FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/HMF/2023/0322**
Property	**:**	**1 Farely Drive, Ilford, IG3 8LT**
Applicant	**:**	**Claudia Cucca**
Representative	**:**	**Mr Edward Phillips of Justice for Tenants**
Respondents	**:**	**(1) Anthony Enyioma** **(2) Haibo Zhao and Mingjun Li** **(3) Clevarent Ltd**
Representative	**:**	**No appearance**
Type of application	**:**	**Application for a rent repayment order by tenants**
Tribunal	**:**	**Judge Adrian Jack,** **Tribunal Member Susan Coghlin MCIEH**
Date of decision	**:**	**24th February 2025**

DECISION

Procedural

1. By an application to the Tribunal made on 15th November 2023, the applicant seeks a rent repayment order in respect of payments totalling £6,300 made between 16th February 2022 and 15th February 2023, a period when there was no licence permitting the letting of the room she occupied whilst the property was a house in multiple occupation ("HMO")

2. We heard this matter on 21st February 2025. The tenant was represented by Mr Edward Phillips of Justice for Tenants. None of the respondents appeared. The applicant did not appear due, Mr Phillips said, to her ill-

© CROWN COPYRIGHT

health. Her written evidence was thus not subject to any questioning by us. However, since the respondents were not present, there would only have been limited questions which we would have put to her.

The need for there to be a case to answer

3. This is a quasi-criminal matter, where the applicant needs to prove in relation to each respondent that that respondent is guilty of a relevant offence, in this case section 72(1) of the Housing Act 2004. Proof is to the criminal standard, namely so that we are sure of the relevant respondent's guilt or so that guilt is proved beyond reasonable doubt.

4. Because this is a quasi-criminal matter, the usual rule is that a respondent has the right to silence and is not obliged to give evidence or incriminate him or herself. The right to silence and the right not to incriminate oneself are fundamental constitutional rights. This impacts on a party's obligation to produce documents pursuant to the Tribunal's directions, because a party is entitled to refuse to produce documents which are liable to incriminate himself: see Hollander on Documentary Evidence (15th Ed, 2024) Chapter 21 and as to the principle's application to this Tribunal: The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 rule 18(8).

5. Section 235(1) of Housing Act 2004 states that a

> "person authorised in writing by a local housing authority may exercise the power conferred by subsection (2) in relation to documents reasonably required by the authority—
>
> > (a) for any purpose connected with the exercise of any of the authority's functions under any of Parts 1 to 4 in relation to any premises, or
> >
> > (b) for the purpose of investigating whether any offence has been committed under any of those Parts in relation to any premises.
>
> (2) A person so authorised may give a notice to a relevant person requiring him—
>
> > (a) to produce any documents which—
> >
> > > (i) are specified or described in the notice, or fall within a category of document which is specified or described in the notice, and
> > >
> > > (ii) are in his custody or under his control, and
> >
> > (b) to produce them at a time and place so specified and to a person so specified.
>
> (3) The notice must include information about the possible consequences of not complying with the notice.
>
> (4) The person to whom any document is produced in accordance with the notice may copy the document.
>
> (5) No person may be required under this section to produce any document which he would be entitled to refuse to provide in

proceedings in the High Court on grounds of legal professional privilege.
(6) In this section 'document' includes information recorded otherwise than in legible form, and in relation to information so recorded, any reference to the production of a document is a reference to the production of a copy of the information in legible form.
(7) In this section 'relevant person' means, in relation to any premises, a person within any of the following paragraphs—

(a) a person who is, or is proposed to be, the holder of a licence under Part 2 or 3 in respect of the premises, or a person on whom any obligation or restriction under such a licence is, or is proposed to be, imposed,
(b) a person who has an estate or interest in the premises,
(c) a person who is, or is proposing to be, managing, or having control of the premises,
(d) a person who is, or is proposing to be, otherwise involved in the management of the premises,
(e) a person who occupies the premises."

6. So far as section 235(1) is concerned, we express no view as to whether, where a local authority seeks information in connection with licensing, this provision impliedly overrules the right against self-incrimination. In the current case, however, the London Borough of Redbridge has never served a notice under section 235(1) against any of the respondents. Thus there is in our judgment no basis on which any inference could be drawn against the respondents or any of them from a failure to respond to a section 235(1) notice.

7. It is sometimes submitted that a court can draw an adverse inference from a defendant's silence in circumstances set out in sections 34 to 37 of the Criminal Justice and Public Order Act 1994, even if the respondent himself was not at the hearing to invoke the right to silence."

8. As to the modification of the right to silence in the 1994 Act, section 35 (so far as material) provides:

> "(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it."

9. On its face, these provisions only apply to trials on indictment or in criminal cases in the Magistrates' Court, however, the High Court in *VIS Trading Co Ltd v Nazarov* [2015] EWHC 3327 (QB), [2016] 4 WLR 1 at [31] (*per* Carr J, as she then was) (approved by the Court of Appeal in *ADM International SARL v Grain House International SA* [2024] EWCA Civ 33 at [91]) held that in quasi-criminal proceedings like an application to commit for contempt "[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." Accordingly, we proceed on the basis that we must apply the provisions of the 1994 Act.

10. In a criminal case, the standard direction to the jury would be this (substituting respondent for defendant):

"In this country we have the right to silence. A respondent has an absolute right not to give evidence.

The burden of proving the case rests throughout upon the prosecution. The fact that a particular respondent did not give evidence is not evidence in support of the prosecution case.

However, the fact that a respondent did not give evidence means that there is no evidence from him or her to rebut, contradict or explain the evidence adduced by the prosecution.

You will remember the warning which I gave the respondents when their advocate indicated that the respondents did not intend

to give evidence. Their advocate confirmed that he had advised the respondents of the possible consequences of their not giving evidence.

What approach should you take? Firstly, you must ask whether the prosecution case is sufficiently strong to call for an answer. If you think that the prosecution have not established a case for any particular respondent to answer, or if you are unsure that such a case has been established, then you should stop right there and bring in a verdict of Not Guilty.

Secondly, assuming you are sure that the prosecution have presented a sufficient case for a particular respondent to answer, you should ask yourself whether there is any sensible reason for that respondent not to have given evidence. If you think the reason he or she did not give evidence is that he or she has no answer to the prosecution case or none that would stand up to cross-examination you are entitled to consider his or her failure to give evidence as lending some support to the prosecution case.

Thirdly, I must warn you that an inference drawn from the fact that a particular respondent did not give evidence cannot of itself prove his or her guilt."

11. In a quasi-criminal case such as the present, the Tribunal at the conclusion of the applicant's case has to satisfy itself that there is a case for a respondent to answer. If there is not, then the Tribunal must dismiss the application for a rent repayment order. If there is no case for a respondent to answer, no question of drawing adverse inferences under the 1994 Act can arise.

12. We therefore proceed to consider whether the applicants have proved that there is a case for each respondent to answer.

The landlord's identity

13. The first issue is the landlord's identity. Section 40 of the Housing and Planning Act 2016 provides:

"(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."

A breach of section 72(1) of the 2004 Act is listed in the table.

14. In the current case, the tenancy agreement of 16th February 2020 defines the landlord as: "Anthony Enyioma of Clevarent Ltd. The Landlord also refers to his/her agent, or other person acting on their behalf." The tenancy agreement is on Clevarent notepaper. The freeholder of the property is and was Mr Zhao and Ms Li.

15. If the landlord is Mr Enyioma or Clevarent Ltd, then no rent repayment order can be made against Mr Zhao and Ms Li: *Rakusen v Jepsen* [2023] UKSC 9, [2023] 1 WLR 1028. This would appear to be the case even if there is only a tenancy by estoppel between Mr Enyioma or Clevarent Ltd and the applicant. Likewise, if the true landlords were Mr Zhao and Ms Li, then no rent repayment order would lie against Mr Enyioma or Clevarent Ltd.

16. If there is uncertainty as to whether the landlord was Mr Enyioma or Clevarent Ltd or Mr Zhao and Ms Li, then the Tribunal would be unable to be sure that any of them were the landlord. (In a criminal case, if one of two men had to be the murderer but the prosecution could not establish which, and there was no question of joint enterprise, then both men would have to be acquitted on a submission of no case to answer.)

17. The Court of Appeal has recently handed down its judgment in *Cabo v Dezotti* [2024] EWCA Civ 1358 (published 6th November 2024). This has some similarities to the current case. There the owner of the flat, a Ms Cabo, had signed a management agreement with Top Holdings Ltd, allowing Top Holdings to grant holiday lets. Top Holdings in turn had made an agreement in its own name with Ms Dezotti headed "Licence to occupy a room as holiday let". Ms Dezotti signed as "Licensee" and Mr Grasso (Ms Cabo's husband) signed on behalf of Top Holdings, "the Licensor". In due course Ms Dezotti applied for a rent repayment order against Ms Cabo, who disputed that she was the relevant landlord.

18. The Court of Appeal upheld the decisions of this Tribunal and of the Upper Tribunal on appeal from this Tribunal that she was in truth the landlord, acting through Top Holdings as her agent. (Although expressed as a licence, the agreement notionally between Top Holdings and Ms Dezotti was in truth a tenancy: *Street v Mountford* [1985] AC 809.) The significance of the case for current purposes is that in order to make its findings of fact that Top Holdings was an agent (despite appearing as principal in the licence agreement), the Tribunals and the Court of Appeal had to make detailed findings as to the true relationship between

Ms Cabo and Top Holdings and the true nature of the "management agreement". Had the management agreement been a genuine agreement allowing Top Holdings to let the property in its own name, then Top Holdings would have been the appropriate respondent to the rent repayment order, but on the facts it was in effect a sham. The true landlord was Ms Cabo.

19. In the current case, we have no documentary evidence of the true relationship between Mr Zhao and Ms Li on the one hand and Mr Enyioma or Clevarent Ltd on the other. However, there are strong indications that the true landlord in this case was Mr Zhao and Ms Li. Text messages from Clevarent's representatives dated 11th April 2020 (page 216 of the bundle), 26th January 2023 (page 278), and 24th May 2023 (page 324) show on a reasonable interpretation that Clevarent and its representatives considered Mr Zhao and Ms Li were the actual landlords.

20. There is no evidence that Clevarent Ltd was anything more than a property manager. The case for Mr Enyioma being anything other than a representative of Clevarent Ltd is equally barren. If Clevarent Ltd and Mr Enyioma were just agents for Mr Zhao and Ms Li, then it will be Mr Zhao and Ms Li who have control of the property for the purposes of section 72(1) of the 2004 Act.

21. We accept, and it is within the Tribunal's knowledge, that a not-uncommon arrangement, at least in London, is for a flat-owner to grant a lease (sometimes formal, sometimes less formal) to an entrepreneurial property professional at a fixed rent. The professional then lets the property at the best price he or she can and pockets the difference between the rent from the tenants and that payable to the flat-owner. However, on the facts of this case, the applicant has in our judgment shown a case to answer against Mr Zhao and Ms Li.

22. It is thus open to us to draw inferences against Mr Zhao and Ms Li from their failure to answer the applicant's case. We do consider that on the facts of this case it is appropriate and fair to draw an adverse inference against Mr Zhao and Ms Li, but we remind ourselves that silence alone cannot prove the case against them.

23. When we stand back and look at the evidence in the round, we have no reasonable doubt that Clevarent Ltd (or Mr Enyioma) were not in truth the landlord. We have no reasonable doubt that Mr Zhao and Ms Li were the actual landlords with control of the property.

Separate households

24. This was a six bedroom house with all the bedrooms let, some to two people, so the total number of persons living there was usually nine. There may have been short voids in particular bedrooms (the applicant's witness statement gives details), but never sufficient to mean the property did not require a licence to be occupied as an HMO.

25. Section 254(2) defines a house in multiple occupation (so far as relevant for current purposes) as one where:

> "(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."

26. The occupiers of the property stayed there typically for long periods of time in full time occupation and we have no reasonable doubt that the room which each occupant occupied was their only or main residence. We are equally sure all the other criteria are satisfied.

Liability

27. An application was only made for a licence to authorise the HMO on 13th April 2023. Accordingly for the whole period of the applicant's occupation of her room up to that date, an offence under section 72(2) of the 2004 Act was being committed. The applicant is entitled to choose the period of a year during which she seeks a rent repayment order. She was entitled to choose the period stated in her application and thus the Tribunal has jurisdiction to order that rent up to a maximum of £6,300 be repaid to her.

28. The fact that the Tribunal has the power to order the maximum does not, however, necessarily mean that it should. Firstly, if the landlord has paid

for utilities, then it would not generally be appropriate to order that the part of the rent referrable to utilities be repaid to the tenant. In the current case, however, there is no evidence that the landlord did pay anything towards the utilities. On the contrary, on 27th July 2023, Ovo, the energy supplier, sought payment from a Mr Smith of the sum of £10,144.10 in respect of utilities supplied to the property (page 340 of the bundle). Accordingly, it is not possible in our judgment to infer that the landlords must have been paying for energy at the property. We make no deductions in respect of utilities.

29. Secondly, we need to have regard to the severity of the breaches. The current case is in our a judgment a bad case of a landlord's failure to comply with proper housing standards. The property was poorly maintained and overcrowded. There were mice and subsequently rat infestations. Pest control was inadequate. There were insufficient council-approved rubbish bins, resulting in some of the rubbish not being collected. The boilers constantly broke down rendering the property cold. Because of inadequate means of varying the temperature, when the boilers operated the property was uncomfortably hot. The exit doors to the house were defective, because they required a key to open them. There were no fire doors. A gas leak was not timeously remedied.

30. These are all serious matters, but they do not in our judgment put this case in the rare category where a 100 per cent order for rent repayment should be made. In our judgment an award of 75 per cent is appropriate, or £4,725.

Costs

31. The Tribunal has a discretion as to the fees payable to the Tribunal. These comprise the application fee and the hearing fee totalling £300. In our judgment these costs should follow the event, so that Mr Zhao and Ms Li should pay them.

32. As regards the other potential costs of the parties, the Tribunal's powers are more limited: see The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 rules 13(1)(a) and (b). The Tribunal gives directions below, if any party seeks such costs.

DETERMINATION

(a) The applicant's application for a rent repayment order is granted against Mr Haibo Zhao and Ms Mingjun Li. The respondents, Mr Haibo Zhao and Ms Mingjun Li, shall pay the applicant £4,725 by way of rent repayment order

(b) The applicant's application for a rent repayment order against Mr Enyioma and Clevarent Ltd is dismissed.

(c) The respondents, Mr Haibo Zhao and Ms Mingjun Li, shall pay the applicant £300 in respect of the fees payable to the Tribunal.

(d) Any party seeking any other order as to costs should make the same by 4pm on 7th March 2025 with a schedule of the costs claimed and the Tribunal will give further directions.

Name: Judge Adrian Jack **Date: 24th February 2025**