FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AE/HMF/2023/0163**
Property	**:**	**6A Odessa Road, London NW10 5YH**
Applicants	**:**	**(1) Ms J Garland** **(2) Ms S Collier** **(3) Mr F McGuigan**
Representative	**:**	**Ms Garland**
Respondent	**:**	**Mr C Ifeayni**
Representative	**:**	**John Barclay Management**
Type of Application	**:**	**Application for a rent repayment order by a tenant**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms L Crane MCIEH**
Date and venue of Hearing	**:**	**27 November 2023** **10 Alfred Place**
Date of Decision	**:**	**30 November 2023**

DECISION

Orders

(1) The Tribunal makes a rent repayment order against the Respondent to Ms Garland, on behalf of herself and the other Applicants, to be paid within 28 days of £10,060.

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

The application

1. The Tribunal received an application under section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for Rent Repayment Orders ("RROs") under Part 2, Chapter 4 of the Housing and Planning Act 2016, dated 29 June 2023. Directions were given on 17 August 2023.

2. In accordance with the directions, we were provided with an Applicant's bundle of 61 pages. The Respondent did not provide a bundle.

The hearing

Introductory

3. In the directions, both the landlord and the managing agent were identified at respondents. Ms Garland said that as far as she was aware, the landlord was Mr Ifeayni, and John Barclay Management (JBM) was his agent. We accordingly removed JBM as a respondent.

4. Ms Garland represented the tenants. At the hearing, Ms Collier also attended.

5. The Respondent had not submitted a bundle, and did not attend. JBM had been in contact with the Tribunal earlier in the proceedings, and initially indicated that they would attend to represent the Respondent. A further enquiry as to representation was sent to both parties in the week before the hearing. The Applicants responded. The Respondent did not.

6. We concluded that it was in the interests of justice for us to continue the hearing in the absence of the Respondent.

7. The Applicants were all students, undertaking a course that required that they be away for most of every day. They all moved in on 19 August 2022, on a 12 month fixed term assured shorthold tenancy.

8. The property is a three bedroom flat in a converted house. The flat has its own front door. It consists of three bedrooms, and a further room identified by the Applicants as the office room. There is a kitchen/diner at one end of a hall which is not separated from the hall by a door.

The alleged criminal offence

9. The Applicants allege that the Respondent was guilty of the having control of, or managing, an unlicensed house in multiple occupation contrary to Housing Act 2004 ("the 2004 Act"), section 72(1). The offence is set out in Housing and Planning Act 2016, section 40(3), as one of the offences which, if committed, allows the Tribunal to make a rent repayment order under Part 2, chapter 4 of the 2016 Act.

10. The Applicants case is that the property was situated within an additional licensing area as designated by the London Borough of Brent ("the Council").

11. The Applicants did not provide direct evidence in their bundle of the existence of the scheme, nor that the property was located in an area covered by the scheme.

12. The applicants did, however provide a document consisting of a copy of a letter to the Respondent from a Mr George Graham, an enforcement officer with the Council's private housing services, immediately followed by a long document headed Compliance Inspection Schedule. The schedule quotes a licence reference number. The inspection date was 11 April 2023. The letter is dated 5 May 2023. The letter refers to an inspection of the property by Mr Graham, at which he identified a number of breaches of the licensing conditions. Those breaches are identified in the Schedule. The letter required the breaches to be resolved by 1 June 2023.

13. In an email dated 29 June 2023, Mr Graham states that the HMO licence "came into force" on 27 March 2023.

14. Accordingly, taken together, these materials show that the property was licensed (and so licensable) on 11 April 2023, and that the license was obtained at least by 27 March 2023. The conditions obtaining at that time were those referred to in the Compliance Inspection Schedule.

15. By section 72(4)(b), it is a defence to the alleged offence that an application for a licence had been duly made. The Applicants did not, in advance of the hearing, provide evidence as to when the Respondent applied for a licence. However, at the hearing, they produced a letter from the Council, dated 25 January 2023. The letter had been addressed to "the occupier", so they opened it. It was a warning letter from the Council (in a standard form) indicating that an HMO licence may be necessary (referring to both a selective and an additional

licensing scheme). The Applicants forwarded the letter to the Respondent.

16. Ms Garland also told us that, after they had forwarded the letter, they enquired of JBM as to whether a licence had been applied for. JBM responded that it had, and included in the email to Ms Collier what is clearly some text copied and pasted from an email from the Council. That email was confirmation of receipt of an application for a licence under the additional licensing scheme. The email to Ms Collier is dated 21 February 2023. However, the date of the email from the Council, from which the text was copied and pasted, is not shown.

17. Our conclusions are as follows. First, the property was an HMO comprising three occupiers in three households. Secondly, it was licensable under an additional licensing scheme of the Council's. Thirdly, it was not licensed from the start of the tenancy until, at some point, an application for a licence was made. We are satisfied as to these conclusions beyond a reasonable doubt.

18. Thereafter, a licence was issued, and, after Mr Graham's inspection, the Compliance Inspection Schedule was completed.

19. The issue for us is when we should conclude that the licence was applied for. It must have been some time between the letter being sent by the Council on 25 January 2023, and the email to Ms Collier on 21 February 2021. We conclude that we cannot be sure beyond a reasonable doubt that the application was made any time after the 25 January 2023. We cannot exclude the possibility that the Respondent made the application independently, before receiving the forwarded letter, but we can be sure that they had not done so on the date on which the letter was sent out by the Council.

20. We are, therefore, satisfied so that we are sure that the offence is made out from August 19 2022 to 25 January 2023.

21. In considering the amount of an RRO, the Tribunal will take the approach set out in *Acheampong v Roman and Others* [2022] UKUT 239 (LC) at paragraph 20:

> "The following approach will ensure consistency with the authorities:
> (a) Ascertain the whole of the rent for the relevant period;
> (b) Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. …
> (c) Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made … and compared to other examples of the same type of offence. What proportion of the rent (after

> deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:
> (d) Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4)."

22. We add that at stage (d), it is also appropriate to consider any other of the circumstances of the case that the Tribunal considers relevant.

23. In respect of the relationship between stages (c) and (d), in *Acheampong* Judge Cooke went on to say at paragraph [21]

> "I would add that step (c) above is part of what is required under section 44(4)(a) [conduct of the parties]. It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked."

24. As to stage (a), by sections 44(2) and (3) of the 2016 Act, the maximum possible RRO is the rent paid during a period of 12 months, minus any universal credit (or Housing Benefit – section 51) paid during that period.

25. The total rent paid by the Applicants (which, for convenience, was paid by Ms Garland) was £2,275 per month. The maximum is thus five months' and six days' rent, which amounts to £11,830 (pence rounded).

26. As to stage (b), the tenancy agreement makes the Applicants liable for utilities, so there are no deductions to be made.

27. In assessing the seriousness starting point under stage (c), there are two axes of seriousness. The first is the seriousness of the offence, compared to the other offences specified in section 41 of the 2004 Act. The offence under section 72(1) is significantly less serious than those in rows 1, 2 and 7 in the table in section 40 of the 2016 Act, and we take that into account. It is also by far the most common offence which comes before the Tribunal on an application for an RRO.

28. We turn to the seriousness of the offence committed by the Respondents compared to other offences against section 72(1).

29. A useful starting point is the list of defects identified by Mr Graham in his Compliance Inspection Schedule. While it shows defects occurring after the relevant period, it is evident from the Schedule itself that the

state of the property must have been the same during the relevant period, rather than it being the case that the condition of the property had deteriorated. Such was, also, independently the evidence provided by the Applicants.

30. The defects (expressed as breaches of licence conditions) can be summarised as follows, with our comments reflecting the uncontested evidence (which we accepted) from the Applicants:

(i) The front left and rear right bedrooms were below the minimum space standard of 6.51m² for a single adult (but could be used together by one tenant). Ms Garland explained that the larger of the two rooms was her bedroom (which suffered from the leak – see below). Because of the leak, she transferred her mattress to the second of these two rooms, which is the room identified by the Applicants as the office room. Accordingly, de facto she was using both rooms, which would have been permitted under the licence conditions.

(ii) A gas safety certificate and electrical installation periodic report had not been supplied to the Council. The Applicants' evidence was that both certificates had, in fact, been provided to them at the commencement of the tenancy.

(iii) There were no adjustable thermostats on the room radiators;

(iv) The front door thumb lock was misaligned, preventing proper locking, and the same door had a mortice lock requiring a key. The Applicants were given a key for the mortice lock, but (happily, in fire protection terms) it was unusable. We were told that the door could be shut with the thumb lock, albeit with some difficulty.

(v) Bedroom keys had not been provided to the occupants. The locks were such that it was possible for occupants to lock themselves out. When this happened to Ms Garland, she had to pay for a locksmith to gain re-entry.

(vi) There were no window restrictors in the bedrooms or kitchen;

(vii) There was evidence of a leak into the rear right bedroom. We refer to this leak below.

(viii) Other repairs were necessary, including to electrical sockets in one of the rear bedrooms, the kitchen window, the replacement of a seal to the shower screen and various more minor repairs and decoration.

(ix) The licence, gas safety certificate, name and address of landlord/agent etc should be displayed, and were not.

(x) In respect of fire safety, the was a requirement to install wired-in interlinked smoke and heat alarms in the kitchen/diner and hall and battery operated smoke alarms in each bedroom, install a fire door to the kitchen/diner with appropriate intumescent seals and strips (there being no door at all at the inspection), install appropriate emergency lighting, provide a fire blanket in the kitchen, remove obstructions from the means of escape and provide a fire routine notice. The Applicants evidence was that they had purchased their own fire blanket for the kitchen. The obstructions were the bins, which they could and did move.

31. As to the leak in Ms Garland's bedroom, the Applicants' evidence was that the leak persisted for the entire period of the tenancy, despite a number of visits (often on less than 24 hours notice) by a contractor, and some failed attempts at spot repairs. It later transpired (as evidenced by an email from Mr Graham to the Applicants) that the landlord's intention was to undertake a permanent repair to the roof to remedy the leak after the end of the tenancy, a state of affairs in which (somewhat to our surprise) Mr Graham appeared to be acquiescing.

32. The leak was such that the room was affected by black mould, and was unsuitable for use as a bedroom.

33. The nature of the landlord – professional or not – has been held to be relevant to the seriousness of the offence. In this case, apart from the Applicants' belief that Mr Ifeayni was resident abroad, we have no information about the landlord's holdings one way or another, and therefore do not take this aspect into account (and we note the guidance to be wary of placing too much emphasis on the distinction in any event in *Daff v Gyalui* [2023] UKUT 134 (LC)).

34. Our conclusion is that this is at the higher end of the spectrum of seriousness seen in section 72(1) offences. First, there was serious disrepair, particularly regarding the persistent, unaddressed leak that made one of the bedrooms uninhabitable as such. The other disrepair issues are of less moment, but not insignificant.

35. Secondly, and above all, the state of the fire safety provision was lamentable. There were no effective fire alarms, no fire (or any) door between the kitchen and the rest of the flat, and no emergency lighting. These are very serious defects in what must be the most important single responsibility of a landlord.

36. At stage (c), we have had regard to the guidance provided by the Upper Tribunal in setting an initial percentage for the RRO, including *Acheampong* itself, *Williams v Parmar and Others* [2021] UKUT 244 (UT), [2022] H.L.R. 8; *Aytan v Moore* [2022] UKUT 27 (LC); *Simpson House 3 Ltd v Osserman* [2022] UKUT 164 (LC); [2022] HLR 37 *Hallett v Parker* [2022] UKUT 239 (LC); *Hancher v David and Others* [2022] UKUT 277 (LC); *Daff v Gyalui* [2023] UKUT 134 and *Dowd v Martins and Others* [2022] UKUT 249 (LC).

37. Given the significance of the key issues in this case – fire safety and disrepair – we consider that this comes in the higher bracket provided by cases such as *Aytan v Moore* (including the conjoined case of *Wilson v Arrow*), *Williams v Palmer*, *Simpson House* and *Choudhury v Razak* (conjoined with *Acheampong).* We accordingly set the percentage at this stage at 85%.

38. At stage (d), we must consider what effect the matters set out in section 44(4) have on our conclusions so far. Section 44(4) provides that in determining the amount of an RRO, within the maximum, the Tribunal should have particular regard to the conduct of both parties, and to the financial circumstances of the landlord. We must have particular regard to these matters, but we may also have regard to such us matters as we consider relevant in the circumstances.

39. As Judge Cooke noted in *Acheampong*, there is a close relationship between stages (c) and (d). Insofar as we have already made findings in relation to the Respondent's conduct as it relates to the condition of the property, we do not double count them in considering the section 44(4) matters.

40. At stage (d), the Applicants' brought to our attention the frequent failure of the JBM to give 24 hours notice of visits, and what they described as a disconcerting sequence of communications about the time of Mr Graham's inspection. We do not think it necessary to go into further details

41. We ascertained from the Applicants that none of them had been in rent arrears at any time, and there had been no complaints about their behaviour during the course of the tenancy. Being absent, the Respondent was not able to provide any adverse evidence at to the conduct of the Applicants.

42. There is no evidence or submissions as to the financial circumstances of the landlord, nor any hint of them, which would put us on notice of further enquiry, even if that were possible, given the paucity of engagement from the Respondent.

43. We conclude that there is nothing at stage (d) to affect our conclusion at stage (c) either way.

44. The Applicants apply for reimbursement of their application and hearing fees. In the light of our conclusions, we allow both applications.

Rights of appeal

45. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

46. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

47. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

48. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

Name: Tribunal Judge Professor Richard Percival **Date:** 30 November 2023

Appendix of Relevant Legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

Housing and Planning Act 2016

40 Introduction and key definitions

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord and committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

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

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

	Act	*section*	*general description of offence*
7	This Act	section 21	breach of banning order

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

41 Application for rent repayment order

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

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

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made.

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

(a) the offence relates to housing in the authority's area, and

(b) the authority has complied with section 42.

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

42 Notice of intended proceedings

(1) Before applying for a rent repayment order a local housing authority must give the landlord a notice of intended proceedings.

(2) A notice of intended proceedings must—

(a) inform the landlord that the authority is proposing to apply for a rent repayment order and explain why,

(b) state the amount that the authority seeks to recover, and (c) invite the landlord to make representations within a period specified in the notice of not less than 28 days ("the notice period").

(3) The authority must consider any representations made during the notice period.

(4) The authority must wait until the notice period has ended before applying for a rent repayment order.

(5) A notice of intended proceedings may not be given after the end of the period of 12 months beginning with the day on which the landlord committed the offence to which it relates.

43 Making of a rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord had been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).

44 Amount of order: tenants

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in this table.

If the order is made on the ground that the landlord has committed	*the amount must relate to rent paid by the tenant in respect of*
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(3) The amount that the landlord may be required to repay in respect of a period must not exceed –

(a) the rent in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account –

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord,

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.