FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AX/HMF/2023/0203**
Property	**:**	**22 Mill Street, Kingston-Upon-Thames, KT1 2RF**
Applicant	**:**	**Anderson Arteaga Lopez**
Representative	**:**	**In person**
Respondent	**:**	**Grand Residential Limited**
Representative	**:**	**In person**
Type of Application	**:**	**Application by Tenant for rent repayment order. Sections 40,41, 43 & 44 of the Housing and Planning Act 2016**
Tribunal	**:**	**Judge B MacQueen** **Mr S Wheeler MCIEH, CEnvH**
Date of Hearing	**:**	**3 May 2024**
Date of Decision	**:**	**7 May 2024**

DECISION

DECISION

1. The Tribunal finds that the Respondent has committed the offence of failing to license a House in Multiple Occupation (HMO) under the provisions of section 72(1) of the Housing Act 2004, and that accordingly a rent repayment order in favour of the Applicant can be made. The Tribunal makes a rent repayment order of £3,850.50 for the period 4 April 2022 until 30 March 2023 and this must be paid by the Respondent to the Applicant within 28 days of the date of this decision.

2. The Tribunal also orders the reimbursement of the Tribunal fees in the total sum of £300 and this amount must be paid by the Respondent to the Applicant within 28 days of the date of this decision.

Background

3. On 11 August 2023 the Applicant made an application for a Rent Repayment Order (RRO) under section 41 of the Housing and Planning Act 2016 (the Act) in relation to 22 Mill Street, Kingston-upon-Thames, KT1 2RF (the Property).

4. The Applicant stated in his application that he had paid rent of £380 per month for three months (4 April 2022 to 3 July 2023 and then he had paid £410 per month for 9 months (4 July 2022 to 30 March 2023). The Applicant was therefore seeking a rent repayment order for the period 4 April 2022 until 30 March 2023 (the Relevant Period). The Applicant stated that the total amount of rent paid for this period was £4,830.

5. The Applicant alleged that five people were living at the Property, sharing basic facilities and therefore the Respondent was committing an offence under section 72(1) Housing Act 2004 namely of having control or management of a house in multiple occupation which was

required to be licensed but was not so licensed. The Applicant also alleged that there were a number of problems with the condition of the Property.

6. The Respondent was initially named in the Applicant's application form as Vijayarajah Thuvarakesan, however by letter dated 18 October 2023, the Applicant applied to amend the Respondent to Grand Residential Ltd. The Applicant stated that the tenancy agreement that he had for the Property named the landlord as Grand Residential Ltd and Vijayarajah Thuvarakesan was a director of that company.

7. The Tribunal had considered this application at an oral hearing on 31 January 2024, where both the Applicant and Vijayarajah Thuvarakesan were present. At that hearing the Tribunal had found that the Respondent should be Grand Residential Limited, as that company was the Applicant's landlord, and Vijayarajah Thuvarakesan was a director of that company. The Tribunal had directed (pursuant to Rule 10(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules) that Grand Residential Limited be substituted as the Respondent in place of Vijayarajah Thuvarakesan and had directed that by 28 February 2024 the Applicant must send by post and email to the addresses provided at the hearing by Vijayarajah Thuvarakesan a bundle of all relevant documents to the Respondent.

8. The Tribunal had further directed at the hearing on 31 January 2024 that the Respondent must email to the Tribunal and the Applicant a bundle of all relevant documents for use in determining that application, with the Applicant being given the opportunity to reply by 10 April 2024. The matter was listed for hearing on 3 May 2024.

9. The Applicant produced a bundle of documents that was indexed and numbered chronologically and consisted of 51 pages (the Bundle).

10. The Respondent did not provided a bundle or any evidence to the Tribunal.

The Hearing – 3 May 2024

11. The Hearing on 3 May 2024 took place at Alfred Place, London. The Applicant attended in person, but the Respondent did not appear and was not represented.

Respondent's Application for an Adjournment and Extension of Time

12. On 3 May 2024 at 08:40 (the morning of the hearing), Vijayarajah Thuvarakesan (Director) on behalf of Grand Residential Limited sent an email to the Tribunal seeking an adjournment. This email was not copied to the Applicant, as was required by the Tribunal (section (a) of "important note").

13. The Respondent's email stated that "regretfully at the eleventh hour" an adjournment was requested. In this email Vijayarajah Thuvarakesan stated that he was the only Director of Grand Residential Limited, which he described as a family run business, and the only person who could represent the company at the Tribunal. He further explained that the company did not have funds to appoint a lawyer. Vijayarajah Thuvarakesan stated that he had had a high temperature, constant cough and diarrhoea since yesterday. He explained that he had expected to be better and had planned to attend the hearing but that his condition had deteriorated and worsened on the morning of the hearing. He further confirmed that he had called his GP practice who had given him a telephone appointment as they did not want to give an in-person appointment due to the infection and his condition. Vijayarajah Thuvarakesan stated that the GP surgery had said that it may be covid but he had not tested.

14. In addition, Vijayarajah Thuvarakesan stated that he had what he believed to be a stress related illness. He explained that the majority of

the stress had been caused as a result of a family bereavement when, in late February, he had lost his mother-in-law. He stated that the death had caused delayed grieving and his wife, who had been very close to her mother, had had to be comforted by him. In the circumstances, Vijayarajah Thuvarakesan asked for a time extension of 28 days from 3 May 2024 in which to file his defence.

15. The Tribunal gave the Applicant time to read a copy of the email that had been sent on behalf of the Respondent. The Applicant confirmed that he had not been sent a copy of the email and noted that whilst he was very sorry for Vijayarajah Thuvarakesan's loss, it was the Applicant's belief that the Respondent could have notified the Tribunal earlier of this situation. Additionally, the Applicant confirmed that he felt that Vijayarajah Thuvarakesan was not the only person who could represent the company and noted that in any event, no evidence had been provided by the Respondent to date.

Tribunal Decision on Adjournment and Extension of Time Application

16. The Tribunal considered the Respondent's application. With regards to the application for an extension of time for an additional 28 days to file evidence to the Tribunal, the Tribunal refused that application. In reaching this decision the Tribunal noted that the Directions were made on 31 January 2024 and that the Respondent was given until 27 March 2024 to provide his evidence to the Tribunal. The Respondent had not sent any evidence to the Tribunal and had not provided the Tribunal with any explanation as to why he has not complied with the Tribunal's directions. The Tribunal noted that the Respondent had stated that his mother-in-law passed away in late February but found that if Vijayarajah Thuvarakesan was not able to comply with the Tribunal's directions he, or someone on his behalf, should have contact the Tribunal earlier. The Tribunal noted that Vijayarajah Thuvarakesan's email seeking an extension of time was sent at 08:40

for a hearing that was starting at 10:00 on the same day, and was not copied to the Applicant. The Tribunal considered the overriding objective and parties' obligation to co-operate with the Tribunal (rule 3 of the 2013 Rules) and found that the Tribunal had to deal with cases fairly and justly and avoid delay, so far as compatible with the proper consideration of the issues. In the circumstances of this case the Tribunal found that it was not acceptable to seek an additional 28 days to file evidence which was due on 27 March 2024 only 1 hour and 20 minutes before the hearing started. The Tribunal therefore refused the Respondent's application for additional time to serve evidence.

17. With regards to the Respondent's application for an adjournment because he was not well enough to attend the hearing, the Tribunal refused this application to adjourn. The Tribunal made this decision because the Respondent had not complied with the Tribunal's direction and therefore no evidence on behalf of the Respondent was before the Tribunal. The Respondent would therefore be limited in what he could say to the Tribunal at any hearing. The Tribunal therefore found that it was not in the interests of justice to delay given that the case had been timetabled at the hearing on 31 January 2024, and this was a hearing that Vijayarajah Thuvarakesan had been present at.

18. Having refused the Respondent's application for further time to submit evidence and adjourn the hearing, the Tribunal proceeded with the hearing in the absence of the Respondent. The Tribunal considered rule 34 of the 2013 Rules and was satisfied that the Respondent was aware of the hearing and that it was in the interest of justice to proceed, in particular considering the overriding objective and the need to avoid delay.

The Law

19. Section 41(1) of the Act states:

> "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"

20. Section 43(1) of the Act states:

> "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)"

21. Section 40(3) of the Act defines "an offence to which this Chapter applies" by reference to a table. The offence under section 72(1) Housing Act 2004 (control or management of unlicensed house) is within that table.

Control or Management of Unlicensed HMO:

22. Section 72(1) Housing Act 2004 provides:

> "A person commits an offence if he is a person having control of or managing an HMO which is required to be licenced under this Part but is not so licensed."

An HMO required to be licensed, is defined in Section 55(2)(a) Housing Act 2004 as:

> "any HMO in the [local housing] authority's district which falls within any prescribed description of HMO".

The Licensing of Houses in Multiple Occupation (Prescribed Description) Order 2018/221 states:

> "An HMO is of a prescribed description for the purpose of section 55(2)(a) of the Act if it
>
> (a) is occupied by five or more persons;
> (b) occupied by persons living in two or more separate households; and
> (c) meets either (i) the standard test under section 254(2); (ii) the self-contained flat test under s.254(3) except for purpose-built flats situated in blocks comprising three or more self-contained flats; or (iii) the converted building test under section 254(4) of the Act, unless the HMO has a temporary exemption notice or is subject to an interim or final management order;

Finally, section 254 Housing Act 2004 defines the standard test, self-contained test and the converted building test:

Section 254 provides:

> (1)For the purposes of this Act a building or part of a building is a "house in multiple occupation" if
> (a) it meets the conditions in subsection (2) ("the standard test")
> (b) it meets the condition in subsection (3) ("the self-contained flat test")
> (c) it meets the conditions in subsection (4) ("the converted building test").

The standard test is defined as:

> 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;

(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;

(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.

Person having Control of or Managing

23. The section 72(1) offence is committed by the person having control/managing the Property. Section 263(1) Housing Act 2004 defines "person having control" in relation to the premises as "the person who received the rack-rent of the premises (whether on his own account or as agent or trustee of another person). Section 263(2) defines "person managing" as the person who, being an owner or lessee of the premises (a) received (whether directly or through an agent or trustee) rents or other payments (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises.

24. At pages 13 to 15 of the Bundle, the Applicant provided bank transaction details showing funds transferred to Grand Residential. These confirmed the details set out at page 43 of the Bundle namely that 3 monthly payments of £380 had been made between 4 April 2022 and 3 July 2022 and 9 payments at £410 per month had been made between 4 July 2022 and 30 March 2023. The Tribunal was therefore satisfied that the Respondent was collecting rent and therefore was the "person having control" for the purposes of the section 72(1) offence. Additionally, the Tribunal found that the Respondent was the "person

managing". The Applicant provided an Assured Shorthold Tenancy Agreement (pages 16-21 of the Bundle) for the Property which stated that the Respondent was the landlord who received rent for the people occupying the Property. The Respondent could therefore commit an offence under section 72(1).

Was the Property an HMO that was required to be licensed?

25. The Applicant told the Tribunal both in his written statement and oral evidence to the Tribunal that throughout the Relevant Period for which he was seeking a RRO (4 April 2022 to 30 March 2023) there were five people living at the Property. The room that the Applicant lived in was described by the Applicant as a room that had been made under the stairs by erecting a partition so that an additional room was created. The Applicant confirmed that in addition to his room on the ground floor, there was another bedroom, and on the 1st floor there were three additional bedrooms. Ekaterina Pavlenko, who provided a witness statement at page 44 of the Bundle as well as oral evidence to the Tribunal, confirmed that for the Relevant Period there were five people living at the Property of which she was one.

26. The Applicant confirmed that the tenants lived at the Property as their main residence and that they lived as separate households.

27. Further both the Applicant and Ekaterina Pavlenko confirmed that the residents shared one kitchen and one bathroom.

28. The Tribunal found the Applicant and Ekaterina Pavlenko to be credible witnesses. They had both lived at the Property for the Relevant Period and gave the Tribunal evidence of what they had witnessed whilst living at the Property. The Tribunal therefore accepted their evidence and found that the Property consisted of one or more units of living accommodation not consisting of a self-contained flat or flats and that the occupiers did not form a single household. Additionally, the occupiers were occupying the Premises as their main residence, paying

rent, and there were two or more households occupying the Property who were sharing toilet, personal washing and cooking facilities. The Tribunal therefore found that the Property was required to be licensed as an HMO as it met the standard test.

Was the Property licensed?

29. For an offence under section 72(1) to be proved, the Tribunal had to be satisfied that the Property was not licensed. The burden of proof remained on the Applicant to prove this beyond reasonable doubt.

30. At page 32 of the Bundle, the Applicant provided a copy of a report completed on 6 April 2023 by Kingston Upon Thames Council (the Council) which followed an inspection they had made to the Property. This report described the Property as an unlicensed HMO. The Applicant was unsure of the exact date that the Council had completed its inspection, however the Applicant's evidence was that it was because of the Council's inspection that the tenants were told by the Landlord to vacate the Property. He also confirmed that he was living at the Property when the Council's inspection took place.

31. In addition, the Applicant confirmed that he had completed a search of the Council's records and he confirmed to the Tribunal that the Property did not have an HMO licence for the Relevant Period.

Statutory Defence – Section 72(4)(b) and Reasonable Excuse.

32. The Tribunal considered whether a statutory defence or reasonable excuse could exist in this case. However, the Tribunal found that there was no evidence before the Tribunal of any temporary exemption or application for a licence. Additionally, the Respondent had not raised any defence or reasonable excuse. The Tribunal was therefore satisfied that the Respondent had not shown, on a balance of probabilities, a statutory defence or reasonable excuse.

Should the Tribunal Make a Rent Repayment Order (RRO)?

33. Section 43 of the Act provides that the Tribunal may make a RRO if it is satisfied beyond reasonable doubt that the offence has been committed.

34. For the reasons set out above, the Tribunal found, beyond reasonable doubt, that the Respondent was the person having control/managing a house in multiple occupation which was required to be licensed but was not so licensed (section 72(1)).

35. The decision to make an RRO award is discretionary. However, because the offence was established the Tribunal found no reason why it should not make an RRO in the circumstances of this application.

Ascertaining the Whole of the Rent for the Relevant Period

36. The Applicant was seeking to recover rent paid of £4,830 for the period between 4 April 2022 and 30 March 2023. The Tribunal accepted the Applicant's evidence that this was the whole rent he had paid for the relevant period.

Deductions for Utility Payments that Benefit the Tenant

37. The Applicant confirmed that the rent he had paid included utilities; however, understandably, the Applicant was not aware of the amount from this rent that attributed to utility payments.

38. With the Applicant's agreement, the Tribunal considered the Property's Energy Performance Certificate (EPC) and found that utilities amounted to approximately £1,500 per year. This equated to £125 per month and when divided between the 5 people living at the Property as separate households, amounted to £25 per month. The Applicant

accepted that this was a realistic calculation and the Tribunal therefore found that a deduction of £25 per month for utilities should be made.

Determining the Seriousness of the Offence to Ascertain the Starting Point

39. The Tribunal had to consider the seriousness of the offence compared to other types of offences for which a RRO could be made, and also as compared to other examples of the same offence.

40. In determining the seriousness of the offence, the Tribunal adopted Judge Cooke's analysis in Acheampong v Roman [2022] that the seriousness of the offence could be seen by comparing the maximum sentences upon conviction for each offence. Using this hierarchical analysis, the relevant offence of having control or managing an unlicensed house would generally be less serious. However, the Tribunal had to consider the circumstances of this particular case as compared to other examples of the same offence.

Conduct of Landlord and Tenant

41. The Applicant identified the following areas he wished the Tribunal to consider namely:

- Non-compliance with HMO regulations
- Undersized Room
- Withholding the deposit
- Rent Increase
- Maintenance Neglect
- Harassment and Illegal eviction attempt

Fire Hazard and Non-compliance with HMO Regulations

42. The Applicant told the Tribunal that there were no interlinked smoke alarms, heat detectors, fire doors, or fire risk assessment at the Property. In addition, the Applicant showed the Tribunal the Improvement Notice that the Council had issued for the Property (pages 26 to 33 of the Bundle). Whilst this report was dated 6 April 2023, and so is after the Relevant Period, the Tribunal accepted the evidence of the Applicant that this related to an inspection that was completed whilst the Applicant still lived at the Property. The Tribunal therefore accepted that this Improvement Notice was relevant to show the condition of the Property at the Relevant Period.

43. In the Improvement Notice the Council identified a category 1 fire hazard at the Property. The details of the deficiencies were set out at page 26 of the Bundle, and the remedial action required was set out at pages 27 and 28 of the Bundle. The deficiencies were listed as follows:

- Early warning system at the Property was inadequate and appeared not to be working,
- There were no interlinked smoke alarms within the bedroom or on each floor,
- There was no heat detector in the kitchen,
- There were no fire doors (FD30) to the bedrooms or kitchen,
- Doors to the bedroom had locks without thumb-turn devices,
- The partition between the ground floor rear bedroom and the hallway (means of escape) appeared not to be 30-minute fire resistant,
- There was a fridge and other household items in the hallway,
- No fire risk assessment was displayed or provided to the tenants.

44. As well as this category 1 fire hazard, category 2 hazards were also identified by the Council (pages 26 to 27 of the Bundle). These included the extractor fan being out of order in the bathroom, the bathroom radiator not working, damage to the bathroom window panel and damp and mould in the bathroom.

45. The Tribunal accepted the evidence provided by the Applicant, which included the Council's Improvement Notice. In relation to the fire hazard, the Tribunal found this to be an aggravating factor, particularly because this was a category 1 hazard. The Tribunal noted that the Council had identified that the partition between the ground floor rear bedroom and the hallway appeared not to be 30-minutes fire resistant. This bedroom was identified by the Applicant as the room that he occupied, and this deficiency was made more serious because the Tribunal accepted the evidence of the Applicant that his room did not have a window and so the only means of escape was through the door. The lack of early warning system and fire doors could result in the Applicant being trapped in the event of a fire. This was compounded by the evidence that the Applicant gave to the Tribunal that the partition was ill-fitted and allowed light to pass through the gaps. Given that light could pass through the gap, the Tribunal noted that smoke would also be able to pass into the Applicant's room in the event of a fire. Given the proximity of the kitchen to the Applicant's room where the risk of fire was greater, the combination of the room not having a window, proper fire prevention or detection mechanisms, an ill-fitting partition that appeared not to be 30-minute fire resistant, and would allow smoke through, and the room's proximity to the kitchen meant that this lack of fire safety was a significant aggravating factor.

46. In relation to other breaches, the Tribunal found that the Applicant had not been provided with a copy of the "How to Rent" booklet. There was also no evidence of an electrical installation certificate displayed, no evidence of a gas safety certificate or energy performance certificate.

The Tribunal found that this lack of attention to these important safety requirements by the Respondent also aggravated the seriousness of the offence.

Undersized Room

47. The Applicant told the Tribunal that his room was below the minimum size. Additionally, as set out above, the room did not have a window. Therefore, the only way the Applicant could ventilate the room was to open the door, however this prevented the Applicant from having privacy. Again, as noted above, the Applicant also explained that the only natural light that came into the room when the door was shut was through gaps in the ill-fitting partition wall between his room and the hallway. This meant that the Applicant had to use an electric light in his room constantly.

48. The Tribunal noted that the room undersize and lack of window were identified as category 2 hazards by the Council in the Improvement Notice they issues (page 27 of the Bundle).

49. The Tribunal accepted the Applicant's evidence and found that the room was below the minimum size, had inadequate ventilation and did not have natural light. The Respondent was therefore collecting rent for a room that did not meet minimum standards and was not suitable for habitation.

Refusal to return Applicant's Deposit

50. The Applicant told the Tribunal that he paid a deposit of £380 when he had moved into the Property. However, the Applicant told the Tribunal that the deposit was not put into a protected scheme and had not been refunded to him. At page 51 of the Bundle, the Applicant produced a

letter he had sent to the Respondent requesting the return of his deposit, but the Applicant confirmed that he had not had his deposit returned.

51. The Tribunal accepted the evidence of the Applicant and found that he had paid the deposit in good faith and when it was not returned, he had written to the Respondent to request that this was paid to him. The Tribunal found that this was in breach of the Respondent's obligation to the Applicant.

Rent Increase

52. The Applicant produced text messages from Vijayarajah Thuvarakesan (page 45 of the Bundle) which showed that the rent increase that occurred from July 2022 was communicated to the tenants by text message. The Applicant produced text messages that stated that if tenants could not afford the new rent they should move out.

53. The Tribunal found that, given the Applicant had an assured shorthold tenancy, the Respondent was not permitted to increase rent without serving valid notice.

Maintenance Neglect

54. The Applicant told the Tribunal at page 46 of the Bundle that he and the other tenants had repeatedly told the landlord's agent about issues with the property, and this had included broken pipes, damage to windows, mould in the bathroom and heating problems. The Applicant told the Tribunal that these issues were either ignored or there would be a delayed reply which created what the Applicant described as unsafe and uncomfortable living conditions.

55. The Tribunal accepted the evidence of the Applicant and noted, in particular, the condition of the Property as set out in the Council's Improvement Notice.

Illegal Eviction Attempt

56. The Applicant gave evidence to the Tribunal that on 23 March 2023 the Respondent's agent arrived at the Property late at night and issued a verbal eviction notice.

57. The Tribunal accepted the evidence of the Applicant that he was told to leave the Property without the correct formal process being followed and found this to be an aggravating factor.

Financial Circumstances of Respondent Landlord

58. The Respondent did not provide the Tribunal with any financial information that may be relevant to an assessment of an RRO.

Whether Respondent Landlord has been convicted of offence

59. There is no evidence before the Tribunal that the Respondent had any convictions identified in the table at section 45 of the Act.

Quantum Decision

60. Taking all of the factors outlined above into account, the Tribunal found that this licensing offence was not the most serious under the Act. The Tribunal concluded that the starting point for an offence of this nature would be 60%. However, taking the factors of this

particular case into account, the Tribunal increased this amount to 85% in line with the findings made above.

61. The Tribunal therefore reduced the rent repayment figure by 15% and ordered that the Respondent pay 85% of the amount claimed, with a deduction made for utilities.

Total Claim - £4,830
Less utilities - £ 300

85% of which gave a **total amount of £** 3,850.50

62. The Tribunal ordered that the payment be made in full within 28 days.

Application Fees

63. The Applicant asked the Tribunal to make an order requiring the Respondent to pay that Applicant's application fee of £300 of the date of this decision.

64. Given that the Tribunal had made an RRO, the Tribunal exercised its discretion to order that the Respondent must pay the applicant £300 in respect of Tribunal fees. This amount shall be paid within 28 days of the date of this decision.

Judge Bernadette MacQueen **Date: 7 May 2024**

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 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 to 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 (ie 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.