introduction

1. This is the second time the Tribunal has considered this appeal against a decision of the First-tier Tribunal (Property Chamber) (“the FTT”) made on 27 January 2020. The Tribunal’s first decision was made after written representations, without a hearing, on 17 March 2021, and has the neutral citation reference [2021] UKUT 60 (LC) (“the March 2021 decision”). The Tribunal dismissed the appeal on that occasion.
2. The circumstances in which a further appeal against the same decision now comes to be considered by the Tribunal are procedurally complicated.

Procedure

3. The FTT made a rent repayment order requiring the appellant, Mrs Irvine, to pay sums totalling £45,043.88 to the respondents. They had been tenants of a property owned by Mrs Irvine at 20 Hailsham Road in Tooting, a five bedroom semi-detached house on three floors. Each respondent occupied one room in the house at different times between March 2016 and August 2019. In February 2016 Mrs Irvine had let the whole house to a company called Uptown Properties Ltd (“Uptown”). The letting agreement included a term that Uptown must not allow the house to become licensable as a house in multiple occupation (“HMO”). Notwithstanding that stipulation Uptown let each of the five bedrooms in the property and it has never been disputed in these proceedings that, for at least part of the period under consideration, the house was an HMO for which a licence was required under Part 2, Housing Act 2004 (“the 2004 Act”).
4. It is a criminal offence to be in control of an HMO which requires to be licensed but which is not so licensed (section 72(1), 2004 Act). It is a defence that the person in question had a reasonable excuse for having control of or managing the house without the required licence (section 72(5), 2004 Act). A person in receipt of a rack rent for a house has control of it for this purpose (section 263(1), 2004 Act). More than one person can have control of a house at the same time (*London Corporation v Cusack-Smith* [1955] AC 337, 357-358).
5. Where a landlord commits a relevant housing offence, including the offence of being in control of an unlicensed HMO, Chapter 4 of Part 2, Housing and Planning Act 2016 (“the 2016 Act”) allows the FTT to make a rent repayment order requiring the landlord to repay rent paid by occupiers of the HMO for up to 12 months while the offence was being committed.
6. In *Goldsbrough v CA Property Management Limited and Gardner* [2019] UKUT 311 (LC) this Tribunal determined that a rent repayment order could be made against any landlord who had committed a relevant housing offence to which section 40, 2016 Act applied. On that basis, a head landlord in receipt of a rack rent from an intermediate landlord, and who was therefore a person having control of an HMO, could be the subject of a rent repayment order in favour of subtenants with whom they had no direct relationship, if they were found to have committed the offence under section 72(1). That understanding of the law was later found to be wrong. It was subsequently determined by the Court of Appeal, whose decision was confirmed by the Supreme Court, that a rent

repayment order may only be made against the immediate landlord of the tenant making the claim: *Rakusen v Jepsen* [2023] UKSC 9 (“*Rakusen*”).

7. The decision of the FTT in this case was made after the Tribunal’s decision in *Goldsbrough*, and before its decision in *Rakusen* which followed *Goldsborough*. The first decision of this Tribunal in this case was made after its decision in *Rakusen*. The Tribunal had granted the unsuccessful landlord in that case permission to appeal to the Court of Appeal and the parties in this appeal were asked if they wanted to await the outcome of that appeal. Neither of them responded to that suggestion. Nor were any further representations made on Mrs Irvine’s behalf. It was hardly surprising, therefore, that the Tribunal was not persuaded to take a different view from the position it had already taken in *Goldsbrough* and in *Rakusen*. The Tribunal followed its earlier decisions and concluded that the FTT had been entitled to make a rent repayment order in favour of the tenants notwithstanding that Mrs Irvine, against whom the order was made, had not been their immediate landlord for the whole of the period during which the rent was paid (paragraph 17, March 2021 decision).
8. Mrs Irvine did not apply within the usual time limit for permission to appeal to the Court of Appeal against the Tribunal’s March 2021 decision. In normal circumstances that would have been the end of the proceedings. But this case has not followed a normal course.
9. Mrs Irvine’s appeal against the FTT’s decision had been brought with permission granted by this Tribunal. She had applied for permission to appeal on a number of different grounds but the only one for which permission was granted was her argument that *Goldsbrough* had been wrongly decided. Permission was refused on all other grounds.
10. In parallel with the appeal proceeding in the Tribunal, but unknown to the Tribunal at the time because the relevant proceedings were never served on it, in September 2020 Mrs Irvine had applied to the Administrative Court for permission to seek a judicial review of the Tribunal’s refusal to grant her permission to appeal on the other grounds which she wished to raise. The application was made under the High Court’s *Cart* jurisdiction (*R (Cart) v The Upper Tribunal* [2011] UKSC 28) which allows a judicial review of a refusal by the Upper Tribunal to grant permission to appeal.
11. On 12 May 2021 Mostyn J, sitting in the Administrative Court, granted permission to Mrs Irvine to apply for judicial review of the Tribunal’s refusal of permission to appeal on her additional grounds. The Tribunal had been unaware of those proceedings and, by this time, had already dismissed the appeal in the March 2021 decision. Nevertheless, having reconsidered the original grounds of appeal in the light of Mostyn J’s observations when granting permission for the judicial review to proceed, the Tribunal did not request a hearing of the substantive application. The High Court therefore proceeded to quash the Tribunal’s original refusal of permission to appeal on 26 May 2021.
12. Thereafter, on 28 July 2021, on the basis that the High Court had determined that the additional grounds of appeal were arguable, the Tribunal granted permission to appeal on all of the grounds for which permission had originally been refused and which had not already been considered and dismissed in the March 2021 decision. Those additional

grounds did not include any challenge to the decision in *Goldsborough* because that challenge had already been considered and dismissed.

13. The following day, 29 July 2021, the Court of Appeal allowed the appeal in *Rakusen*, ruling that a rent repayment order may only be made against the immediate landlord of the tenant making the application, and cannot be made against a superior landlord.
14. On 14 September 2021 Mrs Irvine's solicitors applied for permission to rely on the Court of Appeal's decision in *Rakusen*. The Tribunal initially postponed consideration of that request until after the expiry of time for an application for permission to appeal to the Supreme Court in *Rakusen*. When permission to appeal was granted, the appeal was stayed to await the outcome and nothing further occurred until the Supreme Court published its decision in *Rakusen* on 1 March 2023 confirming the Court of Appeal's decision.
15. On 4 May 2023 the Tribunal granted Mrs Irvine permission to rely on the Supreme Court's decision in *Rakusen* as an additional ground of appeal against the FTT's decision.
16. It was only possible for the Tribunal to make that order by first reviewing and setting aside the March 2021 decision under the power in section 10, Tribunals, Courts and Enforcement Act 2007. On a review the Tribunal may set aside its own decision (section 10(4)(c), 2007 Act). By rule 55 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 the power of review may only be exercised when the Tribunal receives an application for permission to appeal, and only if it is satisfied that a ground of appeal is likely to be successful. The Tribunal treated the application of 14 September 2021 as a late application for permission to appeal the March 2021 decision and, rather than granting permission to appeal to the Court of Appeal, it permitted Mrs Irvine to file consolidated grounds of appeal against the FTT's decision including, once again, her reliance on her status as a superior landlord. In doing so it set aside the March 2021 decision (this could have been more clearly expressed in the Tribunal's order, but it is implicit in the decision not to grant permission to appeal to the Court of Appeal but to allow the same argument to be raised for a second time at this level).
17. After that lengthy procedural introduction it is now possible to turn to the substance of the appeal. At the hearing Mrs Irvine was represented by John Yianni and the tenants were represented by George Penny (neither of whom had appeared at the FTT). I am grateful to them both for their helpful submissions.

The facts relevant to the appeal

18. The FTT made few express findings of fact, but the following matters are established by the documents which were provided to it and are not controversial.
19. As Mrs Irvine explained to the FTT, she had not been involved in the management of the house at 20 Hailsham Road and had left everything to her husband, Mr Clive Irvine. The FTT found that he was Mrs Irvine's agent, and there is no challenge to that finding. It was in that capacity, therefore, that Mr Irvine entered into an agreement with Uptown on 22 February 2016.

20. The agreement was a detailed printed document headed “Company Let Agreement” (“the Agreement”) which began, rather eccentrically, with the following:

“This document is intended to create a Company Let Agreement in accordance with the forfeiture provisions contained in the Law of Property Act 1925. It gives the Tenant (as defined) a right to occupy the Property (as defined) until the Expiry (as defined)”
21. The Agreement then identified 20 Hailsham Road as its subject, Uptown as “the Tenant”, Mr Irvine as “the Landlord” and “the Expiry” as 28 February 2018. The rent payable was £2,500 a month.
22. The Agreement granted the Tenant express permission to “sublet” the property (clause 2.3). It also stated that the Tenant was not to allow the number of occupiers to be such as would require an HMO licence (clause 2.4). In practice, that meant that no more than four people could be allowed to occupy the five bedroom house as their only or main residence (section 254(2), 2004 Act). The Agreement also included a forfeiture clause providing that if the rent remained unpaid for ten days “the Landlord may re-enter the Property and this Agreement shall thereupon determine absolutely” (clause 8.3).
23. Uptown then entered into arrangements with individual occupiers which were described on their face as “house share licence agreements”. The earliest of these was granted to Mr Johnson, the sixth respondent, on 12 March 2016. It allowed him to occupy one room in the house and share the facilities with others.
24. When the original term of the Agreement expired in February 2018 the arrangement was allowed to continue. Uptown went on paying rent by monthly instalments for the whole house, and it continued to allow the respondents and their predecessors to occupy individual rooms and share the rest of the building.
25. On 7 February 2019 Uptown went into liquidation. The liquidators are said to have disclaimed the company’s interest in the property on the same day. They (or Uptown immediately before their appointment), provided Mr Irvine with details of the tenants living in each of the properties Uptown had managed on the couple’s behalf. He made contact with the respondents and provided them with his bank account details into which he directed them to pay the rent they had previously paid to Uptown. Thereafter from the end of February 2019 rent was paid by the respondents directly to Mr Irvine.
26. In March 2019 the fourth respondent, Mr Weston, moved into a room in the house which had been vacated by the seventh respondent, Ms Zuccala. In April the fifth respondent, Ms McGregor replaced Mr Johnson when he moved out. Mr Weston and Ms McGregor had been living in another house owned by Mrs Irvine and managed by her husband and their relocation had been at Mr Irvine’s suggestion.
27. On 13 June 2019 the first respondent, Dr Metcalfe, gave notice to Mr Irvine of his intention to leave the property. He returned his keys and gave up the occupation of his room on 18 August 2019. From then on the house was no longer occupied by at least five people and so ceased to be an HMO.

28. Following helpful concessions made by Mr Yianni at the start of the hearing it is now agreed that the house had been an HMO from at least February 2018 until 18 August 2019. During that period it had not been licensed when it was required to be.

The application and the FTT's decision

29. On 24 July 2019 the seven respondents applied to the FTT under section 41, 2016 Act for the repayment of rent totalling £42,849. That sum was made up of payments made by the different tenants at different times and the amounts claimed, and the periods to which they related were different in each case. Those who had been in occupation for more than 12 months claimed repayment of the rent they had paid in the last 12 months of their occupancy. The two tenants who had moved in most recently, Mr Weston and Ms McGregor, claimed in respect of periods of four or five months ending with the date of the application.
30. The only respondent to the application was Mrs Irvine. Following *Goldsbrough*, it was understood at that time that a rent repayment order could be claimed against any landlord who had committed a relevant housing offence and that it was not necessary for that person to have been the immediate landlord of the tenant making the claim.
31. Mrs Irvine did not dispute that the house had been an HMO which required a licence. Her case, as explained in her own witness statement and in a detailed skeleton argument settled by counsel who then appeared on her behalf, was that she had left all matters in the hands either of her husband, or Uptown. If she was a person who had control of the HMO (because rent was received by her husband on her behalf), she had a reasonable excuse before Uptown's liquidation, because the property had been let to Uptown on terms that prohibited it from creating an HMO. After the property came under her husband's management from 7 February 2023, she had a reasonable excuse because that turn of events was entirely unexpected and she had "no idea where to start" nor any understanding that an HMO licence might be required. After Dr Metcalfe gave notice on 13 June, she had a reasonable excuse because the house was about to be occupied by fewer than five people and would no longer require a licence. She had therefore committed no offence and, even if *Goldsbrough* was correct (which she disputed) no rent repayment order could be made against her.
32. The FTT's finding that an offence had been committed in the period of 12 months ending with the date of the application was contained in two short paragraphs which did not do justice to the submissions made on Mrs Irvine's behalf. The FTT said only this:

“31. The tribunal is satisfied that the property required a licence and had not been licensed during the tenancies or since the landlord was made aware of the requirement to licence. The tribunal is satisfied that an offence has been committed.

32. The tribunal relies on *Goldsbrough* and considers that Mrs Irvine was the landlord for the purposes of this application. In addition, the terms of the management agreement between Mr Irvine and Uptown, placed the usual responsibilities of a landlord on Mr Irvine. We consider that at all times, Mr Irvine

has acted as agent for Mrs Irvine, he has received the rent on her behalf, and dealt with the management of the tenancies on her behalf.”

33. The FTT did not refer to Mrs Irvine’s reliance on the defence of reasonable excuse nor, as is apparent from the two paragraphs quoted above, did it consider whether the circumstances in which the property was managed both before and after 7 February 2019 had any bearing on the criminal offence which it found Mrs Irvine to have committed. When this omission was pointed out in the application for permission to appeal which Mrs Irvine addressed first to the FTT, it responded in its refusal with the barest dismissal, saying only “the tribunal was not persuaded by the excuse given”.
34. The FTT then asked itself what was the maximum amount that could be ordered under section 44(3), 2016 Act. It decided that that amount was £46,001, despite that not being a figure in the application. It arrived at that figure by adding unspecified sums which had been paid after the application, but it did so without identifying the period during which it was satisfied the offence had been committed or even the persons who had made the payments. It took no notice of a concession agreed to have been made in evidence that only four people occupied the house after the departure of Dr Metcalfe on 18 August.
35. Having considered various allegations about the conduct of the parties, and dismissing them all as irrelevant, and having deducted payments made for broadband and council tax (which were included in the rent) the FTT decided that a rent repayment order in the sum of £45,043.88 was appropriate. It did not break that figure down into sums payable to the individual respondents, none of whom could tell from the decision how much each was entitled to receive.

The appeal

36. The application for permission to appeal first made on 27 March 2020 had raised numerous grounds including whether the evidence was sufficient to establish that the house had been an HMO at all times, whether Mrs Irvine was a person having control of it, whether the FTT had given adequate reasons for its decision, whether *Goldsbrough* was correctly decided, and whether the FTT had considered Mrs Irvine’s defence of reasonable excuse. Although the Tribunal’s order of 4 May 2023 had granted permission to appeal on all of those grounds, Mr Yianni limited his submissions to two issues.
37. Mr Yianni’s first ground was that, following the decision of the Supreme Court in *Rakusen*, the FTT had no jurisdiction under section 40, 2016 Act to make a rent repayment order covering the period up to 7 February 2019 when the Agreement between Mr Irvine and Uptown remained in force. It was only after Uptown went into liquidation and the liquidators disclaimed all its interest in the property that a direct relationship of landlord and tenant came into existence between Mrs Irvine, acting through her husband as her agent, and those of the respondents who were living in the house at that time.
38. Mr Yianni’s second ground of appeal was that the FTT had failed properly to consider the defence of reasonable excuse and, when that omission was drawn to its attention, had given no adequate reasons rejecting it.

39. Mr Yianni addressed his submissions to three distinct periods. The first was from 1 March 2018 to 7 February 2019, during which time the Agreement with Uptown had been in force. The second was from 7 February to 18 August 2019, when Mrs Irvine was the direct landlord of the respondents at least five of whom remained in occupation so as to make the house an unlicensed HMO. The third period was from 18 August to 31 October 2019, during which the house had not been an HMO.
40. In his measured and realistic submissions on behalf of the respondents, Mr Penny accepted that if the Agreement between Mr Irvine and Uptown had created a tenancy, the FTT had had no jurisdiction to make a rent repayment order for the period up to the appointment of liquidators on 7 February 2019. He nevertheless took two points in support of maintaining the FTT's order.
41. He first argued that because of the understanding of the law at the time of the original hearing nobody had focussed closely on the nature of the relationship between Mrs Irvine and Uptown. The FTT had not found that the Agreement created a tenancy and indeed had referred to it in paragraph 32 of its decision as a "management agreement". That, he suggested, was a finding of fact that the relationship was a management agreement and not a tenancy. Alternatively, because of the lack of clear findings about the status of the Agreement, Mr Penny submitted that the application should be remitted to the FTT for it to make further findings of fact about the true relationship between Mrs Irvine and Uptown.
42. As to that point, I agree with Mr Penny that there was no reason for the FTT to focus on the nature of the Agreement. Whether it created an interest in land or an agency relationship did not matter, because it was thought, wrongly, that an order could be made against a superior landlord. But the nature of the rights created by the Agreement is a matter of law. Mr Penny confirmed that he could not suggest the Agreement was a sham and it therefore falls to be interpreted like any other contract, by reading its terms and taking account of the relevant context. No purpose would be served by sending this case back to the FTT for it to carry out that exercise, as it would have no more information than is already available to the Tribunal.
43. There is no doubt that the Agreement created a landlord and tenant relationship. It conferred a right of occupation for a term at a rent. No rights were reserved to the landlord which would have prevented Uptown's right of occupation from being exclusive and anything less than exclusivity would have been inconsistent with the express intention that Uptown would sublet the house to others. The Agreement created a lease or tenancy for a term of two years which was continued on a periodic basis after its expiry.
44. Secondly, Mr Penny argued that even if the Agreement created a relationship of landlord and tenant between Mrs Irvine and Uptown, that relationship had come to an end automatically when Uptown had failed to pay rent. The factual basis of that submission is a passage in Mrs Irvine's witness statement where she suggests that as a result of their involvement with Uptown she and her husband "have lost more than £30,000 in outstanding rent and deposits paid". The existence of rent arrears for more than 10 days would have had the result, Mr Penny submitted, that the Agreement would have come to an end automatically under clause 8.3 (see paragraph 22 above).

45. I do not accept this argument. Mrs Irvine's evidence does not establish that Uptown failed to pay rent due for 20 Hailsham Road under the Agreement. The company had similar arrangements in relation to a number of other properties belonging to Mr and Mrs Irvine and the evidence does not say when or at what property any rent arrears accrued. Mr Penny's point is not made out on the facts. More importantly, even if rent arrears had built up, that would not have had the effect of bringing the Agreement to an end automatically, as Mr Penny suggested. Clause 8.3 was a forfeiture clause which gave the landlord the right to bring the Agreement to an end by forfeiture if rent arrears existed. There is no evidence that Mr or Mrs Irvine ever took steps to bring the Agreement to an end. The evidence is only consistent with the Agreement having continued for the original term and then from month to month on the same terms.
46. Mr Penny acknowledged that, if the Agreement had continued until its disclaimer by Uptown's liquidators, the FTT would have had no power to order the repayment of rent paid before that date. I am satisfied that that was the position and that the decision of the FTT must therefore be set aside so far as it relates to the period up to 7 February 2019.
47. As to the third period identified by Mr Yianni, Mr Penny agreed that the evidence provided to the FTT, including in cross examination, but not recorded in the decision, showed that Dr Metcalfe had moved out on 18 August 2019. There was no evidence that anyone moved in to replace him, and therefore no basis on which the FTT could have been satisfied to the required criminal standard of proof that the house had remained an unlicensed HMO. To the extent that the FTT's decision ordered repayment of rent paid in respect of the period after 18 August 2019 it must therefore also be set aside. It is not possible to tell from the decision how much of the lump sum ordered by the FTT is affected by that defect or which individuals it was satisfied had paid additional amounts after the application had commenced.
48. The only ground of appeal pursued by Mr Yianni in relation to the period between 9 February and 18 August 2019 was the failure of the FTT to deal adequately or at all with the defence of reasonable excuse which had been raised clearly in the written argument provided by Mrs Irvine's original counsel. The excuses put to the FTT were different in respect of different periods. While Uptown was the intermediate landlord under an Agreement which prohibited it from letting so as to give rise to the need for a licence, Mrs Irvine should be excused from liability because she had done what she could to prevent an offence from being committed. Later, the circumstances in which the house returned to her husband's management in February 2019 required that some period of grace be allowed for the couple to understand the arrangements which had fallen into their lap, appreciate their legal significance, take advice, and make the appropriate application for a licence. For as long as that necessary period of grace continued, Mrs Irvine had a reasonable excuse for controlling an unlicensed HMO. After 13 June she had had a reasonable excuse because she knew that the house would shortly cease to be an HMO and no licence would be required.
49. Mr Penny did not attempt to argue that the FTT's treatment of the defence in its decision was adequate. He could hardly do so because the decision contains no reference to the defence or to the evidence given in support of it in Mrs Irvine's witness statement. Mr Penny could point to what the FTT said when it was asked for permission to appeal on grounds which included its failure to deal with the defence. It is true that a tribunal is

entitled to give additional reasons for its decision when it is asked for permission to appeal (*English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, at [23]-[25]). But any reasons given at a later stage must discharge the tribunal's duty to demonstrate that the essential issues that have been raised by the parties have been addressed by it and how those issues have been resolved. The FTT's peremptory statement that "the tribunal was not persuaded by the excuse given" plainly failed to meet that standard. The FTT did not record anywhere in its decision or in its refusal of permission to appeal what excuse it was referring to or consider whether different excuses might apply to different periods. Nor did it explain why it was "not persuaded".

50. It must not be forgotten that the making of a rent repayment order requires a finding of facts amounting to the commission of a criminal offence. Mostyn J made that point when granting Mrs Irvine permission to apply for judicial review. He went on:

"The law requires that a respondent to a RRO application is fixed with a finding of criminal culpability. This gives rise to an important point of principle: what degree of specificity is required of the FTT when fixing a respondent with such culpability? Is it acceptable for the forensic exercise to be approached on a broad brush basis when a finding of such significance is being sought?"

51. Although Mostyn J's question was not addressed in argument in the appeal, the answer to it must be that the obligation to give adequate reasons must be influenced by the seriousness of the matter being determined. The FTT's treatment of Mrs Irvine's defence came nowhere near an acceptable standard. Its decision must be set aside for this reason too.
52. For these reasons I allow the appeal and set aside the decision of the FTT in its entirety.
53. Although Mr Penny had suggested that the application might be remitted to the FTT for further evidence to be taken on the relationship between Mrs Irvine and Uptown, he did not ask for remission if I was against him on that point. It is clearly preferable for this long running application to be determined without further delay and expense to the parties. I will therefore redetermine it on the material provided to the FTT.

Redetermination

54. The only matters which now need to be considered are the defence of reasonable excuse and, subject to that defence, the quantum of the order to be made.
55. It is not necessary to consider the defence to the claim in respect of the period before 7 February and after 18 August 2019. No rent repayment order can be made in respect of those periods in any event.
56. It was submitted by Mr Yianni that Mrs Irvine had a reasonable excuse for being a person in control of an unlicensed HMO for the whole of the period from 7 February to 18 August. It is convenient to work back from the end of that period.

57. The proposed excuse for the period from 13 June until 18 August relied on the fact that Dr Metcalfe gave notice of his intention to end his tenancy and move out on 31 August, as he duly did. Mr Yianni submitted that because the house would shortly cease to be an HMO requiring a licence, it was reasonable for Mrs Irvine not to apply for one. I disagree. To provide a defence to the section 72 offence, a reasonable excuse must be an excuse for having control of an unlicensed HMO. The fact that in about 3 months the property will no longer require a licence may be a reason for the landlord to wish to avoid the expense of an application, but it cannot be an excuse for allowing the property to remain unlicensed. That is particularly the case since the 2004 Act contains a procedure to benefit landlords whose properties will require a licence for only a short period of time.
58. Where a person having control of an unlicensed HMO notifies the local housing authority of their intention to take particular steps with a view to securing that the house no longer requires a licence, the authority may, if it thinks fit, issue a temporary exemption notice under section 62, 2004 Act. Such a notice may not be issued for a period of more than 3 months, but it can be renewed for a further period of up to 3 months if the authority is satisfied that there are exceptional circumstances. While a temporary exemption notice is in force, the person in control of the HMO has an additional defence to the offence under section 72(1) (section 72(5)).
59. The availability of a simple procedure which can be used to avoid the need for a licence for a short period is relevant to the reasonableness of the excuse relied on by Mrs Irvine after 13 June 2019. I am satisfied that the prospect of circumstances changing so as to make a licence unnecessary does not provide a reasonable excuse for Mrs Irvine having continued to be in control of an unlicensed HMO.
60. The excuse relied on for the earlier period between 9 February and 13 June (and possibly for the whole period to 18 August) was that it was reasonable in circumstances where Mrs Irvine had become the immediate landlord of the house unexpectedly, on the liquidation of Uptown, for there to be a period of time for investigation into the occupation of the house and to take legal advice. While that period continued it was reasonable for Mrs Irvine to be in control of the house without a licence.
61. The evidence in support of this part of Mrs Irvine's case was supplied in her witness statement of 23 October 2019 in which she said this:

“We were completely unaware that the property was subject to HMO conditions and we needed a mandatory HMO licence until we sought our solicitor's advice in late August 2019. When Uptown went into liquidation, we were in a panic and shocked as we had no idea where to start. They simply passed on to us the contact details of tenants living at the properties, some of whom had already vacated. My husband then contacted the tenants by email and was trying to help the tenants and explain the situation. At the same time, we were trying to comply with the regulations and contacted Merton Council to explain the situation. In short, the managing agents had been liquidated and we were in the process of taking back all of the properties and handing them on to another managing agent.”

62. I will assume in Mrs Irvine's favour that what she says in her witness statement is true, at least as far as her state of knowledge is concerned. It nevertheless begs a number of questions. Why, for example, would her solicitor have advised on the need for a licence in late August by which time the house was occupied by only four tenants? When was contact made with Merton Council? In an email from a housing officer at Merton Council to one of the respondents on 18 May 2019 the officer stated that they had already written to "the landlord" (presumably Mr Irvine) asking him to apply for a licence within 28 days.
63. It is for the person who wishes to rely on a defence of reasonable excuse to provide the evidence necessary to make it out on the balance of probabilities. In this case Mrs Irvine is not well placed to provide any evidence about the management of the property. Her witness statement begins with a statement that the property was acquired by her husband and his business partner, and she had "simply allowed him to use my name and I have no dealings with the property at all." The same case was put to the FTT by her counsel, who is recorded as having submitted that she "left all matters in the hands of either the agents or her husband" and that since the liquidation of Uptown, "all management of the tenancies had been undertaken by ... Mr Irvine". Although she gave oral evidence and was cross examined at the original hearing, the FTT recorded that "Mrs Irvine was unable to assist the tribunal and said that she had been unwell and had left everything to her husband."
64. Against that background, the evidence contained in Mrs Irvine's witness statement must be of matters of which she was told by her husband. Mr Irvine did not give evidence to the FTT. On the basis of what Mrs Irvine said in her witness statement the FTT concluded that he was a professional landlord. He certainly appears to have owned or managed on his wife's behalf at least three HMOs and one other property housing four tenants. His correspondence with those tenants is strongly suggestive of more knowledge than Mrs Irvine appreciated. On 26 July Mr Irvine gave notice to the tenants (in his wife's name) to vacate the house but in an email of the same date he offered to let the house to them but warned "I can only have four people on the contract officially". I infer from that observation that, by the end of July at least, he was aware that the presence of five tenants would be likely to make the house an HMO which was required to be licensed.
65. I am not prepared to make any assumptions about Mr Irvine's state of knowledge of the need for a licence. The evidence is that he had been owning and managing property for at least ten years with an unnamed business partner who, according to Mrs Irvine, also had an equitable interest in the properties registered in her name. There is no evidence from him that he did not know a licence was required as soon as he took the HMO in hand on 7 February. As his wife's agent his knowledge is to be taken to have been available to her. She has therefore failed to establish that she needed any time to assess the situation before appreciating that a licence was required.
66. For these reasons I dismiss Mrs Irvine's defence and find that from 7 February to 18 August 2019 she was a person in control of an unlicensed HMO contrary to section 72(1), 2004 Act. A rent repayment order may therefore be made against her.
67. I approach the assessment of the amount which should be ordered to be repaid having regard to the approach suggested by the Tribunal in *Acheampong v Roman* [2022] UKUT 239 (LC), at paragraph [20].

68. The first step is to ascertain the whole amount of the rent paid during the relevant period from 7 February to 18 August 2019. The rent paid by each of the respondents during that period, according to the chart provided to the FTT, was as follows:

Dr Metcalfe	£2,946
Ms Patterson	£2,337
Mr Mills	£2,428
Mr Weston	£2,170
Ms McGregor	£2,141
Mr Johnson	£2,100
Ms Zuccala	nil

69. Next it is appropriate to deduct from those sums any element of the payments which were to meet the cost of services provided by the landlord, such as utilities. The evidence of Mrs Irvine is that she and her husband paid £200 for a broadband connection and £857.66 in Council Tax. The period to which those payments related was said to be from February to August 2019, a period of seven months. Rather than any more complicated apportionment I will deduct £175 from the sums paid by each respondent from the headline figures above.
70. The Tribunal in *Acheampong* then suggested that consideration be given to the seriousness of the offence, 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.
71. Mr Yianni referred to the absence of evidence that there were any defects which the local housing authority might have required to be remedied as a condition of granting a licence. A number of complaints had been made by the respondents about the time it had taken to repair an oven when it had broken down or to deal with the discovery of mice at one point, and to the circumstances in which the electricity meter was changed to a pre-payment meter when Uptown failed to pay the bill, but the FTT did not regard any of these as sufficiently serious to weigh in the balance, and I agree.
72. A failure to licence an HMO is always a serious matter, although generally of lesser significance than the other housing offences listed in section 40(3), 2016 Act. Where there is little or no evidence that licensing would have been conditional on changes being made to the condition of the property the particular failure may be regarded as lower in the scale of seriousness.
73. In assessing the seriousness of the offence committed by Mrs Irvine it is relevant that she and her husband owned a number of large properties which were let out to groups of tenants. The FTT described them as “professional landlords”. The contemporaneous evidence suggests that Mr Irvine was aware of the need for an HMO licence and nevertheless moved additional tenants (Mr Weston and Ms McGregor) in in March and April 2019 when numbers would otherwise have fallen below the level at which licencing is required. There is therefore an element of deliberate avoidance in this case which I take into account, albeit that it was conduct on the part of Mrs Irvine’s agent and not her own personal conduct.

74. Having regard to these matters, I will allow a deduction of 25% from the net figure to take account of the seriousness of the offence and landlord's conduct.
75. None of the other factors in section 44(4) are relevant in this case.
76. After a draft of this decision was circulated to counsel for proof reading, further representations were made on behalf of the respondents about the order I should make. These were not provided by Mr Penny, the respondents' counsel (although he did supply helpful editorial comments) but by the organisation Flat Justice which had represented the respondents before the FTT and which instructed Mr Penny on their behalf. They suggested that the draft should be adjusted to include rent paid after July 2019 by Mr Weston and Ms McGregor. I am not prepared to make that adjustment, as the evidence provided to the FTT was only of payments made up to July, and Mr Penny confirmed in his submissions that the schedule provided in the bundle should form the basis of any redetermination. It was also suggested that rent paid by the other respondents before the offence began to be committed on 7 February 2019 should be apportioned by the day and repayment ordered of the rent in respect of the remainder of that month. That was not a submission made to the FTT or on the appeal and it is not obvious that section 44(2), 2016 Act allows for such a calculation (only rent paid during the relevant period can be the subject of a repayment order). The figures I have used are therefore for payments made after 7 February.
77. The rent repayment order I make in this case is in the following sums (which I have rounded up or down to the nearest £10):
- | | |
|--------------|--------|
| Dr Metcalfe | £2,080 |
| Ms Patterson | £1,620 |
| Mr Mills | £1,690 |
| Mr Weston | £1,500 |
| Ms McGregor | £1,470 |
| Mr Johnson | £1,440 |
| Ms Zuccala | nil |
78. The amounts payable are recoverable as a debt through action in the County Court or other forms of enforcement.

Martin Rodger KC,
Deputy Chamber President
30 November 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.