FIRST - TIER TRIBUNAL

PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CQ/HMK/2020/0042-46**
Property	**:**	**19 St Margaret Road, Coventry, CV1 2BT**
Applicants	**:**	**Sebastian Kay (0042) 1** **Ounsi Iskandar (0043) 2** **Katie Clarke (0044) 3** **Eleanor Goswell (0045) 4** **Tasmin Hays (0046) 5**
Applicants' Representative	**:**	**Mrs Carol Siew-Joo Kay**
Respondent	**:**	**Mrs Annabel Brewer**
Respondent's Representative	**:**	**None**
Type of Application	**:**	**Application under section 41(1) of the Housing and Planning Act 2016 for a rent repayment order**
Tribunal	**:**	**Tribunal Judge P. J. Ellis.** **Tribunal Member Mr R.P. Cammidge**
Date of Hearing	**:**	**13 October 2020**
Date of Decision	**:**	**23 October 2020**

DECISION

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a. ***The Respondent was guilty of a housing offence namely having control of or managing a house, which was required to be licensed under Part 3 Housing Act 2004 but was not so licensed***
b. ***Consequently, the Applicants are entitled to a rent repayment order under s41 Housing and Planning Act 2016 (the 2016 Act)***
c. ***The period for which rent is repayable is 15 September to 8 December 2019***
d. ***The sum payable after applying the principles described in s44 of the 2016 Act is £1308.00***
e. ***Applicant 1 Sebastian Kay is entitled to a rent repayment order of £1308.00***
f. ***Applicant 2 Ounsi Iskandar is entitled to a rent repayment order of £1308.00.***
g. ***Applicant 3 Katie Clarke is entitled to a rent repayment order of £1308.00***
h. ***Applicant 4 Eleanor Goswell is entitled to a rent repayment order of £1308.00***
i. ***Applicant 5 Tasmin Hays is entitled to a rent repayment order of £1308.00***
j. ***The Tribunal makes no order for costs pursuant to r13 The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 as neither party has acted unreasonably in bringing, defending or conducting these proceedings.***

Introduction and Background

1. On 10 June 2020 each of the Applicants issued an application for a rent repayment order pursuant to the Housing Act 2004 (the 2004 Act) and the Housing and Planning Act 2016 (the 2016 Act).

2. The applications were in identical terms because the five applicants were all tenants of 19 St Margaret Road Coventry (the Property) pursuant to a tenancy agreement made between them and the Respondent dated 01 May 2019. As the application arises from one tenancy agreement which named all the Applicants the matter was conducted by the Tribunal as a consolidated hearing. The facts and issues were the same for each Applicant and the decision is the same for each Applicant.

3. The tenancy agreement was an Assured Shorthold tenancy with effect from 01 September 2019 to and including 30 June 2020. Although Mr Kay is the first named Applicant, Miss Clarke was named as lead tenant in the agreement.

4. The rent was expressed as £2600.00pcm. Each tenant paid £520.00pcm. There was a deposit of £2600.00.

5. The agreement provided that the tenants were responsible for council tax but the rent included water, gas electricity, tv licence and broadband.

6. Although the tenants were entitled to take up occupation on 1 September it was not until 15 September, they were all living in the Property. It is common ground that the five Applicants are students who do not form a single household.

7. The Respondent Annabel Brewer is identified in the tenancy agreement as the landlord although the Property is owned by a company, Lurline Limited which is owned by the Respondent and Mr Paris Christofides. Mrs Brewer or her company is the owner of nine properties in Coventry. The Respondent has traded with these properties since 2018 offering accommodation to students.

8. At the time of its acquisition by the Respondent, the subject Property was a two-bedroom end terrace two storey house constructed in late 19th or early 20th century. After purchase it was substantially extended and refurbished to provide living accommodation for students comprising five en-suite rooms plus a shared kitchen and living room. The Applicants were the first occupiers after its refurbishment.

9. Coventry City Council is the local housing area responsible for mandatory licensing properties occupied by five or more people forming more than one household under the 2004 Act.

10. At the commencement of the tenancy the Respondent did not have an HMO licence nor a gas safety certificate. The application for an HMO licence was made to the local housing authority on 8 December 2019.

11. The Applicants claim the failure of the Respondent to obtain an HMO licence without reasonable excuse until 8 December 2019 entitles them to a rent repayment order on the grounds that that she is guilty of an offence to which Chapter 4 of the 2016 Act applies within twelve months of the day on which the application for a rent repayment order was made.

The Parties Submissions

12. Mrs Kay is the mother of Sebastian Kay and presented the case on behalf of all Applicants. It was apparent to the Tribunal from the bundle of documents and statement of case that Mrs Kay was fully familiar with the facts giving rise to the claim and had taken a close interest in the tenancy of the Property from the outset of occupation by the Applicants. Her opening submission was necessarily quite short as the Respondent did not deny the Property was unlicensed. Most of her submission was concerned with answering the Respondent's submission.

13. The Respondent admitted the Property was unlicensed. The justification for the absence of a licence was that when attending an Landlords Accreditation course given by Coventry City Council on 20 September 2019 she had been lead to

believe she had three months from the date tenants moved in to the Property within which to apply for a licence.

14. On 4 December 2019, the local housing authority contacted her to explain that that an HMO licence is required before tenants move in. A council representative had inspected the property following an inquiry by the tenants and having inspected the property checked the HMO registrar to find the property was not registered as an HMO. The Respondent acted promptly when learning of her error and filed an application for an HMO licence on 8 December 2019.

15. After making the application for a licence the Respondent believed the matter was closed. The Applicants remained in occupation of what the Respondent described as a beautifully renovated property.

16. The Respondent also admitted that the Property did not have a gas safety certificate until 12 October 2019. The installer had issued an installation certificate upon completion of the works prior to commencement of the tenancy but a safety certificate was not obtained until afterwards. The failure to obtain a safety certificate upon installation was the fault of the installer and described as a clerical error on the Respondent's part as she knew a certificate was required.

17. The Respondent asserted that the conduct of the tenants was not good. They made complaints over minor matters which were difficult to resolve as the tenants did not make access easy. More significantly there were rent arrears. The tenants asked for rent reduction during the period of social restrictions because of coronavirus. At the date of issue of proceedings, the arrears were £520.00 on the part of Miss Goswell and Miss Clarke and £780.00 on the part of Mr Kay. The arrears accrued after 8 December 2019 and were discharged by the date of the hearing.

18. The local authority had considered the Respondent's failure to obtain a licence but decided to take no enforcement action.

19. In response to a question from the Tribunal the Respondent said rent included £150pcm for gas and electricity, £50pcm for broadband, water rates £120 every six months and TV licence £170,00pa (although the Tribunal used its common general knowledge to determine the cost of an annual TV licence is £157.50).

20. Mrs Brewer described herself as a property investor. She has nine properties identical or substantially similar to the subject Property. All are HMOs. Her business of property investment started in 2018. Her aim is to provide accommodation of high standard. She agrees with the requirement to obtain an HMO licence but asserted her failure to do so on this occasion was because of her misunderstanding of the date for making an application for a licence.

21. The Respondent considered the Applicants had been unreasonable in their conduct as tenants and by bringing these proceedings and asked for an order for costs against the Applicants under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Regulations 2013.

22. Mrs Kay in response denied that the tenants conduct was poor. She stated that the property did not have a gas safety certificate until after the tenants had taken up occupation She alleged the room sizes were small, the landlord had misrepresented the condition and quality of the furniture and furnishings and that the Property had inadequate sound insolation both internally and in relation to the adjoining property. There was a delay in response to a dishwasher fault and a table was not in the common lounge area. In response to the allegation of arrears Mrs Kay relied upon the right of a tenant to know the name of the landlord and advice received form the local CAB that until the identity was known, there is no obligation to pay rent. As far as the effects of the coronavirus was concerned Mrs Kay averred the tenants were following national guidance that landlords should offer a no penalty release from the agreement. Any rent arrears arose as a result of these issues and in any event, they were discharged from the deposit without complaint by the tenants.

23. Mrs Kay asserted that it was unreasonable of the Respondent to deny the claim and they should have costs pursuant to r13.

The Statutory Framework

24. The Act of 2004 gave the First-tier Tribunal the jurisdiction to make a rent repayment order against a person who had been convicted of controlling or managing an unlicensed HMO. Chapter 4 of the Housing and Planning Act 2016 replaced the jurisdiction to make a rent repayment order where a landlord has committed an offence to which the Chapter applies after 6 April 2017. The Chapter provides the framework by which decisions are made.

25. S40(2) defines a rent repayment order as an order requiring the landlord under a tenancy of housing in England to repay an amount of rent paid by a tenant, and subsection (3) provides

"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" and at item 5 of the table in subsection 3 having control or management of an unlicensed HMO contrary to s72(1) of the 2004 Act is identified as behaviour amounting to an offence.

By s41 of the 2016 Act

(1)A tenant …. 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.

26. S43 Provides that a Tribunal may make a rent repayment order only if made under s41, if satisfied beyond reasonable doubt that a landlord has committed an offence to which the Chapter applies, whether or not the landlord has been convicted. By s43(3) the amount of a rent repayment order in the case of an application by a tenant is to be determined in accordance with s44.

27. S44 provides that where a First-tier Tribunal decides to make an order under s43 the amount to be repaid must not exceed the rent paid in respect of the unlicenced period and 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 been convicted of an offence to which the Chapter applies.
28. It is a defence to a charge of letting an unlicenced HMO that the person had applied for a licence or had a reasonable excuse for having control or managing the house without a licence (s95(3) & (4) 2004 Act).

The Decision

29. In coming to its decision, the Tribunal first determines whether the property is a house in multiple occupation which should be licenced under the relevant legislation. It then identifies the person who has the control or management of the property and whether they have a licence. If the person having control or management of the property does not have a licence is there either a reasonable excuse for not having one or is there an application for a licence.

30. It must then be satisfied beyond reasonable doubt that a landlord has committed an offence whether or not the landlord has been convicted of an offence. It must also have regard to any explanation offered by the landlord for their failure to obtain a licence because *"Tribunals should consider whether any explanation given by a person managing an HMO amounts to a reasonable excuse whether or not the appellant refers to the statutory defence"* per Martin Rodger QC (Deputy Chamber President Upper Tribunal (Lands Chamber) in *IR Management Services Limited v Salford City Council [2020] UKUT 81 (LC).*

31. In *Sutton v Norwich City Council 2020 [UKUT] 0090(LC)* Martin Rodger QC said in relation to the defence of reasonable excuse "*It is possible to conceive of circumstances in which a lack of knowledge of the facts which caused a house to be an HMO might provide a reasonable excuse for non-compliance..*" with the

obligation to licence a property but in *Thurrock Council v Daoudi [2020] UKUT 209 (LC)* Martin Rodger QC held that a genuine lack of awareness of the need to obtain a licence was irrelevant in deciding whether the landlord had a reasonable excuse for not obtaining a licence.

32. Where the Tribunal decides to make a rent repayment order in favour of the tenant the amount is to be determined in accordance with s44 2016 Act in particular taking into account the conduct of the landlord and tenant, the financial circumstance of the landlord and whether there has been a conviction of the landlord at any time of an offence to which the 2016 Act applies.

33. In *Vadamalayan v Stewart & Others [2020] UKUT 0183(LC)* HHJ Cooke said at paragraphs 15 &16:

"*it is not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord has spent on the property during the relevant period. That expenditure will have repaired or enhanced the landlord's own property, and will have enabled him to charge a rent for it. Much of the expenditure will have been incurred in meeting the landlord's obligations under the lease. The tenants will typically be entitled to have the structure of the property kept in repair and to have the property kept free of damp and pests. Often the tenancy will include a fridge, a cooker and so on. There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order.*

In cases where the landlord pays for utilities, as he did in Parker v Waller, *there is a case for deduction, because electricity for example is provided to the tenant by third parties and consumed at a rate the tenant chooses; in paying for utilities the landlord is not maintaining or enhancing his own property. So it would be unfair for a tenant paying a rent that included utilities to get more by way of rent repayment than a tenant whose rent did not include utilities. But aside from that, the practice of deducting all the landlord's costs in calculating the amount of the rent repayment order should cease."*

34. In this case there was no dispute that the Property was purchased by the Respondent for the purposes of refurbishment from a two-bedroom property to a five-bedroom property which would then be offered to students. The Respondent admitted she was familiar with the licencing regime and indicated her support for the scheme as a way of improving housing conditions for rent.

35. The Respondent's only explanation for not having applied for a licence was her understanding that a licence was not necessary until three months after the commencement of the tenancy. Her source of that belief arose from the Landlords Accreditation course she had attended on 20 September 2019. No evidence to justify that explanation was adduced other than her own statement of belief.

36. The Tenancy agreement commenced on 1 September 2019 therefore even before attending the Landlords Accreditation course the Respondent had let a property with the expectation that it would be occupied by five students who did not form a single household. The Tribunal is satisfied the Property was an unlicensed house in multiple occupation by 15 September 2019 and that the Respondent was the person having control of the Property.

37. The tenancy agreement was in her name even though it was owned by Lurline Limited. There was an agency responsible for collecting rents and dealing with tenants' issues, but the Respondent retained overall control of the Property. Therefore, the Tribunal is satisfied beyond reasonable doubt that the landlord has committed an offence under Chapter 4 of the 2016 Act. Whether an excuse for not having a licence is reasonable or not is an objective question for the Tribunal (*Sutton*). The explanation for not having a licence is not a sufficient reason either as to fact or as a justification for not understanding the law, which in any event is no excuse.

38. The Tribunal has decided to make a rent repayment order. In doing so it has considered the matters mentioned in s44(4). The Respondent has not been convicted of any offence under the 2016 Act because the local housing authority decided not to proceed with a prosecution.

39. The Respondent presented no evidence about her financial circumstances. In response to questions from the Tribunal, the Respondent admitted to holding

other properties let to students the income form which is her principal income. Her husband was made redundant earlier in 2020. The Property is subject to a mortgage of £659.00 pcm and the letting agent charges a fee of 8.5% monthly rent. No other information was suppled. As appears from the decision in *Vadamalayan* the expenses associated with the mortgage and the agents fees are not relevant in determining the rent the subject of a rent repayment order but the outgoings paid by the landlord but consumed by the tenants are relevant.

40. As far as those outgoings were concerned the tenants are responsible for council tax but outgoings paid by the landlord pursuant to the tenancy agreement were estimated by the Respondent as:

a.	Gas & Electricity	150pcm
b.	Broadband	50 pcm
c.	Water rates	20 pcm
d.	TV licence £157.50 pa	13.13pcm
	Total	**233.13 pcm**

The Respondent estimated all outgoings and the Tribunal identified the TV licence from common general knowledge. The Tribunal determines the sum to be deducted for outgoings is £233.00pcm.

41. Both sides complained about the others conduct. The Tribunal was not satisfied that the Applicants' conduct was such as to warrant any reduction in the award. Their complaints relating to the state of the Property were described as "nit-picking" but they included untended complaints relating to the dishwasher, essential furniture not provided and a delayed gas safety check.

42. As far as the Respondent was concerned, the Tribunal recognises and accepts her desire to provide good accommodation for her tenants but her conduct was at best naïve in failing to comply with the fundamental obligations of a landlord especially as she recognised the value of the HMO licencing system. The Tribunal sees no reason to make a reduction from the award as the Respondent has decided upon a business plan which involves acquiring property for letting to students which will generate a significant monthly income.

43. The rent is £2600.00 pcm. After the deduction for relevant outgoings the rent payable to the landlord is £2366.87pcm. Each tenant is responsible for one fifth

of the monthly rent or £473.37. The relevant period for which the property was unlicenced or not the subject of an application for a licence was from 15 September to 8 December 2019 being 84 days. The tenancy was for a period of 10 months or 304 days. The net rent per day for the Property before division among the tenants was £77.85. The unlicenced period was 84 days. Rent received in the unlicenced period was £6539.40. Each tenant paid the same one fifth portion of the total rent, therefore the sum payable to each tenant is £1308.00.

Appeal

44. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal an aggrieved party must apply in writing to the First-tier Tribunal for permission to appeal within 28 days of the date specified below stating the grounds on which that party intends to rely in the appeal.

Tribunal Judge PJ Ellis