FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/HMF/2023/0008**
Property	**:**	**4 Florin Court, 8 Dock Street, London E1 8JR**
Applicant	**:**	**Jose Diego Celsi Gonzalez**
Representative	**:**	**Ms Hoxha, agent for Represent Law Ltd**
Respondent	**:**	**WD Rooms London Ltd/Capital Lets Ltd**
Representative	**:**	**Mr Sanchez, director.**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mrs L Crane MCIEH**
Date and venue of Hearing	**:**	**7 July 2023** **10 Alfred Place**
Date of Decision	**:**	**30 August 2023**

DECISION

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Order

The Tribunal makes a rent repayment order against the Respondent to the Applicant in the sum of £2,860, to be paid within 28 days.

The application

1. On 28 December 2022, the Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for Rent Repayment Orders ("RROs") under Part 2, Chapter 4 of the Housing and Planning Act 2016. Directions were given on 24 February 2023.

2. In accordance with the directions, we were provided with an Applicant's bundle of 62 pages. Shortly before the hearing, we also received from the Applicant a document described as a skeleton argument, but to which was appended further documentary evidence. The Respondent did not provided any material, nor responded to communications from the Tribunal, until the day before the hearing, when, having instructed solicitors, two witness statements were sent to Tribunal office. To one was appended a number of pages of documentary evidence.

The hearing

Introductory

3. The Applicant was represented by Ms Hoxha, agent for Represent Law. Mr Sanchez represented the Respondent. The Respondent had been called WD Rooms London Ltd at the relevant time, but has since changed its name to Capital Lets Ltd. We refer to it as WD.

4. The property is a two bedroom flat, the sitting room of which has been converted into a further bedroom. During the relevant period, the Applicant occupied the converted bedroom, the others being occupied by a named couple in one and a single person in the other. There was no issue as to occupation.

5. The Applicant occupied the property from 29 October 2021 to 10 April 2022.

Preliminary matters

6. We dealt with the following matters as preliminaries, before hearing any evidence:

(i) The admission of late evidence by both parties;

(ii) The identity of the proper Respondent;

(iii) The location of the property, and thus the nature of the licencing obligation.

7. Late evidence: Both parties provided late evidence (see paragraph 2# above). While the lateness, particularly that in respect of the Respondent, was egregious, we nonetheless concluded that it would assist the Tribunal if the evidence were to be admitted. As to the admission of the Respondent's evidence, the Applicant was not prejudiced by the reception of the Respondent's evidence – indeed, he was advantaged by it. Annexed to Mr Sanchez's witness statement was a tenancy agreement between an agent acting (we assume) for the long leaseholder, and Mr Sanchez's company. This was the only evidence tha the Respondent was the Applicant's immediate landlord. We concluded that if we were to admit that evidence, we should also admit the other late evidence provided by the Respondent.

8. Having come to that conclusion in respect of the Respondent's evidence, we did not consider that the Respondent could properly object to the admission of the Applicant's (lesser, somewhat less late) evidence.

9. The proper Respondent: The Applicant initially identified two respondents – WD and the person identified as the holder of the long lease in the property, Kim Ivan Grace. The Respondent's witness statements effectively conceded that it was the immediate landlord, and exhibited to the witness statement was the tenancy agreement referred to above. We accordingly removed Kim Ivan Grace as a respondent.

10. The location of the property and the licensing regime: The original application alleged a breach of a selective licensing scheme and provided evidence of that scheme. A print-off from a commercial website indicated that the property fell into Whitechapel ward, one of the wards identified in the designation as being included in the selective licensing scheme. Evidence was also provided from an official of Tower Hamlets Borough Council that no selective licence had been issued. The offence alleged was, erroneously, that under section 72(1) of the Housing Act 2004 (the 2004 Act), rather than that under section 95(1), the relevant offence in respect of selective licensing under part 3 of the 2004 Act.

11. However, the skeleton argument, and its attachments, showed that the Respondent had applied (in March 2023) for an additional license, and evidence was provided by an official that no additional licence had been

applied for in respect of the relevant period. The same email stated that the property was not in the selective licensing area.

12. The members of the Tribunal were aware that Tower Hamlet had designated an additional licensing scheme that applied to all HMOs (ie not just those covered by the mandatory licensing regime). In advance of the hearing, the Tribunal consulted Tower Hamlets' licensing website, and established that the additional licensing scheme applied to all of the borough, save for those wards covered by the selective licensing scheme. The details of the selective licensing scheme provided in the Applicant's evidence included the statement that the wards specified in the scheme referred to pre-2014 ward boundaries.

13. At the hearing, we explained the facts set out above, and both parties agreed that we should proceed on the basis of them. We shared, via one of the Tribunal's computer monitors, the map on Tower Hamlets' website of the selective scheme areas, and the location given by Google Maps for the property. Assisted by the Google Streetview function, both parties established that the property was just outside the Southern border of the selective licensing area, and that it therefore fell within the additional licensing scheme. Both parties agreed with the location of the property thereby determined, and that it was the additional scheme that applied. We surmise that the original error was a result of the boundary changes in 2014.

14. Accordingly, the appropriate criminal offence was that contrary to section 72(1) of the 2004 Act.

The alleged criminal offence

15. We proceeded on the basis that the section 72(1) offence was that in issue.

16. The Respondent admitted that the property should have been licensed during the relevant period, and that it was not. They relied, however, on the reasonable excuse defence in section 72(5).

17. The Respondent's business model was to rent properties from those with a superior interest, and then let them to individual tenants. They had rented the property from (or through) an agency called Cosmopolitan Properties, for a total rent of £2,100 a month. Cosmopolitan told them that no licence was required, and they accepted the assurance, as coming from a much more experienced agency operating in the field. Accordingly, they did not check themselves whether a license was necessary. Before us, Mr Sanchez said that they now appreciated that that was an mistake, and that the should always make such a check themselves. He pointed out that they had a number of other properties which had been either subject to licences when they rented them, or required licences at that point, and they

maintained or secured licences when that was the case. It was not part of their business model to ignore or evade licensing obligations. The failure to check was, he said, an innocent mistake.

18. Ms Hoxha, for the Applicant, submitted that the Respondent was a professional agency operating a rent-to-rent business model, on a significant scale (we were told by Mr Sanchez that they operated approximately 30 properties in Newham and Tower Hamlets). It was clearly negligent for such a company to not conduct the necessary checks itself.

19. In determining whether the defence is made out, we have regard to the helpful guidance on the reasonable excuse defence provided by the Upper Tribunal in *Marigold v Wells* [2023] UKUT 33 (LC). In that case, the Deputy President draws attention to the tax case of *Perrin v HMRC* [2018] UKUT 156 (TCC) at paragraph [47] and following. At paragraph [48], the Deputy President commended the following approach, quoting *Perrin*:

> "(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question 'was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?'"

20. In this case, the facts that the Respondent relied on for its reasonable excuse was that it was an honestly mistaken in assuming that the assurance by Cosmopolitan was correct. We find as a fact that that is made out – we believe Mr Sanchez's evidence that they genuinely thought that they could rely on the assurance.

21. It is, however at the third stage – and with regard to the discussion of ignorance of the law as a reasonable excuse at paragraph [49] – that we reject the Respondent's submissions.

22. It was not objectively a reasonable excuse for *this* landlord – a professional rent-to-rent company – in *these circumstances* –

including its general knowledge, and application, of the licensing system in respect of other properties – not to undertake a check as to whether the property required to be licensed.

23. Licensing is a key part of the regulatory system in respect of HMOs, and it cannot be reasonable for a professional rent-to-rent operation to accept such an assurance from a counter-party to a tenancy agreement. WD, we accept, was not deliberately seeking to evade its obligations, but it was nonetheless an objectively negligent way of carrying on business not to undertake the necessary check.

24. We find, beyond a reasonable doubt, that the offence contrary to section 72(1) of the 2004 Act was committed by the Respondent.

The amount of the RRO

25. In considering the amount of an RRO, the Tribunal will take the approach set out in *Acheampong v Roman and Others* [2022] UKUT 239 (LC) at paragraph 20:

> "The following approach will ensure consistency with the authorities:
> (a) Ascertain the whole of the rent for the relevant period;
> (b) Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. …
> (c) Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made … and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:
> (d) Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4)."

26. We add that at stage (d), it is also appropriate to consider any other of the circumstances of the case that the Tribunal considers relevant.

27. In respect of the relationship between stages (c) and (d), in *Acheampong* Judge Cooke went on to say at paragraph [21]

> "I would add that step (c) above is part of what is required under section 44(4)(a) [conduct of the parties]. It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a

separate step because it is the matter that has most frequently been overlooked."

28. As to stage (a), by sections 44(2) and (3) of the 2016 Act, the maximum possible RRO is the rent paid during a period of 12 months, minus any universal credit (or Housing Benefit – section 51) paid during that period. It was not contested that the Applicant had not been in receipt of relevant benefits.

29. The Applicant claims an RRO in respect of the period from 29 October 2021 to 10 April 2022. His first submission was that the maximum RRO was £6,512, being the rent for five full months, plus the rent charged for an initial period of less than a full month.

30. Ms Hoxha somewhat tentatively submitted that we should add another month's rent of £1,200 to that total. The Applicant left the property a month earlier than the end date of the agreement. There was a dispute between the parties as to the basis on which he did so. Mr Celsi said that it was agreed that he could do so if he made appropriate efforts to find another tenant, which he did, by, for instance, showing prospective tenants the room and taking photographs for marketing purposes. Mr Sanchez's case was that the agreement was that he should find a tenant, such that they were in place for the last month. There was no documentary evidence one way or the other. The Respondent had retained the Applicant's deposit, which was in the same amount, to cover the Applicant's final month.

31. In respect of the maximum RRO, Ms Hoxha's submission was that, if we agreed with the Respondent's account of the agreement, then the retention of the deposit represented the payment of rent due for the last month (although, on the Applicant's case, no rent was due for that period).

32. Ms Hoxha told us, however, that a claim in respect of the deposit was being made in the County Court, in which it was alleged that the deposit had not been protected. In these circumstances, we do not consider that we should determine the issue as to whether the deposit was retained as rent due or not. To do so would be to potentially partially pre-empt the proceedings in the County Court, which will in any event be in a much better position to come to conclusions, and might even give rise to a risk of double jeopardy for the Respondent. We accordingly decline to do so. It is not, therefore, necessary for us to come to a conclusion as to what the content of the agreement about the last month was, or, indeed, if there was in fact an agreement, rather than a misunderstanding between the parties.

33. As to stage (b) of the process set out in *Acheampong*, it was the Respondent's evidence that gas, electricity and internet bills were paid by the Respondent. Ms Hoxha noted that there was no documentary

evidence that the expenditure was met by the Respondent, or that the figures they gave (in a table compiled to show their slim profit margins on the property) were accurate.

34. We accept the Respondent's figures. We were impressed with Mr Sanchez as a clearly honest and moderate witness, who (repeatedly) admitted the mistakes that he and WD had made. While it would have been better if we had been provided with bills to authenticate the sums provided, we see no reason to disbelieve them.

35. Adding the figures for energy (gas and electricity) and internet access, and dividing the total by three, we arrive at a total figure of £160 which falls to be subtracted from the total, to give a modified total possible RRO of £6,352.

36. In assessing the seriousness starting point under stage (c), there are two axes of seriousness. The first is the seriousness of the offence, compared to the other offences specified in section 41 of the 2004 Act. The offence under section 72(1) is significantly less serious than those in rows 1, 2 and 7 in the table in section 40 of the 2016 Act, and we take that into account. It is also, on the other hand, much the most common offence committed by landlords coming before the Tribunal.

37. We turn to the second axes of seriousness, that is of the offence committed by the Respondents compared to other offences against section 72(1).

38. The Applicant only really raised one issue with the condition of the property, which related to the shower. It was of the old-fashioned type that requires one to use both hot and cold taps on a bath to provide the correct temperature. Mr Celsi's evidence was that it was defective, in that it could not be adjusted to provide water of an appropriate temperature. It remained in a faulty condition for about three months. Mr Sanchez's evidence was that, after the Applicant complained, he had visited the property and established that the shower did, in fact, work. He thought that Mr Celsi was simply not familiar with this type of shower, a suggestion that Mr Celsi rejected. The effect of Mr Sanchez's evidence was that nothing had been done to correct what was, in his view, the proper functioning of the shower.

39. While we are prepared to accept that the shower was sub-optimal, either in design or as a result of a fault, we do not think it amounts to a very substantial flaw.

40. Mr Sanchez gave evidence that, now that an application for a licence had been made (in March 2023), the property had been inspected and there had been no requirement for any alterations. In particular, the fire safety provision, including fire doors, was up to the standard

required for a licence. Ms Hoxha again noted that there was no documentary support for this contention. This is true, but we consider that we have no reason to disbelieve Mr Sanchez.

41. In her submissions in respect of seriousness, Ms Hoxha relied primarily on the professional status of the Respondent, a point we accept. Mr Sanchez did not dispute this, but did note that WD had made an application reasonably soon after the lack of a licence was disclosed by this application. Ms Hoxha argued that, given that the application was made in December (albeit very late in December), applying for a license in March 2023 was not very rapid.

42. Nonetheless, taken as a whole, and compared with the state of many properties seen in the Tribunal in claims for RROs, we consider that this is at the lower end of seriousness of section 72(1) offences.

43. In the light of our findings of fact above, we assess the stage (c) starting point at 45%.

44. In coming to this conclusion, we have considered a range of cases assessing the quantum of the RROs at stages (c) and (d) (albeit some pre-date the staged approach set out in *Acheampong*). We take particular account of the guidance in the following cases, including particularly where the Upper Tribunal has substituted percentage reductions from the maxima: *Acheampong*, *Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8; *Aytan v Moore* [2022] UKUT 27 (LC); *Hallett v Parker* [2022] UKUT 239 (LC); *Hancher v David and Others* [2022] UKUT 277 (LC); *Dowd v Martins and Others* [2022] UKUT 249 (LC); and *Daff v Gyalui* [2023] UKUT 134 (LC).

45. In particular, we considered that *Dowd v Martin* was a useful guide to the proper approach to a breach at the lower end of seriousness of the same offence, albeit one more serious than those in which particular and exceptional circumstances justified a lower still order, such as *Hallett* and *Daff v Gyalui*. In *Dowd v Martin*, a post-*Acheampong* case, the Upper Tribunal (Judge Cooke) came to a figure of 45% at stage (c).

46. By way of a further check, we considered that this case is significantly less serious than *Hancher v David*, in which the offence was characterised as deliberate, and the property itself was described as "basic" and required improvements before it could be licenced. In that (also post-*Acheampong*), Judge Cooke in the Upper Tribunal arrived at a figure of 65% at stage (c).

47. At stage (d), we must consider what effect the matters set out in section 44(4) have on our conclusions so far. Section 44(4) provides that in determining the amount of an RRO, within the maximum, the Tribunal

should have particular regard to the conduct of both parties, and to the financial circumstances of the landlord. We must have particular regard to these matters, but we may also have regard to such us matters as we consider relevant in the circumstances.

48. As Judge Cooke noted in *Acheampong*, there is a close relationship between stages (c) and (d). Both parties made some complaints about the conduct of the other, but in both cases the complaints were mild, and at some remove. Without going into detail about essentially trivial matters, we do not think that the conduct of either party is such as to disturb our conclusion at stage (c).

49. The Respondent claimed that the financial position of WD was poor. Mr Sanchez produced a bank account to support this claim. He also said (but, as Ms Hoxha noted, without documentary evidence) that he and Mr El Mouden, the other person involved in the company, were each paid salaries of £30,000 a year, and that last year the company made a profit of only £6,000. The bank account, Mr Sanchez said, did not have an overdraft allowance. The balances shown in the bank statement show credit balances ranging from about £3,000 to £14,000.

50. Our conclusion as to WD's financial circumstances are that it appears to be a modest concern, but one that is solvent and apparently well run. We do not think that its finances are such as to impact on the amount of the RRO.

51. Accordingly, we make an RRO at 45% of the maximum possible. We have slightly rounded the final figure, shown at the start of this decision.

Reimbursement of Tribunal fees

52. There was no application for reimbursement of the Tribunal application and hearing fees under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. While there is no requirement for an application to be made before the Tribunal may make an order under Rule 13(2), neither do we consider that one should be made automatically, and we see no reason to do so in the absence of an application.

Rights of appeal

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

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

55. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

56. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 30 August 2023

Appendix of Relevant Legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

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

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and 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 to 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

	Act	*section*	*general description of offence*
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).

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.

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a 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 had 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 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).

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 this 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 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,

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