In the FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Tribunal Case reference	**:**	**LON/00AG/HMF/2022/0254**
Property	**:**	**105C Fordwych Road, London NW2 3TL**
Applicant	**:**	**Nur Iriani Amirudin; Anna Tyan; Damian Barrous-Dume; Alicia Tarver**
Representative		**Nur Iriani Amirudin**
Respondent	**:**	**Hyeon-Jeong Ro**
Representative		**Aaron Shorr, the Respondent's husband**
Type of application	**:**	**Rent repayment order**
Tribunal Judge	**:**	**Judge Adrian Jack, Tribunal Member Fiona MacLeod MCIEH**
Date of decision	**:**	**11th April 2023**

DECISION

IMPORTANT – COVID 19 ARRANGEMENTS

This matter was determined after a hearing face-to-face.

Whether an offence was committed

1. 105 Forwych Road is a house converted into three flats. By an agreement made 9th August 2022, the landlord rented Flat C to the tenants, all post-graduate students, for a term of twelve months from 1st September 2022 to 31st August 2023. It is common ground between the parties that from the date of the agreement Flat C was a house in multiple occupation ("HMO"). It is also common ground that between 1st August 2022 and 27th October 2022 the HMO was not licensed, as it was required to be by the London Borough of Camden.

2. Section 254 of the Housing Act 2004 defines an HMO (so far as material to the current case) as follows:

> "(1) For the purposes of this Act a building or a part of a building is a 'house in multiple occupation' if—
>
> (a) it meets the conditions in subsection (2) ('the standard test');
>
> (b) it meets the conditions in subsection (3) ('the self-contained flat test');
>
> (c) it meets the conditions in subsection (4) ('the converted building test');
>
> (d) an HMO declaration is in force in respect of it under section 255; or
>
> (e) it is a converted block of flats to which section 257 applies.
>
> (2) A building or a part of a building meets the standard test if—
>
> (a) it 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 (see section 258);
>
> (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 (see section 259);
>
> (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 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.

(3) A part of a building meets the self-contained flat test if—

(a) it consists of a self-contained flat; and

(b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat)."

3. The landlord puts forward a defence that she reasonably believed that the property did not require an HMO licence. She says that she believed that it was only if there were five or more tenants at the property that a licence was required. The burden is on her to prove the defence on balance of probabilities. The landlord gave no explanation for how she came to have this belief. She exhibited no documents which might have led her to hold this belief. We note that the landlord has another property which is an HMO, so we find she is reasonably familiar with the concept of an HMO and would have known where to find information on the concept. In our judgment the landlord has failed to establish her defence on balance of probabilities.

4. Section 40 of the Housing Act 2016 confers power on this Tribunal to make a rent repayment order "where a landlord has committed an offence to which this Chapter applies." The only relevant offence is that in section 72(1) of the Housing Act 2004 (control or management of an unlicensed HMO). Under section 41 tenants can apply for a rent repayment order in respect of housing let to them in breach of, inter alia, section 72(1). By section 43(1) this Tribunal may only make a rent repayment order if it is satisfied beyond reasonable doubt that a landlord has committed a relevant offence, here under section 72(1).

5. We are satisfied beyond reasonable doubt that the landlord was guilty of an offence under section 72(1) between 1st September 2022, when the tenancy began, and 27th October 2022, when the landlord applied for an HMO licence (so that the offence under section 72(1) ceased to be committed: section 72(4)).

Whether to make a rent repayment order

6. It follows that the tenants are entitled to apply for a rent repayment order under section 41 of the Housing and Planning Act 2016. We have a discretion under section 43 as to whether or not to make a rent repayment order, but in our judgment it is appropriate to do so. There was a failure to obtain an HMO licence. As we shall explain, if the landlord had applied for a licence on or before 1st September 2022, the application would have been refused, because there were no gas or electricity certificates. When steps were taken to obtain the certificates, the flat failed the tests and works were required. This is therefore a case in which the landlord's failure to apply for an HMO licence had potential consequences for the tenants' health and welfare. In these circumstances in the exercise of our discretion, we consider it appropriate to make a rent repayment order.

7. As regards the amount of the order, section 44 provides:

> "(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 [in the current case 1st September 2022 to 27th October 2022].
>
> (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."

8. In the current case, no issues have been raised as to the conduct of the tenants or the financial circumstances of the landlord. The landlord has never been convicted of a relevant offence. The sole issue in determining the amount of the rent repayment order is the landlord's conduct. The landlord made no claim for a reduction in the amount of rent subject to the rent repayment order on account of her outgoings on the property.

9. The tenants paid three months' rent totalling £9,600 up-front on about 10th August 2022 plus the deposit of £3,600. In our judgment, a rent repayment order can only be made in respect of the rent due in advance on 1st September 2022 of £3,200 and on 1st October 2022 of £3,200. A rent repayment order cannot be made in respect of the rent due on 1st November 2022 or in respect of the deposit.

The landlord's alleged misconduct

10. So far as the landlord's conduct is concerned, the tenants relied on matters post-dating 27th October 2022. In our judgment as a matter of law, that is not right; it is conduct during the period for which the rent repayment order is made which is relevant. Otherwise, there is a risk of double-counting, for example if the conduct amounts to a tort. For completeness, however, we deal with all the allegations made by the tenants.

11. The tenants complain of harassment. They relied on three messages sent by the landlord to individual tenants. In these messages, the landlord

said that, if the tenants were not happy, they could terminate the lease on giving one month's notice. The messages were not on their face threatening. We agree with the tenants that these messages were inappropriate. However, we do not agree that they amounted to the serious harassment claimed. We had the advantage of seeing and hearing the tenants. They appeared to be robust individuals. We consider that they exaggerated the extent to which the messages caused them distress.

12. The tenants also complained of various inconveniences caused by workmen employed by the landlord failing to turn up at agreed times. As regards the workmen, the landlord arranged for workmen to come to fix problems identified by the tenants. It is right that one workman, Demerius, in particular repeatedly failed to appear. That resulted in the landlord instructing other tradesmen. She made arrangements whereby the tenants could have given the keys to another householder in the house so as to allow access. The tenants refused that offer. We do not need to determine whether their reasons for that refusal were justified or not. In our judgment the landlord acted as best she could. There was also a one-off incident of an electrician failing to sweep up the dust generated by his work. In our judgment there is no misconduct on the landlord's part. We should add that the tenants also exaggerated the consequences of the inconvenience caused by these matters.

13. The tenants complained that a workman doing works on 6th January 2023 returned on 7th January 2023 to finish the works. The landlord, they say, did not give them the requisite 24 hours' notice of the workman's attendance on 7th January. We reject this complaint. The workman needed more time to finish the work on 6th January and asked if he could leave his tools there overnight. We find as a fact that the tenants agreed to this. There is no substance in the complaint.

14. Shortly after the commencement of the lease there was a water-leak from the roof. The freeholder of the house is in fact the London Borough of Camden. It had the responsibility for fixing the leak. The landlord promptly informed Camden of the leak, but it took Camden until January 2023 to fix it (and then only after prodding from Camden's own HMO licensing officer, Mr Pugh). In our judgment the landlord did all she could to have the leak fixed. In our judgment there is no misconduct on the landlord's part.

15. The HMO licence ultimately granted required four matters to be done within three months and one matter within ten months. The five matters were the provision of an automatic fire detection system; the changing of the door locks to the external and the bedroom doors so that they could be opened from the inside without the use of a key; changing the doors of two bedrooms so that they were solid; the provision of a fire blanket; and the installation of more electric plugs. In our judgment, the failure to carry out these works prior to letting the flat does not amount to misconduct.

16. Towards the end of 2022 there was a problem of condensation in the bathroom leading to mould growing. This appears to have been minor and could have been controlled by correct use of the mechanical extractor fan. In any event the mould could be easily brushed off. We reject this complaint.

17. The tenants complain that the landlord communicated with one of them, Ms Tyan, in Korean. We fail to understand this complaint as both women were Korean. Likewise we fail to understand the complaint that the landlord somehow put "cultural pressure" on them when she explained her need to return to Korea as being due to her father's ill-health. The tenants also say that the landlord said one of the reasons she had selected them as tenants was because Ms Tyan was Korean. That may or may not be unlawful discrimination (we make no findings as regards this), but it was discrimination *in favour* of the tenants, not discrimination against them. They can hardly complain about such discrimination.

18. The tenants say the landlord was tardy in lodging their deposit with the DPS. She should have done so within 30 days of 10th August 2022, when the deposit was paid. The landlord started to set up an account on 4th September 2022, but full acceptance of the lodgement of the deposit was only acknowledged by the DPS on 15th September 2022. The only consequence of a late lodging of a deposit is that a landlord cannot serve a notice to terminate an assured shorthold tenancy. In our judgment there is no relevant misconduct by the landlord. She seems to have done her best; there was no prejudice to the tenants.

19. We do, however, find two allegations of misconduct proven. The landlord rented the flat without having obtained a gas certificate and an electricity certificate. This was not just a technical breach. When the landlord sought to obtain certificates, the property failed the tests. It required further work before the property was in a fit state. These works should have been carried out before the property was let. Some, such as the installation of a carbon monoxide detector, could have been done very easily.

The amount of the rent repayment order

20. We turn then to the amount of the rent repayment order. In *Williams v Parmar* [2021] UKUT 0244 (LC), Fancourt J said:

> "51. It seems to me to be implicit in the structure of Chapter 4 of Part 2 of the 2016 Act, and in sections 44 and 46 in particular, that if a landlord has not previously been convicted of a relevant offence, and if their conduct, though serious, is less serious than many other offences of that type, or if the conduct of the tenant is reprehensible in some way, the amount of the RRO may appropriately be less than the maximum amount for an order. Whether that is so and the amount of any reduction will depend on the particular facts of each case. On the other hand, the

> factors identified in para 3.2 of the guidance for local housing authorities are the reasons why the broader regime of RROs was introduced in the 2016 Act and will generally justify an order for repayment of at least a substantial part of the rent. This is what Judge Cooke meant when she said in *Vadamalayan* that the provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act, which included expressly a criterion of reasonableness. If Parliament had intended reasonableness to be the criterion under Chapter 4 of Part 2 of the 2016 Act it would have said so.
>
> 52. In this case, the landlord is, on the evidence, a first offender, with no relevant convictions. That is obviously in her favour. She was, however, a professional landlord who must be taken to have known the requirements for licensing an HMO. The failure to apply for a licence is unexplained in evidence, save that the landlord said that she overlooked it. There is nothing in her financial circumstances or her conduct to justify reducing the amount of the RROs. The landlord only applied for a licence after an environmental health officer had visited and itemised deficiencies of the Property and the absence of a licence. The Property would not have obtained a licence without further substantial works, had the landlord applied for one, and her February 2020 application was in due course refused because the works had not been done. The inference to be drawn is that the landlord wanted to be able to derive rental income from the Property before she was in a position to do the further works that were necessary to enable her to obtain an HMO licence. There were serious deficiencies in the condition of the Property, which affected the comfort of all the tenants, and the undersized bedroom affected Ms Susans particularly."

21. The judge reduced the rent repayment order to 90 per cent of the rent paid in the case of Ms Susans and to 80 per cent in the case of the other tenants.

22. In our judgment the current case is less serious than that in *Williams*. Apart from the absence of the gas and electricity certificates (which is an aggravating feature), the council would have granted an HMO licence. Looking at matters in the round, in our judgment is appropriate to grant a rent repayment order in the sum of £3,200, half the rent payable in the relevant period. (Any difference between the 27 days in October when the offence was committed and the 31 days in respect of which rent was paid is *de minimis*.)

Costs

23. As to costs, the Tribunal has a discretion as to the costs payable to the Tribunal, which comprise a £100 application fee and a £200 hearing fee. As the landlord has lost, those costs should fall on her.

DECISION

(1) The landlord shall pay the tenants the total sum of £3,200 by way of a rent repayment order.
(2) The landlord shall pay the tenants £300 in respect of the costs paid by them to the Tribunal.

Judge Adrian Jack 11th April 2023