FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/HMF/2023/0006**
Property	**:**	**59 Searles Road, London SE1 4YL**
Applicant	**:**	**Chiara Milanesi (A1)** **Emmanuel Paolo Forchione (A2)** **Mareike Rubien (A3)**
Representative	**:**	**David Gyulai -** **Represent Law Ltd**
Respondent	**:**	**Daniel Stratulat (R1)** **Magdalena Mirela Stratulat (R2)**
Representative	**:**	**Daniel Stratulat**
Type of application	**:**	**Application for a rent repayment order by a tenant** **Sections 40,41,43 & 44 of the Housing and Planning Act 2016**
Tribunal member(s)	**:**	**Judge D Brandler** **Mr C Gowman MCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR (remotely)**
Date of hearing	**:**	**16 August 2023**
Date of decision	**:**	**17 August 2023**

DECISION

Decision of the tribunal

(1) The application for a rent repayment order is dismissed. The Applicants have failed to prove beyond a reasonable doubt

that the Respondent committed the offence. The application for costs against the Respondent is dismissed.

The relevant legislative provisions are set out in an Appendix to this decision.

Reasons for the tribunal's decision

Background

1. By an application dated 24/12/2022 Chiara Milanesi ("A1"), Emmanuel Paulo Forchione ("A2") and Mareike Rubien ("A3") ("the applicants") sought a Rent Repayment Order ("RRO") in respect of rent paid to Daniel Stratulat ("R1") under the terms of assured shorthold tenancy ("AST") agreements each of the applicants had with R1. R2 is the joint freeholder of the property but is not named as a landlord on the AST agreements.

2. The application alleges that the Respondents are in breach of mandatory licencing requirements for 59 Searles Road, London SE1 4YL ("the property"). The basis for that assertion is that there are two flats in the property, a ground floor flat which is said to accommodate a family of 4, and a 1st/2nd floor flat which the applicants occupied together with one other person referred to as George. The applicants and George shared kitchen and bathroom facilities located on the 1st floor.

3. The application did not assist the Tribunal with the layout of the property stating at paragraph 3 *"House divided into 2 flats, one on the ground floor with 4 bedrooms and shared kitchen. Upstairs configuration unknown"*.

4. The Grounds of Application submitted that "*at all times the Property was occupied by 5 or more tenants in 2 or more households. Accordingly, the Property was required to be licensed as by Southwark Borough Council ("SBC") under the mandatory HMO licensing scheme"*. The only documentary evidence from the Council is an email dated 05/10/2022, in which the Council are responding to the Applicants' legal representatives. In that email the Council write *"If the property was/is occupied by 8 people who are made up of more than one household it would be required to be licenced. A TEN (Temporary Exemption Notice) has been made in respect of the property but has not yet been assessed" [26].*

5. *The periods of claim and the sums claimed by the applicants in the application form were as follows:*
   - *(i) A1 25/09/21-25/09/22 £6,600*
   - *(ii) A2 25/09/21-25/09/22 £6,600*
   - *(iii) A3 25/06/22-25/09/22 £1,650*

6. The description of the property in the three witness statements produced in the bundle were somewhat contradictory. A1 states at paragraph (4) [29] "*The property has been split up into two flats., one on the ground floor and one upstairs. On our floor there were 4 rooms, 1 kitchen, 1 bathroom with toilet and 1 separate toilet. There was no living room. The rooms didn't have numbers but on our floor I lived in what I called room 1. People always lived in the other rooms. Emmanuel lived in what I call room 2. When Mareike moved in she took room 3. George lived in the room 4 (he still living in the house since we moved out). I don't know who lived upstairs but there were always tenants living there*" [29] (sic)

7. A2 reported in his statement "*59 Searles Road is a 3-floor terraced house. The ground floor is occupied by a family of 4 (parents and 2 children). The 1st and 2nd floor was occupied by me and 3 other flatmates. Our flat had my room, bathroom, kitchen and an utility room with a toilet on the first floor and 3 rooms on the 2nd floor. We shared a bathroom and toilet*" [47] (sic)

8. A3 stated in her witness statement paragraph 4 that "*59 Searles Road is a house with two separate flats. The upstairs flat (our flat) has four bedrooms, one shared bathroom and one shared kitchen. There is no living room*". But at paragraph 5 she states "*I lived at the flat with Chiara Milanesi who is my friend. I also rented the ground floor of the property with two other people that I have no details of apart from their first names*" [91].

9. The respondents have played no part in the proceedings, other than an email to the Applicants' representative dated 09/01/2023; and an email to the Tribunal a few days before the hearing stating that R1 would like to put the hearing off as he will be in Romania at the time of the hearing for health reasons. Although a document was attached, this was not accessible to the Tribunal and despite contact from the Tribunal Clerk in this regard, no legible document was provided. In addition he failed to copy in the Applicants to his emails. No valid application for a postponement was made.

10. Directions were issued on 17/04/2023 and amended on 25/04/2023. The Respondents' deadline to provide a bundle of documents upon which they sought to rely was 16 June 2023.

11. It was on the basis of this background that the hearing listed for 10 a.m. was commenced by remote video connection.

THE HEARING

12. The Tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle provided, enabled the tribunal to proceed with this determination.

13. This was a remote hearing by video. The applicants' provided a bundle of [126] pages. Any reference to that bundle of documents will appear in square brackets and refer to the electronic page number.

14. Each of the Applicants joined remotely by video as did their representative David Gyulai. R1 attempted to join the hearing at 10.42 by telephone. He told the Tribunal clerk he had been trying for some time to join by video but had failed. Some 20 minutes was spent trying to assist him in joining by video, but without success, and the Tribunal allowed him to join the hearing by telephone.

15. The hearing was by that stage half way through A2's oral evidence. A short synopsis of the points made were provided to R1, and it was explained to him that because he had not complied with directions, and had not sought any extension of time to do so, and had provided no evidence, he would not be permitted to adduce evidence at the hearing. He would however, be permitted to challenge the Applicants' evidence by asking them questions.

16. R1 confirmed that he understood and agreed, and further confirmed that he had known about these proceedings since at least 09/01/2023, as the email referred to above suggested, and that he had received the directions and knew about the hearing.

The evidence

17. In oral evidence A2 confirmed the layout of the property as follows:- access to the building was from a locked front door leading to a communal hallway. To the left was the locked door to the ground floor flat. To the right was the staircase leading up to the first floor and locked door to the flat occupying the 1st and 2nd floors of the property. His room was on the first floor. Also on the first floor were a kitchen, bathroom, and small utility room with a toilet which were shared by A1, A2, A3, and George. There were three rooms on the 2nd floor occupied by A1, A3, and George. A2 confirmed that there were only ever 4 people occupying the 1st/2nd floor flat, and that the occupiers of the ground floor flat did not share their facilities.

18. He confirmed that Gas electric and water were included in the rent.

19. A2 moved into the property on 04/08/2020 and moved out on 31/07/2022, which does not reflect the claim made by him to 25/09/2022. He therefore amended his claim to reflect that clarification, the correct claim for A2 is for the period 25/09/2021 to 31/07/2022. He confirmed the rent he had paid for the period was £550 pcm.

20.A2 was asked about the allegation in R1's email of 09/01/2023 that A2's boyfriend had lived in the property without permission and without

paying rent. A2 denied this. He explained that his boyfriend had stayed a couple of times a week only.

21. The Tribunal then heard from A1. She confirmed the layout of the property as described by A2, and that charges for gas, electricity and water were included in the rent. She was asked to clarify paragraph 4 of her witness statement as detailed above. She was asked why she had written *"I don't know who lived upstairs but there were always tenants living there*" [29], even though she had confirmed that she had read the statement of truth and understood it, and that her statement was correct and true. In response she apologised and stated that it was an error and that she had always occupied a room on the 2nd floor, and that she had meant to say that she didn't know who occupied the ground floor.

22. A1 confirmed that she had occupied the property from 03/12/2019 to 02/11/2022 when she and A3 had moved out. She confirmed that throughout the time she lived there she had shared the facilities with 3 other occupiers of the flat. Her monthly rent was £550 which she confirmed included charges for gas electricity and water. She was able to provide proof of rental payments only from 03/12/2021 to 25/09/2022.

23. A1 stated in her witness statement that she had been "*exploited and taken advantage of by Daniel. I'm no from the UK and I think that Daniel took advantage of my lack of knowledge about renters' rights because I'm Italian*" [30]. When challenged on this point in cross examination, she said that she was referring to not getting all of her deposit back from R1 and that she was not aware of the legal process of getting the deposit back.

24. The Tribunal then heard from A3. She confirmed the layout of the property as described by A2, that gas and electricity was included in the monthly rent of £550, that she had shared the upstairs flat with 3 others throughout the time she lived there, but that in around September 2022 George's girlfriend had moved in to his room so that there were 5 occupiers. She was unable to provide a date on which the girlfriend started to occupy the property as her home, because she said, George had not told them that his girlfriend was moving in. However, when asked, A3 claimed that the landlord had approved this. No documentary evidence was produced to support this assertion nor was it mentioned in any of the witness statements.

25. A3 was asked about paragraph (5) of her witness statement with a further fundamental flaw in the description of the occupation of the property. At paragraph (5) she states "*I also rented the ground floor of the property with two other people that I have no details of apart from their first names"* [91]. She initially stated that she had written the statement herself, but then said she had written it with the assistance of her representative. In response to the request for clarification, she stated that it was a mistake and she had meant to say upstairs not downstairs [91]. She told the Tribunal that she had told the representative that paragraph was wrong, and they had advised that she should deal with the amendment at the hearing.

26. When asked why she considered that R1 required a Mandatory HMO licence, her response was that there were too many people in the property. She also complained that they had been given inadequate notice to move out, by WhatsApp messages.

27. A3 confirmed that she had moved into the property on 25/06/2022 and moved out on 03/11/2022. Her rent payments are confirmed by bank statements for the period claimed by her.

28. In re-examination in relation to the layout of the property, A3 was asked about how her post was delivered. She confirmed that there was one front door through which the post for both the ground floor flat arrived as well as that for the first floor flat, and that all post, for both flats was addressed to '59 Searles Road'. There was no individual flat number for either flat. She also stated that while the front door from the street locked automatically when it was closed, that the door to the upstairs flat did not. She reported that they had a key and could lock it, but that it was not therefore a proper front door. She was asked about the door to the ground floor flat, but she didn't know as she had never been inside that flat, but, she said, it didn't look like a 'proper' front door. This was new evidence that had not previously been introduced in witness statements and no photographic evidence was produced in relation to the suggestion that these were not somehow adequate boundary doors to the flat.

Submissions

29. In submissions, Mr Gyulai asked the Tribunal to accept that there had been no planning or building regulation approval for the conversion of the terraced house into two flats and that therefore the house must be considered one unit for the purpose of s. 254(2) of the Housing Act 2004. He bases this argument on the Land Registry Office Copy Entry for the property which demonstrates that it is a freehold house. When challenged as to whether a freehold house could be converted into two self contained flats without having to register them as leasehold properties, and whether if they were let as such would that require an HMO licence. His response was that R1 had not produced any evidence to demonstrate that he had correctly converted the house into flats and absent that evidence, he asks the Tribunal to accept that this freehold house must be considered as one dwelling, requiring a mandatory HMO licence.

30. Mr Gyulai confirmed that on the basis of R2 not being mentioned as a landlord in any documentation, the application against her be dismissed.

31. Mr Gyulai asked the Tribunal to accept that the errors made in the Applicants' witness statements had been rectified in oral evidence, and that the occupation of the upstairs flat is not in dispute. In relation to the ground floor flat, he states that this has not been challenged by the Respondent.

32. He referred to the Law in relation to Mandatory HMO licences, and to s.72 of the 2004 Act in that R1 had control of or managing an HMO which is required to be licensed but is not so licensed.

33. He also referred to the flat doors as being "*just doors with a key*", as opposed to a front door that locked itself upon closing.

34. He asked the Tribunal to accept that the TEN applied for and referred to in the email from the Council, was evidence that a Mandatory HMO licence was required.

35. The Tribunal were asked to accept that A1 had paid 12 months rent, despite there being only evidence for 9 months, because this had not been challenged by R1.

36. Submissions were also made for costs under Rule 13 because, it is submitted that the Respondents' failure to engage with application process had increased legal costs. When challenged why that would be the case, the response was that by his late joining of the hearing and his clear disregard for the proceedings.

37. R1 in submissions stated that he found it unfair that the Applicants are seeking this order because he has always helped them. In relation to the TEN, he confirmed he had applied for this, but had not been granted a Temporary Exemption because he did not need it, and if indeed there had been a Temporary Exemption Notice, the Applicants would have produced it.

FINDINGS

38. The Tribunal cannot find beyond a reasonable doubt that the respondent landlord is in breach of mandatory licensing requirement for the property for the period 25/09/2021 to 25/09/2022. The reasons for this are as follows:

39. The Tribunal find that the 1st/2nd floor flat is a separate entity to the ground floor flat. There are no shared facilities between them, other than a front door, a letterbox, and a small communal hallway. The bathroom and kitchen that are shared are only shared between the 4 occupies of the 1st/2nd floor flat. This does not satisfy the requirements for a Mandatory Licensing.

40. Even if that is wrong, which the Tribunal do not accept, there was no evidence about the ground floor flat occupiers, when they had moved in or out. The only mention of them from the Applicants was that they existed, but there was no mention of ever having seen them. It would therefore be impossible on the evidence to find beyond a reasonable doubt that the property was occupied by 8 people for the period claimed.

41. In any event that argument is not accepted by the Tribunal.

42. The argument that the front door to the flat is not an adequate front door, such that the house is one unit without separation into two flats is also rejected. This argument appeared to be thrown in as an afterthought, without any supporting photographic evidence, nor was it mentioned in any witness statements or by A1 or A2 in oral evidence. Although it is noted that Mr Gyulai was about to re-examine A1 on this point just at the point that she lost her connection to the hearing. It was in any event a very tenuous re-examination point, as the state of the doors had not been raised in evidence in Chief.

43. The Tribunal do not accept the late assertion made by A3 in oral evidence that there was a 5th occupier in the 1st/2nd floor flat, namely George's girlfriend sometime in September 2022. The assertion is too vague and unsupported by the other Applicants.

44. No alternative to a breach of a Mandatory HMO was pleaded.

45. It is not for the Tribunal to consider conduct, having refused the application.

46. Having made the determination above, the Tribunal also dismissing the Applicants' claim for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

Name: Judge D. Brandler **Date:** 17 August 2023

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

(8) 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.

(9) 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.

(10) 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).

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.

(2) 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.