FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BS/HMF/2020/0049**
Property	**:**	**17 Bloom Street, Stockport, Cheshire SK3 9LA**
Applicant	**:**	**Mr Vasili Vasilev**
Applicant's Representative	**:**	**Matt Wynne**
Respondents	**:**	**Mr Mark Thompson and Mrs Denise Thompson**
Type of Application	**:**	**Application for a Rent Repayment Order by a Tenant** **Section 41(1) Housing and Planning Act 2016**
Tribunal Members	**:**	**Mr S Moorhouse LLB** **Mr J Platt FRICS FIRPM**
Date of Notice	**:**	**15 February 2021**

DECISION

DECISION

(a) The tribunal makes a rent repayment order against the Respondents in favour of the Applicant in the sum of £3,328.

(b) The tribunal orders the Respondents to pay to the Applicant the sum of £100 by way of reimbursement of the application fee.

REASONS

Application

1. By an application dated 30 May 2020 ('the Application') the Applicant seeks a Rent Repayment Order in relation to a tenancy at 17 Bloom Street, Stockport, Cheshire SK3 9LA ('the Property').

2. The Applicant indicated in his application form that he would be content for the matter to be decided on the papers if the Tribunal considered it to be appropriate. Directions issued on 9 July 2020 stated that the matter appeared to be suitable for paper determination and the parties were invited to notify HMCTS should they decide that they wanted a hearing. The Tribunal met on 19 November 2020 to consider the Application on the papers, no request for a hearing having been received.

3. The Application is made under Section 41(1) of the Housing and Planning Act 2016 ('the 2016 Act'). Section 41(1) permits a tenant to apply to the Tribunal for a rent repayment order against a person who has committed an offence to which Chapter 4 of the 2016 Act applies. The Applicant alleges that the Respondents committed the offence of being in control or management of an unlicensed House in Multiple Occupation ('HMO') under section 72(1) of the Housing Act 2004 ('the 2004 Act'), being an offence included in the table set out at section 40(3) of the 2016 Act.

4. In support of the Application the Applicant provided a copy Financial Penalty Notice in relation to the alleged offence, issued to the Respondent Mark Thompson by Stockport MBC. The financial penalty was under appeal to another First-tier Tribunal. The present tribunal considered the outcome of the financial penalty appeal to be potentially relevant to the present proceedings, and therefore stayed the present proceedings pending the outcome of the financial penalty appeal.

5. A decision in relation to the financial penalties was made on 23 November 2020 under case reference MAN/00BS/HNA/2020/0004. The present tribunal reconvened on 1 February 2021 to determine the Application.

6. The tribunal had the benefit of a statement of case and supporting evidence submitted by each party, and a statement in reply by the Applicant, together with the original Application and the written decision in the related financial penalties case.

7. The tribunal was content that submissions received from the parties, and the other documents before it, were sufficient to enable the tribunal to proceed without a hearing. In view of the issues to be determined and the time elapsed since the alleged offence the tribunal considered it unnecessary to conduct an inspection.

The Law

8. The relevant statutory provisions relating to Rent Repayment Orders are contained in sections 40, 41, 43 and 44 of the 2016 Act, extracts from which are set out in the Schedule.

9. Section 40 identifies the relevant offences, including an offence under Section 72(1) of the 2004 Act (control or management of unlicensed HMO). Section 72(1) provides that an offence is committed if a person is a person having control of or managing an HMO required to be licensed which is not licensed.

10. Section 44(4) lists considerations which the tribunal must 'in particular' take into account in determining the amount to be repaid - conduct of the landlord and tenant, financial circumstances of the landlord and whether the landlord has been convicted of an offence to which that chapter of the 2016 Act applied.

Findings and determination

11. Section 41(1) of the 2016 Act provides for an application by a tenant or local housing authority. The tribunal accepts that the Applicant was a tenant at the Property for the period 14 November 2017 to 5 June 2019. He was required to leave the Property on 5 June 2019 owing to the service by Stockport MBC of an Emergency Prohibition Order. Whilst the Respondents state that the Applicant was provided with lodging as a favour to his mother and was not charged, the tribunal finds that the Applicant was in exclusive occupation of his room, with the use of communal facilities, and was paying rent of £80 per week to the Respondents' company, evidenced by the Applicant's copy bank statements. Even though it is common ground that there was no written tenancy agreement, the tribunal finds that a tenancy was created.

12. Section 40(3) of the 2016 Act sets out in a table the offences which would entitle a tenant (or local housing authority) to apply to the First-tier Tribunal for a rent repayment order against the offender pursuant to section 41(1).

13. Row 5 in the table describes an offence under section 72(1) of the 2004 Act, generally described as the control or management of an unlicensed HMO.

14. The meaning of HMO is set out at section 254 of the 2004 Act.

15. A building meets the 'standard test' in section 254 if it consists of one or more units of living accommodation that do not consist of a self-contained flat, the living accommodation is occupied by persons who do not form a single household, it is their only or main residence, the occupation constitutes the only use of the accommodation, rent is provided by at least one occupant and two or more households share one or more of the basic amenities.

16. The Applicant describes the Property as a 4 storey, 5 bedroom HMO with some shared living, bathroom and kitchen facilities. He states that there are four bedrooms with shared living room, kitchen and 2 bathrooms as well as a self-contained flat in the basement with its own separate kitchen and bathroom, accessed via the common parts of the building. Whilst the Applicant describes the residential accommodation in the basement of the Property as a 'self-contained' flat, he nevertheless considers the building to be an HMO. The Respondents submit that the basement does indeed

constitute a self-contained flat, and for this reason the entire building cannot be considered to be an HMO.

17. Subsection 254(8) defines a 'self-contained flat' as a separate set of premises which forms part of the building, the whole or a material part of which lies below some other part of the building and in which all basic amenities are available for the exclusive use of the occupants. The basic amenities referred to in the definition are a toilet, personal washing facilities and cooking facilities. The Applicant's own submission indicates that the basement flat includes such (exclusive) facilities.

18. The Applicant submits that the basement flat is accessed only via the common parts of the building. The First-tier Tribunal in the related financial penalties case reached a finding on the access to the basement flat as follows:

'To gain access to the basement flat it is necessary to enter the building through the front door, walk along the entrance hall, walk through the shared basic amenity of the living room, to the area that gives off to the stairs that then lead down to the basement level. On the basement level there is a store room and the door that gives access to the flat…'

19. In the view of the present tribunal a flat may still be considered to be a separate set of premises if it is reached via an entranceway, hallway, stairway or landing (or a combination of these) used also for access purposes by other premises. However the tribunal determine that a flat cannot be regarded as being 'a separate set of premises' for the purposes of the 2004 Act if it has neither its own dedicated access, nor a dedicated access shared with other premises. In the present case the occupiers of the flat are required to pass through the living room shared by the occupiers of the other parts of the building in order to access their accommodation. The flat and the living accommodation in the remainder of the building are not 'separate', the use of the former relies on use of the latter for access.

20. The flat is not therefore a 'separate set of premises' within the definition at section 254(8) and accordingly does not constitute a 'self-contained flat' within the meaning of section 254.

21. Mandatory licensing of an HMO is required where the HMO is of a prescribed description. The Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006 set out the relevant conditions as follows: the HMO or any part of it comprises three storeys or more; it is occupied by 5 or more persons; and it is occupied by persons living in 2 or more single households.

22. The prescribed description changed with effect from 1 October 2018 under the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018. The revised description removed the 3 storey requirement.

23. In the present case the Respondent has provided photographic evidence showing that the building has basement, ground floor, first floor and top floor levels. The tribunal finds that the HMO (of which the basement forms part) comprises at least 3 storeys.

24. Turning to the issue of occupancy, the local authority noted in the Emergency Prohibition Order served on 5 June 2019 that the Property included 4 individual

bedsit rooms (each one containing cooking facilities) in addition to the basement flat, and that all of the rooms were tenanted.

25. The Respondents submit that both Mr and Mrs Ruy were in occupation of the Property from 2012, living in the basement flat from 2018, and were allowed to remain in occupation notwithstanding the service of the Emergency Prohibition Order. The Respondents also provided copy agreements granting tenancies to Irena Surikova (commencing 15 October 2013) and Piotr Tchorzewski (commencing 12 May 2014), as well as an agreement with Mr Ruy. Witness statements from Irena Surikova and Piotr Tchorzewski confirm that they left the Property following the local authority's intervention in June 2019. The Respondents do not deny the Applicant's submission that his mother Ms Dobreva was an occupant.

26. Having already determined that the Applicant was a tenant from 14 November 2017 to 5 June 2019, the tribunal finds that throughout that period there were at least 5 occupants of the HMO. The tribunal further finds that the occupiers lived in 2 or more singe households.

27. It is common ground that the Respondents have neither sought, nor been granted an HMO licence for the Property in relation to the period ending 5 June 2019. Section 72(5) of the 2004 Act provides for a defence based on 'reasonable excuse'. The tribunal finds no basis for such a defence in this case. The Respondents should have been aware of the licensing requirement, and indeed in the related financial penalties case, it was determined (at para 50) that the HMO licensing offence was committed in the face of oral and written advice that increasing the number of tenants from 4 to 5 (or more) would result in the offence being committed.

28. Accordingly, on the papers before it, the tribunal finds, beyond reasonable doubt, that an offence has been committed to which Chapter 4 of the 2016 Act applies, namely that for at least 12 months prior to the date of the Emergency Prohibition Order of 5 June 2019, the Property was required to be licensed as an HMO and was not so licensed. The tribunal's findings in this respect are consistent with those of the First-tier tribunal in the related financial penalties case.

29. Having found that the Applicant was a tenant until 5 June 2019, and that the Application was submitted on 30 May 2020, the tribunal finds that the requirements of section 41(2) of the 2016 Act have been met. Accordingly the Applicant was entitled to make the Application.

30. Having found beyond reasonable doubt that an offence listed in section 40(3) has been committed, the requirements of section 43(1) of the 2016 Act are met and the Tribunal may make a Rent Repayment Order.

31. In this case the Tribunal considers that it is appropriate to make a Rent Repayment Order on the ground that the Respondents committed an HMO licensing offence. In reaching this decision the Tribunal is mindful of the purpose behind such an Order recorded in Hansard, namely (1) to provide for further penalty additional to any fine, (2) to help discourage illegal letting; and (3) to resolve problems that would arise from a tenant withholding rent.

32. The amount of any repayment is to be determined by the tribunal pursuant to section 44. Provisions within section 46 of the 2016 Act requiring a maximum repayment in

the event that the tribunal makes an order do not apply in the present case because the offence is not one of those specified at section 46.

33. Section 44(2) of the 2016 Act prescribes that (for the type of offence in the present case) any repayment must relate to rent paid by the tenant in respect of a period (not exceeding 12 months) during which the landlord was committing the offence. Having regard to its earlier findings the Tribunal determines this period to be 6 June 2018 to 5 June 2019 (inclusive).

34. The particular considerations at section 44(4) of the 2016 Act relate to conduct of both parties, landlord's financial circumstances and any conviction(s) to which that Chapter of the 2016 Act applies.

35. In relation to tenant conduct, whilst the Respondents allege that the Applicant consistently proved be a difficult tenant, and make a number of allegations in this respect, the evidence before the tribunal is insufficient to reach a finding of misconduct on the part of the Applicant.

36. In relation to the landlords' conduct, the Respondents state that they own only one property (the Property) and are not professional landlords – they state that the Applicant has provided no evidence to show that the Respondents possess a portfolio of properties. However the tribunal notes that the financial statements supplied by the Respondents in relation to their company JSJ Properties show that rental income for a property in Huddersfield was being received until 2019. The Respondents also state that if they committed an offence of having an unlicensed HMO it was not intentional and they were under a good faith belief that a licence was not required.

37. The First-tier tribunal in the related financial penalties case varied the civil financial penalties imposed by the local authority to £10,000 for not having the required HMO licence and £20,000 for failing to comply with management regulations in relation to an HMO (duty of the manager to take safety measures). The First-tier tribunal also determined (as noted earlier) that the offence of not having the required HMO licence was committed in the face of oral and written advice that increasing the number of tenants from 4 to 5 (or more) would result in the offence being committed.

38. Having regard to the evidence before it, including the decision in the related case, the present tribunal does not accept the Respondent's contention that they acted unintentionally and in good faith. The tribunal finds also, having regard to the terms of the Emergency Prohibition Order and the First-tier Tribunal decision, that the Respondents not only failed to obtained the necessary licence, but failed to operate the HMO to the requisite safety standards.

39. Turning to the issue of financial circumstances, the Respondents state that they are £42,000 in debt, have lost £19,411 in rental income since June 2019 and own no assets. However it is not in dispute that the Respondents own the Property and office copies of the entries at HM Land Registry show that they purchased the 999 year lease of the Property in 2006 for £155,000. Information supplied by the Respondents showed that their company JSJ Properties made a profit of £18,475 in 2019.

40. The tribunal finds that the Respondents' own actions or omissions have given rise to financial penalties, which were varied from £40,000 to £30,000 (in total) on appeal, and to the service of an Emergency Prohibition Order resulting in lost rental income.

41. The tribunal accepts that the Respondents have not been convicted of an offence to which Chapter 4 of the 2016 Act applies.

42. The tribunal has considered whether overall the amount of the rent to be repaid to the Applicant should be adjusted on account of the considerations set out in section 44(4) of the 2016 Act. On the basis of the findings noted above, the tribunal makes no adjustment to the rent to be repaid to the Applicant for reasons of tenant conduct, or the financial circumstances of the Respondents. Whilst the tribunal accepts that the Respondents have not been convicted of a relevant offence, the tribunal considers it inappropriate to make a deduction from the rent to be repaid in recognition of this, given the tribunal's findings on landlords' conduct.

43. The tribunal noted that utility costs were met by the landlord, and considered it appropriate to deduct these in determining the amount to be repaid. The Respondents stated that the utility costs came to £1,012.99 but provided no explanation as to how this figure was arrived at. The tribunal had limited information but was able to arrive at an approximation for the required figure from the financial statements of the Respondents' company JSJ Properties.

44. The profit and loss account for the year ended 5 April 2019 included rental income for the Property of £22,130 and a part-year sum for a property in Huddersfield of £600. Total 'rates and water' came to £2,752 and total 'light and heat' came to £1,963. The tribunal noted that the total costs for rates, water, light and heat came to approximately 20% of rental income. Given that less than 3% of the rental income related to the Huddersfield property, and the period was so close to the period to which the rent repayment would relate, the tribunal considered it reasonable to adopt an approximation that the utility costs would be 20% of rent.

45. It was unclear whether 'rates' referred to (or included) Council Tax paid by the company on behalf of the tenants, or whether Council Tax was paid direct by the tenants. Either way it was considered appropriate to include the amount incurred by the landlords in calculating the deduction.

46. The tribunal calculates the rent paid for the period 6 June 2018 to 5 June 2019 to be £4160 (being 52 weeks x £80). The deduction of 20% for utility costs gives an amount of rent to be repaid of £3,328.

47. The Tribunal makes a rent repayment order in the total sum of £3,328.

Refund of fees

48. The Applicant has applied for the refund of application and hearing fees. Given that there was no hearing the only fee in issue is the £100 application fee.

49. Rule 13(2) of the tribunal's procedure rules provides for an order for the reimbursement of any such fee paid by a party. This is at the discretion of the tribunal and does not automatically apply.

50. In the present case, the tribunal considers that it is in the interests of fairness and justice that the Applicant should not be 'out of pocket' for the application fee, in view of the tribunal's overall findings. The Respondents are therefore ordered to pay to the Applicant the sum of £100 in this respect.

S Moorhouse
Tribunal Judge

Schedule

Housing and Planning Act 2016

Section 40

(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).....

(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.

The table described in s40(3) includes at row 5 an offence contrary to s72(1) of the Housing Act 2004 "control or management of unlicensed HMO"
Section 72(1) provides: (1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

Section 41

(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.

Section 43

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

Section 44

(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.

The table provides that for an offence at row 5 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.

(3) The amount that the landlord may be required to pay 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.