FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/HMF/2022/0287**
HMCTS code (paper, video, audio)	**:**	**Face -to- face Hearing**
Property	**:**	**16B, Lampard Grove, London N16 6UZ**
Applicant	**:**	**Mr. Isaac Leibowitz**
Representative	**:**	**Not represented**
Respondents	**:**	**(1) Woo and Co. Ltd.** **(2) Mr. George Woo**
Representative	**:**	**Not represented**
Type of Application	**:**	**Application for a rent repayment order by tenant**
Tribunal	**:**	**Tribunal Judge S.J. Walker** **Tribunal Member S. Wheeler MCIEH CEnvH**
Date and Venue of Hearing	**:**	**15 June 2023 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**30 June 2023**

DECISION

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(1) The Tribunal makes a Rent Repayment Order under section 43 of the Housing and Planning Act 2016 requiring the First Respondent, Woo & Co. Ltd., to pay the Applicant, Mr. Isaac Leibowitz, the sum of £2,773.98.

(2) The Application against the Second Respondent is dismissed.

(3) Pursuant to rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal orders that the First Respondent is to re-imburse the fee of £300 paid by the Applicant in bringing this application. Payment is to be made within 28 days.

Reasons

The Application

1. The Applicant seeks a rent repayment order pursuant to sections 43 and 44 of the Housing and Planning Act 2016 ("the Act") for a period beginning on 16 March 2021 and ending on 15 March 2022.

2. The application was made on 11 December 2022, so is in time, and on the face of it alleges that the Respondents have committed an offence under section 72(1) of the Housing Act 2004 ("the 2004 Act") – having control of or managing an HMO which is required to be licensed under Part 2 of the Housing Act 2004, but which is not so licensed.

3. Directions were issued by the Tribunal on 19 January 2023. They required the parties to submit bundles of documents for the hearing. The Applicant produced a bundle comprising 41 pages. Page references in what follows are to that bundle. Neither Respondent produced any documents prior to the hearing, but, at the hearing Mr. Woo put forward a single page letter written by Ms. Lilly Lai.

The Hearing

4. The Applicant and the Second Respondent both attended the hearing. The First Respondent was represented by Mr. Woo and their office manager Mr. Damien was also in attendance.

Matters of Clarification

5. At the outset of the hearing the Tribunal clarified a number of matters with the parties which were unclear from the documents provided.

6. Although the application form produced by the Applicant stated that the offence that was alleged to have been committed by the Respondents was one contrary to section 72 of the 2004 Act, and this was what was stated in the directions, the grounds for making the application set out in the application form alleged that the property in question was subject to selective licensing and did not have such a licence. This suggested that what was really being alleged was an offence contrary to section 95(1) of the 2004 Act.

7. The Tribunal raised this with the Applicant, who confirmed that he in fact intended to base his claim on section 95 not section 72. Mr. Woo made it clear that he did not object to the hearing proceeding on that basis. The Tribunal took the view that it was clear from a close reading

of the application that this was what had been intended at the outset and that the reference to section 72 should be treated simply as an error. It therefore proceeded to consider whether an offence under section 95(1) had been committed.

8. Another area of uncertainty was the identity of the Applicant. On the application form the Applicant is stated to be Mr. Isaac Leibowitz of Euroshield Enterprises Ltd. In the documents in the bundle there are references to both Euroshield Enterprises and Euroshield Enterprises Ltd. The directions state that the Applicant is Euroshield Enterprises Ltd.

9. When asked about this Mr. Leibowitz said that there was a limited company called Euroshield Enterprises Ltd., for whom he worked, but that he also acted personally using the name Euroshield Enterprises. He stated that this application was made by him personally trading as Euroshield Enterprises and that the limited company was not involved as a party to the leases under which the property in question was occupied.

10. The Tribunal sought the views of Mr. Woo, who was content with the hearing proceeding on the basis that the correct applicant was Mr. Leibowitz personally. Given that the application itself refers to Mr. Leibowitz but does not refer to the limited company, and in the absence of objection, the Tribunal was content to proceed on that basis.

11. Finally, the Tribunal considered whether Mr. Woo should be permitted to rely on the letter he had provided from Ms. Lai referred to above, despite its not being provided until the day of the hearing. The Applicant did not object to its inclusion and so the Tribunal took this into account.

The Legal Background

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

13. The Tribunal may make a rent repayment order when a landlord has committed one or more of a number of offences listed in section 40(3) of the Act. These include an offence under section 95(1) of the 2004 Act. Such an offence is committed if a person has control or management of a house which is required to be licensed under the selective licensing provisions of Part 3 of the Housing Act 2004 but which is not so licensed. Part 3 of the Housing Act 2004 allows local housing authorities to designate areas as being subject to selective licensing requirements.

14. Section 95(3)(b) provides a statutory defence to proceedings for an offence under section 95(1). This defence applies where an application for a licence has been duly made and is still effective.

15. An offence under section 95(1) can only be committed by a person who has control of or manages a house. The meaning of these terms is set out in section 263 of the 2004 Act as follows;

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

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

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

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

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

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

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

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

16. It is a defence to a charge of an offence under section 95(1) of the 2004 Act that a person had a reasonable excuse for committing it.

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

18. By virtue of the decision of the Supreme Court in the case of Rakusen -v- Jepsen and others [2023] UKSC 9 an order may only be made against the immediate landlord of a tenant.

19. By section 44(2) of the Act the amount ordered to be paid under a rent repayment order must relate to rent paid in a period during which the landlord was committing the offence, subject to a maximum of 12 months. By section 44(3) the amount that a landlord may be required to repay must not exceed the total rent paid in respect of that period and any relevant award of Universal Credit ("UC") paid in respect of the rent under the tenancy must be deducted.

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

Findings of Fact

21. There was, in reality, no factual dispute between the parties in this case. In the course of the hearing the Respondents made no challenge to the factual basis of the Appellant's case. The Tribunal was, therefore, satisfied of the following facts.

22. The property in question is, in fact, owned by Ms. Lai (page 33), and it is situated in the Cazenove ward of the London Borough of Hackney.

23. On 10 May 2018 the London Borough of Hackney made a designation under section 80 of the 2004 Act which applied to the whole of the Cazenove ward and under which selective licences would be required in order to let any house in that area. The designation came into force on 1 October 2018 and is effective until 30 September 2023 (page 26). It was accepted by Mr. Woo, and confirmed in the letter from Ms. Lai, that no licence had been obtained or applied for during the period in question. It is clear from the Applicant's own statement, the letter from Ms. Lai, and from what Mr. Woo informed the Tribunal, that Mr. Leibowitz had been negotiating with Ms. Lai for the purchase of the property during the period in question. Those negotiations were ultimately successful, and an application was made for a licence on 15 March 2022.

24. During the period for which an order was sought there were two distinct tenancy agreements in operation. Firstly, there was an assured shorthold tenancy agreement which commenced on 22 September 2019 and was for a term certain of 24 months, expiring on 21 September 2021 (page 12). Secondly there was a new assured shorthold tenancy agreement which began on 22 September 2021 for a term certain of 1 year less 1 day (page 13).

25. The rent payable under both tenancies was £900 per month. The Applicant's case was that this rent was paid mainly by means of bank payments to the First Respondent of £860 per month (page 34), and that the balance of £40 per month was paid in a lump sum on 15 March 2022 (page 35). Mr. Woo accepted that the rent had been paid in this way. The terms of the tenancy agreements were such that the cost of utilities was not included as part of the rent.

Has an Offence Been Committed?

26. On the basis of the findings set out above the Tribunal was satisfied that throughout the period in question the property was required to have a selective licence and that it did not have one. It follows that any person who falls within the definition of either a person having control of the property or a person managing it – as set out above – was committing an offence.

27. At this point it becomes necessary to consider the two distinct tenancy agreements. The first, which expired on 21 September 2021 is stated to be made between Woo & Co. Ltd, as landlord, and Mr. Isaac Leibowitz of Euroshield Enterprise Ltd. as tenant (page 12). The second tenancy, which commenced on 22 September 2021, is stated to be made by Ms.

Lilly Lai, "*C/o Woo & Co. Ltd*" as landlord and Euroshield Enterprises, as tenant.

28. The Tribunal considered each Respondent separately. In the case of Woo & Co. Ltd. the Tribunal was satisfied that the rent was being paid to them. This is clear from the bank statements provided by Mr. Leibowitz. This was either a rack rent, or, if not, had a rack rent in fact been charged it would still have been received by them. With regard to the first tenancy agreement, it would appear that the rent was being paid to them in their own right, as they are named as the landlord, and in respect of the second tenancy they were receiving rent as an agent for Ms. Lai. In either case they fall clearly within the definition of a person having control of the premises.

29. Although it was not expressly raised by the First Respondent, the Tribunal nevertheless bore in mind its obligation to consider whether or not a defence of reasonable excuse applied in this case. In its view it did not. Indeed Mr. Woo, who is employed by the First Respondent, stated that he knew that a selective licensing designation was in place but that no application had been made for a licence because it was hoped that the property would be sold to Mr. Leibowitz, thereby removing the need for a licence.

30. It follows therefore, that the Tribunal was satisfied that throughout the period claimed the First Respondent was guilty of an offence contrary to section 95(1) of the 2004 Act.

31. In the case of the Second Respondent, Mr. Woo, however, the Tribunal was not so satisfied. There was insufficient evidence to show that Mr. Woo ever received rent in his personal capacity at all rather than solely as an officer of Woo & Co. Ltd. Even the cash payments are stated in the final account to have been paid to the landlord (page 35), and Mr. Woo is not personally named as the landlord. It follows that the Tribunal was not satisfied that Mr. Woo was a person in control of the premises.

32. There was also no evidence that Mr. Woo had any proprietary interest in the property, therefore he could not be regarded as an owner of it, and so he cannot be a person managing the property.

33. It follows that the Tribunal was not satisfied that the Second Respondent had committed the offence alleged.

Jurisdiction to Make an Order

34. The Tribunal then went on to consider whether or not, in the light of the case of Rakusen, it had jurisdiction to make an order under section 43 of the Act against the First Respondent. This required considering whether or not Woo & Co. Ltd. were the Applicant's immediate landlord.

35. In determining this question, the Tribunal needed to look no further than the tenancy agreements. As already explained, the first such agreement clearly states that the landlord is Woo & Co. Ltd. This was sufficient for

the Tribunal to conclude that Woo & Co. Ltd were the immediate landlord up until 21 September 2021. The fact that there was no evidence that Woo & Co. Ltd had any proprietary interest in the property is immaterial. As is made clear in the case of Bruton -v- London & Quadrant [2000] 1 AC 406, the relationship of landlord and tenant can exist when a person who does not have a proprietary interest in a property nevertheless purports to grant a tenancy of it. The Tribunal, therefore, had jurisdiction to make an order against the First Respondent for the period from 16 March 2021 to 21 September 2021 inclusive.

36. However, the second agreement is very different. In that case the landlord is very clearly stated to be "*Ms. Lilly Lai (hereinafter called 'the landlord)*", whose address is given as care of Woo & Co. Ltd. In the Tribunal's view the immediate landlord in respect of this tenancy was Ms. Lai, not Woo & Co. Ltd. It follows that, in the light of the Rakusen case, the Tribunal had no jurisdiction to make an order against the First Respondent for any period after 21 September 2021.

37. For the sake of completeness, even if the Tribunal were wrong to conclude that Mr. Woo was not guilty of committing an offence under section 95, there was insufficient evidence to show that he was the Applicant's immediate landlord – he is not named personally in the tenancy agreements – and so in any event no order could be made against him. In addition, the case of Kaszowska -v- White [2022] UKUT 11 (LC) makes it clear that an order cannot be made against a director of a company landlord.

Amount of Order

38. The Tribunal therefore went on to consider the amount, if any, which it should order the First Respondent to pay. In doing this it had regard to the approach recommended by UT Judge Cooke in the decision of Acheampong -v- Roman and others [2022] UKUT 239 (LC) @ para 20. The first step is to ascertain the whole of the rent for the relevant period.

Rent

39. The agreed rent was £900 per calendar month, which equates to £29.59 per day. The period for which an order was sought commenced on 16 March 2021 and ended on 21 September 2021. That amounts to 6 months and 5 days. The rent for 6 months is £5,400 and that for the extra 5 days pro-rata is 5 x £29.59 = £147.95, making the total rent paid in the relevant period £5,547.95.

40. No deductions are required for utilities, as the rent did not include them. Therefore, the total maximum award was £5,547.95.

Seriousness of Offence

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

proportion of the rent was a fair reflection of the seriousness of the offence.

42. The offence in question is one contrary to section 95(1) of the 2004 Act. This is, when compared with offences such as unlawful eviction, a more minor offence. In the view of the Tribunal this would merit a reduction of 25% from the total maximum award.

43. In addition, this was also very much at the lower end of the scale for offences involving a failure to licence. The only aggravating feature is the fact that Woo & Co. are in the business of letting property and were aware that a licence needed to be obtained. However, the Tribunal accepted that, whilst not an excuse, the fact that they were hoping to agree a sale of the property – which in fact finally took place – provides a small degree of mitigation.

44. More importantly in the view of the Tribunal is the fact that, unlike many cases of unlicensed properties, there was absolutely no evidence of any deficiencies in the property and, more importantly, there was no evidence that any of the occupiers of the property were at any kind of risk.

45. Taking this into account, the Tribunal decided that a further reduction of 25% from the maximum amount was appropriate. The Tribunal therefore decided that, once the relatively minor nature of the offence was taken into account, the appropriate overall reduction from the maximum amount was 50%.

Section 44(4)

46. The Tribunal then considered whether any decrease – or increase – was appropriate by virtue of the factors set out in section 44(4) of the Act. There was no suggestion that there had been any bad conduct by either party, and there was no evidence about the First Respondent's financial circumstances. There was no evidence of the commission of any other offences by the First Respondent.

47. In the view of the Tribunal, in the light of this no further adjustment in the amount to be awarded was required in either direction.

48. The Tribunal therefore decided to make a rent repayment against the First Respondent for the sum of £5,547.95 x 50% = £2,773.98

49. For the reasons given above, the Tribunal dismissed the application against the Second Respondent, Mr. Woo.

50. The Tribunal was satisfied that, given the Applicant's success, it was just and equitable to make an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 requiring the First Respondent to re-imburse the Applicant with the hearing fee of £300.

51. There were no other applications before the Tribunal.

Name:	Tribunal Judge S.J. Walker	**Date:**	30 June 2023

ANNEX - RIGHTS OF APPEAL

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

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

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

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

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

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

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

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

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

	Act	section	general description of offence
1	Criminal Law Act 1977	section 6(1)	violence for securing entry
2	Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	section 30(1)	failure to comply with improvement notice
4		section 32(1)	failure to comply with prohibition order etc
5		section 72(1)	control or management of unlicensed HMO
6		section 95(1)	control or management of unlicensed house
7	This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

Section 41 Application for rent repayment order

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

(2) A tenant may apply for a rent repayment order only if —

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if—

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

Section 43 Making of rent repayment order

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

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

(3) The amount of a rent repayment order under this section is to be determined in accordance with—

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

Section 44 Amount of order: tenants

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

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

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed—

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account—

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord, and

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

Section 52 Interpretation of Chapter

(1) In this Chapter—

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

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

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

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

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