FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BB/HMF/2023/0318.**
Property	**:**	**10 Harland Heights, 1 Wallis Walk, Becton, London, E16 2XR.**
Applicants	**:**	**Michael Kibala.** **Sophia Capitao.**
Representative	**:**	**Mr Kibala**
Respondent	**:**	**ERG RAW Limited.**
Representative	**:**	**Lisa Blythe, ES Solicitors**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms L Crane MCIEH**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR** **28 August 2024**
Date of Decision	**:**	**28 August 2024**

DECISION

Orders

(1) The Tribunal makes rent repayment orders against the Respondent to f the Applicants together in the sum of £6,500, to be paid within 28 days:

(2) The Tribunal orders under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(2) that the Respondent reimburse the Applicants together the application and hearing fees in respect of this application in the sum of £300.

The application

1. On 30 October 2023, 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 8 March 2024.

The hearing

Introductory

2. Mr Kibala represented himself and the second Applicant, his partner. Ms Blythe, of SE solicitors, represented the Respondent.

3. 10 Harland Heights is a one bedroom flat in a modern purpose built ten storey block of flats. It is part of a wider development including two other blocks, known as Royal Albert, which contains 182 flat altogether.

The alleged criminal offence

4. It was agreed that the Applicants occupied the property from 31 July 2021 to 17 May 2024, and that the Respondent acquired the freehold of Royal Albert, the wider development, on 22 April 2022 .

5. The Applicants allege that the Respondent was guilty of having control of, or managing, an unlicensed house contrary to Housing Act 2004 ("the 2004 Act"), section 95(1). The offence is set out in Housing and Planning Act 2016, section 40(3), as one of the offences which, if committed, allows the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

6. A selective licencing scheme covering the relevant area had been in force from 1 March 2018 to 28 February 2023. A second scheme, also covering the relevant area, came into effect on 1 June 2023, and will

persist for five years. The existence of both schemes was accepted by the Respondent.

7. It was also agreed that the Respondent had made a licence application which was received by the Council on 5 July 2023, and that thus the defence in section 95(3)(a) was made out from that date.

8. The Applicants' case is that the Respondent committed the offence from 22 April 2022 to 28 February 2023, and from 1 June 2023 to 5 July 2023. The Applicants claim an RRO for those two periods.

9. The Respondent argued that it had a reasonable excuse for failing to licence the premises (section 95(4)(a)).

10. Before us, Ms Blythe sought to rely on correspondence that had been provided to the Applicants and the Tribunal on the previous Friday, 23 August 2024. The members of the panel had not been provided with them before the hearing. Mr Kibala objected to us receiving these documents. They were very late, should have been disclosed earlier, and Mr Kibala had had insufficient time to consider them. Ms Blythe explained that they had only come into her hands on the Friday. We concluded that we would not receive the documents. There was no good reason why they had not been disclosed earlier and in accordance with the directions. However, we allowed Ms Blythe some flexibility in referring to their content in making her submissions on reasonable excuse.

11. In respect of the first period, Ms Blythe said that there had been correspondence between the Respondent's managing agents, Courtlands, and the Council in April and July 2022, and again in February 2023, but that a member of staff had then left and the issue was not picked up again. She said there had been difficulties accessing the email account of that member of staff.

12. In respect of the second period, the managing agents contacted the Council in June 2023, asking whether a single application could be made in respect of each block in the development. The Council indicated that a separate application was required for each flat. The Respondent argued that this was, therefor, a large exercise requiring some planning. As a result, applications for licences did not begin until 5 July 2023. The process of making all the applications took until 17 July.

13. Essentially, Ms Blythe submitted, the Respondent had expected the managing agents to deal with matters such as licencing, and they had let the Respondent down. The agents, she said, were an American company. Royal Albert was its first development in the UK, and it dropped the ball.

14. We drew the parties attention to *Aytan v Moore* [2022] UKUT 27 (LC), [2022] HLR 29, paragraph [40]:

> " … a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themself of the licensing requirements without relying upon an agent, for example because the landlord lived abroad."

15. Ms Blythe agreed that she did not have a copy of the management agreement between the managing agents and the Respondent, and she could not speak to the second criterion set out by Judge Cooke, reasonable reliance. As to the third criterion, while the Respondent was a UK company whose business was managing the development, it was part of a larger, international group based in Germany.

16. Mr Kibala submitted, relevantly, that the Respondent owned a large number of flats, and should have acted more professionally in licencing the properties.

17. We reject the defence.

18. The Respondent is a large commercial landlord of private sector rental properties. It is part of an even larger international group. We do not think that, in the light of the approach taken in *Aytan*, it can properly be said to have reasonably relied on its agents. We do not think that it can properly evade its legal responsibilities by engaging the management agents. Mr Kilela was right in saying that such an organisation should manage its affairs, and in particular, its compliance with its legal obligations, more professionally.

19. We accordingly make an RRO.

The amount of the RRO

20. 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)."

21. 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.

22. 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."

23. 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.

24. Both parties agreed the following calculation. The rent throughout the tenancy was £1,225. The first period was 10 months and five days. The second period was one month and four days. The total rent payable during both period was accordingly £13,842.50 (calculating the days by dividing £1,225 by 30).

25. The Applicants had fallen into arrears of a month during the first period. The arrears were paid during the gap between the two schemes. For the purposes of calculating an RRO, rent paid at a time other than the relevant period must be discounted: *Kowalek and Another v Hassanein Ltd* [2022] EWCA Civ 1041, [2022] 1 WLR 4558. Thus one month's rent falls to be deducted.

26. Mr Kibala also told us that during the period from January 2023 to 28 February 2023, he received £2,617.22 in benefits, which must also be deducted.

27. The total rent was accordingly £10,000.28.

28. The tenancy agreement produced by the Applicants provided that the tenants should pay gas, water, electricity and phone charges. Accordingly, no deduction in respect of utilities paid by the landlord fall to be made at stage (b).

29. 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 40 of the 2016 Act. The offence under section 95(1) is significantly less serious than those in rows 1, 2 and 7 in the table in section 40, and we take that into account (see *Ficcara v James* [2021] UKUT 38 (LC), paragraphs [32] and [50]: *Hallet v Parker* [2022] UKUT 239 (LC), paragraph [30]; *Daff v Gyalui* [2023] UKUT 134 (LC), paragraphs [48] to [49] and the discussion in *Newell v Abbott and Okrojeck* [2024] UKUT 181 (LC), paragraphs [34] to [39]).

30. We turn to the seriousness of the offence committed by the Respondents compared to other offences against section 95(1), and under section 72(1), the more frequently encountered licensing offence in relation to houses in multiple occupation, and an offence of the same seriousness, compared to other offences listed in section 40 of the 2016 Act.

31. In this case, neither party made accusations of mis-conduct against the other, and no claim had been, nor could be, made in respect of the Respondents' financial position.

32. The Respondent is a large, and we can reasonably assume, profitable landlord, part of a larger still group. It was aware, through its agents, of the need to licence from effectively the outset of its ownership, in April 2022, but did not apply for a licence until July 2023. We do not think that that can be described as a deliberate failure to licence, in the sense of a landlord operating a business model of not adhering to its legal obligations. It is, however, at best substantially negligent of a landlord of the nature of the Respondent.

33. In assessing the quantum of the RROs at stages (c) and (d), we have taken account of the guidance provided by the Upper Tribunal, including particularly where the Upper Tribunal has substituted percentage reductions in making a redetermination. The key cases are set out in (with respect) a most helpful manner in the course of the re-determination in *Newell v Abbott and Okrojeck* [2024] UKUT 181 (LC)

from paragraph [47] to [57]. We do not repeat that material here, but have been guided by it.

34. Following his discussion of the individual cases, and having noted that the upper end (not the norm) of RRO determination is at 85% or 90% of the total rent paid, the Deputy President said at paragraph [57]

> "Factors which have tended to result in higher penalties include the offence as committed deliberately, or by a commercial landlord or an individual with a larger property portfolio, or were tenants have been exposed to poor or dangerous conditions …".

35. As we have said, we do not think that the Respondent can properly be said (quite) to have deliberately failed to licence, but it certainly falls into the category of commercial landlord, and one with a larger portfolio. We do not think, where there is no evidence or allegation of disrepair or fire safety failures that that alone puts this case into the highest category, but it is significant.

36. This case is, we conclude, rather less serious than *Irvine v Metcalf* [2023] UKUT 283 (LC), which warranted 75%. Failure to licence was not (really) deliberate, and there is no issue of condition. It is, rather, close to *Hancher v David* [2022] UKUT 277 (LC). In that case, there were some (but not at the highest level of seriousness) improvements necessary, but, contrariwise, that is off set in this case by the larger, more commercial nature of the landlord.

37. We accordingly conclude that the right figure is 65%.

Reimbursement of Tribunal fees

38. The Applicant applied for the reimbursement of the application and hearing fees paid by the Applicants under Rule 13(2) of the Rules. In the light of our findings, we allow that application.

Rights of appeal

39. 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.

40. 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.

41. 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.

42. 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:** 28 August 2024

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.