FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CN/HMK/2022/0001-8**
Property	:	**194A Dawlish Road, Birmingham, West Midlands, B29 7AR**
Applicant	:	**(1) Ben Norton, (2) Abigail Spicer, (3) Ben Williamson, (4) Sophie Duigenan, (5) Rebecca Bernat, (6) Ellen Fadden, (7) Ella Hewlett and (8) Will Dawkins**
Respondent	:	**(1) Khalda Begum (2) Mehla Homes Limited**
Type of Application	:	**Rent Repayment Order (s.41 Housing and Planning Act 2016)**
Tribunal Members	:	**Tribunal Judge Craig Kelly** **Alan McMurdo MCIEH**
Date of Decision	:	**22 June 2022 (hearing date 25 May 2022)** **6 July 2022 (Amended Decision – see below)**

DECISION

This decision is an amended decision made in the exercise of the Tribunal's power under Rule 50 to correct a clerical mistake, accidental slip or omission, in this instance, being the omission of one of the claimants from the awards made from the decision 22 June 2022. The amendments are in blue text.
Signed: C Kelly
Dated: 29 June 2022

DECISION

1. The Tribunal concludes that the Respondents, Khalda Begum and Mehla Homes Limited, have both committed the offence of managing or controlling a House in Multiple Occupation which is let to tenants without a licence when required to do so, contrary to s. 72(1) of the Housing Act 2004 ("the 2004 Act").

2. Further, the Tribunal concludes that it is appropriate to grant a rent repayment order pursuant to Part 2 of Chapter 4 of the Housing and Planning Act 2016 ("the 2016 Act") in favour of the Applicants against the Second Respondent, Melha Homes Limited, in the following sums:

    a. Abigail Spicer - £2,936.83
    b. Sophie Duigenan - £2,963.83
    c. Ben Williamson - £2,963.83
    d. Ben Norton - £2,366.00
    e. Ella Hewlett - £2,963.83
    f. Ellen Fadden - £2,963.83
    g. Will Dawkins - £2,427.30
    h. Rebecca Bernat - £2,963.83

3. That the First and Second Respondent do pay to the Applicants the total fees for commencing these proceedings in the amount of £300 (being the application issue fee of £100 and the hearing fee of £200) pursuant to Rule 13 of the Tribunal Procedure (First-Tier Tribunal) Property Chamber Rules 2013.

4. The above sums must be paid within 14 days of service of this decision upon the Respondents.

REASONS FOR DECISION

Introduction

5. This is the decision in the application made by the Applicants concerning 194A Dawlish Road, Selly Oak, B29 7AR ("the Property") for a rent repayment order pursuant to the provisions of Part 2, Chapter 4, of the 2016 Act.

6. By s.42(2) a tenant may apply for a rent repayment order where a person has committed an offence to which Part 2, Chapter 4 of the 2016 Act applies. Such offences are detailed in s.40(3) of the 2016 Act and include the offence under s.72(1) of the 2004 Act, which is committed in relation to housing in England.

7. S.72(1) of the 2004 Act states:

    (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.
    (2) A person commits an offence if—

(a) he is a person having control of or managing an HMO which is licensed under this Part,
(b) he knowingly permits another person to occupy the house, and
(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.
(3) A person commits an offence if—
(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and
(b) he fails to comply with any condition of the licence.
(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—
(a) a notification had been duly given in respect of the house under section 62(1), or
(b) an application for a licence had been duly made in respect of the house under section 63,and that notification or application was still effective (see subsection (8)).
(5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse—
(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or
(b) for permitting the person to occupy the house, or
(c) for failing to comply with the condition, as the case may be…

8. In determining whether an offence has been made out, to which the rent repayment order regime applies, the Tribunal must be satisfied beyond reasonable doubt that the offence is made out. This requires consideration of each element of the alleged offence separately, with appropriate findings being made as to the whether those requirements are met beyond reasonable doubt.

9. This case concerns an alleged failure on the part of the those controlling or managing the Property to seek a license as required in respect of the Property when at a time it was let out to a number of tenants.

The Facts

10. The Property itself has been described by the Applicants as being an eight bedroom terraced house comprising three stories, which provides shared communal areas and accommodation, with each tenant having their own room. All of the Applicants were students at the relevant time of the letting period with which these proceedings are concerned.

11. A single written tenancy agreement was entered into by all of the Applicants and the Second Respondent dated 16 December 2019 ("the Tenancy Agreement"), which provided for the Property to be let to the Applicants for a 12-month period for a monthly rental sum of £2,912, such being payable on or by the first day of each calendar month. The Applicants met their own ongoing utility costs. None of the Applicants were in receipt of universal credit.

12. The Property was managed by the landlord directly, there was no third-party processional managing agent engaged.

Procedural issues

13. The Respondents have not taken part in these proceedings.

14. On 14 March 2022, Regional Judge Jackson issued directions, which required, amongst other things, the Respondents to send to the Applicants and the Tribunal a paginated bundle of various documents, comprising such things as their reasons for resisting the application (if any). These directions contained a warning that the Tribunal may bar the Respondents if they failed to comply with them. A similar warning was provided in relation to strike out in respect of non-compliance by the Applicants.

15. There had been no compliance by the Respondents with the directions of Regional Judge Jackson. Indeed, there has been no engagement by the Respondents at all throughout these proceedings. Accordingly, on 28 April 2022, Regional Judge Jackson made an order which required the Respondents to comply with the previous direction by 4pm 6 May 2022, in default of which, they would be debarred from taking further part in the proceedings. They failed to comply and they were therefore debarred from taking further part in the proceedings. No application seeking relief from that sanction has been received by the Tribunal.

16. The Respondents did not appear at the hearing on 25 May 2022. However, despite this, the Tribunal must still consider and test the evidence appropriately to determine whether an offence had been committed as alleged and, further, whether it was appropriate to make a rent repayment order. The standard of proof for determining whether or not an offence has occurred is the criminal standard of beyond reasonable doubt.

17. All Applicants confirmed their evidence and were subject to some questioning on that evidence by the Tribunal panel.

The parties' cases and discussion

Overview of the Applicants' positions

18. All eight of the Applicants adopted a common approach throughout on all key issues. Essentially, one of the Applicants had been informed by a relative that it might be possible to apply for a rent repayment order, having read about such remedies against another landlord. Having then made enquiries, the tenants discovered that their house was not licensed as a HMO and that accordingly, they should look to make an application for a rent repayment order. They then approached "Justice for Tenants", a not for profit organisation for assistance.

19. The Applicants claims, together with the period for which rent was paid, is as follows:

Applicant	Period claimed for	Sum claimed
Abigail Spicer	1 July 2020 to 16 June 2021	£4,195.47
Sophie Duigenan	1 July 2020 to 16 June 2021	£4,195.47
Ben Williamson	1 July 2020 to 16 June 2021	£4,195.47
Ben Norton	1 July 2020 to 16 June 2021	£3,640.00
Ella Hewlett	1 July 2020 to 16 June 2021	£4,195.47
Ellen Fadden	3 July 2020 to 16 June 2021	£4,195.47
Will Dawkins	1 September 2020 to 16 June 2021	£3,467.47
Rebecca Bernat	3 July 2020 to 1 July 2021	£4,195.47

20. The applications were made using the standard RRO application form, completed by a statement of truth on behalf of each applicant. It was in this form that each Applicant set out the period of occupation for which they had paid rent. Given that there is no resistance to the application and no evidence to the contrary, and positive evidence provided by the Applicants that show sums being transferred from their bank account, the Tribunal accepts that these were the sums of rent paid.

Has an office of controlling or managing an unlicenced HMO been committed?

21. The starting point is to determine whether the Property is indeed a HMO. If it is not, then this offence cannot, by definition, have been committed.

22. A HMO is defined by s.254 of the 2006 Act as a building or part of a building if is meets (a) the standard test (s.254(2)), (b) the self-contained flat test (s. 254(1)(b)), (c) the converted building test (s. 254(1)(4)), (d) an HMO declaration is force in respect of it under s.255, or (e) it is a converted block of flats to which s. 257 applies.

23. By s. 254(2), a building or part of a building meets the "*standard test*" if

    a. it consists of one or more units of living accommodation not consisting of a self-contained flat or flats (s. 254(2)(a));

    b. the living accommodation is occupied by persons who do not form a single household (s. 254(2)(b))

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 (s. 254(2)(c));

d. their occupation of the living accommodation constitutes the only use of that accommodation (s.254(2)(d));

e. rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation (s. 254(2)(d)); and

f. two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities (s. 254(2)(e)).

24. Dealing with each of the requirements of the "standard test" in turn.

S.254(2)(a)

25. In this case, the evidence of the Applicants is that the property is a three-storey end of terraced house, with eight bedrooms and shared kitchen and bathrooms. Hence, the Tribunal is satisfied that the requirement under s.254(2)(a) is made out as the Property clearly consists of one or more units of living accommodation not consisting of a self-contained flat or flats.

S.254(2)(b)

26. The living accommodation is occupied by persons who do not form a single household. By s. 258(2), persons are to be treated as not forming part of a single household unless:

a. they are all members of the same family (s.254(2)(a)); or

b. their circumstances are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority (s.258(2)(b)).

27. As there are no national regulations made to exempt classes of persons under s.254(2)(b), the Tribunal is only concerned with whether the tenants are part of the same family. In this case, they are not. Ben Williamson and Abigail Spicer provided witness statements setting out the fact how the individuals came to know of each other and it is plainly the case that they are not family members and that they have met as a result of coming together to rent the Property or from limited past association through their University studies.

28. Accordingly, the Tribunal is satisfied that the requirement of s.254(2)(b) is made out.

S.254(2)(c)

29. This is a property which has been occupied by the various individuals as their main residence. Ben Williamson gave evidence that he was a full-time student at the relevant time and Ben Norton's evidence was that the other tenants, Sophie, Ella,

Ellen and Veca resided at the Property as their primary residence. So, insofar fas Ben Williamson is concerned, the presumption (which was not rebutted in this case) that he uses the Property as a full-time residence applies. S.259(2) states:

"(2) A person is to be treated as so occupying a building or part of a building if it is occupied by the person—

(a) as the person's residence for the purpose of undertaking a full-time course of further or higher education…"

S.254(2)(d)

30. The applicants have all confirmed the nature and description of the Property in the RRO form. The Tribunal has no difficulty accepting that description from which it is apparent that the only use of the Property is as living accommodation. Accordingly, the requirement under s.254(2)(d) is met.

S.254(2)(e)

31. Each of the Applicants was named on the Tenancy Agreement and they were jointly obliged to pay the monthly sum of £2,912 by the first day of each calendar month as consideration for the letting and indeed, the various bank statements provided clearly demonstrate the payments made as required. Accordingly, there can be no doubt that the requirement in s.254(2)(e) is met.

S.254(2)(f)

32. Two or more of the households that occupy the living accommodate share one or more basic amenities. Sophie Duigenan and Ben Williamson provided evidence by way of witness statements describing the layout of the Property and the various amenities within it, which the Tribunal accepts. There are three bathrooms, one living/sitting room and a kitchen. It is clear that all members of the accommodation share these various basic amenities. Accordingly, the Tribunal is satisfied that s.254(2)(f) is met.

33. It is further noteworthy, albeit not evidence of the relevant legislative requirements necessarily being met, that the Property has been the subject of previous applications for a HMO licence.

34. Accordingly, the Tribunal is satisfied that the "standard test" is satisfied and the Property is a HMO which required licensing.

Has the HMO been used as such without a licence?

35. The next stage is for the Tribunal to determine whether the HMO was required to be licensed under Part 2 of the Housing Act 2004.

36. By s.62 of the 2004 Act, every HMO to which Part 2 of the said Act applied must be licensed unless an exemption applies. There is no suggestion in this case that any exemption applies. Accordingly, the Tribunal is satisfied that the HMO is required to be licensed with Birmingham City Council.

37. The Applicants have provided an exchange of emails between Dr Shan-Jun Lu of Justice for Tenants and Mr Matthew Smith of Birmingham City Council on 9 and 10 December 2021. The essence of that exchange is that the City Council advised of the following:

    a. that the Property had been granted two previous licenses for the period 18 March 2010 to 17 March 2015 and 17 March 2015 to 13 March 2020; and

    b. that a further application for a licence was submitted on 17 June 2021.

38. In the absence of anything to the contrary, the Tribunal accepts the information conveyed in that exchange as being correct. Accordingly, the Tribunal concludes that the Property was unlicensed for the period 13 March 2020 to 17 June 2021. It is important to appreciate that, although the HMO licenses was not granted as at 17 June 2021, by s.72(4)(b), it is a defence that, at the material time, an application for a licence had been submitted. Accordingly, the only period of unlicensed letting with which the Tribunal is concerned is the period between 13 March 2020 and 17 June 2021.

    Has there been management or control of the unlicensed HMO and if so, by whom?

39. This is the final element which must be proven beyond reasonable doubt to establish an offence.

40. The Applicants submit that an offence has been committed by both Mehla Homes Ltd and Khalda Begum. They say that Mehla Homes is the landlord on the Tenancy Agreement, which of course, it is, but that Khalda Begum is the registered owner – office copy entries were provided to the Tribunal in support of the latter. Furthermore, the Applicants provided copies of records from Companies House showing that Khalda Begum is a director, together with Mohammed Rashid.

41. There can be little doubt that Mehla Homes Ltd, as the landlord, has actively engaged in the management or control of the house by letting it out to tenants and then having the right to receive rent. This is essentially part of the test for "managing" a HMO as set out in s.263(3) of the 2004 Act. Accordingly, the Tribunal is satisfied that Mehla Homes Ltd has committed an offence under s.72 of the 2004 Act.

42. However, the Applicant says that Khalda Begum is guilty of managing or controlling the Property because she is the freehold owner and beneficially entitled to it. The Tribunal disagrees. This is not enough to establish liability for managing or controlling a relevant property contrary to s.72 of the 2004 Act. The mere ownership of a HMO, as reflected by the register at HM Land Registry, does not indicate that the owner has themselves taken part in controlling or managing an unlicensed HMO. There could be many circumstances in which an owner of an HMO knows little to nothing of the Property, let alone, becomes involved in the control or management of the Property.

43. However, the Respondent further argues that Khalda Begum received the "rack rents" (i.e. the rent which is not less than two-thirds of the full net annual value of the premises) and, accordingly, falls within the definition of "managing" the Property, and, being an owners of the Property and receiving rent puts her within the definition of "controlling" the Property. The Tribunal accepts this is correct because, there is evidence of a text message exchange with Mohammed Rasheed and the Applicants in which he instructs them, in relation to the upcoming tenancy which is due to commence on 1 July 2020, to pay the monies to the bank account of "K Begum". Given the initial "K" tallies with the name "Khalda" and the surname matches and given the fact Khalda Begum is the freehold owner and director of Mehla Homes Ltd with Mohammed Rasheed, it is realistically inconceivable that the monies would be directed to any party other than Kahlda Begum and the Tribunal is satisfied beyond reasonable doubt that this is a reference to Khalda Begum. Accordingly, the Tribunal is satisfied that Khalda Begum has committed an offence contrary to s.72 of the 2004 Act.

44. As an observation, there is nothing before the Tribunal that would explain why Mr Rasheed directs the payment of monies apparently due to Mehla Homes Ltd under the Tenancy Agreement to Khalda Begum. This is not a matter for this Tribunal, but it may well become a matter for any liquidator or creditor in the courts in due course in the event that any order made by this Tribunal is not paid as required. A liquidator might, for example, query whether Mr Rasheed is in breach of duty for directing payments owned to Mehla Homes Ltd to Khalda Begum's account. Indeed, similar questions might be asked of Khalda Begum in respect of an obligation to account to Mahal Homes Ltd. If payments were requested to be made in this way, this might well be a matter taken up by creditors under actions such as those in s.459 of the Insolvency Act 1986. In any event, all of this is speculation, because these are not matters that fall for the consideration of this Tribunal.

Should a rent repayment order be made and if so, for what sum?

45. The Tribunal has a discretion on whether to make a rent repayment order. There is no guidance as to how the Tribunal should exercise that in principle discretion, but the policy objectives dictate that it cannot be more cost effective for a landlord to simply avoid seeking a licence. There is no suggestion of any mitigating factors in this case and no indication of the reasons why there has been no involvement on behalf of the Respondents at all in these proceedings. Accordingly, the Tribunal considers it appropriate to make a rent repayment order.

Who should any rent repayment order be made against?

46. The Court of Appeal in *Rakusen -v- Jepson [2021] EWCA Civ 1150* held that a rent repayment order could only be made against an immediate landlord. This case is, however, subject to an appeal to the Supreme Court which has at the date of this decision granted permission to appeal. As matters stand, however, any order of this Tribunal can and will only be made against Mehla Homes Ltd.

What amount should the order be for?

47. The Tribunal has a largely unfettered discretion as to what sum should make a rent repayment order for. The only statutory requirement is that it must consider, and does so in this case, are set out in s.44 of the 2016 Act, which states:

44 Amount of order: tenants
(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.

If the order is made on the ground that the landlord has committed	*the amount must relate to rent paid by the tenant in respect of*
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

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

48. There is no evidence in this case at to the factors set out in s.44(4)(b) and (c). The Applicants do, however, have observations about the landlord's conduct under s.44(4)(a).

49. In *Vadamalayan -v- Stewart [2020] UKUT 183* the Upper Tribunal held that not being a professional landlord was not a basis upon which the Tribunal should make any provision in determining what sum should be awarded.

50. In this case, Mehla Homes Ltd is a property manager as defined by s.263 of the 2004 Act. The Management of Houses in Multiple Occupation (England) Regulations 2006 ("the 2006 Regulations") imposes a number of duties upon managers of HMOs. In this case, those failings which are identifiable from the evidence in support of the rent repayment order are as follows:

a. that the fire-alarms at the Property were broken and it took over two weeks to have them repaired according to the evidence of Abigail Spicer – this is a breach of Reg 4 of the 2006 Regulations;

b. that all of the appliances in the common parts were not, contrary to Reg 7 of the 2006 Regulations, kept in good and safe repair and in clean working

order, in that the oven was filthy when the Applicants moved in and barely functional, the middle floor shower was broken for a considerable period of time and the wooden floorboards around the bathroom on the top floor had mould growing on them;

c. that the lock to one of the bedrooms had been left in a state of disrepair, with kitchen utensils having to be used to open the door and not replaced for some time, contrary to the obligation under Reg 8 of the 2006 Regulations;

d. the Property was subject to extensive mould and damp issues, which the Respondent had promised to rectify prior to the Applicants moving in, but failed to do so, contrary to the terms of the agreement reached – the tenants having expressly requested this be done beforehand.

51. The Tribunal takes account of the conduct issues which it considers proven, on the balance of probability and considers that a rent repayment order in favour of each Applicant should be made which reflects approximately 85% of the rent paid by the tenant during the relevant period.

52. The Tribunal considers matters holistically in terms of the award to be made and has concluded that it shall hereby make rent repayment orders in the following sums and in favour of the individuals listed:

a. Abigail Spicer - £2,936.83
b. Sophie Duigenan - £2,963.83
c. Ben Williamson - £2,963.83
d. Ben Norton - £2,366.00
e. Ella Hewlett - £2,963.83
f. Ellen Fadden - £2,963.83
g. Will Dawkins - £2,427.30
h. Rebecca Barnet - £2,963.83

53. Furthermore, the Tribunal considers it reasonable to make an award of the application fee of £200 (which was paid between the Applicants) in their joint favour. This means that once the sum of £200 is paid, no matter to which of the applicants it is paid, this particular liability to pay the application fee will be discharged.

54. The Tribunal orders that the sums set out above must be paid within 14 days from service of this decision.

C Kelly
Judge of the First-tier Tribunal

Any party wishing to seek to appeal this decision to the Upper Tribunal (Lands Chamber) must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends its written reasons for the Decision to the party seeking permission.