FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AP/HMF/2024/0045**
Property	**:**	**67 Rangemoor Road, London N15 4NA (ground floor flat)**
Applicants	**:**	**(1) Mohammed ANWAR** **(2) Zeba ANWAR**
Respondent	**:**	**Recep GONULALAN**
Type of application	**:**	**Application for a rent repayment order by tenant** Sections 40, 41, 43, & 44 of the Housing and Planning Act 2016
Tribunal members	**:**	**Judge T Cowen** **Mr Apollo Fonka FCIEH CEnvH M.Sc**
Date of hearing	**:**	**9th September 2024**
Date of decision	**:**	**9th September 2024**

DECISION

The Tribunal orders that:

The Respondent is required to make a rent repayment to the Applicants in the sum of **£2,940.00**

REASONS FOR ORDER

The Property

1. The Property is a one-bedroom ground floor flat in Haringey with a back yard.

The Application

2. Section 41 of the Housing and Planning Act 2016 allows a tenant to apply to this Tribunal for a rent repayment order against a person who has committed a relevant offence. The relevant offences are listed in section 40.

3. The Applicants' application was issued on 11 March 2024. It was based on an allegation that the Respondent has committed the offence of having control of or managing an unlicensed house. That would be an offence under section 95(1) of the Housing Act 2004 to which Chapter 4 of the Housing and Planning Act 2016 applies, pursuant to section 40(3) of that Act.

4. The application makes the following allegations:

   4.1. The Respondent granted a tenancy of the ground floor flat of 67 Rangemoor Road ("the Property") to the Applicants on 17 February 2023 for a fixed term of 1 year.

   4.2. The Applicants occupied the Property from 17 February 2023 until 17 September 2023, when they vacated the Property with the agreement of the Respondent.

   4.3. The Applicants paid £1,400 with respect to each month of their occupation: a total of 7 rent payments amounting to £9,800.

   4.4. The Applicants were tenants at the Property during the 12 months leading up to the issue of this application.

   4.5. During that Period, the Property was within an area designated for selective licensing and was a "house" to which the selective licensing designation applied.

   4.6. The Property did not have a selective licence during the entire period of the occupation of the Applicants.

   4.7. The Respondent had control and/or was managing the Property during that period.

5. The claim is for the total sum of **£9,800**, being the total rent paid by the Applicants at **£1,400** per month for the period of their occupation.

The Hearing

6. The matter was heard at a face-to-face oral hearing. The Applicants represented themselves at the hearing. They gave evidence and made submissions. They had also prepared, file and served on the Respondent a bundle as directed by the Tribunal.

7. The Respondent also represented himself. He did not comply with the Tribunal's directions to prepare a bundle and serve it on the other side. Instead he sent a series of short emails to the Tribunal stating his position and attached some photographs which were impossible to view. He did not send anything to the Applicants. He said that he did not want to send anything to the Applicants (despite being aware of the Tribunal's order requiring him to do so) because they were against him. He said that his property agents in Bristol had advised him not to send anything to the Applicants.

8. The Respondent brought copies of the photographs to the hearing and showed them to the Applicants. The Applicants did not object and had the opportunity to respond to and comment on them. The Respondent also brought a man with him who he said was his witness. There was no witness statement served prior to the hearing, nor did he bring a statement of the man's evidence. The Respondent did not try to call the man to give evidence during the hearing. After we had heard from both parties in full, we stated that the hearing had concluded. At that point, the Respondent asked to call the man to give evidence on his behalf, stating that he was the man who had been sent to the Property every time the Applicants called with a complaint. We refused, because the Respondent had not complied with any directions relating to witness evidence, the directions had stated (at paragraph 11(c)) that the Tribunal could refuse to hear a witness for whom no statement had been served and it would not be fair or just to the Applicants to allow the Respondent to call the witness in those circumstances.

The Alleged HMO Offence - the elements of the offence

9. We must consider whether the Applicants have proved the following matters beyond reasonable doubt:

    9.1. The Property was a house which was required to be licensed during the period of the Applicants' occupation under section 95(1) of the 2004 Act.

    9.2. The Property was not so licensed during that period.

    9.3. The Respondent had control of and/or was managing the Property during that period.

    9.4. The Respondent granted a tenancy of the Property to the Applicants on 17 February 2023.

9.5. The Applicants occupied the Property pursuant to the terms of that tenancy from 17 February 2023 to 17 September 2023.

9.6. The Applicants were therefore tenants at the Property during the 12 Months immediately leading up to the application.

10. We shall consider each of those allegations in turn.

Was the Property a house subject to selective licensing during the period of the Applicants' occupation?

11. The definition of a "house" in section 99 of the 2004 Act includes a part of a building occupied as a separate dwelling. So, although the Property is what one would colloquially call a flat, it is a "house" for the purposes of Part 3 of the 20024 Act (which contains the selective licensing regime).

12. We saw an email from Haringey London Borough Council dated 6 October 2023 which stated that the Property is in an area of selective licensing designation. Publicly available documents show that Haringey designated an area (in which the Property is situated) as being subject to selective licensing requirements for all privately rented lettings to single persons, two persons or single households. The Applicants (who are a family of 2 adults with children) are a single household.

13. The Haringey selective licensing designation is in force from 17 November 2022 for a period of 5 years.

14. The Respondent did not seek to persuade us that the Property was not subject to selective licensing during the period of the Applicants' occupation. He applied for a selective licence for the Property in March 2024 after receiving this Tribunal application.

15. It is therefore clear beyond reasonable doubt that the Property was a house subject to selective licensing while the Applicants were in occupation .

Was the Property licensed?

16. The email of 6 October 2023 from Haringey stated that the Property was not licensed during the period of the Applicants' occupation. The Respondent did not assert that he had a selective licence during that period for the Property. His case was that he did not know that he needed a licence until he received the application form in these proceedings.

17. The Respondent applied for a selective licence after he was served with this application. His application is still being processed and the Property still shows as unlicensed in the publicly available records of Haringey.

18. We are satisfied beyond reasonable doubt that the Respondent had no selective licence for the Property throughout the period of the Applicants' occupation.

Person having control

19. The correct test under the offence alleged under section 95 of the 2004 Act is whether the Respondent is a person controlling or managing the Property within the definition contained in section 263 of the 2004 Act. The relevant parts of that definition are 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) …"

20. "Person managing" is defined by section 263 as follows:

> "(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; …
>
> (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."

21. We have no evidence whether the Respondent is an owner or lessee of the Property. The Respondent therefore cannot come within the definition of a "person managing" the Property.

22. The evidence did however show that the rent reserved under the tenancy agreement was payable to Respondent and the Applicants' bank statements for the relevant period show that rent was actually paid to the Respondent. Using our experience and expertise, we are satisfied that the rent reserved under the tenancy agreement (£1,400) was a rack rent for the purposes of the Act.

23. The Respondent did not deny that he was receiving the rent from Applicants. In fact, he gave evidence that the Applicants had not paid rent to him on time on some occasions.

24. We have therefore decided beyond reasonable doubt that the Respondent is a "person having control" of the Property during the period when the Applicants were in occupation.

Elements of the Alleged Offence

25. It follows from all the above that we have found that all of the elements are in place for a finding that the Respondent is guilty of the offence as alleged. Before deciding whether it actually committed the offence, we need to consider whether there is a defence of reasonable excuse.

Reasonable Excuse

26. Pursuant to section 95(4), it is a defence if the Respondent had a reasonable excuse for having control of the house without a licence.

27. The Upper Tribunal stated in relation to an HMO case (in which the reasonable excuse defence is expressed in a very similar way) in *IR Management Services Limited v Salford City Council* [2020] UKUT 81 at paragraph 40 that "the issue of reasonable excuse is one which may arise on the facts of a particular case without [a respondent] articulating it as a defence (especially where [a respondent] is unrepresented). Tribunals should consider whether any explanation given … amounts to a reasonable excuse whether or not [the respondent] refers to the statutory defence".

28. The particular terms of the reasonable excuse defence in section 72(5) came under scrutiny in *Palmview Estates Limited v Thurrock Council* [2021] EWCA Civ 1871. In that case, the Court of Appeal (at paragraphs 33 and 34) made the following important points:

    28.1. Section 72(1) creates an offence of strict liability. That means that it does not matter whether the Appellant knew that the property they had control of was a property which required to be licensed. That strict liability nature of the offence is part of the statutory context in which the reasonable excuse defence should be construed and applied.

    28.2. The defence of reasonable excuse is not framed in terms of failure to apply for a licence - it is framed expressly in terms of the offence itself. In other words: "a person may have a perfectly reasonable excuse for not applying for a licence which does not (everything else being equal) give that person a reasonable excuse to manage or control those premises as an HMO without that licence." (paragraph 34 of *Palmview*)

29. Is there a defence of reasonable excuse in this case? The Respondent simply stated that he did not know selective licensing was required. He said that he knew about HMO licensing, and he was satisfied (correctly) that the Applicants' occupation of the Property did not make it into an HMO. He simply knew nothing about selective licensing.

30. The Respondent did not elaborate on this at all. He did not give any evidence of his efforts to find out about his legal requirements as a landlord. He did not give evidence about how widely known the Haringey selective licensing designation was. He did not suggest that Haringey had failed to publicise the scheme to landowners. We heard no evidence about whether he lets out any other properties in Haringey or elsewhere.

31. The Upper Tribunal gave guidance for considering reasonable excuse defences in the case of *Marigold v Wells* [2023] UKUT 33. The first two parts require the First-tier Tribunal to establish (1) what facts the Respondent asserts as giving rise to reasonable excuse and (2) whether those facts are proven. In this case, no such facts are alleged beyond the simple statement that the Respondent did not know about selective licensing. The third element of the guidance in *Marigold* reads as follows:

> (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?"

32. We are also encouraged to consider the fact that some requirements of the law (such as whether a selective licensing scheme is in force) are less well known than others. Nevertheless, that does not mean that a Respondent's stated ignorance about selective licensing will always amount to a reasonable excuse.

33. In *Newell v Abbott* [2024] UKUT 181, the Upper Tribunal approved a decision of the FtT that: "It was incumbent on landlords to familiarise themselves with the legal requirements to which they were subject". That was a case in which the landlord positively asserted that he had made (albeit inadequate) efforts to find out. In the present case, the Respondent did not give evidence of any attempts to find out about licensing or other requirements.

34. The Respondent gave evidence that he lives in Bristol (and did so during the period of the Applicants' occupation of the Property. In our judgment, that increases on him the obligation to make himself aware of local requirements in Haringey. Because he lives so far away from the Property, he would have known that he could not rely on having local Haringey knowledge and that should have encouraged him to have made extra efforts to find out for himself.

35. The Respondent also gave evidence that he used property agents, Property Outlet, in Bristol to deal with aspects of this tenancy. Their name is mentioned on the rent deposit receipt dated from the first day of the Applicants' tenancy and we know that they handled the deposit and placed it in the Deposit Protection Scheme. There was no evidence whether he discussed licensing or other legal requirements, but we would expect it to be less objectively reasonable for a landlord using agents to be completely unaware of at least the need to check for licensing requirements.

36. Finally, if we were to find a reasonable excuse in this case, it would amount to a finding that, for this landlord, simply sitting back and doing nothing to inform himself would be objectively reasonable. We have no reason to make such a finding.

37. For all those reasons, we have decided that there is not a reasonable excuse under section 95 in our judgment. We therefore reject the defence of reasonable excuse.

The Alleged HMO Offence: Conclusion

38. It follows that the Respondent committed the offence as alleged under section 95 of the Housing Act 2004 during the whole of the period of the Applicants' occupation, which was within the period of 12 Months immediately before the date of this application. We so find beyond reasonable doubt.

Rent Repayment Order – whether to make an order

39. As a result of all of the above, the Tribunal may make a rent repayment order in this case (see section 43 of the 2016 Act).

Rent repayment order – amount of the order

40. The steps to be taken by the Tribunal in assessing the amount of the rent repayment order to be paid under section 44 of the 2016 Act was recently set out by the Upper Tribunal in *Acheampong v Roman* [2022] UKUT 239 (LC) at paragraph 20 of the judgment as follows:

> "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. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.

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 whose relative seriousness can be seen from the relevant maximum sentences on conviction) 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)."

We shall go through each of those steps as follows.

(a) Ascertain the whole of the rent

41. The amount stated to be payable as rent in the tenancy agreement in this case is the sum of £1,400 per month. The Applicants occupied the Property for 7 months out of the 12-month fixed term and claim that they made 7 monthly payments during that period. It is common ground that the Respondent did not require the Applicants to occupy for the full term or to pay the rent for the remaining 5 months of the term (which he may have been entitled to do).

42. The Applicants provided bank statements and banking app remittance screen shots showing the following payments:

Date due	Date paid	Amount
17.03.2023	21.03.2023	£1,400
17.04.2023	27.04.2023	£1,400
17.05.2023	15.06.2023	£1,400
17.06.2023	07.07.2023	£1,400
17.07.2023	17.07.2023	£1,400

17.08.2023	05.09.2023	£1,400
TOTAL		**£8,400**

43. There were no bank records showing the payment due on 17.02.2023 for the first months' rent. The Applicants told us at the hearing that they had paid the first months' rent on 15 February 2023 in cash (which is why it did not show up on their bank records), because they had only just arrived in the UK from Dubai and the money they had brought was in cash.

44. One of the documents which the Respondent brought to the hearing was a used envelope on the back of which he had handwritten the dates and amounts of payments by the Applicants. The dates matched the Applicants' bank records, and the envelope list also included confirmation that he had received £1,400 in respect of rent (on either 17 February or 1 March 2023 – it was not clear) at least partly in cash.

45. We therefore find that the Applicants did pay £1,400 in respect of the first months' rent.

46. That then gives a potential maximum claim of **£9,800** (being £1,400 x 7). That is the amount of the claim in the application.

(b) Subtracting element of utilities from the rent

47. The rent repayment order can relate only to amounts paid as rent. The tenancy agreement in this case at clause 3.2 requires the tenants to pay all utilities to the relevant authorities. The Applicants gave evidence at the hearing that they had done so and that they did not pay the Respondent any element in respect of utilities.

48. There is no evidence of any award of universal credit paid in respect of rent in this case.

49. Therefore, there is nothing to deduct from the claim under this heading.

(c) Ascertain the seriousness of the offence

50. In considering the seriousness of the offence itself, the Upper Tribunal in *Acheampong* gave the following additional guidance at para 21:

> "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."

51. With that approach, we take the following into account (partly informed by the criteria considered in *Hallett v Parker* [2022] UKUT 165) on the seriousness of the offence:

51.1. This offence is not of the most serious type. It is not a case of a landlord exploiting his tenants by deliberately renting out substandard, overcrowded or dangerous accommodation.

51.2. Nevertheless, proper enforcement of licensing requirements against all landlords (even the less bad ones) is necessary to ensure the effectiveness of the licensing system and to deter evasion.

51.3. This was probably the first occasion on which the Respondent let the Property after the selective licensing first came into force on 17 November 2022. The Respondent told us that he had let the Property previously for 2 months with a one or two month void gap before the Applicants moved in. It is therefore likely that the previous tenancy was not subject to selective licensing.

51.4. The Respondent did not take any steps to inform himself of the licensing requirements for the area. We take into account that selective licensing is less well known generally than HMO licensing requirements. But we also take into account that the broad system of regulations for the benefit and safety of tenants cannot work effectively unless landlords make an effort to inform themselves.

51.5. The Respondent applied for a licence as soon as he became aware that one was required.

51.6. The Respondent did not insist on holding the Applicants to the full 12-month term, but he did let the Property to others after September 2023 in further breach of the selective licensing requirements.

(d) Other section 44(4) factors

52. We now need to consider whether to make any additions or deductions to that figure, taking into account all the factors in s44(4). The first of these is conduct.

Conduct

53. We are required by section 44(4)(a) of the 2016 to take account of the conduct of the landlord and the tenants.

54. The Respondent alleged the following poor conduct on the part of the Applicants:

54.1. Failure to keep the Property in repair. The Respondent alleged that the Applicants failed to ventilate the Property properly by failing to open windows to let out steam from the bathroom. As a result, mould grew in the Property which needed to be dealt with upon the Applicants' departure. The Applicants' response to this allegation amounted to their own counter-allegation of bad conduct on the part of the Respondent.

54.2. Rent arrears. The table under paragraph 42 above shows that only one of the 6 rent payments made by bank transfer was on time. The others ranged from a few days late to nearly a whole month late. The Applicants' response at the hearing was that the Second Applicant was a full-time student and the First Applicant was self-employed as a food delivery driver and could only pay when he had had enough work. They also assert that they informed the Respondent when the rent was going to be late. We also, however, heard evidence from the Respondent that the Applicants had showed him a bank statement from which it appeared that the First Applicant had $100,000 in a Dubai bank account. The First Applicant conceded that he had this money in Dubai, but said that he preferred not to transfer that money to the UK because of the exchange rate and other costs. We were not impressed by the Applicants' approach to paying rent. They had committed to paying £1,400 on a certain day every month and at all times they had the necessary funds. It was not good conduct for them to keep the Respondent waiting for his money just because they did not want to incur the costs of dipping into a $100,000 foreign currency fund.

55. The Applicants rely on the following elements of alleged bad conduct on the part of the Respondent (all of which were raised for the first time at the hearing, although this could partially be explained by the fact that the Applicants had had no notice of anything the Respondent was going to say, as discussed above):

55.1. They claim that the Property was very muddy and dirty when the tenancy commenced.

55.2. They claim that the windows in the Property were painted in, preventing them from being opened and that this was the cause of the mould which they therefore blame on the Landlord. They say that the lack of ventilation (which they said was suffocating in the summer) was the main reason why they decided to leave before the end of the fixed term of the tenancy. They also say that it was exacerbated by the fact that the main way to allow steam out of the flat was to open the kitchen door – but the yard which was part of the demised Property was full of dangerous tools belonging to the Respondent which meant that opening the door was dangerous for their children. They also claimed that

leaving the door open encouraged slugs and a local cat to come into the Property. Their claim that all the windows were painted in was somewhat undermined during the course of the hearing when they eventually conceded that the bathroom window did open, but they preferred to keep it shut for privacy.

55.3. They claim that they did not receive a gas safety certificate, an electrical safety certificate or an energy performance certificate from the Respondent at all. The Respondent says that he supplied them with a gas safety certificate, but conceded that he did not have the other certificates at the start of the tenancy at all.

55.4. The Respondent did not supply the Applicants with written confirmation of remittance of their £1,400 deposit to a recognised tenancy deposit scheme. It seems that the Applicants' deposit was eventually placed in the Deposit Protection Scheme by the Respondent's Bristol agents, Property Outlet, but we have no way of knowing when that was done.

55.5. They claim that the Respondent refused to return the deposit to them at the end of the tenancy and in fact demanded that they pay him an additional £400 towards the costs of remedying the mould and condensation issues described above. The Respondent immediately backed down and returned the full deposit as soon as these proceedings were commenced.

56. On the limited evidence we have, we are not in a position to allocate blame for the mould/condensation problem at the Property. Each side's claims have potential merit. That also means that we are not in a position to judge whether the Respondent should have returned the deposit earlier than he did. His return of the deposit in March 2024 may either have been a large concession and act of contrition on his part. Or it may have been long overdue compliance with his obligations. We cannot tell.

57. We are therefore left with the Applicants' unsatisfactory explanation for their persistent rent arrears on the one hand and the Respondent's failure to comply with requirements for certificates and deposit information. We have reached the view that these effectively cancel each other out, meaning that conduct issues have no impact either way on the percentage to be assessed.

(d) Other section 44(4) factors: Landlord's financial circumstances

58. We are required to take into account the landlord's financial circumstances under section 44(4)(b) of the 2016 Act. There is no statement or evidence at all of the financial circumstances of the Respondent.

59. In *Daff v Gyalui* [2023] UKUT 134 (LC) the landlord had stated her income and expenditure and had provided some limited evidence of those items. She gave oral evidence to the First-tier Tribunal, but was not questioned about her financial circumstances. The First-tier Tribunal was criticised by the Upper Tribunal for failing to take a more inquisitorial approach and explore that evidence further during the hearing.

60. In this case:

    60.1. There was no evidence or statement of any kind before the Tribunal about the Respondent's financial circumstances. The evidence was therefore not "incomplete", rather it was entirely absent.

    60.2. There was no material upon which the Tribunal could have exercised an inquisitorial approach without positively inviting the Respondent to give completely fresh evidence at the hearing for which the unrepresented Applicants would have been unprepared. That, in our view, would have been unjust and unfair, contrary to the overriding objective in rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and contrary to the principles of natural justice. So we did not do so.

61. Therefore, in taking account of the landlord's financial circumstances, we have decided that there is nothing to warrant any adjustment to the amount of the rent repayment order under this heading.

(d) Other section 44(4) factors: Previous convictions

62. We have no evidence that the Respondent has been convicted of any offence to which Chapter 4 of the 2016 Act applies, for the purposes of section 44(4)(c) of the 2016 Act.

Amount of rent repayment order: Discussion and Conclusion

63. We have decided in the light of all of the above that the correct level for the rent repayment order would be 30% of the rent.

64. The figure we have arrived at is therefore 30% of £9,800 which amounts to **£2,940** payable by the Respondent to the Applicants.

Dated this 9th day of September 2024

JUDGE TIMOTHY COWEN

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).