FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/30UK/HMC/2019/0002-0007 P**
Property	**:**	**43 Brackenbury Road** **Preston** **Lancashire** **PR1 7UQ**
Applicants	**:**	**Miss Leah Rawlinson (1)** **Miss Jessica Eland (2)** **Mr Thomas Cottom (3)** **Miss Claire Haselden (4)** **Miss Anna Martin (5)** **Mr Aled Bysouth (6)**
Respondent	**:**	**Mr Michael Gibbons**
Type of Application	**:**	**Rent Repayment Order** **Housing and Planning Act 2016 – s41**
Tribunal	**:**	**Judge J Holbrook** **Regional Surveyor N Walsh**
Date and venue of Hearing	**:**	**Determined without a hearing**
Date of Decision	**:**	**22 May 2020**

DECISION

DECISION

Michael Gibbons is ordered to repay rent to the six Applicants in these proceedings. The amount he must repay to each Applicant is £3,564.30.

REASONS

Procedural history

1. On 13 August 2019, the six Applicants in these proceedings applied to the Tribunal under section 41(1) of the Housing and Planning Act 2016 ("the 2016 Act") for a rent repayment order.

2. Each Applicant seeks repayment of rent which they have paid to the Respondent, Michael Gibbons, in respect of their occupation of the Property, 43 Brackenbury Road, Preston PR1 7UQ. The Tribunal must determine whether it has jurisdiction to make a rent repayment order in each case and, if so, the amount which Mr Gibbons must repay to each Applicant.

3. On 14 October 2019, the Tribunal sent a copy of the application to Mr Gibbons by post at the business address provided for him by the Applicants and, on 16 October, it sent directions for the conduct of the proceedings to the same address. Both letters were returned undelivered by Royal Mail.

4. On 4 November, the Tribunal's correspondence was sent again, using Royal Mail's 'Track & Trace' service, this time to Mr Gibbons' home address in Worsley. On this occasion, the correspondence was returned with a note that the recipient had refused to accept it. A Judge subsequently directed that, because Mr Gibbons had had sufficient opportunity to accept service but had apparently refused to do so, no further attempts at service would be made or required.

5. Mr Gibbons evidently did become aware of the applications (and of the Tribunal's directions) at some point because, on 16 December 2019, he provided the Tribunal with a statement of case and supporting documentation in response to them. He had been required to do so by directions 4 and 5 (albeit the submission of his bundle was some three weeks late).

6. Direction 4 required Mr Gibbons to send a copy of his bundle of documents to each Applicant as well as to the Tribunal. By letter dated 14 January 2020, the Tribunal asked him to confirm that this had been done. Following a further reminder, Mr Gibbons submitted a witness statement in which he stated that a copy of the bundle had been sent to each Applicant. Nevertheless, the Applicants subsequently informed the Tribunal that none of them had received any documentation from Mr Gibbons.

7. On 21 February 2020, the Regional Judge noted that, not only had Mr Gibbons breached the Tribunal's directions by submitting his bundle of documents late, but also that he was in further breach by failing to serve it on the Applicants. In consequence, the Regional Judge proposed to bar Mr Gibbons from taking any further part in the proceedings.

8. On 4 March 2020, Mr Gibbons emailed the Tribunal to say that due to an administrative error, the copies of his bundle intended for the Applicants had been sent to the Property (which the Applicants had by then vacated) rather than to the Applicants' current addresses. Mr Gibbons did not say that the necessary papers had been re-sent to the correct addresses, but he did provide details of the individual and firm whom he said was representing him in these proceedings. Upon contacting that individual, however, the Tribunal was told that neither he nor his firm was currently representing Mr Gibbons.

9. We therefore find that Mr Gibbons has not remedied his non-compliance with the Tribunal's directions by the simple expedient of providing each Applicant with a copy of his bundle of documents. The barring order proposed by the Regional Judge on 21 February should therefore take effect: in particular, the applications should be determined without regard being had to Mr Gibbons' bundle of documents as it would clearly be unfair for the Tribunal to rely on arguments and/or evidence which one party has declined to disclose to another.

10. On 12 May 2020, having decided that this matter was suitable for a paper determination, the Tribunal wrote to the parties to notify them that the applications would be determined upon consideration of the relevant papers, without holding a hearing. Rule 31 of the Tribunal's procedural rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed). In this case, the Applicants have given their consent and Mr Gibbons' consent is not required because he is barred from participating.

Law

Rent repayment orders

11. A rent repayment order is an order of the Tribunal requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant. Such an order may only be made where the landlord has committed one of the offences specified in section 40(3) of the 2016 Act. A list of those offences was included in the directions issued by the Tribunal on 16 August. The list includes the offence (under section 72(1) of the Housing Act 2004 ("the 2004 Act")) of controlling or managing an unlicensed house in multiple occupation ("HMO"). It also includes the offence (under section 30(1) of 2004 Act) of failing to comply with an improvement notice which has become operative. In either case, the offence must have been committed by the landlord in relation to housing

in England let by him. In addition, in relation to the offence under section 30(1), the improvement notice must have been given to the landlord in respect of a hazard on the premises let by him (as opposed, for example, to common parts).

12. Where the offence in question was committed on or after 6 April 2018, the relevant law concerning rent repayment orders is to be found in sections 40 – 52 of the 2016 Act. Section 41(2) provides that 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.

13. Section 43 of the 2016 Act provides that, if a tenant makes such an application, the Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that the landlord has committed one of the offences specified in section 40(3) (whether or not the landlord has been convicted).

14. Where the Tribunal decides to make a rent repayment order in favour of a tenant, it must go on to determine the amount of that order in accordance with section 44 of the 2016 Act. If the order is made on the ground either that the landlord has committed the offence of controlling or managing an unlicensed HMO, or that the landlord has failed to comply with an improvement notice, the amount must relate to rent paid during a period, not exceeding 12 months, during which the landlord was committing that offence (section 44(2)). However, by virtue of section 44(3), the amount that the landlord may be required to repay must not exceed:

    a) the rent paid in respect of the period in question, less

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

15. In certain circumstances (which do not apply in this case) the amount of the rent repayment order must be the maximum amount found by applying the above principles. The Tribunal otherwise has a discretion as to the amount of the order. However, section 44(4) requires that the Tribunal must take particular account of the following factors when exercising that discretion:

    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 any of the specified offences.

Mandatory HMOs

16. The licensing offence under section 72(1) of the 2004 Act can only be committed in respect of a property which is an HMO to which Part 2 of that Act applies and which is required to be licensed under it. Such properties are commonly referred to as 'mandatory HMOs'. In the present case, to have been a mandatory HMO, the Property must have satisfied the conditions specified in article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018 at the relevant time. Those conditions are that:

    a) the property is occupied by five or more persons;

    b) it is occupied by persons living in two or more separate households; and

    c) it meets 'the standard test' for an HMO under section 254(2) of the 2004 Act.

17. A property meets the standard test for an HMO 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 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.

18. A property which satisfies the conditions listed in paragraph 17 above is a mandatory HMO unless either a temporary exemption notice or an interim or final management order is in force in relation to it. However, it should be noted that prior to 1 October 2018 (the date when the 2018 Order came into force), a property only qualified as a mandatory HMO if all or part of it comprised three storeys or more. But from October 2018 onwards, that condition no longer applies.

Facts

19. The Applicants describe the Property as an eight-bedroomed house in multiple occupation, with shared amenities. As a consequence of the current Covid-19 pandemic, the Tribunal has been unable to carry out a physical inspection of the Property. However, we note that Google Streetview shows it to be a two-storey, end-terraced house of traditional design and construction.

20. Mr Gibbons has been the owner/landlord of the Property at all material times. We understand that he runs a business letting residential properties in the Preston area to students and that this is one of those properties.

21. On 19 November 2017, the Applicants entered into an assured shorthold tenancy agreement with Student Accommodation Preston (which we understand to be the business operated by Mr Gibbons). The agreement granted a tenancy of the Property for a fixed term which began on 31 August 2018 and ended on 30 July 2019. The rent stated to be payable under the tenancy agreement was £84.99 for every week of the term per tenant and was payable in three instalments. In fact, each Applicant appears to have made an initial payment of £199.99 followed by three equal payments of £1,359.84 during the term. So each of them paid a total rent of £4,279.51. We note that each Applicant also appears to have made a further payment of £199.99 towards the end of July 2019. However, this payment seems to have related to a subsequent period of occupation and we have therefore left it out of account.

22. The Applicants have produced a witness statement given by Mr Leslie Crosbie (a housing standards officer employed by Preston City Council). Mr Crosbie's statement records that, on 4 January 2018, officers of the council inspected the Property following a complaint about its condition. The inspection identified the presence of a number of hazards, and the council made Mr Gibbons aware of them. However, a re-inspection on 10 April 2019 revealed that a large number of these hazards still existed. An improvement notice was served on Mr Gibbons under section 12 of the 2004 Act on 17 April 2019. The notice specified 25 separate 'category 2' hazards and required Mr Gibbons to take various remedial action by 12 June 2019. The council carried out a further inspection of the Property on 28 August 2019, following which the council apparently varied the improvement notice in order to describe the extent of the remedial work which still needed to be undertaken.

23. Mr Crosbie's witness statement also records that, following its inspection of the Property in April 2019, the council formed the view that the Property was a mandatory HMO which was required to be licensed as such under the 2004 Act, but which was not so licensed. On 5 June 2019, an HMO Declaration was served on Mr Gibbons under section 255 of the 2004 Act and, on 18 June 2019, Mr Gibbons submitted an application for an HMO licence in respect of the Property. That application was

subsequently refused, but notice of refusal was not given until 2 August 2019, by which time the Applicants' tenancy had come to an end.

Jurisdiction to make a rent repayment order

24. It is necessary first to consider whether Mr Gibbons has committed one or more of the offences specified in section 40(3) of the 2016 Act. He has not been convicted of such an offence, but the Applicants assert that he has nevertheless committed:

    a) the offence under section 72(1) of the 2004 Act of being a person having control of or managing an HMO (namely the Property) which was required to be licensed under Part 2 of that Act but was not so licensed; and

    b) the offence under section 30(1) of failing to comply with an improvement notice which was served on him and which has become operative.

The licensing offence

25. It is clear that, because the Property was occupied from August 2018 to July 2019 as a student house by more than five individuals who were not related to one another, but who shared amenities such as bathrooms and a kitchen, the Property satisfied the standard test for an HMO throughout that period. However, it is also clear that, because it only has two storeys, the Property did not become a mandatory HMO until 1 October 2018. It follows that the Property was not required to be licensed under Part 2 of the 2004 Act until that date (see paragraph 18 above).

26. We are therefore satisfied, beyond reasonable doubt, that Mr Gibbons committed the offence under section 72(1) of the 2004 Act in relation to the Property from 1 October 2018 onwards. However, the offence ceased to be committed on 18 June 2019, when he submitted his licence application (see section 72(4)(b)). It follows that, based on the licensing offence alone, the Tribunal cannot order the repayment of rent which relates to a period before 1 October 2018 or after 17 June 2019.

The improvement notice offence

27. The evidence given by Mr Crosbie is sufficient to establish not only that Mr Gibbons had failed to comply with the improvement notice by 12 June 2019 (the date by which the notice required him to complete the remedial works), but also that he had failed fully to comply with it by the end of July 2019 (when the tenancy ended). Although the extent of Mr Gibbons' non-compliance is unclear from the evidence provided to us, we are nevertheless satisfied, beyond reasonable doubt, that he committed the offence under section 30(1) of the 2004 Act throughout the period from 13 June to 31 July 2019.

Whether a rent repayment order should be made

28. We are satisfied that it is appropriate to make a rent repayment order on the ground that Mr Gibbons has committed both an HMO licensing offence and an improvement notice offence. In coming to this decision, we are mindful of the fact that the objectives of the statutory provisions concerning rent repayment orders are (i) to enable a penalty in the form of a civil sanction to be imposed in addition to any penalty payable for the criminal offence of operating an unlicensed HMO; (ii) to help prevent a landlord from profiting from renting properties illegally; and (iii) to resolve the problems arising from the withholding of rent by tenants.

Amount of the order

Maximum possible amount

29. The maximum amount for which a rent repayment order could be made in favour of each Applicant in the present circumstances is £3,564.30. That is the apportioned amount of rent which each of them paid in respect of the period of 304 days during which one or both of the relevant offences was being committed. There is nothing to indicate that any of the Applicants were in receipt of housing benefit or universal credit which would need to be deducted from that maximum amount.

Principles guiding the Tribunal's determination

30. It is important to note that the Tribunal is not *required* to make an order for the maximum amount in the circumstances of this case, and that there is no presumption that the order should be for the maximum amount. Rather, the Tribunal should take an overall view of the circumstances in determining what amount to order the landlord to repay (taking particular account of the factors listed in paragraph 15 above). The fact that the tenant will have had the benefit of occupying the premises during the relevant period is not a material consideration, but the circumstances in which the offence is committed are always likely to be material. A deliberate flouting of the requirement to obtain a licence (or to comply with an improvement notice) would merit a larger amount than instances of inadvertence, and a landlord who is engaged professionally in letting is likely to be dealt with more harshly than a non-professional landlord.

Whether the landlord has any relevant convictions

31. There is nothing to indicate that Mr Gibbons has ever been convicted of any of the offences specified in section 40(3) of the 2016 Act.

The financial circumstances and conduct of the landlord

32. As we have already noted, Mr Gibbons is a professional landlord. However, no evidence is before us about his business or about his financial circumstances. Nor do we have any information about any

outgoings which he may have incurred in respect of the Property during the relevant period.

33. The Applicants complain that the Property was let to them in poor condition and that Mr Gibbons failed to make necessary repairs or improvements during their tenancy. The fact that the Property was indeed seriously sub-standard is confirmed by the improvement notice issued to Mr Gibbons by Preston City Council. Mr Crosbie's evidence also confirms that Mr Gibbons failed to do what was required to put matters right.

The conduct of the Applicant tenants

34. There is no relevant evidence to be taken into account concerning the conduct of the Applicant tenants.

The Tribunal's determination

35. Taking all of the above into account, we consider it appropriate to make a rent repayment order for the maximum amount in favour of each Applicant. Mr Gibbons has committed two serious housing offences in respect of the Property and has let in a sub-standard condition. By doing so, he has shown a disregard for his responsibilities as a landlord and for the safety and well-being of his tenants.

Judge J Holbrook
22 May 2020