FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references:	**:**	**MAN/00BN/HMF/2020/0005** **MAN/00BN/HMF/2020/0025**
Property:	**:**	**90 Wellington Rd, Fallowfield, Manchester M14 6BL**
Applicants:	**:**	**(1) Ben Whalley** **(2) Aimee Daly**
Respondent:	**:**	**Sarah Aspinall**
Type of Applications:	**:**	**Applications for a rent repayment order under Section 41 of the Housing and Planning Act 2016**
Tribunal Members:	**:**	**Judge J.M.Going** **I James MRICS**
Dates of Deliberations:	**:**	**8th October 2020**
Date of Decision:	**:**	**3rd November 2020**

DECISION

The Decision and Order

Mrs Aspinall is ordered to repay rent of £4436.38 to each of the Applicants.

Background

1. By Applications dated 14th January 2020 and 2nd March 2020 respectively the Applicants ("Mr Whalley and Ms Daly") each applied to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under Section 41 of the Housing and Planning Act 2016 ("the 2016 Act") for a rent repayment order in respect of rents paid by them to the Respondent ("Mrs Aspinall") as a landlord of the property.

2. The Tribunal issued Directions to the parties on 11th June 2020 stating that the matter would be dealt with on the basis of the written representations and documentary evidence without the need for an oral hearing, unless either party requested the opportunity to make oral representations. Neither party requested an oral hearing.

3. The bundle of documents supplied by the Applicants included copies of the Tenancy Agreement, bank statements, extracts and screenshots of WhatsApp conversations and photographs, an open letter from a David Ellwood a Housing Compliance Officer at Manchester City Council ("the Council") as well as their submissions. Mrs Aspinall provided copies of emails to the Council, including its building control department when the property was modified in 2011, and as evidence of her difficulties in attempting to making her licence application online in March 2018, as well as fuller copies and transcripts of the WhatsApp conversations and her submissions.

4. After having allowed Mrs Aspinall various time extensions, the Tribunal convened on 8th October 2020.

5. It did not inspect the property, but understands that it is a six bedroomed semi-detached house with shared bathroom and kitchen facilities.

Facts

6. None of the following matters have been disputed.

7. The property is located within the Old Moat ward of Manchester which, on 23rd April 2018, was designated by the Council as a selective licensing area in accordance with part 3 of the Housing Act 2004 ("the 2004 Act"), whereby all privately rented properties within the designated area required a licence from that date.

8. Since October 2006 it had also been a national legal requirement for specified Houses in Multiple Occupation ("HMOs") meeting certain designated tests to be licensed under part 2 of the 2004 Act with a mandatory HMO licence.

9. On 1st October 2018 the types of buildings requiring a mandatory HMO licence were extended to include those with less than three storeys, and any property occupied by five or more people, living in two or more households, containing shared facilities such as a kitchen bathroom or toilet.

10. Mr Whalley and Ms Daly, with four other students, entered into an Assured Shorthold Tenancy Agreement ("the Tenancy Agreement") with Mrs Aspinall and her husband for a one-year term beginning on 1st July 2018 until 30th June 2019. The rent was payable in monthly instalments, with the tenants also responsible for paying separately the council tax and utilities charges.

11. Mrs Aspinall's application for a mandatory HMO licence was accepted as having been duly made by the Council on 11th June 2019, and an HMO licence granted to her on 12th August 2019.

The Applicants submissions

12. The Applicants complained that mould was a particular issue in the colder months "the mould grew in large quantities in the living room, kitchen and one upstairs bedroom… This was first mentioned to the landlord at the start of December and reminders had to be sent till someone was sent round spray it and paint over it late December/early January. Within a few weeks the mould began to grow back again very quickly and got the point where one of the tenants, Aimee Daly, could no longer sleep in their bedroom ….. struggling to breathe with asthma, which was made worse by the mould. The mould was then sprayed over and painted again until it didn't grow back with temperatures beginning to rise".

13. "The bedroom ceiling first leaked in the early weeks of September, the water had spilled out of the shower upstairs due to the shower curtain being too short and leaking through the floor into the ceiling of the downstairs bedroom, where it dripped down the lightbulb and…. all the fire alarms…set off… When the fire alarm was removed water spilled out of ceiling and onto the floor. The landlord sent round a plumber .. and he confirmed that the water had leaked through the floor… because the grouting between the tiles had clearly rotted away… the landlord fitted a longer shower curtain so the water couldn't spill onto the floor. As expected the bedroom ceiling continued to leak over the course of the tenancy and the fire alarm was still never replaced up until the week before the Council inspection on Thursday 20th June….. The screenshots of conversation history throughout the tenancy show that all the issues that we had with the property were constantly being reported all year round. The landlord was responsive, but often took a while to help resolve any issue… Shortcuts were often taken when solving these issues such as wiping and repainting over large quantities of mould and fitting longer shower curtains prevent water dripping through the rotted tiles".

14. Copies of various corroborative WhatsApp messages were included including photographs showing water leaking into the bedroom, and mould that on occasions went from floor-to-ceiling.

15. Mr Allwood provided an open letter on 20th August 2019 confirming his inspection of the Council's records and correspondence.

16. He confirmed that a letter was sent to Mrs Aspinall on 14th September 2018 advising as to the need for the property to be licensed and setting out the potential consequences of it not being licensed.

17. His statement says "There was no response to this letter. Following the extension to mandatory HMO licensing… several letters were sent to the owners advising that a mandatory HMO licence was required… As no application for the aforementioned licence was submitted a suspect licensable HMO investigation was commenced. Following further reminders Sarah Aspinall submitted an HMO licence application on the 11th day of June 2019 which means that until that day the property was a property for which a licence was required but was not so licensed. The property was finally licensed, for a maximum occupation of six persons on 12th August 2019".

18. Each of the Applicants provided bank statements and other documentary evidence to confirm the rental payments made to "Aspinall properties" during the term of the tenancy.

The Respondent's submissions

19. Mrs Aspinall stated that she was unaware of the new licence changes and that letters sent by the Council addressed to the property were not passed on. Nor did her agents advise her of the need for a licence.

20. She stated that as soon as she was made aware of the necessity she tried to make an application, but that due to difficulties with the Council's website her application, which a screenshot showed she tried to submit on 27th March 2018, was not accepted until further attempts in June.

21. Mrs Aspinall felt that the WhatsApp messages and pictures referred to by the Applicants did not tell the full story where they did not include a her replies, which she exhibited, and which she felt showed that she had responded promptly to complaints and employed Home Service services and others to effect any necessary repairs.

22. Mrs Aspinall complained that all the problems with the property were because the tenants abused the same. She said that they were fined by the Council for leaving rubbish and mess outside the property and that she had been contacted by the Council regarding a problem with noise. She said that the property was used as a party house.

23. She also made various submissions as regards the outgoings relating to the property and her financial circumstances which are referred to below.

The Law

24. Section 40(3) of the 2016 Act lists those offences which if committed by a landlord entitle the Tribunal to make a rent repayment order.

25. The list, repeated in the Directions, includes the offences under Section 72 (1) of the 2004 Act of controlling or managing an unlicensed HMO, and under Section 95 (1) of the 2004 Act of controlling or managing of an unlicensed house. Both Sections 72(5) and 95(4) state that it is a defence that he had a reasonable excuse.

26. Section 72(4) states that it is also a defence that, at the material time, an application for a licence has been duly made.

27. Section 85(1) confirms that "every Part 3 house must be licensed under this Part unless…. it is an HMO to which Part 2 applies".

28. Where the offence 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.

29. 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.

30. Section 43 of the 2016 Act provides that 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).

31. When 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.

32. If the order is made on the ground that the landlord has committed the offence or offences of controlling or managing an unlicensed HMO or an unlicensed house, the amount must relate to rent paid during a period not exceeding 12 months, during which the landlord was committing the offence (section 44(2)).

33. Section 44(3) confirms that 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 universal credit paid (to any person) in respect of rent and the tenancy during that period.

34. In cases such as this the Tribunal has a discretion in determining the amount, but Section 44(4) states that it 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 any of the specified offences.

The Tribunal's Reasons and Conclusions

35. The Tribunal began with a general review of the papers, in order to decide whether the case could be dealt with properly without holding an oral 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).

36. None of the parties requested an oral hearing and, having reviewed the papers, the Tribunal was satisfied that this matter is suitable to be determined without a hearing. Although the parties are not legally represented, the issues to be decided have been clearly identified in the papers enabling conclusions to be properly reached in respect of the issues to be determined, including any incidental issues of fact.

37. The next issue for the Tribunal to address was whether it is satisfied, beyond reasonable doubt, that Mrs Aspinall has committed an offence or offences mentioned in Section 40(3) of the 2016 Act.

38. The documentation is persuasive providing clear and obvious evidence of its contents, and the Tribunal finds no reason to doubt the detail contained.

39. The Tribunal is satisfied, beyond reasonable doubt, from the evidence provided the Council and her own admissions, that Mrs Aspinall committed the offences of controlling or managing the property without the necessary selective licence from at least the beginning of the tenancy until 1st October 2018 (when the property became an HMO requiring a mandatory licence) and then without an HMO licence until the application was made on 11th June 2019.

40. The Tribunal has carefully considered whether, in all the circumstances of the case, Mrs Aspinall has the defence of a reasonable excuse. The Tribunal accepts that she may have been badly served by her agents, and ignorant of the requirement to licence the property. Nevertheless ignorance of a well-publicised local requirement which had subsisted for a number of months before the beginning of the tenancy, and of a national requirement, which similarly had only been brought in after due publicity and notice, is not a reasonable excuse. The importance of failure to obtain a licence should not

be underestimated. An unlicensed property undermines the Housing Authority's regulatory role and poses a risk for harm.

41. Although the mandatory HMO Licence was not granted until 12th August 2019, Mrs Aspinall did have the defence afforded under section 72(4) of the 2004 Act, as previously referred to, from 11th June 2019 when her application was duly made.

42. The Tribunal concluded therefore that the offences were committed consecutively from 1st July 2018 through to 11th June 2019.

43. Because they were committed within the period of 12 months before the Applications, the Tribunal is clear that it does have jurisdiction.

44. The Tribunal (particularly having regard to the objectives behind the statutory provisions i.e. 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 property, to help prevent a landlord from profiting from renting properties illegally, and resolve the legal problems arising from the withholding of rent by tenants) is satisfied that it is appropriate to make a rent repayment order in the circumstances of this case.

45. Having decided that an order should be made, the Tribunal then went on to consider carefully the amount of rent which had to be repaid.

46. The maximum possible amount for which a rent repayment order could be made equates to the full amount each Applicant has paid in respect of the period from 1st July 2018 to 11th June 2019.

47. The Tribunal is satisfied, from the copies of bank statements and other evidence supplied, that each Applicant made rental payments totalling £4680 in respect of the full term of the tenancy, which sums apportioned on a daily basis equate to £4436.38 for the relevant period. There is nothing to indicate that either Applicant was in receipt of universal credit which would need to be deducted from those maximum amounts.

48. The Upper Tribunal in the recent case of Vadamalayan v Stewart and others (2020) UKUT 0183 (LC) ("Vadamalayan") has confirmed that the starting point for the Tribunal's calculation must be the rent itself for the relevant period and that "the only basis for deduction is section 44 itself".

49. Section 44(4) of the 2016 Act mandates the Tribunal to specifically have regard to the conduct of the parties, the financial circumstances of the landlord, and whether the landlord has at any time been convicted of a specified offence.

50. The Tribunal considered each of these matters in turn.

The Conduct of the parties

51. The WhatsApp message trails and photographs show the Applicants acting as students do. They also provide clear evidence of the property repeatedly suffering from bad examples of mould in various rooms, a poorly designed shower enclosure and flood damage which could potentially have been dangerous to health and well-being. Mrs Aspinall communicated quickly when advised of problems but that should not disguise the fact that a number of the problems continued for longer than they should, and the Tribunal was left with the clear impression that not all of the problems could be legitimately blamed on the lifestyle of the Applicants or their co-tenants.

52. Despite Mrs Aspinall's allegations of misconduct there was little evidence in the Whatsapp conversations that she had voiced concerns at the time, except in respect of untidiness and accumulations of rubbish, which appear to have then been better addressed particularly after additional bins were supplied.

53. Whether or not they stayed up late or made a noise, the tenants were fully entitled to expect that the landlords should properly comply with their statutory repairing obligations. Together the tenants were charged and paid a gross annual rent of £28,080. Despite the Tenancy Agreement referring to the rent for the term, ie the full year, being £2340, it is clear from the various bank statements that that sum was charged for each month of the tenancy.

54. The WhatsApp photographs show various untidiness and that the tenants did not collect all of their clothes and belongings at the end of the tenancy, but no more than might reasonably expected at the end of a student letting.

55. The Tribunal felt it significant that whilst the landlords deducted £62.58 from each of the tenant's deposits, they did not seek to withhold any more money, and thereafter paid back a balance of £375.49 to each tenant.

The landlord's financial circumstances

56. Mrs Aspinall clearly initially profited from the rent paid.

57. She has asked the Tribunal to take into account the monies paid to her agents to sort out the contract, her mortgage payments, the monies paid to Home Serve services to help maintain the property both before the start of and during the tenancy, and the monies spent on checking the boiler and gas and electricity certificates. She also said that she had to pay for professional cleaners on the checkout, to order a skip to remove all the waste, and that the lounge needed a full refurbishment. She also stated "due to covid (the last tenant moved out early) having to pay the other tenant their rent back the property has cost me money I am in deficit I have not made a penny profit. The business has been adversely affected".

58. Judge Cooke in Vadamalayan made it quite clear that "it is not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord spent on the property during the relevant period… Much of the expenditure would 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…. 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".

59. Applying those principles, it was clear that the Tribunal should not deduct any of Mrs Aspinall's agent's expenses, mortgage repayments, the costs of standard safety checks, or the monies paid to Home Serve services from the amount of the rent repayment order.

60. The Tribunal then considered whether it would be appropriate to set off the costs of cleaning, refurbishment and skip hire at the end of the tenancy. It was clear that these matters had already been taken into account and paid for by the tenants when the costs for such items were deducted from their holding deposits. The landlords calculated the costs (at £62.58 for each tenant) which were paid, albeit that some of the tenants clearly felt that a skip was unnecessary and that a number of items outside had been left by the tenants of an adjoining property. To deduct such costs again would be double accounting, and the Tribunal was clear that it should not do so.

61. Nor did the Tribunal consider that there could or should be any deduction simply because of any previous order to repay rents to some of the other tenants.

62. As Judge Cooke stated in Vadamalayan "the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit is not appropriate and not in accordance with the law. I acknowledge that this will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence".

63. As to Mrs Aspinall's general comment that "due to Covid the last tenant moved out early" the Tribunal took the view that this must have been many months after the end of the subject tenancy.

Whether the landlord has any relevant convictions

64. There is nothing in the case papers to suggest that Mrs Aspinall has been convicted of any of the offences specified in section 40(3) of the 2016 Act .

The Tribunal's determination

65. Having reviewed all the circumstances of the case the Tribunal noted that:

- Mrs Aspinall, whilst not necessarily a professional landlord, has been a landlord for some years with more than one letting property in the locality. In an early email to the Council she stated "I have been running student homes for a large number of years". She either ignored or should have known that the property required licensing,
- an offence was ongoing from the start of the tenancy to within three weeks of its expiry,
- she was dilatory in properly making an application to the Council, and in making her submissions to the Tribunal,
- there were various problems with the repair of the property which were for the landlord to properly address rather than just paint over,
- such dilapidations as may have been due to the tenants' lifestyle were charged to and paid for by them in the form of the deductions taken from their deposits.

66. The Tribunal, when exercising its discretion, and having due regard to the case law, concluded that there was nothing that was sufficient to justify reducing the maximum amount of the rent repayment orders, and consequently that Mrs Aspinall must repay rent of £4436.38 to Mr Whalley and the same sum to Ms Daly.

JM Going
Tribunal Judge
3rd November 2020