**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER (RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **LON/00BH/HMF/2022/0159** |
| **Property** | **:** | **71a, Poppleton Road, London E11 1LS.** |
| **Applicant** | **:** | **Maria Potocka** |
| **Representative** | **:** | **Ms. K. Balaindra of Safer Renting** |
| **Respondent** | **:** | **Carmen Chu Danying** |
| **Representative** | **:** | **Mr. Xujun Guan** |
| **Type of Application** | **:** | **Application for a rent repayment order by tenants** |
| **Tribunal** | **:** | **Tribunal Judge S.J. Walker**<br>**Mr. S. Wheeler MCIEH, CEnvH** |
| **Date and Venue of Hearing** | **:** | **17 August 2023 – Alfred Place** |
| **Date of Decision** | **:** | **16 October 2023** |

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**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 Respondent to pay the Applicant the sum of £885.**

**(2) The application for an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imbursement by the Respondent of the fees of £300 paid by the Applicant in bringing this application is granted. Payment is to be made within 28 days.**

## Reasons

### The Application

1. The Applicant's original application stated that she sought a rent repayment order pursuant to sections 43 and 44 of the Housing and Planning Act 2016 ("the Act") for the period from March 2021 until February 2022. In her statement of case this was varied to an application for two distinct orders, the first for the period from March 2021 until June 2021 (or, in the alternative for the period from March 2021 until November 2021), and the second for the period from November 2021 until June 2022 (or, in the alternative for the period from February 2022 until May 2022).

2. By the time of the hearing the Applicant had further clarified the periods for which orders were sought as explained at paragraph 3 of the Applicant's response to the Respondent's bundle at page 8 of the Applicant's reply bundle. The orders sought were for the periods from 1 March 2021 until 30 November 2021 and from 1 April 2022 until 30 June 2022 (the dates are not provided at paragraph 3 but can be inferred from paragraph 7 of the response as the periods are said to be of 9 months and 3 months respectively).

3. The application is signed by the applicant and dated 22 July 2022, and in a letter dated 25 July 2022 the Tribunal acknowledged that the application was received on 22 July 2022. That, therefore, is the date on which it was made.

### The Hearing

4. The hearing was attended by the Applicant, who was represented by Ms. Bailandra. The Respondent did not attend, she lives in China, but was represented by Mr Guan who stated that he was a lawyer qualified in China and that he occasionally was asked to deal with issues involving the Respondent's property.

5. The Tribunal had before it various bundles of documents together with a number of additional documents which were provided in the run-up to the hearing. It read and took account of them all. They included the following;
   (a) The Applicant's initial bundle comprising an index and 115 pages (bundle A);
   (b) The Respondent's initial bundle comprising an index and 154 pages (bundle R);
   (c) The Respondent's additional bundle comprising an index and 37 pages (bundle R(2));
   (d) The Applicant's reply bundle comprising two bundles each of 60 un-numbered pages (bundles AR(1) and AR(2));
   (e) A skeleton argument from Mr. Guan which enclosed a witness statement from the Respondent and a copy of a bank statement in the name of the Applicant; and

(f) A letter from the Applicant's representative objecting to the late inclusion of the evidence sent with the skeleton argument.

6. In what follows references to documents in particular bundles will be, where those bundles are paginated, by reference to the printed page numbers. Where the bundles are not paginated they will be by reference to the electronic page number. References will be bear the prefix for each bundle set out above. Thus, for example, page 20 of the Respondent's additional bundle will be page R(2)20.

**The Legal Background**

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

8. 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. An offence is committed under section 72(1) of the 2004 Act if a person has control or management of an HMO which is required to be licensed but is not. By section 61(1) of the 2004 Act every HMO to which Part 2 of that Act applies must be licensed save in prescribed circumstances which do not apply in this case.

9. Section 55 of the 2004 Act explains which HMOs are subject to the terms of Part 2 of that Act. An HMO falls within the scope of Part 2 if it is of a prescribed description (a mandatory licence) or if it is in an area for the time being designated by a local housing authority under section 56 of the 2004 Act as subject to additional licensing, and it falls within any description of HMO specified in that designation (an additional licence).

10. To be an HMO of any description the property must meet the standard test under section 254(2) of the 2004 Act. A building meets the standard test if it;

> "*(a) consists of one or more units of living accommodation not consisting of a self-contained flat or flats;*
> *(b) the living accommodation is occupied by persons who do not form a single household …;*
> *(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it;*
> *(d) their occupation of the living accommodation constitutes the only use of that accommodation;*
> *(e) rents are payable or other consideration is to be provided in respect of at least one of the those persons' occupation of the living accommodation; and*
> *(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.*"

11. By virtue of section 258 of the 2004 Act persons are to be regarded as not forming a single household unless they are all members of the same

family. To be members of the same family they must be related, a couple, or related to the other member of a couple.

12. With regard to additional licensing, there was no dispute that the property was in the London Borough of Waltham Forest and that the whole of that borough was subject to an additional licensing scheme which designated all HMOs other than those subject to mandatory licensing as requiring a licence (see page A41). It follows that under this designation a licence was required if the property was occupied by 3 or more persons in 2 or more households provided that the standard test set out above was met.

13. Another offence in respect of which a rent repayment order may be made is that 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 ("a part 3 house") 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. Again, there was no dispute that the London Borough of Waltham Forest had made a selective licensing designation which commenced on 1 May 2020 and which covered most of the borough, including the property in question (see page A41).

15. An offence under either section 72(1) or 95(1) can only be committed by a person who has control of or manages the property in question. 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 sections 72(1) and 95(1) of the 2004 Act that a person had a reasonable excuse for committing it.

17. In addition, sections 72(4)(b) and 95(3)(b) provide a statutory defence to proceedings for an offence under sections 72(1) and 95(1). This defence applies where an application for a licence has been duly made and is still effective.

18. Paragraph 2(1)(h) of the Selective Licensing of Houses (Specified Exemptions) (England) Order 2006 ("the Order") provides that a tenancy or a licence of a dwelling

> "*under the terms of which the occupier shares any accommodation with the landlord or licensor or a member of the landlord or licensor's family*"

is an exempt tenancy for the purposes of Part 3 of the 2004 Act and in such cases the property does not require a selective licence.

19. By virtue of the decision of the Court of Appeal in the case of Rakusen -v- Jepsen and others [2021] EWCA Civ 1150 an order may only be made against the immediate landlord of a tenant.

20. 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.

21. Section 41(2) of the Act states as follows;

> "*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.*"

22. 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.

23. 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.

## Has an Offence Been Committed?

### The Applicant's Case

24. The Applicant's case is set out at pages AR8 to 11 and in the Applicant's first witness statement (pages A36 to A40) and is as follows.

25. The Applicant originally entered into a tenancy agreement with the Respondent in October 2010 and moved in on 8 November 2010. This agreement was renewed at various times, the most recent being entered into on 20 June 2015 under the terms of which the rent was £365 per month including utilities (see pages A55 to 56). During the period from 1 March 2021 until 30 November 2021 the property was occupied by 4 people, including the Applicant, comprising 3 households, and therefore was required to have an additional licence, which it did not have.

26. At the end of November 2021 the number of occupants at the property reduced to 2 so an additional licence was not required. Although the property would still require a selective licence, it was accepted that on 22 July 2021 the Respondent had applied for a selective licence – as explained at paragraph 15 of the witness statement of Sandra McGrath (AR page 29) and at that time the selective licence application had not been determined and so provided a statutory defence to the Respondent.

27. On 1 April 2022 the local authority refused the Respondent's selective licensing application (see AR(2) page 29). This was on the grounds that the Respondent had informed the authority that the Respondent's husband had moved into the property on 6 February 2022 and that she no longer intended to rent the property.

28. The Applicant's case is that from that date on, until she left the premises, which was on 2 July 2022, the property required a selective licence but did not have one.

### The Respondent's Case

29. The Respondent raises a number of issues in respect of the application.

30. Firstly, issue is taken with the fact that the Applicant was seeking orders for two distinct periods of time. It was argued that she must select one single 12-month period (para 1 at page R14). The Tribunal rejected that assertion. There is nothing in law preventing applications in respect of different offences committed by the same landlord at different times.

31. The Respondent accepted that she had entered into an agreement with the Applicant in June 2015. She argued that that agreement came to an end on 20 May 2021 when the Applicant vacated the property in order to move into another property she had found in Ealing (para 3 at page R15). Although the Applicant in fact returned to the property and remained in occupation until 2 July 2022 the Respondent argued that this was an unlawful occupation without her consent and so the Applicant was not a tenant for the purposes of the Act (para 4(2) at page R16).

32. The Respondent also argued that for the period from 1 April 2022 onwards the property was exempt from the need to have a selective licence because the Respondent's husband was in occupation.

33. During the course of the hearing Mr. Guan also made it clear that the Respondent's case was that on 22 July 2021 she had made an application for an additional licence and, therefore, the statutory defence under section 72(4)(b) of the 2004 Act applied.

**The Additional Licensing Offence**

34. The Respondent did not take issue with the Applicant's case that until November 2021 there were 4 people in occupation of the property. This meant that an additional licence was required.

35. The evidence before the Tribunal showed that on 22 July 2021 the Respondent made at least one licensing application. In her initial expanded statement of reasons, the Applicant accepted that some kind of application had been made. It was suggested that the application was either for an additional licence or a selective licence (see para 5 at page A29). It was accepted that the application that was made had been made on 22 July 2021 (paras 6(b) and 8(b) at pages A29 and 30).

36. In an e-mail dated 22 July 2021 Ms. McGrath stated that the Respondent had logged onto the Council's systems that morning and that she was keeping a close eye to see if an application was submitted (page A44). On 23 July 2021 Katy Osborne from the local authority sent an e-mail to the Respondent which referred to an e-mail the day before and stated that an additional HMO licence application had been made (page R68). On 17 August 2021 Ms. McGrath stated that the Respondent made an application for an additional licence at the end of July 2021 (page A42). Again, on 6 September 2021 there is reference by Ms. Osborne to an additional licence application (page R71).

37. Then, in an e-mail dated 22 February 2022 Ms. McGrath refers to the Respondent's selective licence application (page A50).

38. The Applicant sought to clarify the situation by obtaining a witness statement from Ms. McGrath, which appears at pages AR(1) 26 to 30. At para 15 she states that a selective licence application was submitted on 22 July 2021, and she exhibits what she says is a copy of that application. The exhibit is at pages AR(2) 17 to 23. The application is dated 22 July 2021 (page AR(2) 23). However, in answer to the question "what type of licence are you applying for" the answer is given "mandatory HMO licence" (page AR(2)(19)). The application states that there were 3 people in occupation in 3 households – a household composition which would not require a mandatory licence but would require an additional licence.

39. Mr. Guan's evidence was that a selective licence and an additional licence were applied for at the same time.

40. Taking the evidence as a whole, it was clear to the Tribunal that more than one licensing application was made on 22 July 2021. There was no suggestion that any applications were made after that date. One of the applications was – or was treated as – an application for a selective licence as in due course that application was refused. The Tribunal was satisfied on the balance of probabilities that an application for an additional licence was made on the same day as the selective licence application. This is based on the e-mail sent on the following day by Ms. Osborne and that sent less than a month later by Ms. McGrath, which both clearly state that an additional licence application was made.

41. It follows that the Tribunal was satisfied that the statutory defence under section 72(4)(b) of the 2004 Act applied from 22 July 2021 onwards.

42. This has significant consequences for the Applicant's application for an order in respect of this offence. Section 42(1)(b) of the Act requires an offence to have been committed during the period of 12 months ending on the date of the application. As the application was made on 22 July 2022, in order for the Applicant's application to be in time, the offence must have been committed in the period of 12 months ending on 22 July 2022. That period commences on 23 July 2021. However, by that time the statutory defence applied. It follows, therefore, that the Tribunal has no jurisdiction to make an order in respect of the additional licensing offence because the application is out of time.

**The Selective Licensing Offence**

**1. Lawful Occupation**

43. There was no doubt that the Applicant was in occupation of the premises for the period in question – 1 April 2022 to 30 June 2022. Her case is that she continued to occupy under the terms of the rental agreement which was entered into in 2015. The Respondent's first argument was that she was not there lawfully and so could not be treated as a tenant.

44. The evidence shows that the Respondent was putting pressure on the Applicant to leave the property. In an e-mail dated 19 February 2021 the Respondent states that she requires the Applicant to vacate the property by 1 June 2021 (page R34). However, the next day the Respondent purports to give the Applicant a month's notice to vacate the property (page A66). Then on 22 February 2021 a further e-mail is sent which now seeks possession by 30 June 2021 (page R36). On 9 March 2021 the Applicant – who at the time was trapped in Poland because of Covid restrictions – says that she is investigating alternative accommodation (page R38). At the same time the Respondent's husband provides the Applicant with a landlord's reference.

45. The Applicant accepts that in due course she found a property in Ealing and that she intended to move there. She agreed to move in on 20 May 2021 and ordered a removal van (see para 5 of her witness statement at page AR(1)4). Her case was that when she arrived she found she had been misled by her prospective landlord and so she decided to go back to the property. She did not return the keys and her oral evidence, which

the Tribunal accepted, was that at no point had she removed all her belongings from the property. The Applicant took legal advice from the local authority and on 26 May 2021 she wrote to the Respondent's husband informing him that she had been unable to find another place and passing on the advice she had received (page R48).

46. The Tribunal concluded that the Applicant's tenancy had not come to an end on 20 May 2021 as alleged by the Respondent. At that time the property was occupied by 3 people and required an additional licence, which it did not have. The Respondent therefore could not lawfully bring the tenancy to an end by service of an eviction notice. The Tribunal considered whether the Applicant had surrendered her tenancy and concluded that she had not. There was no formal surrender agreement and the Tribunal was not satisfied that her actions amounted to an unequivocal indication to the landlord that the tenancy was at an end. The keys were never returned and some of the Applicant's possessions remained in the property throughout.

47. The Tribunal also bore in mind that the Respondent continued to accept rent payments from the Applicant from June 2021 – as shown in the schedule at page R19.

48. It follows that the Tribunal was satisfied that the Applicant was a lawful occupier for the period from 1 April to 30 June 2022.

**2. Occupation by Landlord**

49. The Respondent relies on the exemption from the need to have a selective licence conferred by the Order and argues that her husband was in occupation of the property. The evidence about this is as follows.

50. In a witness statement dated 7 March 2023 the Respondent states that her husband was in London from 2 to 17 February 2022 and from 1 to 17 March 2022 (page R21). It was accepted by the Applicant that he stayed at the property at those times. It certainly was not the case that he had moved in on a permanent basis – indeed the Respondent is at pains to deny that this was even suggested, though they did have a long-term plan to return to London (see para 4 of the additional witness statement dated 10 August 2023).

51. The Tribunal concluded that it was not the case that the Respondent's husband had become an occupier of the property in the sense that it was his only or main residence. It concluded that the mere fact that a landlord spends a few weeks staying in a part of the property did not trigger the statutory exemption. Even if it did so, the Respondent's husband did not stay there at any time after 17 March 2022 and so by 1 April 2022 he was no longer in occupation.

52. In any event, the statutory exemption in the Order places emphasis not on who is in occupation but on the terms of the tenancy agreement. The exemption applies when the **terms of the tenancy agreement** are such that the tenant shares occupation with the landlord or a member of

the landlord's family. The Applicant occupied the property under the terms of the 2015 agreement, which says nothing about sharing with the landlord. It has not been suggested that the Applicant agreed to any changes to the terms of that agreement insofar as occupation by the landlord is concerned. What is important is not who was in occupation but what was in the agreement. It follows that in this case the exemption does not apply.

## 3. A Part 3 House?

53. By March 2022 the Applicant was the only occupant of the property and she was living there under the terms of the 2015 agreement. In the course of the hearing it was accepted by Mr. Guan that if the Applicant were living at the property lawfully and the exemption of the Order did not apply a selective licence was required. On this basis the Tribunal was satisfied that at the relevant time the property was a Part 3 house.

## 4. Control or Management

54. It was not disputed that the Applicant paid rent to the Respondent – see page A24. If the rent were a rack rent then it would have been paid to the Respondent.

55. In addition the Respondent is the owner of the property (see page A112) and she was in receipt of rent.

56. It follows that the Respondent was both in control of the property and managing it.

## 5. Reasonable Excuse

57. Although it was not expressly raised by the 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. The Respondent was clearly aware of the need for a licence as an application for a selective licence had been made. Notice of intention to refuse the licence was given on 11 March 2022 when the Respondent informed the local authority that her husband was moving into the property and the tenants were vacating (see the e-mail from Ms. McGrath of 22 February 2022 – page A50) so a licence was not required, and final notice of refusal was sent on 1 April 2022 (see paras 18 and 19 of Ms. McGrath's statement (page AR(1)29). However, he did not in fact move back and the Applicant did not move out. It follows that the Respondent must have been aware that the exemption on which she was seeking to rely did not apply and so she continued to need a licence. Indeed, a further selective licence application was made on 11 November 2022 (see para 20 of the same statement).

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

**Jurisdiction to Make an Order**

59. There was no doubt that the Respondent was the Applicant's immediate landlord – as is made clear in the 2015 agreement (page A55). It follows that the Tribunal has jurisdiction to make an order against her.

**Amount of Order**

60. The Tribunal therefore went on to consider the amount, if any, which it should order the 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

61. Determining the rent payable and paid in this case is not straight forward. The rent under the 2015 agreement was £365 per month. During the Covid pandemic the Applicant reached an agreement with the Respondent to pay a reduced rent of £150 per month and at times to waive the rent altogether. Although the Respondent argues that she was misled into agreeing such a reduction, there is no doubt that such an agreement was made. This is evidenced by the e-mail from the Respondent's husband to Ms. Devoy from the local authority on 2 June 2021 at page R52. He states that the Respondent offered and arranged rent reductions and rent free periods resulting in the rent paid being approximately £2,500 less than the contractual rent.

62. However, by the time of the hearing the Respondent was arguing that these sums were, in fact, rent arrears and should be taken account of. This would be significant as the Tribunal has to consider the period in respect of which rent has been paid.

63. Taking the evidence as a whole, the Tribunal was not satisfied that there were any rent arrears at the beginning of the relevant period. The table produced by the Respondent at page R19 shows a total of £2,800 in underpaid rent for the period from 20 May 2020 to 24 March 2021. The Tribunal was satisfied that this was the amount by which the Respondent had agreed to reduce the rent during Covid in order to assist the Applicant and so was satisfied that there had been no failure to pay the agreed rent.

64. There is no suggestion of any arrears in rent thereafter. It follows that any rent paid by the Applicant during the period in question will be rent paid in respect of that period and should be taken into account when determining the amount of any order.

65. The Applicant's case was that once she became employed, she agreed to pay an increased rent of £420 per month (para 11 of her second statement (page AR(1)6). She says she paid £420 in rent for April and May 2022 and that she paid £400 for June 2022 (para 9 at page AR(1)10). The Respondent accepted that payments of £420 were made on 25 April and 24 May 2022 (page R20). The Tribunal accepted the Applicant's oral evidence that it was agreed that the final payment of

£400 for June 2022 should be deducted from her deposit and that this agreement was made in June 2022. It follows that the total rent paid was £1,240.

Utilities

66. The terms of the Applicant's tenancy agreement were that gas, electricity, water, broadband and TV licence charges were included within the rent (page A55). No documentary evidence was provided by the Respondent in respect of the costs of those services. Following the approach in Acheampong the Tribunal therefore set out to make an informed estimate.

67. In reaching its conclusions the Tribunal bore in mind the following. The property is on the top floor of a two-storey building and is single glazed. The period in question was in the spring / early summer when heating costs will be less. According to the Applicant the property had a combi gas boiler which provided heating and hot water. The heating was on a timer. There was also a gas cooker. There were radiators in all rooms and the heating was set on a timer. In addition to lighting, electricity was used for other normal domestic appliances.

68. On the basis of its own knowledge and experience the Tribunal concluded that the cost of gas and electricity for the property was likely to be in the region of £20 per month. The Tribunal considered that no deductions were appropriate in respect of water or broadband as there was no suggestion that these services were metered and so it was not possible to ascertain what expenditure was dependent on the Applicant's consumption and what was payable in any event.

69. The Tribunal therefore reduced the total maximum amount payable by £60, making a total maximum of £1,240 - £60 = £1,180.

Seriousness of Offence

70. 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.

71. 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.

72. The Tribunal considered the culpability of the Respondent and concluded that this was relatively high. This was not a case of inadvertence. The Respondent knew a licence was required for a property occupied by tenants other than her and her family and had applied for a licence on that basis. That application was refused when she informed the local authority that her husband would be moving in –

which he did not – and that the tenants would be leaving – which the Applicant did not do for several more months.

73. On the other hand. this offence was not at the high end of seriousness as regards the impact on the tenant. There was no suggestion that the Applicant was placed in any danger as a result of the failure to licence and, in due course, a selective licence was in fact granted. There was also no suggestion that the Respondent let any other properties in this country.

74. Taking all these factors together the Tribunal concluded that a reduction of 30% from the total maximum award was appropriate to reflect the seriousness of the offence.

Section 44(4)

75. 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.

76. The Respondent raised a number of issues which she argued amounted to bad conduct on the part of the Applicant. The first of these was the suggestion that she had deceived the Respondent into agreeing to reduce her rent while she was trapped in Poland during Covid. The basis of this argument was that the Applicant had told the Respondent that she could not afford to pay the rent and this was, it was argued, a lie. To substantiate this argument the Respondent relied on one of the Applicant's bank statements which showed that she had a credit balance of over £30,000 and so, it was argued, she could afford to pay the rent.

77. The Tribunal rejected the basis of the Respondent's argument. It was clear that the Applicant invited the Respondent to reduce her rent for a number of reasons, including the fact that she was stuck in Poland and could not make use of the property. Whilst she said that she could not afford to pay the rent when she clearly had the money to do so from her savings, this does not of itself amount to poor conduct. If the question of the Applicant's ability to pay were so central to the Respondent's willingness to forego some of the rent she could have asked for documentary proof of the Applicant's means, but there is no suggestion that she did so.

78. The second assertion of bad behaviour was that the Applicant had asked the Respondent to make a false statement about her rent in a Universal Credit application. The Applicant accepted that she made an application and that in her application she stated that the rent was £500 per month, which was not accurate. However, the evidence does not show that she asked the Respondent to collude in her application. Rather, it is clear that the DWP contacted the Respondent to confirm the correct rent (page RR3). It does, though, appear that the Applicant has indeed sought to mislead the DWP. However, no award of Universal Credit was in fact made, and the matter has little to do with the property or the Applicant's relationship with the Respondent and so the Tribunal attaches little weight to it.

79. The final allegation of poor conduct is that the Applicant behaved badly towards other people at the property. In particular, the Respondent relies on a number of e-mails from their tenant Laida Neto in which she complains that the Applicant has been abusive and intimidating. There is no witness statement from Ms. Neto.

80. The Applicant's response to this allegation is at paragraph 6 of her second witness statement (page AR(1)4) in which she complains of disruptive behaviour by Ms. Neto which made it difficult for her to sleep when she was working night shifts. In the absence of a witness statement from Ms. Neto the Tribunal preferred the Applicant's account.

81. There are some other minor assertions of bad behaviour by the Applicant, such as having a set of master keys and seeking to sublet the property, which are not supported by witness statements and which are rebutted by the Applicant in her second witness statement which again the Tribunal preferred.

82. With regard to the Respondent, the Tribunal accepted that there was no suggestion of any previous convictions for similar offences. However, it was clear that the Respondent had been committing an offence under section 72(1) of the 2004 Act in the period immediately preceding the licensing application in July 2021. Whilst the Tribunal had no jurisdiction to make an order in respect of that offence as the application was out of time, it was still a previous conduct which could be taken into account.

83. With regard to the Respondent's behaviour, the Tribunal accepted that the Respondent had provided assistance to the Applicant in the form of job and landlord references.

84. Although there are some minor complaints about the property in the Applicant's case, nothing of any seriousness is raised and the Tribunal could not identify any instances where the condition of the property was in any sense due to any failure by the landlord to maintain it properly. The Tribunal bore in mind that a landlord is not required to provide a perfect flat at all times but rather is required to respond to problems properly as and when notified of them.

85. The Tribunal accepted that the Respondent had displayed good conduct when agreeing to reduce and/or waive the rent to take account of the Applicant's personal circumstances. However, that conduct needs to be balanced against her subsequent attempts to go back on these concessions and her demands for what she subsequently described as rent arrears.

86. It was also clear to the Tribunal that the Respondent had taken a heavy-handed approach towards the Applicant and had consistently failed to take proper legal proceedings in order to remove her. Whilst the Tribunal accepts that the Respondent engaged in a genuine attempt to

settle her dispute with the Applicant, at the same time the exhibited correspondence shows that the Respondent repeatedly issued demands for possession to be given on different days and at no time was a lawful procedure followed. In addition to the examples already referred to there is, for example, an e-mail dated 11 February 2022 in which she gives notice to quit by 11 March 2022 and demands alleged rent arrears within 7 days (page AR(2)24).

87. Another example of the Respondent putting pressure on the Applicant is shown at page R41. Here the Respondent's husband informs Ms. Neto that he has told the Applicant that he is evaluating the market rent for the rooms and that hers (the Applicant's) will most likely be rented at a much higher price. He asks Ms. Neto to say to the Applicant, if asked, that she too has been told that she can expect her rent to be increased but then assures her that in fact they have no plans to increase Ms. Neto's rent. This clearly suggests an attempt to force out the Applicant by threatening to increase the rent.

88. There was no evidence before the Tribunal as to the Respondent's financial circumstances and certainly nothing to suggest that the Respondent would be unable to pay any amount ordered to be paid.

89. Taking all this together the Tribunal concluded that the amount of the deduction from the maximum amount that could be ordered should be reduced from 30% to 25% and therefore the appropriate award was for 75% of £1,180 = £885.

90. The Applicant also sought an order under rule 13(2) of the Rules for the re-imbursement of the fees paid for bringing the Application. The Tribunal concluded that, given that the Applicant had succeeded in her application, it was just and equitable to make such an order.

| | | | |
|---|---|---|---|
| **Name:** | Tribunal Judge S.J. Walker | **Date:** | 16 October 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.

## Appendix of relevant legislation

## Housing Act 2004

### Section 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.

(2) A person commits an offence if–

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) A person commits an offence if–

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse–

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(7B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

(1) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either–

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(2) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal) has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(3) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

**263 Meaning of "person having control" and "person managing" etc.**

(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.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

## 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.