FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/HMC/2021/0001 & LON/00BK/HMB/2021/0004**
Property	**:**	**Flat 3, 126 Westbourne Grove, London W11 2RR**
Applicant	**:**	**Elke Regensburger**
Respondent	**:**	**Miranda Dunn**
Type of Application	**:**	**Rent repayment order**
Tribunal	**:**	**Judge Nicol** **Mrs A Flynn MA MRICS**
Date and Venue of Hearing	**:**	**4th October 2021;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**11th October 2021**

DECISION

The application for a rent repayment order is dismissed.

The relevant legislative provisions are set out in an Appendix to this decision.

Reasons

1. The Applicant was a tenant at the subject property at Flat 3, 126 Westbourne Grove, London W11 2RR, a 1-bedroom flat in a converted house containing 5 flats, from 9th March 2018. The rent was £1,906.67 per month.

2. The Respondent is the leaseholder of the property. She is also a director and member of the freehold company, Westbourne Grove Ltd, along with her fellow lessees in the building. The company employs agents, Westbourne Block Management Ltd, to manage the building.

3. The Applicant seeks a rent repayment order against the Respondent in accordance with the Housing and Planning Act 2016.

4. The application was originally due to be heard by video conference but that was changed to a face-to-face hearing at the last minute on the Applicant's request. The hearing took place on 4th October 2021. The attendees were:

- The Applicant;
- Mr Filippo Ciani, a friend of and witness for the Applicant;
- The Respondent; and
- Mr Ian Rees-Phillips, counsel for the Respondent.

5. The documents available to the Tribunal consisted of the following in electronic form:

- A bundle of 1,377 pages compiled by the Applicant herself – unfortunately, the bundle was difficult to use, having no proper index and no single statement of case, instead having the documents interspersed with sections of commentary from the Applicant;
- A bundle of 311 pages compiled on behalf of the Respondent; and
- A reply from the Applicant, in similar format to the first bundle.

The offences

6. The Tribunal may make a rent repayment order when the landlord has committed one or more of a number of offences listed in section 40(3) of the 2016 Act. The Applicant alleged that the Respondent was guilty of two such offences:

(a) Harrassment contrary to section 1(3) or (3A) of the Protection from Eviction Act 1977; and

(b) Failure to comply with an improvement notice contrary to section 30(1) of the Housing Act 2004.

7. The burden of proof is on the Applicant. The standard of proof is the criminal one, namely beyond a reasonable doubt.

8. The Applicant represented herself and was clearly inexperienced in legal proceedings, let alone this kind of application before this Tribunal. Therefore, the Tribunal did its best to explain to the Applicant what she needed to show to establish her case and prompted her to concentrate first on her best examples of what she alleged was the Respondent's unlawful behaviour.

9. On the material provided, the Tribunal is satisfied that the Applicant was able to put her best case forward. However, the Applicant failed, on her own case, to come even close to establishing that the Respondent had committed either of the relevant offences beyond a reasonable doubt. As the Tribunal pointed out to her, she arguably had material which may found other causes of action, such as a claim in the county

court for damages for breaches of the covenants to repair, but the Tribunal has no jurisdiction in such matters. In these circumstances, the Tribunal took the relatively unusual step of dismissing the application without requiring the Respondent to set out her full case.

Improvement Notice

10. On 20th July 2020 Westminster Council issued an Improvement Notice and a Hazard Awareness Notice in relation to the subject property (the Applicant said there were 4 Improvement Notices but there was no evidence of any more than the one). The Improvement Notice specified the following hazards:

    (a) Fire – a lack of firefighting equipment in the kitchen, the fire alarm system did not extend into entrance lobbies or hallways, the smoke alarm was inadequate, the bedroom had no alternative means of escape and the front entrance door was inadequate.
    (b) Electrical Safety – the Electrical Installation Condition Report dated 11th October 2019 confirmed the fixed electrical installation was unsatisfactory and one of the spotlights in the bathroom was not working.

11. The Hazard Awareness Notice identified a hazard of damp and mould due to penetrating dampness in the living room.

12. Unfortunately, although Westminster Council were fully aware of the Respondent's correspondence address from their discussions with her prior to issuing the notices, the notices themselves were addressed to "Flat 8 (third floor), 126 Westbourne Grove, London W11 2RR". That is not even the correct address of the subject property.

13. Under section 233(7) of the Local Government Act 1972, a local authority may serve notices by other methods than using the intended recipient's address if their name or address cannot be ascertained. However, Westminster did know the Respondent's name and address. The Applicant asserted that the notices were also sent to the Respondent by email but that is not proper service in the circumstances.

14. The Respondent asserted that she cannot have committed the offence of failing to comply with the Improvement Notice because it was never properly served on her. The Applicant has been unable to establish otherwise beyond a reasonable doubt.

Harassment

15. Under sections 1(3) and (3A) of the Protection from Eviction Act 1977 a landlord commits an offence if they do acts likely to interfere with the peace or comfort of the residential occupier, or persistently withdraw or withhold services reasonably required for the occupation of the premises as a residence with intent to cause the residential occupier to

give up occupation or refrain from exercising a right or remedy or knowing or believing it would have that effect.

16. Despite the length of the Applicant's written submissions, her case may be stated as follows:

(a) The Respondent allowed a number of serious hazards to exist at the subject property and had done so since she began letting the flat as long ago as 2010, 8 years before the Applicant moved in.
(b) The Respondent failed to address these problems, despite knowing about them throughout the time she let the property.
(c) The Respondent had agreed with the Applicant to have works carried out at the commencement of the tenancy but, although her contractors attended for 6 days in March 2018, their work was incomplete and of poor quality.
(d) The Respondent then proceeded to send contractors to her door at least 100 times during the tenancy, ostensibly to address her complaints of disrepair but, in fact, knowing that they were unqualified to do so and, therefore, knowing that the Applicant would refuse them access.
(e) Further, local authority officers visited on over 150 occasions, at all times of day and night, to investigate the Applicant's complaints of poor housing conditions or noise (the noise came from a faulty water pump just outside the Applicant's flat).
(f) The police attended at the Respondent's behest because the Applicant is Buddhist.

17. There are numerous problems with these allegations:

(a) The Applicant repeatedly pointed to the hazards at the property, submitting that, in and of themselves, they constituted good reason for finding the Respondent to have committed a relevant offence on the basis that they were so serious and the Applicant's failure to address them was so egregious. The Tribunal pointed out that the mere existence of hazards and a failure to address them do not, by themselves, establish the relevant offence under sections 1(3) and (3A) of the Protection from Eviction Act 1977, although they may establish other offences or causes of action.
(b) There was no evidence that the Respondent knew of the relevant hazards or that they constituted hazards before this was pointed out to her by Westminster Council.
(c) The Applicant had no expert evidence supporting her claim that the work done to the property at the commencement of her tenancy was of poor quality.
(d) The Applicant's case contradicts itself. She claims that the Respondent failed to address the hazards deliberately and with the intent, knowledge or belief that she would leave or fail to exercise her rights as a result. However, she also says that she refused entry to the Respondent's contractors an incredibly large number of times.
(e) The Applicant justifies her refusal to allow access to the Respondent's contractors on the basis that their previous work had shown them to be unqualified and incompetent. If proved, this might well constitute an

adequate justification for refusal of access. However, the Applicant has to go well beyond this to establish the commission of the relevant offence. She had no evidence that the Respondent knew or believed that her contractors was so poor so that it was inevitable they would be refused access. Further, her argument would require the Tribunal to believe that the Respondent was willing to incur the contractor's call-out charges every time just as a means of harassing the Applicant – on the Applicant's case, the call-out charges would have cost a total of around £8,000 at the very minimum (100 x £80), more than four months' rent.

(f) In fact, the Respondent applied for and obtained an injunction from the county court (claim no. G02CL697) on 15th February 2021 obliging the Applicant to provide access. The court did not accept the Applicant's case. The Applicant says she is appealing this decision, despite the fact that she left the property and her tenancy came to an end in March. However, the Tribunal has no power to look behind the court's decision, particularly while it remains valid and untouched on appeal.

(g) The Applicant points to the fact that the Respondent did not enforce the order or carry out works until after she had left and the tenancy had ended. However, the timescale in question is a matter of weeks. It is entirely understandable that, rather than involving herself in expensive and lengthy contempt proceedings or risking further claims of harassment by the Applicant, the Respondent should wait for that amount of time until she was sure the Applicant had gone.

(h) The Applicant failed in further court proceedings. She persuaded the magistrates' court to issue a summons which was later dismissed with the district judge commenting that it should never have been issued.

(i) The Applicant blames the Respondent for everything that happened, denying all agency to other parties. According to the Applicant, the Respondent is responsible for the actions of the freehold company and its agents, Westminster Council and the police.

(j) A number of the visits to the Applicant's flat were from contractors sent not by the Respondent but by the freeholder's agents. The Applicant alleged that the Respondent was the principal of the freehold company but, even if that were true, it displays an ignorance of how property management works to think that she would have expressly directed all such visits and that the agents would have blindly followed her instructions without any thought for the purpose, time, effort or cost. For example, they would have had to attend to the noisy pump irrespective of any involvement of the Respondent.

(k) Some of the visits from Westminster Council were to address the alleged hazards and some were to address the alleged noise. The Tribunal knows from its own specialist knowledge and experience that local authority environmental health departments are hard-pressed and they do not undertake visits just because someone asks them to. They would have exercised their own judgment whether to visit the Applicant's flat. In any event, there is no evidence of the allegedly large number of visits, let alone that the Respondent prompted them.

(l) The Applicant was very clear that the Respondent caused the police to attend at her flat on the simple basis that she was a Buddhist. Since this is not a crime, it is ridiculous to suggest that the police would have

taken up their time to visit the Applicant for that reason alone, even assuming that the Respondent had made such a complaint (for which there was no evidence).

(m) The Applicant's claim as to the number of times she says she was visited by contractors or Westminster officers (at least one-third of all working days during her tenancy) is unfeasibly high.

18. It is, of course, theoretically possible for a landlord to use defects in a property and their actions or omissions in addressing them as a means to harass their tenant. However, the Applicant had to prove beyond a reasonable doubt that the Respondent used the hazards in her flat so as to commit a crime under section 1(3) or (3A) of the Protection from Eviction Act 1977. In the light of the above issues, the Tribunal is not satisfied that she did so.

Name: Judge Nicol **Date:** 11th October 2021

Appendix of relevant legislation

Protection from Eviction Act 1977

Section 1 Unlawful eviction and harassment of occupier

(1) In this section "residential occupier", in relation to any premises, means a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises.

(2) If any person unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof, or attempts to do so, he shall be guilty of an offence unless he proves that he believed, and had reasonable cause to believe, that the residential occupier had ceased to reside in the premises.

(3) If any person with intent to cause the residential occupier of any premises—

(a) to give up the occupation of the premises or any part thereof; or

(b) to refrain from exercising any right or pursuing any remedy in respect of the premises or part thereof;

does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence, he shall be guilty of an offence.

(3A) Subject to subsection (3B) below, the landlord of a residential occupier or an agent of the landlord shall be guilty of an offence if—

(a) he does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or

(b) he persistently withdraws or withholds services reasonably required for the occupation of the premises in question as a residence,

and (in either case) he knows, or has reasonable cause to believe, that that conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises.

(3B) A person shall not be guilty of an offence under subsection (3A) above if he proves that he had reasonable grounds for doing the acts or withdrawing or withholding the services in question.

(3C) In subsection (3A) above "landlord", in relation to a residential occupier of any premises, means the person who, but for—

(a) the residential occupier's right to remain in occupation of the premises, or

(b) a restriction on the person's right to recover possession of the premises,

would be entitled to occupation of the premises and any superior landlord under whom that person derives title.

(4) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding the prescribed sum or to imprisonment for a term not exceeding 6 months or to both;

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 2 years or to both.

(5) Nothing in this section shall be taken to prejudice any liability or remedy to which a person guilty of an offence thereunder may be subject in civil proceedings.

(6) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager or secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Housing Act 2004

Section 30 Offence of failing to comply with improvement notice

(1) Where an improvement notice has become operative, the person on whom the notice was served commits an offence if he fails to comply with it.

(2) For the purposes of this Chapter compliance with an improvement notice means, in relation to each hazard, beginning and completing any remedial action specified in the notice–

(a) (if no appeal is brought against the notice) not later than the date specified under section 13(2)(e) and within the period specified under section 13(2)(f);

(b) (if an appeal is brought against the notice and is not withdrawn) not later than such date and within such period as may be fixed by the tribunal determining the appeal; and

(c) (if an appeal brought against the notice is withdrawn) not later than the 21st day after the date on which the notice becomes operative and within the period beginning on that 21st day) specified in the notice under section 13(2)(f).

(3) A person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse for failing to comply with the notice.

(5) The obligation to take any remedial action specified in the notice in relation to a hazard continues despite the fact that the period for completion of the action has expired.

(6) In this section any reference to any remedial action specified in a notice includes a reference to any part of any remedial action which is required to be completed within a particular period specified in the notice.

(7) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(8) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

Housing and Planning Act 2016

Chapter 4 RENT REPAYMENT ORDERS

Section 40 Introduction and key definitions

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

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

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

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

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

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

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

Section 41 Application for rent repayment order

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

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

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

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

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

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

(b) the authority has complied with section 42.

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

Section 43 Making of rent repayment order

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

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

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

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

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

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

Section 44 Amount of order: tenants

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

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

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

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

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

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

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

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

(b) the financial circumstances of the landlord, and

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