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

Tribunal Case reference	**:**	**LON/00AN/HMF/2023/0116**
Property	**:**	**Flat 2, 46 Lillie Road, London SW6 1TN**
Applicant	**:**	**Lucas Gregory**
Representative		**In person**
Respondent	**:**	**Equinox Re Ltd, trading as Myrooms**
Representative		**Anthony Owen, solicitor**
Type of application	**:**	**Rent repayment order**
Tribunal Judge	**:**	**Judge Adrian Jack, Tribunal Member Andrew Lewicki FRICS**
Date of decision	**:**	**6th February 2024**

DECISION

© CROWN COPYRIGHT

Background

1. The applicant tenant alleges that he rented a room (Room B) in a flat with three bedrooms which he alleges was an unlicensed house-in-multiple-0ccupation ("HMO"). He seeks a rent repayment order.

2. Although the agreement is expressed to be licence not a tenancy, in accordance with the House of Lords decision in *Street v Mountford* [1985] AC 809, it in our judgment a tenancy as a matter of law. Mr Owen, the solicitor for the respondent landlord, did not concede this, but in our judgment this is a plain case. The tenant rented one lockable room. He shared the bathroom and kitchen with the occupants of Rooms A and C. The provisions of the agreement which purport to give the indicia of a licence are shams.

3. The relevant chronology (with page references to the bundle) is as follows:

5 June 2022	Hammersmith and Fulham's additional licensing scheme comes into effect [90]
22 August 2022	£2,136.50 paid by the tenant [82] At this point the flat is occupied by a couple, Mathilde and Raul in Room A, and a man "Person 1" in Room C
27 September 2022	Commencement and date of agreement between the parties [56] Mathilde and Raul shared Room A. Person 1 continued to occupy Room C.
30 September 2022	Person 1 moved out; Hawaii moved in either this day or the next day [357]
27 October 2022	£1,010 paid by the tenant
30 October 2022	Hawaii moved out [357]
28 November 2022	£1,010 paid by the tenant
28 December 2022	£1,010 paid by the tenant
23 January 2023	Mathilde and Raul moved out, only the applicant lived in the flat
2 February 2023	£1,010 paid [86]; application made for an HMO licence by Madhu Kapisthalam, the freeholder of the flat.
10 February 2023	Hammersmith and Fulham grant Mr Kapisthalam a proposed HMO licence
23 February 2023	Two Australian women, Hayley Smith and Mikala Stonell, moved into the flat and occupy Rooms A and C.
27 February 2023	£1,010 paid by the tenant [87]
8 March 2023	Full HMO licence granted to Mr Kapisthalam
29 March 2023	£1,010 paid by the tenant[88]
26 April 2023	£431.67 paid by the tenant [89]
7 May 2023	RRO form issued
8 May 2023	End of agreement [56]
9 May 2023	Applicant in fact moved out [28]

6 September 2023 Second RRO form issued [24]

4. The tenant seeks repayment of all the rent he paid in the relevant period.

5. The Tribunal heard the matter as an in-person case at 10 Alfred Place. The tenant, who is a bar student, represented himself. With him was Ms Elinor Williams, who had made a witness statement. In the event, it was agreed that neither the tenant nor Ms Williams needed to give oral evidence and be cross-examined. This was on the express basis that Mr Owen, the solicitor for the landlord, could make submissions about various assertions made in their witness statements, including various matters of hearsay. The landlord did not call any oral evidence.

The law

6. 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 a tenant can apply for a rent repayment order in respect of housing let to him 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).

7. Because cases have to be proved to the criminal standard of proof, the burden is on the tenant to establish that an offence has been committed. The landlord has the right to silence. There is no provision for judgment by default. Where a tenant has established a *prima facie* case, it may be appropriate in some cases to draw an inference from the landlord's failure to adduce evidence, but this cannot reverse the burden of proof. As in contempt proceedings, "[t]he burden of proof remains on the Claimant throughout, to the criminal standard, and the Claimant can invite the Court to conclude, on the basis of all the evidence in the case, that the Defendants [are in breach]. If the contemnor chooses to remain silent in the face of that dispute, the Court can draw an adverse inference against him, if the Court considers that to be appropriate and fair, and recalling that silence alone cannot prove guilt": *VIS Trading Co Ltd v Nazarov* [2015] EWHC 3327 (QB), [2016] 4 WLR 1 at [31], approved by the Court of Appeal in *ADM International SARL v Grain House International SA* [2024] EWCA Civ 33 at [91].

8. Section 254 of the 2004 Act 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')…

(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.

9. Section 259 deems certain full-time students to have their accommodation as their only or main residence.

10. The Additional Licensing Scheme which the local authority brought into force on 5th June 2022 requires licensing of premises falling, *inter alia*, within the definition of section 254(2) set out above.

Was this an HMO and if so, when?

11. Mr Owen made two submissions. Firstly, he submitted that there had to be at least three households in the flat for the premises potentially to be an HMO. We do not accept this. A plain reading of section 254(2) in our judgment results in these premises being an HMO at all times when two rooms are occupied by separate households.

12. Secondly, he submitted that, what would otherwise be an HMO ceased to be so, if a person became a resident who did not have the premises as their only or main residence. In concrete terms, he submitted that the evidence that Hawaii had the flat as his only or main residence was lacking. The effect was that even if occupation by Mathilde and Raul (in Room A) and by the tenant (in Room B) was sufficient to give rise to an HMO, the addition of Hawaii (in his words) "polluted" the HMO and meant that the flat ceased to need a licence.

13. We do not accept this submission either. Section 254(2)(b) and (c) requires that the flat be "occupied by persons who do not form a single household" and that "the living accommodation is occupied by *those* persons as their only or main residence". However, it does not require

that *all* persons occupying the flat do so as part of their only or main residence. Accordingly, if the flat required licensing without Hawaii being present, it continued to require licensing once he moved in.

14. We turn then to the question whether the occupants had the flat as their only or main residence. We consider first the position of Mathilde and Raul. The tenant shared the flat with them from September 2022 to March 2023 and had reasonable social intercourse with them. They were a cohabiting couple who both worked as chefs at Dinner by Heston Blumental in the Mandarin Oriental Hotel. They had been in the flat for some months before the tenant moved in. There is no evidence of their having anywhere else to live. On this evidence we are sure they did not have any other home. We find to the criminal standard that the flat was their only residence.

15. We consider next the position of "Person 1". He is so named, because the tenant never discovered his name. He appears to have been a foreigner of Chinese descent. He did not interact socially either with the tenant or with Mathilde and Raul. Raul said that he been there some months, but this evidence is hearsay and it is unclear precisely how long he had been there. On this evidence, we do not find it proved to the criminal standard that the flat was his only or main residence. The evidence adduced to us is consistent with his having a home elsewhere. In particular, a foreigner may well have his main residence in his country of origin whilst staying in this country. We decline to draw an inference adverse to the landlord: the tenant has failed to establish his case in respect of Person 1. It is speculative what evidence the landlord could adduce.

16. The same considerations apply in relation to Hawaii. He stayed at the flat for only a month. Although he seems to have been a PhD student, it is unclear if he was a full-time or only a part-time student. It is unclear whether he had a home elsewhere, either in the UK or abroad. Again, we do not find it proved to the criminal standard that the flat was his only or main residence. Nor should inferences be drawn against the landlord for the same reasons as with Person 1.

17. Ms Smith and Ms Stonell were both Australian and had known each other before coming to London. Both were in full-time work and lived throughout at the flat. We are sure that the flat was their only residence.

18. We turn then to our conclusions. In the period up to 27th September 2022, we find that the flat did not require a licence. Because we are not satisfied as to the flat being Person 1's only or main residence, there were only Mathilde and Raul (who constituted one household), who had the flat as their only residence.

19. In the period 27th September 2022 to 23rd January 2023, the flat did require a licence. The tenant constituted one household; Mathilde and Raul constituted another. All three had the flat as their only or main

residence. We are sure that the other requirements in section 254(2) were satisfied.

20. In the period 24th January to 22nd February 2023, only the tenant lived at the flat. The flat did not therefore require a licence. There were not two or more households.

21. In the period 23rd February to 9th May 2023, the flat did require a licence. Whether Ms Smith and Ms Stonell constituted one or two households is irrelevant. They plus the tenant formed at least two households and all three had the flat as their only residence.

Is the licence valid?

22. The freeholder, Mr Kapisthalam, applied for an HMO licence on 2nd February 2023. The tenant argued that the licence was irrelevant to his claim for a rent repayment order. His landlord was Equinox Re Ltd, not Mr Kapisthalam. A licence in favour of Mr Kapisthalam could not benefit Equinox Re Ltd. Since the person having management of the flat was the latter, the local authority should not have issued an HMO licence to Mr Kapisthalam.

23. We disagree. It is a matter for the local authority to whom a licence should be issued: see section 66 of the Housing Act 2004. If the local authority err in naming the appropriate licensee, then the remedy for a person aggrieved is judicial review. This Tribunal has no jurisdiction to quash or ignore an HMO licence. Once an application is made for an HMO licence, the offence committed by a person having control or management of an HMO ceases: section 72(4)(b). There is no requirement in section 72 for the application to be made by that person.

24. In the current case, it is unclear precisely what the relationship is between Mr Kapisthalam and Equinox Re Ltd. It may be that Mr Kapisthalam granted a lease of the flat to Equinox Rd Ltd, or it may be that Equinox Re Ltd were acting as undisclosed agent for Mr Kapisthalam. Be that as it may, the local authority was satisfied that Mr Kapisthalam was the appropriate licensee. We cannot go behind that. (As between Equinox Re Ltd and the tenant, there would be a tenancy by estoppel, so there is no difficulty the tenant claiming a rent repayment order against Equinox Re Ltd as he has done.)

25. The tenant argued that in some circumstances, the Tribunal can ignore the existence of a licence in the name of someone who was not entitled to the licence. He cited *Taylor v Mina An Ltd* [2019] UKUT 249 (LC). In that case, the licensee had sold the relevant flat. The Upper Tribunal held that the benefit of the licence had not transferred to the purchaser, so that the flat became an unlicensed HMO on completion of the sale. This, however, was because section 68(6) of the 2004 Act provided that a "licence may not be transferred to another person". In the current case, there is no question of a transfer. Both Mr Kapisthalam and Equinox Re

Ltd were potential licensees. Both could rely on a licence granted to the other.

The period during which a rent repayment order can be made

26. It follows that the period during which the flat required a licence was from 27th September 2022 until 23rd January 2023. During that period, the sums actually paid were £3,030, comprising £1,010 paid on 27th October, 28th November and 28th December 2022.

27. The first rent was paid on 22nd August 2022 prior to the commencement of the tenancy. Can this payment be the subject of a rent repayment order? In *Kowalek v Hassanein Ltd* [2022] EWCA Civ 1041, [2022] 1 WLR 4558, the Court of Appeal held (reading from the headnote) that "in order to be recoverable under a rent repayment order, the rent in question had both to have been paid to discharge indebtedness which had arisen during the relevant period of offending by the landlord and *in fact paid during that period*." (Our emphasis.)

28. Here the first rent was paid before the period where the landlord was in breach of its obligations. Accordingly, in our judgment no rent repayment order can be made in respect of this payment. We should add that this is in accordance with the policy of the Act, as explained in *Kowalek*. At the time when the first payment was received, the landlord could have applied for a licence in good time for the start of the tenancy. There was no breach when the landlord received the payment.

29. Accordingly, the maximum rent recoverable by the tenant is £3,030.

Amount of the rent repayment order

30. Section 44 of the 2004 Act provides:

> "(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.

31. In the current case, the tenant had been in receipt of universal credit for part of the tenancy, but during the period in respect of which a rent

repayment order stands to be made he was a student and thus not entitled to universal credit.

32. So far as the financial circumstances of the landlord are concerned, the only accounts we have seen show the landlord insolvent on a balance sheet basis with a deficit of nearly £1 million. However, there is evidence that the landlord has been the subject of a voluntary arrangement. We have no evidence of the company's current financial health. We thus ignore this consideration.

33. As to convictions, the tenant relies on three rent repayment orders made by this Tribunal against the landlord. In our judgment, however, these are not convictions, which can only be made in the criminal courts. They are, however, potentially relevant as going to the landlord's conduct.

34. As to the landlord's conduct, the tenant says that the flat was not as represented in the video clips which he was shown in lieu of an inspection of the flat. In particular, Room C was represented to be a combined living and dining room, whereas in fact it was a third bedroom. Further the flat was dirty and the landlord did not arrange the cleaning of it.

35. The difficulty we have with this is that these are matters for the County Court, who can award damages. The Tribunal should avoid double-counting.

36. Looking at the matter in the round, this is a case where the landlord was a professional supplier of shared housing. It must have known of the licensing requirements. However, this flat itself was suitable for licensing as an HMO. Some works were done before the application for a licence was made by Mr Kapisthalam, however, these seem to have been modest. The tenant suggests that the works involved increasing the size of Room C, but we have difficulty understanding how this could be done. The tenant has no expertise in this area and does not appear to have measured the room up. We reject his case on this.

37. The caselaw suggests that in a bad case an award of 80 or 85 per cent of the rent should be made. The tenant submitted that 85 per cent would be appropriate in the current case. At the lower end of the scale with an amateur landlord, an award of 25 per cent might be appropriate. A professional landlord would generally have a starting point of 50 per cent. Mr Owen submitted that we should award 50 per cent.

38. In our judgment, this case is at the lower end of the scale, but it does concern a professional landlord. We consider that 55 per cent is appropriate. Accordingly we make a rent repayment order in the sum of £1,666.50.

Costs

39. The tenant was exempt from paying fees to the Tribunal. Accordingly we made no order for costs.

DECISION

We order the respondent to pay the tenant £1,666.50 by way of a rent repayment order with no order in respect of the costs payable to the Tribunal.

Judge Adrian Jack 6th February 2024