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RESIDENTIAL PROPERTY TRIBUNAL

Reference: RPT/0002/04/17

In the matter of 12 Fields Park Road, Newport, NP20 5BA

In the matter of an application under Section 73 of the Housing Act 2004

TRIBUNAL	**Timothy Walsh (Procedural Chairman)** **Roger Baynham (Surveyor)** **Juliet Playfair**
APPLICANT:	**Newport City Council**
RESPONDENT:	**Redbrook Property Management Limited**

REASONS FOR THE DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL

The Decision in Summary

1. For the reasons given below the Tribunal hereby makes a rent repayment order under section 73(5) of the Housing Act 2004 requiring the Respondent to pay to the Applicant the sum of £5,257.31.

The Application in Outline

2. This is an application made by Newport City Council under section 73(5) of the Housing Act 2004 ("the Act"). The Applicant applies under that section as a local housing authority seeking a rent repayment order against the Respondent, Redbrook Property Management Limited. By reason of that application it seeks to recover payments of housing benefit in the sum of £5,257.31. The material property is number 12 Fields Park Road in Newport ("the Property").

Representation

3. The Applicant was represented at the hearing by Mrs Catherine Coleman, a solicitor employed by the Applicant.

4. The Respondent was represented by Mr Darren Gardner; he is the sole director and shareholder of the respondent company.

The Statutory Provisions

5. An HMO is a house in multiple occupation as defined by sections 1 and 254 to 259 of the 2004 Act. For present purposes, the key sections of the Act commence at section 73(5) to (7):

73(5) If—
(a) an application in respect of an HMO in Wales is made to the appropriate tribunal by the local housing authority or an occupier of a part of the HMO, and
(b) the tribunal is satisfied as to the matters mentioned in subsection (6) or (8), the tribunal may make an order (a "rent repayment order") requiring the appropriate person to pay to the applicant such amount in respect of the relevant award or awards of universal credit or the housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 74(2) to (8)).

(6) If the application is made by the local housing authority, the tribunal must be satisfied as to the following matters—
(a) that, at any time within the period of 12 months ending with the date of the notice of intended proceedings required by subsection (7), the appropriate person has committed an offence under section 72(1) in relation to the HMO (whether or not he has been charged or convicted),
(b) that—
(i) one or more relevant awards of universal credit have been paid (to any person); or
(ii) housing benefit has been paid (to any person) in respect of periodical payments payable in connection with the occupation of a part or parts of the HMO,
during any period during which it appears to the tribunal that such an offence was being committed, and
(c) that the requirements of subsection (7) have been complied with in relation to the application.

(6A) In subsection (6)(b)(i), "relevant award of universal credit" means an award of universal credit the calculation of which included an amount under section 11 of the Welfare Reform Act 2012, calculated in accordance with Schedule 4 to the Universal Credit Regulations 2013 (housing costs element for renters) (SI 2013/376) or any corresponding provision replacing that Schedule, in respect of periodical payments payable in connection with the occupation of a part or parts of the HMO.

(7) Those requirements are as follows—
(a) the authority must have served on the appropriate person a notice (a "notice of intended proceedings")—
(i) informing him that the authority are proposing to make an application under subsection (5),
(ii) setting out the reasons why they propose to do so,

(iii) stating the amount that they will seek to recover under that subsection and how that amount is calculated, and
(iv) inviting him to make representations to them within a period specified in the notice of not less than 28 days;
(b) that period must have expired; and
(c) the authority must have considered any representations made to them within that period by the appropriate person.

6. Subjections 73(9) to (11) then add the following:

73(9) Where a local housing authority serve a notice of intended proceedings on any person under this section, they must ensure—
(a) that a copy of the notice is received by the department of the authority responsible for administering the housing benefit to which the proceedings would relate; and
(b) that that department is subsequently kept informed of any matters relating to the proceedings that are likely to be of interest to it in connection with the administration of housing benefit.

(10) In this section—
"the appropriate person", in relation to any payment of universal credit or housing benefit or periodical payment payable in connection with occupation of a part of an HMO, means the person who at the time of the payment was entitled to receive on his own account periodical payments payable in connection with such occupation;
"housing benefit" means housing benefit provided by virtue of a scheme under section 123 of the Social Security Contributions and Benefits Act 1992 (c 4);
"occupier", in relation to any periodical payment, means a person who was an occupier at the time of the payment, whether under a tenancy or licence or otherwise (and "occupation" has a corresponding meaning);
"periodical payments" means—
(a) payments in respect of which an amount under section 11 of the Welfare Reform Act 2012 may be included in the calculation of an award of universal credit, as referred to in paragraph 3 of Schedule 4 to the Universal Credit Regulations 2013 ("relevant payments") (SI 2013/376) or any corresponding provision replacing that paragraph; and
(b) periodical payments in respect of which housing benefit may be paid by virtue of regulation 12 of the Housing Benefit Regulations 2006 or any corresponding provision replacing that regulation].

(11) For the purposes of this section an amount which—
(a) is not actually paid by an occupier but is used by him to discharge the whole or part of his liability in respect of a periodical payment (for example, by offsetting the amount against any such liability), and
(b) is not an amount of universal credit or housing benefit,
is to be regarded as an amount paid by the occupier in respect of that periodical payment.

7. The provisions of section 73 are supplemented by section 74 of the Act which provides the following:

74 (1) This section applies in relation to rent repayment orders made by residential property tribunals under section 73(5).

(2) Where, on an application by the local housing authority, the tribunal is satisfied—
(a) that a person has been convicted of an offence under section 72(1) in relation to the HMO, and
(b) that—
(i) one or more relevant awards of universal credit (as defined in section 73(6A)) were paid (whether or not to the appropriate person), or
(ii) housing benefit was paid (whether or not to the appropriate person) in respect of periodical payments payable in connection with occupation of a part or parts of the HMO,
during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO in question,
the tribunal must make a rent repayment order requiring the appropriate person to pay to the authority the amount mentioned in subsection (2A).
This is subject to subsections (3), (4) and (8).

(2A) The amount referred to in subsection (2) is—
(a) an amount equal to—
(i) where one relevant award of universal credit was paid as mentioned in subsection (2)(b)(i), the amount included in the calculation of that award under section 11 of the Welfare Reform Act 2012, calculated in accordance with Schedule 4 to the Universal Credit Regulations 2013 (housing costs element for renters) (SI 2013/376) or any corresponding provision replacing that Schedule, or the amount of the award if less; or
(ii) if more than one such award was paid as mentioned in subsection (2)(b)(i), the sum of the amounts included in the calculation of those awards as referred to in sub-paragraph (i), or the sum of the amounts of those awards if less, or
(b) an amount equal to the total amount of housing benefit paid as mentioned in subsection (2)(b)(ii), (as the case may be).

(3) If the total of the amounts received by the appropriate person in respect of periodical payments payable as mentioned in paragraph (b) of subsection (2) ("the rent total") is less than the amount mentioned in subsection (2A), the amount required to be paid by virtue of a rent repayment order made in accordance with that subsection is limited to the rent total.

(4) A rent repayment order made in accordance with subsection (2) may not require the payment of any amount which the tribunal is satisfied that, by reason of any exceptional circumstances, it would be unreasonable for that person to be required to pay.

(5) In a case where subsection (2) does not apply, the amount required to be paid by virtue of a rent repayment order under section 73(5) is to be such amount as the tribunal considers reasonable in the circumstances.
This is subject to subsections (6) to (8).

(6) In such a case the tribunal must, in particular, take into account the following matters—
(a) the total amount of relevant payments paid in connection with occupation of the HMO during any period during which it appears to the tribunal that an offence was being committed by the appropriate person in relation to the HMO under section 72(1);
(b) the extent to which that total amount—
(i) consisted of, or derived from, payments of relevant awards of universal credit or housing benefit, and
(ii) was actually received by the appropriate person;
(c) whether the appropriate person has at any time been convicted of an offence under section 72(1) in relation to the HMO;
(d) the conduct and financial circumstances of the appropriate person; and
(e) where the application is made by an occupier, the conduct of the occupier.

(7) In subsection (6) "relevant payments" means—
(a) in relation to an application by a local housing authority, payments of relevant awards of universal credit, housing benefit or periodical payments payable by occupiers;
(b) in relation to an application by an occupier, periodical payments payable by the occupier, less—
(i) where one or more relevant awards of universal credit were payable during the period in question, the amount mentioned in subsection (2A)(a) in respect of the award or awards that related to the occupation of the part of the HMO occupied by him during that period; or
(ii) any amount of housing benefit payable in respect of the occupation of the part of the HMO occupied by him during the period in question.

(8) A rent repayment order may not require the payment of any amount which—
(a) (where the application is made by a local housing authority) is in respect of any time falling outside the period of 12 months mentioned in section 73(6)(a); or
(b) (where the application is made by an occupier) is in respect of any time falling outside the period of 12 months ending with the date of the occupier's application under section 73(5);
and the period to be taken into account under subsection (6)(a) above is restricted accordingly…

(16) Section 73(10) and (11) apply for the purposes of this section as they apply for the purposes of section 73.

The Effect of the Statutory Provisions in Summary

8. We have set out core provisions of the statutory regime in detail for completeness although, for the reasons that follow, only certain of the provisions are engaged on the facts of the present application.

9. Whilst there is no substitute for a full reading of the text of the Act, broadly the effect of the foregoing may be summarised thus:

   (I) A local housing authority may apply for a rent repayment order requiring an "appropriate person" to pay to the authority an amount in respect of a relevant award of, inter alia, housing benefit.

   (II) It follows that the Respondent must be an appropriate person as defined by section 73(10) of the Act. Namely, the person who was entitled to receive, on his own account, periodical payments payable in connection with occupation of a part of an HMO.

   (III) On any application, the Tribunal must also be satisfied:

   (a) That, at any time within the period of 12 months ending with the date of the notice of intended proceedings served under section 73(7), the Respondent has committed an offence under section 72(1) of the Act in relation to the HMO (whether or not he has been charged or convicted) (s.73(6)(a)).
   (b) That, inter alia, housing benefit has been paid to any person in respect of the periodical payments payable in connection with the occupation of a part or parts of the HMO during any period during which an offence was being committed (s.73(6)(b)).
   (c) That the requirements of section 73(7) have been complied with in relation to the material application (s.73(6)(c)). Those requirements necessitate that the Applicant must have served a "notice of intended proceedings" on the Respondent in the form prescribed by section 73(7)(a), that the prescribed period for the Respondent to make representations must have expired and that the Applicant must have considered any representations made by the Respondent.

   (IV) By virtue of subsection 74(2) of the Act the Tribunal must make a rent repayment order if it is satisfied that a person has been convicted of an offence under section 72(1) in relation to the HMO and, inter alia, housing benefit was paid in respect of periodical payments payable in connection with occupation of a part or parts of the HMO during any period during which it appears to the Tribunal that such an offence was being committed in relation to the HMO in question.

   (V) The amounts for which a rent repayment order can be made are prescribed by the Act, relate to the amount of housing benefit paid in the relevant period and are subject to the "rent total" in section 74(3).

(VI) The mandatory requirement to make an order in section 74(2) where there has been a relevant conviction is qualified by section 74(4) which directs that a Tribunal must not require the payment of any amount which the Tribunal is satisfied that it would be unreasonable for the Respondent to pay "by reason of any exceptional circumstances".

(VII) Where a person has not been convicted of an offence under section 72(1), the amount required to be paid by a rent repayment order is "such amount as the tribunal considers reasonable in the circumstances" subject to the provisions of section 74(6) to (8).

(VIII) A rent repayment order may not require the payment of any amount which relates to a period falling outside the period of 12 months ending with the date of the Applicant's notice of intended proceedings

10. In short, this application therefore engages the following questions:

(a) Is the Respondent an "appropriate person" in relation to the three flats in the Property for which housing benefit has been paid?

(b) Has the Respondent committed an offence under section 72(1) in relation to the HMO at any time within the period of 12 months ending with the date of the notice of intended proceedings served under section 73(7)?

(c) Has housing benefit been paid to any person in respect of the periodical payments payable in connection with the occupation of a part or parts of the HMO during any period during which an offence was being committed?

(d) Has the Applicant complied with the requirements for the notice of intended proceedings?

(e) How much has the Respondent received by way of rental for the material flats? Does the rental total exceed the total payments of housing benefit?

(f) Has a person been convicted of an offence under section 72(1) of the Act and has housing benefit been paid during the period when the offence was being committed? If so, are there "exceptional circumstances" such that it would be unreasonable for the Respondent to pay some or all of the amount prescribed by section 74(2A)?

(g) If section 74(2) does not apply, what amount should the Respondent be required to pay having regard to what is reasonable in the circumstances and the requirements of sections 74(5) to (8)? In fact, it is clear from what follows that section 74(2) does apply.

The Relevant Facts

11. The Property is registered at HM Land Registry under title number WA80723. The Respondent has been the registered proprietor since 12 June 2003. The

Respondent's sole director and shareholder is Mr Darren Martin Gardner. Mr Gardner has been a director since 3 February 2003.

12. The Property consists of seven flats and all seven are tenanted. On the morning of 12 June 2017, the Tribunal undertook an inspection of the Property. It was clear from that inspection that each of the flats has its own basic amenities (i.e. a toilet, personal washing facilities and some cooking facilities) and that they qualified as "self-contained flats" as defined by section 254(8) of the Act.

13. The Applicant relied at the hearing upon the witness statements of a Mr Christopher Watkins and a Mr Paul Hazlewood. Both were called to give evidence and, when doing so, confirmed the contents of their statements. Mr Gardner accepted that their statements were accurate and did not challenge them in any material respect.

14. In Mr Watkin's witness statement he relates that the Property is an HMO under the Act by virtue of sections 254(1)(e) and 257. Those sections provide that a property is an HMO if it is a converted block of flats which (a) has been converted into, and (b) consists of, self-contained flats and the building work undertaken in connection with the conversion did not comply with the appropriate building standards and still does not comply with them, and less than two-thirds of the self-contained flats are owner occupied. Mr Watkins' evidence was that Building Control records indicate that the Property is still not building regulation compliant and M. Gardner accepts that to be correct.

15. An HMO licence ("the Licence") was issued by the Applicant to Mr Gardner and his wife on 10 October 2010. That licence expired on 10 October 2015. It permitted a level of occupation at the Property limited to seven households of no more that fourteen individuals in total.

16. Following the expiry of the Licence, it was Mr Watkins' evidence that he attended at the Property on 26 November 2015 and discovered that there were seven self-contained flats (numbered Flats 1 to 7) occupied by seven tenants. All bar the occupier of Flat 2 had been in occupation since before the expiry of the Licence. The occupier of Flat 2, Ms Lindsay Slark, had been in occupation since 15 October 2015. Mr Watkins' evidence was that he also returned to the Property around four months later, on 18 March 2016, but the position was unchanged. Namely, the Property continued to be rented as a house in the multiple occupation of seven tenants without the benefit of the required HMO licence.

17. Following a number of requests, copy tenancy agreements were provided by the Respondent on 7 September 2016 (by which time only the tenant of Flat 6 had changed). We note that the Respondent is not consistently named as the landlord in all of the tenancy agreements. In some of the agreements, the landlord is named as Mr Gardner or Mr and Mrs Gardner.

18. In October 2016 (and so, in effect, a year late) an application was submitted by the Respondent for a new HMO licence.

19. This Tribunal has been supplied with memoranda of conviction which record that, on 7 October 2016, the Respondent was convicted, following a guilty plea, of an offence under section 72(1) of the 2004 Act. The material entry in that respect reads:

"On 26 November 2015 at Newport, South Wales the defendant company being the person having control and management of an HMO at 12 Fields Park Road, Newport, South Wales NP20 5BA, which was required to be licensed under section 61(1) of the Housing Act 2004, failed to Licence the said HMO contrary to section 72(1) of the Housing Act 2004"

20. The Respondent was fined £3,600 for that offence. With other fines for related offences said to date from November 2016, the Respondent was fined a total of £5,400.

21. At the hearing, we were supplied with a second memorandum of conviction which also confirms that the Respondent was separately prosecuted and convicted (following a guilty plea) of a repeat offence under section 72 of the Act following Mr Watkin's attendance in March 2016. The principal entry reads:

"On 18th March 2016 at Newport, South Wales, the defendant company being the person having control of an HMO at 12 Fields Park Road, Newport, South Wales NP20 5BA, which was required to be licensed under section 61(1) of the Housing Act 2004, failed to Licence the said HMO contrary to section 72(1) of the Housing Act 2004"

22. The fine for that offence was £900. Including a victim surcharge the total fines for that and related offences dating from March 2016 was £4,620.

23. At the hearing we were told that Mr Gardner was also prosecuted personally. It was his evidence that the totality of the fines that he faced as a result of the various alleged offences relating to the Property was £21,162.00. The Applicant could not confirm that total but was prepared to accept that Mr Gardner was probably correct. When Mr Gardner gave evidence to the Tribunal he also indicated that he (or he and the Respondent) had incurred legal costs of around £1,300; that evidence was not challenged.

24. For completeness, we would add that we heard evidence from Mr Gardner that the Respondent also owns a second property known as numbers 328 to 330 Chepstow Road in Newport. That property is also an HMO and accommodates five households. The Applicant has not pursued the Respondent in respect of any alleged offences concerning that property. It is necessary to record, however, that it was Mr Gardner's evidence that he has spent thousands of pounds on both properties in connection with HMO relicensing as well as undertaking to install five new boilers at the Chepstow Road property at a cost of some £13,000. It was his evidence that the cumulative amount of the fines, relicensing costs, legal fees and proposed

works have meant that he, or the Respondent, has had to find in excess of £35,000 to meet those combined liabilities.

25. We should also add that we received evidence on the circumstances relating to the decision to pursue Mr Gardner and the Respondent in relation to offences in both November 2015 and March 2016 since that might, on the face of it, appear severe or draconian. As Mr Gardner stated, in practical terms he felt that this meant that he was punished four times. Namely personally and so directly and indirectly (as the Respondent's director and shareholder) on two occasions.

26. The Applicant's response, however, was that the decision to prosecute twice was taken because Mr Gardner and the Respondent had failed to engage with, or respond to, the Applicant in relation to the Property. Mr Watkins' unchallenged evidence was that he had contacted the Respondent before the Licence expired by letters sent in July, August and September 2015 as well as making two phone calls in August 2015. After the Notice expired, and after Mr Watkins' visited the Property on 26 November 2015, further correspondence followed. A Notice of Investigation and schedule of works was sent on 30 November 2015 and a Notice to Produce Documents was sent on 23 December 2015. Neither Mr Gardner nor the Respondent replied and on 20 January 2016 they did not attend for a PACE interview to which they had been invited. The second inspection on 18 March 2016 prompted a further Notice of Investigation, dated 23 March 2016 and a second Notice to Produce Documents on 19 April 2016. Again, no response was received.

27. In fairness to Mr Gardner, he does not shy away from his lack of engagement. He did not challenge Mr Watkins' evidence and he accepts that he, and therefore the Respondent, failed to engage with the Applicant. He did indicate that he mistakenly thought that he could not apply for a new HMO licence until he had undertaken works to the Property and that, in his view, he had been making good progress with the works at the time of the second inspection. The difficulty for Mr Gardner is that this does not offer any reasonable explanation for the failure to apply for a new HMO licence sooner which, as Mr Gardner expressly conceded, did not happen until October 2016.

28. On 5 December 2016 the Applicant served a Notice of Intended Proceedings ("the Notice") on the Respondent by first class post. That required written representations from the Respondent by 6 January 2017 and was compliant with section 73(7) of the Act in that it informed the Respondent that the Applicant was proposing to make an application for a rent repayment order in this Tribunal for the amount of £5,257.31 because (a) the Property was an HMO which required a licence under section 61 of the 2004 Act but operated without a licence from 11 October 2015 to 4 October 2016 and (b) housing benefit was paid to occupiers of the Property.

29. As required, the Notice explained how the amount of £5,271.31 was calculated. In short, it indicated that housing benefit had been paid to occupiers of flats 1, 5 and 7 and that the amounts related to the period of 12 months commencing from 12 months prior to the date of the Notice.

30. The address used for the purpose of service of the Notice was number 125 Cathedral Road in Cardiff which is the address for the Respondent contained in the Proprietorship Register for the Property. The Respondent takes no issue over the address for service of, or the validity of, the Notice by the Applicant. It is clear that Mr Gardner had received the Notice by 7 December 2016 because he emailed the Applicant about the Notice on that date.

31. The Respondent's position is set out in a letter of representations from Mr Gardner that was received by the Applicant on 13 January 2017. That date is material because it was after 9 January 2017, the date to which the Applicant had extended the deadline for submissions under section 73(7). In an email to this Tribunal dated 19 May 2017 Mr Gardner re-sent his letter of 13 January 2017 (in fact undated) and confirmed that it accurately set out his case. We have considered that letter in its entirety but note, in particular, that Mr Gardner states that it was his wife who effectively ran the respondent company. He told the Tribunal that she passed away in January 2014 and this caused the administration of the company to suffer. Mr Gardner adds that he was unaware that any of his tenants were in receipt of housing benefit. Finally, he explains that he would be placed in a "very difficult financial position" if required to comply with a rent repayment order.

32. During the course of his evidence the Tribunal sought to explore the basis of this last assertion. Mr Gardner informed us that he is a self-employed Independent Financial Advisor. He is also the director and sole shareholder of two companies. One owns two buy to let houses. The other is the Respondent. The assets of the respondent company were, he said, confined to its freehold interests in the Property and in the Chepstow Road property. We were told that both properties are mortgaged with Paragon Mortgages Limited and Mr Gardner indicated that there is little equity in either. We were not, however, supplied with mortgage redemption statements nor any evidence of the current value of those properties and it was not suggested that the Respondent is, or is necessarily close to, being insolvent. It was not suggested that the Respondent would be unable to meet any liability arising under a rent repayment order. Based on the rental sums disclosed by the leases in the hearing bundle, the gross rental income for the seven flats in the Property would be £1,985 per month and, in fact, Mr Gardner volunteered that the rental for at least one of those properties had increased, so that the total figure for gross rent receipts was in excess of £2,000 per month. The Respondent will, of course, also be in receipt of rental income from its Chepstow Road property.

Discussion and Decision

The Appropriate Person

33. As noted above, a rent repayment order can only be made against the "appropriate person". That is the person who, at the time that the housing benefit was paid, was the person who was entitled to receive "on his own

account" relevant periodical payments in connection with occupation of each of the flats.

34. The period in question is 5 December 2015 to October 2016. The Respondent was certainly the freeholder during that time. For Flat 1 the Tenancy Agreement was with one Ewa Maciaszek. Under the heading "Landlord" the Lease reads:

    "Full name: Susan & Darren Gardner
    Company: (if applicable) Redbrook Property Management Ltd".

35. In the circumstances, we have no difficulty in finding that the Respondent is the corporate entity (or person) entitled on its own account to receive periodical payments in respect of that flat. The Respondent is the freeholder and its name appears in the lease particulars. Either or both of Mr and Mrs Gardner may have been directors of the Respondent and that may explain the presence of their names but, in our view, that does not alter the Respondent's status for these purposes.

36. Flat 5 is occupied by a Mr Richard Dodd pursuant to a Tenancy Agreement dated 15 February 2008 in which the Respondent alone is named as landlord and so is clearly the "appropriate person". Flat 7 is occupied by a Mr Wall. His Tenancy Agreement is with one Michael Holden as landlord. It dates from 21 March 2003 and so predates the Respondent's acquisition of the freehold reversionary interest in the Property. As successor in title to Mr Holden, it is again clear that the Respondent is the landlord and, as such, the "appropriate person" under the Act.

37. Mr Gardner accepted that the Respondent was indeed the appropriate person in respect of all three flats.

The Section 73(6) requirements

38. The Respondent accepts that the Property is an HMO which was required to be licensed and that from 10 October 2015 until 4 October 2016 inclusive it was not. The memoranda of conviction confirm that the Respondent pleaded guilty to offences under section 72 of the Act and that the Property was not licensed as at 26 November 2015 and 18 March 2016. Mr Watkins' evidence confirms that no application to renew the HMO Licence was received until 5 October 2016. Again, this was accepted by the Respondent.

39. In the circumstances, we are satisfied and find that in the period from 5 December 2015 to 5 December 2016 (being the date of the Notice) the Respondent had committed offences under section 72 of the Act. The section 73(6)(a) condition is accordingly satisfied.

40. In addition to the evidence of Mr Watkins, we also received evidence from Mr Paul Hazlewood. Mr Hazlewood works as a control officer for the Applicant and has produced and exhibited "screen grabs" for the three tenants of flats 1, 5 and 7 which confirm the amounts of housing benefit paid to each.

The figures provided therein corroborate and are consistent with the Schedule to the Notice. That evidence was not challenged and, in the circumstances, we accept and find that housing benefit has been paid to each of those tenants between 5 December 2015 and the application for a new licence in October 2016. The section 75(6)(b) condition is necessarily also therefore satisfied.

41. We have already documented the service of the Notice of Intended Proceedings and the terms of that Notice which we find complied with the requirements of section 73(7). We also find that no material representations were made by the Respondent within the deadline for the same (even as extended by the Applicant in correspondence). The section 75(6)(c) condition is, in the circumstances, satisfied.

Section 74(2) and (3)

42. By reason of our findings above, it follows that the Tribunal is satisfied that the Respondent was convicted of offences under section 72(1) in relation to the Property and that housing benefit was paid in respect of rent payable in connection with occupation of each of the three flats (numbers 1, 5 and 7), being parts of the Property, during a period when an offence was being committed. For the avoidance of doubt, it appears to the Tribunal that an offence was being committed from the expiry of the Licence on 10 October 2015 until the belated application for a new licence on 5 October 2016.

43. The effect of those findings is that this Tribunal must make a rent repayment order against the Respondent, subject to sections 74(3), (4) and (8).

44. Under the terms of their leases:

    (I) The tenant of Flat 1 was required to pay £225 per month. We were informed at the hearing that the rent remained unchanged. The tenant's housing benefit entitlement was £49.32 per week. As such housing benefit did not exceed rent.
    (II) The tenant of Flat 5 was required to pay £225 per month. Again, we were told that this is unchanged. The tenant's housing benefit entitlement was £51.92 per week.
    (III) The tenant of Flat 7 was required to pay £250 per month. During the material period from December 2015 to October 2016, Mr Gardner informed the Tribunal that the rent was the increased sum of £300 per month. The tenant's housing benefit entitlement was £69.23 per week.

45. A careful consideration of those figures indicates that the rent total for the periods in question was £6.05 less than the housing benefit paid for flat 5 and £7.24 less than the housing benefit for flat 7 (a total of £13.29). However, for flat 1 the rental exceeded housing benefit payments by £17.87. In the circumstances, the total amounts received as rental for the three flats fractionally exceed the total amounts of housing benefit paid in respect of those flats. As such, no section 74(3) adjustment is appropriate.

Section 74(4)

46. All of the foregoing means that this Tribunal must order the Respondent to pay the entirety of the housing benefit paid in relation to the Property for the period from 5 December 2015 to 4 October 2016 unless section 74(4) applies by reason of "any exceptional circumstances" which render it unreasonable for the Respondent to be required to pay part, or all, of that sum. It makes no difference under the Act that the housing benefit was not paid directly to the Respondent nor that the Respondent was ignorant of the fact that some tenants were in receipt of housing benefit.

47. The Act does not fully elucidate the approach that should be adopted where section 74(2) applies. In *Parker v. Waller* [2012] UKUT 301 (LC) the Upper Tribunal gave guidance on the law as it applies to rent repayment orders in favour of occupiers, but the test to be applied there differs to that under sections 74(2) and (4). As the President observed when explaining the policy of the Act:

"[24] The contrast between what the RPT may or must order in respect of the two types of RRO is marked. In the case of an application by a housing authority it is obliged to make an order for the full amount of housing benefit unless by reason of exceptional circumstances this would be unreasonable. In the case of an application by an occupier, on the other hand, the amount to be repaid under the RRO is the amount that is reasonable in the circumstances, and the circumstances include the conduct and means of the landlord and the conduct of the tenant. The underlying purpose of the provisions as they relate to housing authorities is reasonably clear. As a matter of public policy it is considered unacceptable that a landlord should receive any of the proceeds of housing benefit when he has failed to obtain an HMO licence, so that he is required to repay the full amount that he has received. No such clarity attaches to the provisions as they relate to an occupier…"

48. The position is, accordingly, clear:

    (I) Where section 74(2) applies, the policy of the Act is that it is unacceptable that a landlord should retain any proceeds of housing benefit when it has failed to obtain an HMO licence. There is accordingly a strong presumption in favour of an order for the full amount and the RPT is obliged to so order unless the Respondent can invoke section 74(4).

    (II) Where there are "any exceptional circumstances" which make it unreasonable for the Respondent to be required to pay the full amount under section 74(3), the RPT must only order the Respondent to pay such sum as is reasonable having regard to those circumstances. The burden of proof for these purposes must rest with the Respondent.

49. As already indicated above, Mr Gardner's opposition to a rent repayment order being made against the Respondent is essentially two-fold. First, he points to the fact that his wife was responsible for the administration of the

respondent company and the matters relating to the Property generally. When Mrs Gardner died in January 2014 that resulted in a significant lapse in the administration of matters concerning the Property and led to Mr Gardner's ultimate failure to engage with the local authority about HMO licensing. Secondly, Mr Gardner asserts that a rent repayment order will heap a still greater financial burden upon him, or the Respondent, in circumstances where he and the Respondent have already paid fines as a result of HMO and related issues exceeding £21,000 and where other outlay on both of the Respondent's properties has pushed liabilities associated with those properties to in excess of £35,000.

50. Before addressing these submissions, the Tribunal would make the general observation that we found Mr Gardner to be honest and contrite. We accept unequivocally that the loss of his wife affected Mr Gardner significantly. With the tragedy of losing his wife, he was left to raise the couple's young son in addition to taking on the responsibility for running the Property which had, we also accept, previously rested with Mrs Gardner. Moreover, given that the Property had been licensed from 2010 to 2015, there is every reason to accept that Mrs Gardner would have taken the steps necessary to relicense the Property had she not passed away in January 2014.

51. Whilst the Tribunal is sympathetic to the situation in which Mr Gardner was placed in the aftermath of events in January 2014, it is not possible to characterise those facts as "exceptional circumstances" for the purposes of section 74(4).

52. In considering this issue, we remind ourselves that the Respondent is not Mr Gardner personally. He and his late wife elected to employ the device of a corporate vehicle to hold the Property. Whilst the Tribunal is extremely sympathetic to the difficulties that the loss of his wife has caused Mr Gardner, and the resulting administrative issues with which he has struggled, it is the company that is the appropriate person against whom a rent repayment order is sought. Further, Mr Watkins' evidence is that he wrote to the Respondent on three occasions and telephoned twice before the Licence expired. There were also repeated attempts to engage with the Respondent and Mr Gardner after the Licence expired but it was not until a year later that an application to renew the HMO licence was received. There were repeated and ample opportunities for Mr Gardner to engage with the issues relating to the Property even if he had been wholly ignorant of the requirements of the Act at the time when his late wife assumed responsibility for the Property.

53. In truth, there was no adequate explanation for the failure to engage with the Applicant at all prior to the expiry of the Licence.

54. Turning to Mr Gardner's second argument, we would make the general point that the cumulative effect of fines for not complying with the terms of the Act, legal costs incurred in prior court proceedings concerning the section 72 offence(s) and the costs of, or associated with, obtaining an HMO licence and putting the Property into repair cannot, in and of themselves, amount to exceptional circumstances. On the contrary, those are expenses and costs

that will not be unusual. It is in the nature of practically every application in which section 74(2) is engaged that the respondent will have already incurred costs and fines.

55. What was unusual here, was that each of Mr Gardner and the Respondent had been the subject of two prosecutions. This meant that Mr Gardner directly, and indirectly through the Respondent, has been fined four times for similar ongoing breaches in connection with the Property. In our view, however, that is not an "exceptional circumstance" for the purposes of the Act. Rather, it is the unfortunate consequence of Mr Gardner's admitted failure to fully engage with the local authority or to make any application for a new HMO licence for around one year.

56. The level of the fines and the financial burden that they impose does, though, raise a separate question. Namely, whether the added imposition of a rent repayment order will have an effect on the Respondent which gives rise to any exceptional circumstances. Put another way, given the level of fines that have been directed to the Respondent and its sole shareholder and director, would the effect of an added requirement to repay £5,257.31 be enough to engage section 74(4)?

57. We have already noted that the Respondent's assets comprise the subject Property and numbers 328-330 Chepstow Road, that both properties are mortgaged and that Mr Gardner indicated that there is little equity in either. However, corroborative evidence as to the level of equity was not provided and there was also no suggestion that the Respondent would be unable to meet any liability arising under a rent repayment order.

58. This Tribunal has, in the circumstances, carefully considered the effect of the multiple fines upon both Mr Gardner and the Respondent but has concluded that the levels of debt resulting from the fines imposed upon the Respondent, and their effects upon it, are not factors which in this case can properly be characterised as exceptional circumstances. Whilst a liability for a further £5,257.31 is unwelcome and may be regarded by Mr Gardner as an unfair additional penalty, it equates to around two and a half months of gross rental yield for the entire property and there was no adequate evidence to suggest that the Respondent would be unable to meet that liability or that the burden or consequences of the liability would be so great as to amount to an exceptional circumstance.

59. The effect of the foregoing is that this Tribunal has no jurisdiction to reduce the amount payable under a rent repayment order by reason of the mandatory terms of section 74(2). As a result, the order that must be made is that the Respondent shall pay to the Applicant the sum of £5,257.31.

60. In the circumstances, we accordingly grant the Applicant's application.

Order

In accordance with sections 73 and 74 of the Housing Act 2004 the Residential Property Tribunal hereby makes a rent repayment order requiring the Respondent to pay to the Applicant the sum of £5,257.31 being a sum equal to the housing benefit paid in relation to the subject property for the period 5 December 2015 to 4 October 2016.

DATED this 14th day of July 2017

CHAIRMAN