



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

Case reference : LON/00AY/HMG/2023/0009

Property : 14 Amesbury Avenue, London SW2 3AA

Applicant : Mingyue Zhao

Representative : In person

Respondent : Emma Nash

Representative : In person

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 S Wheeler MCIEH

Venue : 10 Alfred Place, London WC1E 7LR

Date of hearing : 9th October 2023

Date of decision : 26th October 2023

DECISION

Decision of the tribunal

(1) The Respondent shall pay to the Applicant a Rent Repayment Order in the sum of £524.02. This sum to be paid within 28 days of this order.

- (2) The Respondent is further ordered to repay the Applicant the sum of £300 for the fees paid to this tribunal in relation to this application within 28 days of this order.**

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 17/03/2023 Mingyue Zhao (“the applicant”) applied for a Rent Repayment Order (“RRO”) in respect of rent paid to Emma Nash (“the respondent”) from 03/09/2022 to 02/11/2022. The amount claimed by the applicant for that period was £1,600. An additional charge was demanded and paid by the applicant in the sum of £10 per month for cleaning products and toilet paper which did not form part of the agreement.
2. The applicant alleges that the respondent has committed the offence of being in control and managing a House in Multiple Occupation in breach of the Additional Licencing requirements managed by the London Borough of Lambeth (“the Council”). The offence relates to 14 Amesbury Avenue, London SW2 3AA (“the property”) which required the property to be licenced by the Council under the Additional Licencing HMO scheme that came into force on 09/12/2021. This is a Borough wide scheme that applies to any property occupied by three or more individuals.
3. The grounds of the application submit that the property was at all times during the period of claim, occupied by 4 or more occupiers who were from separate households and accordingly the property was required to be licensed by the Council.
4. Documentary email evidence dated 20/02/2023 from the Council confirms that there is no licence in place and that no application had been made [A1/21].
5. The property is a 5-bedroom terraced house over 3 floors. The ground floor accommodates the applicant’s bedroom, a shared living room, a shared kitchen, and a shared wc/shower room. There is access from the ground floor to the garden. The first floor accommodates 3 bedrooms and a shared bathroom. The first-floor bedrooms were occupied by the landlord, Lixin An (the applicant’s friend and witness) and a Canadian woman named Natalia/Natalie Clemence. The bedroom in the loft was occupied by Dani Mariano.

6. The applicant entered into a “lodger’s agreement” [A/25] with the respondent on 03/09/2022 for a two-month term for a monthly charge of £800. She paid a deposit of £800 on 12/08/2022 [A/34]. The agreement permitted the applicant to occupy one ground floor bedroom in the property with shared use of the living room and kitchen. The written agreement is silent on the use of bathroom facilities, but the applicant’s entitlement to use bathroom facilities was not disputed.

7. The respondent’s case is that she does not require an HMO licence because, she says, she is a resident landlord with only two lodgers and that the other occupiers in the property are members of her family. Specifically, her position is that Natalie Clemence who occupied a room on the first-floor is her niece and that her daughter Iris occupied the loft room.

8. Directions were issued on 05/05/2023 .

THE HEARING

9. The Tribunal did not inspect the property as it considered the documentation and information before it in the trial bundles provided sufficient information.

10. This was a face to face hearing at 10 Alfred Place, London WC1E. The applicant provided a bundle of [41] pages as well as a response to the respondent’s bundle of [4] pages. The respondent provided a bundle of [16] pages. Any reference to pages in those bundles of documents will be referred to as follows [A1/page no] (applicant’s bundle); [A2/page no.] (applicant’s response bundle); [R/page no] (respondent’s bundle).

11. The applicant attended the hearing accompanied by witness Lixin An who had had also occupied the property. The Tribunal were assisted by an interpreter fluent in Chinese, Mr Sun. The respondent attended the hearing alone and represented herself.

12. The main issue in dispute is whether the occupiers of the property, other than the applicant and Lixin An, are related. In particular, it is the respondent’s position that she had only two lodgers, the applicant and Lixin An, and that the other occupiers of the property were her daughter who occupied the attic room and her niece who occupied a first floor room.

13. There are also issues of conduct alleged against each other.

The evidence

14. In oral evidence the applicant confirmed that she moved into the property on 03/09/2022 and moved out on 02/11/2022. She and her witness Lixin An viewed the property remotely and each signed an agreement on 03/09/2022 [A1/24] having paid a deposit of £800 on 12/08/2022 [A1/34]. The agreement was for two months only at a charge

of £800 pcm. When the applicant arrived at the property on 03/09/2022, someone called Kalina was still occupying the ground floor room that she had been allocated. That tenant was due to move out on 07/09/2022 and the respondent asked the applicant to stay in the attic bedroom until her ground floor room had been vacated. The applicant said that room was dirty and she didn't want to stay there, so instead, stayed with her friend in her room on the first floor on the night of 03/9/2022. The applicant then travelled until 07/09/2022 when she was able to move into the ground floor room that had been vacated that day.

15. Lixin An moved in on 03/09/2022 and moved out on 01/11/2022. She was allocated one of the first-floor rooms.

16. When the applicant and Lixin An moved in, a woman named "Natalia" from Canada occupied one of the first-floor rooms. The respondent occupied the remaining first-floor room.

17. The applicant told the Tribunal that Natalia was Canadian and she was already living in the house when the applicant moved in. Natalia told her that she had been living there since April 2022 and she was still in occupation when the applicant moved out. At no time did Natalia tell the applicant that she was related to the respondent and the applicant was first made aware of this line of defence in the Respondent's bundle [R/1].

18. The respondent's position is that Natalie (not "Natalia") Clemence is her Canadian niece who stays at the property when she is not travelling. The only documentary evidence is an email dated 14/06/2023 purporting to be from Natalie Clemence in which Natalie states "*I, Natalie Clemence confirm that I am the niece of Emma Nash. I also confirm that I used her house as a base whilst I travelled around the UK and Europe*". In a later email dated 05/07/2023 Natalie provides various dates for her whereabouts [R/3]. These are not quoted here as the respondent in oral evidence admitted that there were errors in those dates. They are therefore unreliable.

19. The respondent reported that Natalie's date of birth was 28/03/2002 without hesitation but although she said she was a student, she could not tell the tribunal what she was studying. Eventually she said she thought it was pharmaceuticals. The applicant said that Natalia was an economics student. The respondent said that she had 19 nieces and nephews and could not remember what they all did.

20. After the hearing the respondent sent a group photograph purporting to be evidence of her relationship with Natalie. The late evidence was not considered by the Tribunal due to the late submission, but in any event it is not clear how a photograph of a group of people could clarify whether they are related.

21. In relation to the loft bedroom, although the respondent acknowledges that there was an overlap between Kalina and the applicant for the ground floor room, she asserts that this was the applicant's fault for arriving

earlier than arranged. However, the respondent categorically denied that she would have offered the applicant the loft room because, she said, the loft bedroom was her daughter's room and she would not have allowed a stranger to sleep in there.

22. In cross examination the contents of an email, dated 30/08/2022 [A2/1], from the respondent to the applicant, copying in Dani Mariano, were put to her. In that email the respondent refers to the applicant as "Ella" and refers to Lixin An as "Ann". The contents of that email are quoted below to clarify the position:

- *"you will both move in on Saturday 3rd September at noon. I am going out mid afternoon but will be here to welcome you and give you keys.*
- *As you are aware Kalina who is in the bottom room can't move until 7th September. This means that Ella (if you are having the bottom roomo (sic) you put your stuff in the living room and Ann you move into your room as usual.*
- *Ella – you sleep in the attic room on Saturday 3rd September.*
- *I understand that you are both going away on 4th September to return on 6th/7th. Kalina will vacate the room by 2pm on 7th September so it would be better if you could come back on the 7th – please confirm that this is all correct.*
- *Dani (who is in Ann's room) has had to extend her stay until 27th September. Therefore she will stay in the attic room once you are both in and make alternative arrangements on the night of 3rd September. On 4th onwards she will stay in the attic until she leaves on 27th September"*

23. The respondent confirmed the contents of her own email quoted above were true and correct and accepted that they contradicted her previous oral evidence that in relation to the attic room.

24. The email also confirms Dani's occupation in the property. This, the respondent explained, was because she was helping Dani out as a friend and previous lodger. She told the Tribunal that Dani was resident in the US where her son and husband lived, but that she was now living in the UK. She was waiting for a visa to return to the US to visit her son. The Respondent could not explain how if Dani was a resident of the US why she needed a visa, other than to say that "*maybe she is illegal*". She claimed no charge was made to Dani for the accommodation provided.

CONDUCT

25. The issue of the double booking for the ground floor room has been dealt with above.

26. In addition to the £800 pcm contractual payment for the room, the respondent demanded an additional £10 pcm which she said was for cleaning products. In oral evidence the applicant thought this was also for toilet paper. There is nothing in the written agreement allowing such a

charge. The applicant and Lixin An were both asked to clean the corridor and bathroom although the Canadian occupier was not asked to do so and as such the applicant felt she was not treated fairly.

27. The respondent denied this allegation and said she had treated them fairly. She made no mention of why the lodgers were doing what seemed to be most of the bathroom cleaning. Nor did she explain why she was making an additional charge.

28. Both parties were asked about smoke alarms. Neither party could provide a persuasive description of what smoke alarms were in place.

29. Although the signed agreement provided for shared living space in the living room, the applicant told the Tribunal that she had never been able to use the space because it was used by the respondent for her business creating body oil and the room was full of glass containers. She also reported that although there was a WC/shower room on the ground floor, she was not able to use the shower cubicle because it was used by the respondent to store boxes. The bathroom used by all the occupiers was the one on the first floor which contained a bath, a shower over the bath, WC and hand washbasin. Although there is no mention in the lodger's agreement that there are shared bathroom facilities, the respondent did not dispute that the applicant was entitled to use these.

30. The respondent's response in oral evidence was that she and her daughter used the living room and she couldn't see why the applicant wouldn't want to use it. It was, she said, the applicant's choice. She made no comment on the use of the room for her body oil business or the glass jars occupying much of the space.

31. When the applicant moved into her room, she noted that there was a broken tumble dryer stored there. She asked the respondent to remove it. The respondent refused saying that the applicant could use it as a small table. The respondent also used one of the two drawers in the applicant's room to store documents and phone cables, such that the applicant was deprived of the use of that drawer. The request to remove these items was also refused by the respondent.

32. In oral evidence, the respondent acknowledged that the broken tumble dryer was in the room, but she could not see why the applicant could not use it as storage surface. In relation to her use of one of the drawers in the room, she initially denied this claim. She stated that she had stored documents in the drawer previously, but had moved them out when Kalina moved out of the room. However, later she said that she stored 'phone cables and chargers in the drawer while the applicant occupied the room.

33. Storage available to the applicant was limited in the room. No wardrobe was provided. A portable hanging rail with a shelf was provided without hangers. A bedside table was provided. It was unclear from the parties' conflicting evidence whether the bed was double or single. No photographs

were provided. The applicant complained that the room was cold, the bed was poor quality and she brought her own bedding.

34. The applicant told the Tribunal that the door to her room could not be closed. There was some sort of fault and the door remained open all the time with a gap of about 8 inches. She had asked the respondent to rectify the problem but she had failed to do so. The respondent denied a defective door. No photographs were provided and no response was made to the complaint in the respondent's bundle. When asked why she had not responded on this point, the respondent stated that it was because she didn't "*believe them to be true*".

35. The written agreement provided for use of the shared kitchen. However, when she moved in, the applicant was told by the respondent that there was no room in the kitchen for her pots and pans and that she would have to store them in her bedroom. No allocated space was provided in the cupboards or the fridge. In cross examination by the respondent, she asked why the applicant would expect there to be space for her belongings in the kitchen. The respondent was very much of the view that this was her home and she shouldn't have to put up with lodgers wanting space in her kitchen.

36. In relation to the £800 deposit paid to the respondent, when the applicant moved out, she had been repaid only £360. Proceedings have been issued in the County Court in this regard. The only evidence produced by the respondent to justify this large retention was one photograph in her bundle of some hair in a shower cubicle [R/15].

FINDINGS

37. The tribunal finds that during the period 03/09/2022 to 27/09/2022 (inclusive) the property was occupied by 4 unrelated occupiers in breach of the Additional Licencing requirements managed by the Council. The 4 unrelated occupiers were: the respondent, the applicant, Lixin An and Dani Mariano. The respondent did therefore require a licence for that period. No reasonable excuse defence was put forward by the respondent and the Tribunal could not identify any available defence.

38. The Tribunal had real concern about the voracity of the respondent's evidence about Natalie Clemence being her niece, particularly in light of the respondent not telling the truth about the occupation of the attic room. However, in the absence of any evidence other than allegations from the applicant, the Tribunal could not find beyond a reasonable doubt that Natalie Clemence was not related. The respondent's defence that she did not require a licence is therefore successful for the period from 28/09/2022 to 02/11/2022. During that period the occupiers were the respondent, the applicant, Lixin An and Natalie Clements.

39. The Tribunal finds beyond a reasonable doubt that the respondent landlord was in breach of those Additional HMO Licencing requirements during the period 03/09/2022 to 27/09/2022 (inclusive)(25 days).

40. Therefore, the only further issue for determination by the Tribunal is the amount of the RRO.

41. In determining the amount, the Tribunal must have regard to the conduct of both landlord and tenant, the landlord's financial circumstances and whether the landlord has been prosecuted.

42. There is no evidence to demonstrate that the landlord has been prosecuted.

43. The Tribunal finds that the respondent showed poor conduct in relation to the following:

- (i) breach of the written agreement in failing to allow use of the shared living room; the downstairs shower cubicle; and kitchen storage [A27] (although the agreement is silent on the use of the bathroom, this was not in dispute at the hearing)
- (ii) The living room was being used by the respondent as a work room; the downstairs shower cubicle was full of boxes; and the respondent refused to allow the applicant storage space for her saucepans in the kitchen
- (iii) Making an additional charge of £10 per month for cleaning materials which was not part of the contract and was an opportunistic additional fee [A/35]
- (iv) Storing a broken tumble dryer in the applicant's room and telling her to use it as a table
- (v) Using one of the two drawers in the room to store her own documentation and cables/phone charges, and refusing to empty the drawer when the applicant requested this
- (vi) Not mending the broken door to the applicant's room such that she could never fully close it.
- (vii) Failing to return the applicant's full deposit on spurious evidence of some hair in the shower cubicle [R/15]

44. The Tribunal do not find that the applicant tenant demonstrated poor conduct. She paid the rent on time and on the evidence appeared to have done her fair share of cleaning the communal areas, even though this was not part of the contractual agreement. The photograph provided by the respondent of some hair in a shower cubicle is inconclusive as the location or date taken have not been established.

45. Little evidence was available in relation to the financial circumstances of the respondent, other than her purchase of a large house in South West London in 2002 with the assistance of a mortgage. Mortgage payments from the account, which the respondent stated was her only account were for £1000 on 28/0/22 and £1211.67 on 18/10/2022. She reported that she worked for the NHS and must have an income from that job. That together with an income of £1600 pcm for two rooms in the house, did not indicate financial difficulty.

46. The Tribunal keeps in mind that a RRO is meant to be a penalty against a landlord who does not comply with the law. It is a serious offence which could lead to criminal proceedings. Taking these matters into account and having had regard to the principles most recently set out in *Acheampong v Roman* [2022] UKUT 239 (LC) at paragraphs 8-21.

- a. Rent was paid by Applicant the period 03/09/2022 to 27/09/2022 (25 days) @ £800 pcm.
- b. Utilities were included in the rental charge. The Lodgers agreement states this includes charges for council tax, water rates, electricity, gas, tv licence, and internet [A/28] but failed to provide a percentage or details of a charge. In the absence of any evidence to demonstrate what proportion of the rent was for utilities, the Tribunal took a view. The respondent would be liable for Council Tax, water rates, TV licence and internet charges whether or not she had lodgers and so nothing was deducted for those items. In relation to electricity and gas, the Tribunal took the view that a reasonable charge for a 5 bedroom house would be £50 per room pcm. That was deducted from the monthly charge, making the net rent £750 pcm. The net rent paid by the applicant for the period of 25 days (@ £24.66 per day) was £616.50.
- c. The respondent purchased the property in July 2002 for £258,000 [A/32]. Her evidence is that she only moved in April 2020 and that she began letting rooms at that time. There is no finding that she is a professional landlord. This does not however excuse her poor behaviour towards the applicant, and her failure to comply with licensing requirements.
- d. However, the respondent has not been prosecuted and there is no evidence before the Tribunal of any previous convictions. Considering the cases cited in paragraph 16 of the *Acheampong* case cited above, the starting point in this case is 80% and on a par with *Williams v Palmer* [2021] UKUT 244 (LC)
- e. The respondent has provided no information about her financial circumstances.
- f. The assertion by the respondent of the applicant's poor conduct is rejected.
- g. The Tribunal consider the respondent's poor conduct towards the applicant to be an aggravating factor. The Tribunal therefore consider that 85% of the net rent for the period is repayable. Accordingly, we find that an RRO be made against the

respondent in the sum of **£524.02** to be paid to the applicant within 28 days.

47. The Respondent is also ordered to repay to the Applicant the sum of £300 being the tribunal fees paid by her in relation to this application.

Name: Judge D. Brandler **Date:** 26th October 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.

(3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

Act	section	general description of offence
1 Criminal Law Act 1977	section 6(1)	violence for securing entry
2 Protection from Eviction Act 1977	section 1(2), (3) or (3A)	eviction or harassment of occupiers
3 Housing Act 2004	section 30(1)	failure to comply with improvement notice
4	section 32(1)	failure to comply with prohibition order etc
5	section 72(1)	control or management of unlicensed HMO
6	section 95(1)	control or management of unlicensed house
7 This Act	section 21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

Section 41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if —

- (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
- (b) the offence was committed in the period of 12 months ending with the day on which the application is made.

(3) A local housing authority may apply for a rent repayment order only if—

- (a) the offence relates to housing in the authority's area, and
- (b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

Section 43 Making of rent repayment order

- (1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).
- (2) A rent repayment order under this section may be made only on an application under section 41.
- (3) The amount of a rent repayment order under this section is to be determined in accordance with—
- (a) section 44 (where the application is made by a tenant);
 - (b) section 45 (where the application is made by a local housing authority);
 - (c) section 46 (in certain cases where the landlord has been convicted etc).

Section 44 Amount of order: tenants

- (1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.
- (2) The amount must relate to rent paid during the period mentioned in the table.

If the order is made on the ground that the landlord has committed

the amount must relate to rent paid by the tenant in respect of

an offence mentioned in row 1 or 2 of the table in section 40(3)

the period of 12 months ending with the date of the offence

an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)

a period, not exceeding 12 months, during which the landlord was committing the offence

- (3) The amount that the landlord may be required to repay in respect of a period must not exceed—
- (a) the rent paid in respect of that period, less
 - (b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.
- (4) In determining the amount the tribunal must, in particular, take into account—
- (a) the conduct of the landlord and the tenant,
 - (b) the financial circumstances of the landlord, and
 - (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.