FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/30UK/HMF/2019/0037 & 0038**
Property	**:**	**21 St. Ignatius Square** **Preston** **PR1 1TT**
Applicants	**:**	**Miss Angelika Maciejewska (1)** **Miss Maria Kichukova (2)**
Representative	**:**	**N/A**
Respondent	**:**	**Mr Michael Gibbons**
Representative	**:**	**N/A**
Type of Application	**:**	**Rent Repayment Order** **Housing and Planning Act 2016 – s41**
Tribunal	**:**	**Judge J Holbrook** **Deputy Regional Valuer N Walsh**
Date and venue of Hearing	**:**	**Determined without a hearing**
Date of Decision	**:**	**9 January 2020**

DECISION

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A. Mr Gibbons is ordered to repay rent to Miss Maciejewska. The amount which he must repay is £2,535.54.

B. Mr Gibbons is also ordered to repay rent to Miss Kichukova. The amount which he must repay to her is again £2,535.54.

REASONS

Background

1. On 2 July 2019, both Angelika Maciejewska and Maria Kichukova 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, 21 St. Ignatius Square, Preston PR1 1TT. 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 16 August 2019, the Tribunal issued Directions to the parties in respect of both applications stating that the matter would be dealt with by way of a determination on the basis of the written submissions and documentary evidence, without the need for an oral hearing unless any party requested one. No party requested an oral hearing and therefore the Tribunal convened on the date of this decision to consider the applications on the basis of the written representations of the parties.

4. The Tribunal did not inspect the Property, but we understand it to comprise a two-storey, six-bedroom house with a shared kitchen/lounge area and two shared bathrooms.

Law

Rent repayment orders

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 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"). The offence must have been committed by the landlord in relation to housing in England let by him.

6. 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.

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 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.

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.

Mandatory HMOs

10. 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.

11. 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.

12. A property which satisfies the conditions listed in paragraph 10 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

13. 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.

14. On 16 February 2018, the Applicants, together with two other female students, 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 payable under the tenancy agreement was £69.99 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 £1,119.84 during the term. So each Applicant paid a total rent of £3,559.51.

15. The tenancy agreement provided, among other things, that the landlord would contribute towards the tenants' utility charges (in respect of internet access, TV licence, water, electricity and gas) up to a maximum allowance of £2,000 during the one-year fixed term.

16. Whilst it is a matter of dispute, the Applicants say that they had agreed to rent the Property on the understanding that it would only be occupied by females. They say that they were therefore surprised to be told, prior to moving in, that two male students would also be living there. The Applicants assert that they did indeed share occupation of the Property with two male tenants of Mr Gibbons, "CF" and "RS". Mr Gibbons denies that these two individuals were his tenants or that he was aware of their occupation of the Property.

17. What is clear is that, following receipt of a complaint about the condition of the Property, it was inspected on two occasions by officers of Preston City Council. The second such inspection took place on 28 May 2019 and the Council's officers noted that it was then occupied by six unrelated students: four females (including the Applicants) and two males (CF and RS).

18. The Council's officers formed the view that the Property was a mandatory HMO which was required to be licensed as such under the 2004 Act and, on 5 June 2019, an HMO Declaration was served on Mr Gibbons under section 255 of that Act. 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

19. It is necessary first to consider whether Mr Gibbons has committed one 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 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.

20. It is immediately clear that, prior to 1 October 2018, the Property was not a mandatory HMO, because it comprises only two storeys, and thus was not required to be licensed under Part 2 of the 2004 Act (see paragraph 12 above). It is also clear that any licensing offence which may have been committed on or after that date under section 72(1) would have ceased to be committed on 18 June 2019, when Mr Gibbons submitted his licence application (see section 72(4)(b)). It follows that the Tribunal cannot order the repayment of rent which relates to a period before 1 October 2018 or after 17 June 2019.

21. In fact, however, Mr Gibbons argues that in this case the Tribunal has no jurisdiction to make a rent repayment order at all. He asserts that the Applicants have failed to establish, to the criminal standard of proof, that he has committed the relevant offence. In particular, Mr Gibbons asserts that, for the following reasons, the Applicants have not established that the Property was a mandatory HMO:

    a) It has not been established that the Property was occupied by five or more persons during the relevant period.

    b) Even if it is accepted that the Property was occupied by five or more persons who did not form a single household, it has not been established that limbs c) or d) of the standard test for an HMO were satisfied during the relevant period (see paragraph 11 above).

22. The principal matter in dispute concerns the alleged occupation of the Property by CF and RS, about which the parties have starkly contrasting views. On the one hand, the Applicants assert that Mr Gibbons permitted these individuals to reside at the Property throughout the 2018-19 academic year against the wishes of the four original female tenants. On the other hand, however, Mr Gibbons says that, if CF and/or RS did occupy the Property, it was without his knowledge or consent (and presumably, therefore, at the invitation of the female tenants).

23. Neither CF nor RS were parties to the Applicants' tenancy agreement and we have not been provided with a copy of any other relevant tenancy agreement or with witness evidence from either of them confirming the nature and circumstances of their occupation. However, whilst it seems odd that Mr Gibbons would have purported to let rooms in the Property to CF and/or RS given that he had already entered into an agreement for a letting of the entire Property to the four female tenants, there is evidence to corroborate the Applicants' assertion that this is what actually happened. In particular:

    a) An exchange of text messages between one of the Applicants and Mr Gibbons' letting agency (a copy of which was included in the Applicants' bundle) indicates this quite clearly: at 11.25 on 20 April 2018, the following text was sent:

> "Hi, I have just received an email from someone called [C] saying that he's going to be living with us next year. However, we had specified when we booked the house that we did not want to live with any males and we were told that if anyone was interested in the property they would have to contact [?]"

The following text was sent in response by the letting agency about 10 minutes later:

> "We don't recall that as we always try to achieve a mixed group house as works better [?] rather all male or female. Also at this late stage we can't be picky"

Soon afterwards, the letting agency sent the following additional text message:

> "It's just not possible when letting by per room and we guarantee an all female house would not be an ideal set up for a house share. Mixed groups work best."

b) The Applicants' bundle also included a copy of an email sent by CF to Mr Gibbons' letting agency on 9 December 2018. In this email CF complained about pest control and damp issues and, in doing so, appears to have regarded himself as a tenant.

c) CF and RS were apparently in occupation when the Property was inspected by Preston City Council on 28 May 2019.

24. Mr Gibbons has asked us to disregard witness evidence from the relevant officer of Preston City Council about the alleged basis on which CF and RS were occupying the Property on the ground that this evidence is hearsay. That is true but, provided that fact is recognised when deciding what weight to attach to such evidence, the Tribunal is not prevented from taking hearsay evidence into account. In the present case, there is no good reason not to accept the Council's evidence that it found six unrelated students to be in occupation of the Property as at 28 May 2019. At least as far as CF is concerned, other evidence indicates that his occupation had been in contemplation from as early as April 2018 and that he was in residence in December that year. It therefore seems reasonable to accept the Applicants' assertion that he was in occupation for the whole of the 2018-19 academic year. The text messages discussed above also indicate that CF's occupation was arranged by or on behalf of Mr Gibbons – presumably on the mistaken premise that he was entitled to let the Property's two remaining bedrooms separately – and not by the female tenants of the Property. We note that, in the course of these proceedings, Mr Gibbons has been provided with copies of the text messages and email referred to but that he has not taken issue with either their authenticity or their import.

25. On this basis we are satisfied, beyond reasonable doubt, that the Property was occupied by at least five students throughout the 2018-19 academic year. They did not form a single household and, by virtue of

section 259(2)(a) of the 2004 Act, their occupation of the Property as students must be treated as occupation of it as their only or main residence. As far as limb d) of the standard test is concerned (the 'sole use' condition), we have seen nothing which indicates that the Property was used for any purpose other than as living accommodation during the period in question.

26. We are therefore satisfied, beyond reasonable doubt, that Mr Gibbons has committed an offence under section 72(1) of the 2004 Act in relation to the Property. That offence was committed between 1 October 2018 and 18 June 2019. Given that each of the Applicants applied for a rent repayment order within 12 months of the end of that period, the Tribunal does have jurisdiction to make such an order in favour of both of them.

Whether a rent repayment order should be made

27. We are satisfied that it is appropriate to make a rent repayment order on the ground that Mr Gibbons has committed an HMO licensing 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

28. The maximum amount for which a rent repayment order could be made in favour of each Applicant in the present circumstances is £2,535.54. That is the apportioned amount of rent which each of them paid in respect of the period of 260 days during which the offence was being committed. There is nothing to indicate that either Applicant was in receipt of housing benefit or universal credit which would need to be deducted from that maximum amount.

Principles guiding the Tribunal's determination

29. 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 9 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 is always likely to be material. A deliberate flouting of the requirement to obtain a licence 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

30. 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

31. As we have already noted, Mr Gibbons is a professional landlord. However, he has not provided us with any information 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.

32. The Applicants complain that Mr Gibbons was a very poor landlord. They have given details of the many grievances they have in relation to his conduct. These include complaints about the arrangements for taking over the Property at the start of the academic year and delay in providing a copy of the tenancy agreement; the fact that CF and RS were permitted to share the Property with them; multiple issues concerning the unsatisfactory condition of the Property; and difficulties in communicating with Mr Gibbons. In his response to the applications, Mr Gibbons chose not to respond to any of these complaints directly, but said that he expressed regret for any dissatisfaction the Applicants had with the Property.

33. We note from the evidence supplied by Preston City Council that, upon inspection in May 2019, a number of (unspecified) hazards were noted to be present at the Property and that the Council subsequently provided Mr Gibbons with an informal schedule of work to remedy those hazards. It appears that Mr Gibbons responded to the effect that he would carry out those works, but not until the summer holidays, by which time the Applicants had vacated the Property.

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. Not only did Mr Gibbons commit a serious housing offence, but he appears to have let the Property in a sub-standard condition. Moreover, his actions in re-letting rooms to CF and RS appear to be a fundamental breach of the tenancy he had already granted to the Applicants. He had no right to do so.