FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/30UK/HMF/2020/0034, 0038, 0039 & 0040 V**
Property	**:**	**188a Adelphi Street** **Preston** **Lancashire** **PR1 7BH**
Applicants	**:**	**Ms Evie South (1)** **Ms Emily White (2)** **Ms Megan Curran (3)** **Ms Lucy Fox (4)** **Mr Nathan Crozier (5)**
Respondent	**:**	**Mr Kulvant Singh Steven Birk**
Type of Application	**:**	**For a Rent Repayment Order** **Housing and Planning Act 2016 – s41**
Tribunal	**:**	**Judge J Holbrook** **Regional Surveyor N Walsh**
Date and venue of Hearing	**:**	**Hearing by video on** **5 May 2021**
Date of Decision	**:**	**13 May 2021**

DECISION

DECISION

Kulvant Singh Steven Birk is ordered to repay rent to the five Applicants in these proceedings. The amount he must repay to each Applicant is £2,116.00.

REASONS

Procedural history

1. During April 2020, the first four Applicants in these proceedings each applied to the Tribunal under section 41(1) of the Housing and Planning Act 2016 ("the 2016 Act") for a rent repayment order.

2. On 5 February 2021 the Tribunal directed that the fifth Applicant, Nathan Crozier, be joined as a party to the proceedings. Mr Crozier had been a co-signatory to the statement of case submitted by the Applicants on 8 December 2020, and had also written to the Tribunal at the beginning of December to say that, in common with his four housemates, he wanted to apply for a rent repayment order. Indeed, he said that he had previously lodged a separate application for a rent repayment order (although the tribunal administration has been able to find no trace of one).

3. The Applicants are all students who share a flat at 188a Adelphi Street, Preston PR1 7BH ("the Property"). Each of them seeks repayment of rent which they have paid to the Respondent, Kulvant Singh Steven Birk, in respect of their occupation of the Property during the 2019-20 academic year. The Tribunal must determine whether it has jurisdiction to make a rent repayment order in each case and, if so, the amount which Mr Birk must repay to each Applicant.

4. The applications were heard at a video hearing (using HMCTS' Video Hearing Service) on 5 May 2021. The Applicants were represented at the hearing by three of their number (Ms Fox, Ms South and Mr Crozier). The Respondent landlord, Mr Birk, also attended the video hearing, at which he was represented by his solicitor, Mr David Darlington. We heard oral evidence and submissions from both sides and also considered the written representations and supporting documentary evidence which had been provided in advance. We are grateful to the parties for the assistance they provided.

Law

5. 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 directions issued to the parties by the Tribunal on 26 November 2020. 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"). The offence must have been committed by the landlord in relation to housing in England let by him.

6. 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.

7. 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).

8. 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 that the landlord has committed the offence of controlling or managing an unlicensed HMO, the amount must relate to rent paid for 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.

9. 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.

Facts

10. The Tribunal did not inspect the Property, but we understand it to comprise a five bedroomed first floor flat forming part of a former public house now converted into two flats.

11. Mr Birk has been the landlord of the Property at all material times. He describes himself as being "a landlord and convenience store owner" and we understand that he also owns other residential property in the Preston area which he lets to tenants. Mr Birk told us that he owns ten properties in total, seven of which are let to residential tenants. The Property is the only premises in his portfolio which is required to be licensed as an HMO.

12. On 23 July 2019, the Applicants entered into an assured shorthold tenancy agreement with Mr Birk. The agreement granted a tenancy of the Property for a fixed term of 11 months which began on 1 August 2019 and ended on 30 June 2020. The rent stated to be payable under the tenancy agreement was £18,000 in total, payable by three instalments (following an initial advance rental/deposit payment of £1,000). The tenancy agreement provided that the rent was to be inclusive of gas, electricity, water and broadband charges. However, the tenants were responsible for council tax.

13. It is agreed that the above rent has been paid in full (and in equal shares as far as the five Applicants are concerned). As mentioned above, the Applicants remain in occupation of the Property pursuant to a subsequent tenancy agreement and we note that the initial £1,000 deposit – which formed part of the specified rent – has been carried forward for the purposes of the second tenancy.

14. We also pause to note the parties' agreement that, for reasons unknown, Ms Curran overpaid her rent for the first tenancy by £200. We shall leave it to the parties to rectify this matter separately: no further account is taken of it in this decision.

15. Although the tenancy ran from 1 August 2019, it is agreed that the Applicants did not all take up occupation of the Property immediately: they moved in separately over the course of the first two months – the last of the five to arrive was Mr Crozier, who moved in on 25 September 2019.

16. In addition, of course, the period of the tenancy included the start of the COVID-19 lockdown from late March 2020 onwards. It is agreed that, on or around 30 March 2020, the Applicants returned to their respective homes on advice from the university. It is also agreed that, whilst some of them subsequently returned to the Property for various periods before the tenancy ended at the end of June, there was no time after the end of March when all five Applicants were living there at the same time.

17. Mr Birk expended the following sums in respect of the Property in relation to the period covered by the tenancy agreement:

Mortgage repayments	£8,673.69
Repairs	£1,753.53
Internet charges	£605.88
Utilities charges	£1,472.50
TV Licence	£154.50
Safety checks	£1,160.00
Letting agents & deposit	£1,026.00
HMO licensing costs	£760.00

18. Mr Birk has no complaints about the Applicants' conduct as tenants and, for their part, the Applicants consider Mr Birk to be a reasonable landlord who has been generally responsive to their needs. They mentioned an ongoing issue about the repair of a radiator, as well as some difficulty with access to a shared bin store, but these appear to be relatively minor complaints.

19. Nevertheless, in March 2020, ongoing issues about the bins led to an inspection of the Property by housing standards officers from Preston City Council. As a result of that inspection, 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. Following discussions between the council and the landlord, Mr Birk made an application for an HMO licence in respect of the Property on 22 May 2020. The HMO licence application is still outstanding, but we gather that the council is satisfied that the condition of the Property is of a licensable standard.

20. It is also relevant to note that, on 29 October 2020, Preston City Council gave Mr Birk notice of its intention to impose a financial penalty upon him under section 249A of the 2004 Act. The amount of the proposed penalty is £4,125 and the stated grounds for imposing it are that Mr Birk has committed an offence under section 72(1) of the 2004 Act in relation to the Property.

21. Mr Birk has not been prosecuted for the section 72(1) offence. Nor has he ever been convicted of any of the other offences specified in section 40(3) of the 2016 Act.

Jurisdiction to make a rent repayment order

22. It is necessary first to consider whether Mr Birk has committed one or more of the offences specified in section 40(3) of the 2016 Act: in this case, the offence under section 72(1) of the 2004 Act. Mr Birk admits that he has committed this offence and we are satisfied, beyond reasonable doubt, that this is indeed so.

23. In coming to this conclusion, we note that Mr Birk accepts that he was the landlord and manager of the Property at all material times. He also

accepts that the Property was unlicensed, despite it being a mandatory HMO for at least some of the period of the tenancy. Mr Birk rightly points out that, because the Property is part of a two-storey building, it was not required to be licensed as an HMO prior to a change in the law in October 2018. He says that, prior to the council's intervention in March 2020, he had been unaware of this change and this is why he had not previously applied for an HMO licence. Nevertheless, Mr Birk accepts that these circumstances do not amount to a reasonable excuse for his failure to licence the Property. We agree.

24. Nevertheless, Mr Birk challenges the Applicants' assertion that the section 72(1) offence was being committed throughout the eleven-month period of the tenancy. He argues that the Property was not a mandatory HMO before the last of the five Applicants moved in on 25 September 2019, or after 30 March 2020 (when the Applicants returned home because of lockdown). Alternatively, Mr Birk argues that the offence was no longer being committed on or after 22 May 2020 (when the HMO licence application was submitted to Preston City Council).

25. A property needs to be licensed as an HMO (and is a so-called 'mandatory HMO') if, among other things, it is occupied by five or more persons[1]. Section 262(6) of the 2004 Act provides that an 'occupier', in relation to premises, "means a person who occupies the premises as a residence". Although the 2004 Act does not offer further clarification as to what constitutes occupation, we consider that the expression "occupies … as a residence" connotes something more than simply a right to occupy. So, for example, if a person takes a tenancy of premises but never moves in for some reason, they cannot be said to 'occupy' those premises. At the other extreme, short or transitory absences from premises occupied as one's residence cannot reasonably be characterised as a break in occupation.

26. In the present case, whilst the Applicants had the right to occupy the Property from 1 August 2019, Mr Crozier did not move in until 25 September. He did not 'occupy' the Property before this date and thus it is the date on which the offence under section 72(1) of the 2004 Act was first committed (because it was only from this date that the Property was being occupied by five or more persons).

27. Whilst we therefore agree with Mr Birk's analysis of the legal implications of the manner in which the Applicants arrived at the Property, we disagree with him when it comes to the question of the Applicants' temporary absences during lockdown. Having heard oral evidence on this issue from Ms Fox, Ms South and Mr Crozier, we are satisfied that the Applicants' lockdown-related absences were transitory and should not be regarded as a break in their occupation of the Property. We heard that, on being advised to return home when face-to-face teaching was suspended at the end of March 2020, the Applicants

[1] See Article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018.

were initially hopeful that this would be for a short period or just two or three weeks. They fully intended to return as soon as circumstances permitted them to do so and they did not remove all their belongings from the Property (Ms South, for example, told us that she had just packed a small bag).

28. Nevertheless, we accept Mr Birk's alternative argument that the period for which the offence was being committed ended on 21 May 2020 (as section 72(4)(b) of the 2004 Act has the effect of ending the commission of the offence once a licence application is made).

29. It follows from these findings that the Tribunal does have power to make a rent repayment order in favour of each of the five Applicants in this case. The amount of any such order must not exceed the rent paid in respect of the period beginning on 25 September 2019 and ending on 21 May 2020 (being the period during which Mr Birk was committing the relevant offence).

Whether a rent repayment order should be made

30. Whilst the power in section 43 of the 2016 Act gives the Tribunal discretion as to whether a rent repayment order should be made in a particular case, it is clear that the Tribunal should ordinarily exercise that discretion in a tenant's favour where the power to make a rent repayment order arises. The obvious intention of Parliament was that the making of such an order will be a likely consequence of committing one of the specified offences, and that this will be in addition to any other criminal or civil sanction imposed in respect of the offence. As the Upper Tribunal (Lands Chamber) observed in *Vadamalayan v Stewart & Others* [2020] UKUT 0183 (LC), Parliament intended a harsh and fiercely deterrent regime of penalties for the offences in question.

31. In the present case, we are satisfied that it is appropriate to make a rent repayment order on the ground that Mr Birk has committed an HMO licensing offence under section 72(1) of the 2004 Act.

Amount of the order

Maximum possible amount

32. Although the total rent passing under the tenancy was expressed to be £18,000, we have already noted that £1,000 of this sum was a damage deposit which has effectively been carried forward as a deposit in respect of the Applicants' second year of occupation. It is therefore appropriate to remove this sum from the equation and to base our determination on a total passing rent of £17,000.

33. On this basis, the maximum amount which the Tribunal could order Mr Birk to repay in the present circumstances is £12,179.10. That is the apportioned amount of the total rent which the Applicants paid in respect of the period of 240 days during which the relevant offence 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

34. In *Rakusen v Jepsen & Others* [2020] UKUT 0298 (LC), the Upper Tribunal (Lands Chamber) observed that the policy of the whole of Part 2 of the 2016 Act (which includes the provisions about rent repayment orders) is clearly to deter the commission of housing offences and to discourage the activities of "rogue landlords" in the residential sector by the imposition of stringent penalties. Despite its irregular status, an unlicensed HMO may be a perfectly satisfactory place to live, and the main object of the provisions is deterrence rather than compensation.

35. It follows that, even though the Tribunal is not *required* to make a rent repayment order for the maximum amount in the circumstances of this case, that amount is the obvious starting point when determining how much should be repaid. This was also made clear by the Upper Tribunal in *Vadamalayan v Stewart*, where Judge Cooke observed that a rent repayment order is not tempered by a requirement of reasonableness and that it would generally be wrong to attempt to limit the amount of a rent repayment order to the landlord's profits from letting the premises in question. Judge Cooke stated that:

> "The only basis for deduction is section 44 [of the 2016 Act] itself, and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But 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."

36. Nor did the Upper Tribunal see any justification for deducting either a fine or a financial penalty imposed on the landlord for the offence(s) in question – because it was Parliament's obvious intention that the landlord should be liable both (1) to pay a fine or civil penalty, and (2) to pay a rent repayment order.

37. The Upper Tribunal has subsequently re-emphasised (in the case of *Awad v Hooley* [2021] UKUT 0055 (LC)) that it is always necessary to consider whether the factors in section 44(4) of the 2016 Act (listed in paragraph 9 above) have an impact on the amount which should be repaid – and that it will be unusual for there to be absolutely nothing for the Tribunal to take into account in this regard. Nevertheless, in exercising its considerable discretion in respect of these matters, it is not appropriate for the Tribunal to calculate the amount of a rent repayment order simply by deducting from the rent everything the landlord has spent on the property during the relevant period. Much of that expenditure will have been incurred in meeting the landlord's obligations under the tenancy agreement: it will have repaired or

enhanced the landlord's own property, and will have enabled him to charge a rent for it.

38. Nevertheless, in cases where the landlord pays for utilities, such as electricity, gas or water, there is a case for deduction: 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.

Application of the above principles in this case

39. On behalf of the landlord, Mr Darlington submitted that, even excluding any financial penalty which the council may yet impose, or any associated legal costs, Mr Birk will have made little, if any, profit from this letting once the expenses listed at paragraph 17 above are taken into account. He argued that Mr Birk should be given credit for all those expenses (on a pro-rata basis) when the amount of any rent repayment order is determined.

40. Mr Darlington also argued that, whilst the rent obtained by letting premises as an HMO is typically more than the rent achievable for a single-household letting, the necessary expenditure on repairs and other running costs tend to be higher for an HMO too. He argued that a landlord of an HMO should also be given credit for having to bear such higher operating costs.

41. For the reasons explained above, we are not persuaded that there is any justification for making a deduction from the amount of rent to be repaid simply to reflect the general expenditure which Mr Birk has incurred in connection with the letting. We consider it immaterial that a landlord's expenditure on an HMO letting might be higher than for other lettings: the landlord also receives more rent for letting an HMO. Nor do we consider that a deduction is warranted merely because the letting may have turned out not to be profitable.

42. Nevertheless, we do consider that Mr Birk should be given due credit for the expenditure he incurred in ensuring that the Applicants were provided with Internet access, utilities and a TV licence. Mr Birk's expenditure on these items was £2,232.88 for the entirety of the tenancy (so, £1,599.68 pro rata for the period during which the relevant offence was being committed).

43. Turning to the particular factors specified in section 44(4) of the 2016 Act, we make the following observations:

    a) <u>The conduct of the landlord and the tenants</u>

    There has been no misconduct on the tenants' part which would warrant a reduction in the amount to be repaid. Mr Birk has also been generally a good landlord. Nevertheless, his good conduct

has not gone over and above that which tenants should reasonably expect from their landlord and we do not consider that it warrants any further reduction in the amount of rent to be repaid.

b) The financial circumstances of the landlord

We have already touched on the issue of Mr Birk's financial circumstances when explaining why we consider he should be given due credit in this process for certain specific items of expenditure but not for others. However, there is also a wider question as to whether anything about Mr Birk's financial circumstances generally should cause us to order repayment of a different amount of rent than would otherwise be the case. We do not believe there is. In fact, Mr Birk has provided virtually no evidence about his general financial circumstances other than to confirm that he has significant property holdings in the Preston area. We were told nothing about his overall income or outgoings. As noted above, the fact that this particular letting might have proved unprofitable is not something which, in isolation, warrants a reduction in any rent repayment order.

c) Whether the landlord has at any time been convicted of any of the specified offences

The fact that Mr Birk has no relevant convictions does not, of itself, warrant a reduction in the amount of any rent repayment order.

The Tribunal's determination

44. The above findings indicate that Mr Birk should be ordered to repay £10,579.42 to the Applicants (being the maximum possible amount less the expenditure for which credit should be given). Rounding up this figure to £10,580.00, we consider that Mr Birk should repay rent to each Applicant in the sum of £2,116.00.

45. Accordingly, we make a rent repayment order to this effect.

Signed: J W Holbrook
Judge of the First-tier Tribunal
Date: 13 May 2021