FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:BIR/00CQ/HMK/2020/0048**
Property	**: 285 Walsgrave Road, Coventry,CV2 4BE**
Applicant	**: Dylan Jon Kubler**
Respondent	**: Mr Nijjer and Mrs Rai**
Representative	**:Cloud9 Estates Limited**
Type of Application	**: Application for a Rent Repayment Order by tenant** Sections 40,41,43 and 44 of the Housing and Planning Act 2016
Tribunal Members	**: Judge T N Jackson** **Mr Vivek Chadha MRICS MCIArb FCIH**
Date of Decision	**: 18th January 2021**

DECISION

Decision

The Tribunal makes a Rent Repayment Order against the Respondent in the sum of £5071 to be paid to the Applicant within 28 days of the date of this Decision.

Reasons for Decision

Introduction

1. On 19th June 2020, the Applicant applied for a Rent Repayment Order stating that the Respondent had failed to license the Property as required under section 85 (1) of the Housing Act 2004.

Background

2. Nijjer Properties Limited, of 271-273 Walsgrave Road, Coventry, holds the freehold of the Property under Title Number WM20961.

3. On 5th February 2016 the Respondent applied for planning permission for the Property for single and two storey extensions and alterations and change of use to 6 bed HMO with retention of ground floor retail unit.

4. The Applicant entered an assured shorthold tenancy agreement dated 27th February 2019 with the Respondent c/o Cloud9 Estate Agents to rent room 3 of the Property. The tenancy agreement was for a period 30th August 2019 to 29th August 2020.The rent was £485 per calendar month inclusive of electricity, gas, water, TV licence and internet

5. The Property had 5 rooms to rent and there were 4 other tenants in the Property, to none of whom the Applicant was related. During the tenancy, the Property was the Applicant's main residence. He shared the kitchen and communal areas with the other residents.

6. On 9th February 2019, the Applicant made a payment of £200 to secure the room. He paid £485 on 28th June 2019 as a deposit as required by the tenancy agreement.

7. The Applicant moved into the Property on or around 6th September 2019.Bank records show payments of £485 per month made to Cloud9 Estate Agents for the period July 2019 to May 2020 inclusive commencing on 17th July 2019. The Applicant says he also made a payment of £485 on 27th June 2020 and was due to make a further payment in July 2020.

8. The Applicant was advised by an officer of Coventry City Council, (the 'Council'), that the Property did not have an HMO Licence. On 25th November 2019 the Applicant submitted a written statement to the Council regarding the occupancy of the rooms in the Property.

9. On 3rd December 2019, the Respondent submitted an application for an HMO Licence for the Property.

10. The Applicant moved out of the Property at the beginning of July 2020, (the Applicant says the 3rd July and the Respondent says 10th July 2020). The Applicant

was due to make a further payment of £485 in July 2020 as required by the tenancy agreement.

11. On 31st July 2020, the Council confirmed that the HMO application was complete and valid and as such the Respondent had 'tacit approval' to lawfully operate the Property as a licensable HMO. However, the email confirmation relates to **258A** Walsgrave Road as distinct from **285** Walsgrave Road, the Property the subject of the appeal.

Inspection

12. Due to Covid-19 measures, we did not inspect the Property either internally or externally. Having regard to the issue to be addressed and the evidence in the bundles we did not consider it necessary to inspect the Property.

Hearing

13. Neither party requested a hearing nor objected when a paper determination was proposed by the Tribunal. Both parties provided written submissions. Having reviewed the written submissions we are satisfied that the matter is suitable to be determined without a hearing. Although the parties were not legally represented, the issues to be decided have been clearly identified in their respective Statements of case and additional documentation. They set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including any incidental issues of fact.

14. Directions dated 25th June and 10th December 2020 were issued, the latter of which sought to clarify the issue relating to the address in the 'tacit approval' from the Council. The Respondent's response did not clarify the issue but stated that the tacit approval was the only documentation received in relation to the subject Property.

The Law

15. Section 41 of the Housing and Planning Act 2016 ("the 2016 Act"), provides that a tenant may apply to the Tribunal for a Rent Repayment Order against a landlord who has committed an offence to which the 2016 Act applies.

16. The 2016 Act applies to a number of offences including an offence committed under section 95 (1) of the Housing Act 2004, namely the control or management of a house required to be licensed under section 85 (1) of the 2004 Act but which is not so licensed.

17. Section 263 of the 2004 Act defines 'a person having control' and 'a person managing'.

18. Section 43 provides that the Tribunal may make a Rent Repayment Order if satisfied, beyond a reasonable doubt, that the landlord has committed an offence to which the 2016 Act applies (whether or not the landlord has been convicted).

19. Section 44 of the 2016 Act provides for how the Rent Repayment Order is to be calculated. In relation to an offence under section 95 (1) of the 2004 Act, the period to which a Rent Repayment Order relates is a period, not exceeding 12 months, during which the landlord was committing the offence. The rent the landlord may be

required to pay in respect of that period must not exceed the rent paid in respect of that period, less any relevant award of universal credit paid in respect of rent under the tenancy during that period.

20. Section 44(4) of the 2016 Act states that in determining the amount of a Rent Repayment Order, we should take account of the following factors:

    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 that Chapter of the Act applies.

Submissions

Applicant

21. The Applicant says that he was unaware that the Property was not licensed as an HMO until he was so informed by the Council officer. He says he would not have rented the room if he had been so aware. He is concerned that the lack of HMO Licence would have nullified any fire risk certificate the Property had.

22. The Applicant says that he has paid a total of £6990, comprising 12 monthly payments of £485; a £200 payment to secure the room; £485 as a deposit and includes in the figure the £485 due in July 2020. He says he has yet to receive repayment of the deposit despite handing over the keys and leaving the Property in a clean and tidy order.

Respondent

23. The Respondent accepts that there was not an HMO Licence at the commencement of the tenancy. He applied for a Licence on 3rd December 2019 and due to an administrative backlog at the Council, he did not receive 'tacit approval' until 31st July 2020.

24. The Respondent accepts that during the period between 30th August 2019 and 3rd December 2019 when he submitted the HMO application, 'the Property did not have a full Licence, but this was under review'. He says that he had insurance in place which was not invalid or revoked and that cover is in place for an HMO property. He says that he thought it had been applied for at the same time as the planning application in 2016.

25. The Respondent says that the Applicant left the Property on 10th July 2020 and had remained in the Property even though aware that the HMO Licence had not been completed but was aware one had been applied for.

Deliberations

26. We considered the applications in four stages –

    a) Whether we were satisfied beyond a reasonable doubt that the Respondents had committed an offence under section 95(1) of the 2004 Act.

b) Whether the Applicant was entitled to apply to the Tribunal for a Rent Repayment Order;

c) Whether we should exercise our discretion to make a Rent Repayment Order;

d) Determination of the amount of any Order

Offence

27. Section 95(1) provides that:

> '*a person commits an offence if he is a person having control of or managing a house which is required to be licensed under [section 85(1) of the 2004 Act] but is not so licensed.*'

28. Section 95(2) provides that it is a defence if:

> *'at the material time,*
> *a. .....*
> *b. an application for a licence had been duly made in respect of the house under section 87*
>
> *and that ..... .application was still effective.'*

29. Section 95(4) provides that is a defence if the person:

> '*had a reasonable excuse-*
> *a. for having control or managing the house in the circumstances mentioned in subsection (1) or*
> *b. .....'*

30. Section 263 of the 2004 Act provides:

> *(1) In this Act 'a person having control' in relation to premises, means (unless the context otherwise requires), the person who receives the rack rent of the premises whether on his own account or as agent or trustee of another person) .....*
>
> *(2) .....*
>
> *(3) In this Act 'person managing' means, in relation to premises, the person who, being an owner or lessee of the premises-*
>
> *(a) receives (whether directly or through an agent or trustee) rents or other payments from-*
> *(i).....*
> *(ii) in the case of a house to which Part 3 applies (see section 79 (2)), persons who are in occupation as tenants or licensees or parts of the premises, or of the whole of the premises;*
>
> *and includes, where those rents or other payments are received through another person as agent or trustee, that other person.*

31. Through Cloud9 Estate Agents, the Respondent was receiving rent from the Applicant who, by virtue of the tenancy agreement, was in occupation of the Property as a tenant. The Respondent was therefore a 'person managing' the Property.

32. Having regard to the facts set out at paragraphs 4 to 7 we find that the Property was a HMO as defined in section 254(2) of the 2004 Act. A Licence for the Property was therefore required under section 85(1) of the 2004 Act.

33. We considered whether the defence under section 95(2)(b) applies. 'A duly made' application for an HMO Licence is one which is complete and contains all relevant documentation upon which the Council can make a decision. The date of the 'duly made' application is therefore the date of the Council's tacit approval when they have confirmed that the application is complete and valid rather than the date the application is submitted.

34. We did not receive clarity as to whether the 'Council's tacit approval' dated 31st July 2020 related to the subject Property or to 258A Walsgrave Road as is referred to in the Council's email. Upon the matter being brought to his attention in the Directions dated 10th December 2020, the Respondent has relied upon that email as the tacit approval for the subject Property and has stated that there is no other correspondence. In the absence of any evidence to the contrary, there was no Licence or a duly made application for a Licence until 31st July 2020, which is when the commission of the offence ceased (and which is after the date of the application to the Tribunal). The defence under section 95(2)(b) does not apply.

35. The Respondent thought that an application for an HMO Licence had been submitted at the same time as the planning permission in 2016. We are unclear as to whether the Respondent is saying that he thought that the planning application itself, as it referred to an HMO, comprised an application for an HMO Licence or whether he is saying that he submitted a separate application at the time of the planning application. If the former, ignorance of the law is no excuse. If the latter,there is no evidence that a separate application was submitted in 2016. However, the Respondent clearly accepts that he did not make an application for a Licence until 3rd December 2019. We therefore find that the defence under section 95(4) of 'reasonable excuse' in relation to an unlicensed HMO does not apply.

36. On the basis of the facts set out in paragraphs 33 to 35 above, we are satisfied beyond a reasonable doubt that the Respondent had committed an offence under section 95 (1) of the 2004 Act, namely being a person managing a house which was required to be licensed under section 85(1) of the 2004 Act but was not so licensed.

Entitlement of the Applicant to apply for a Rent Repayment Order

37. We determine that the Applicant is entitled to apply for a Rent Repayment Order. In accordance with section 41(2), the offence relates to housing that at the time of the offence was let to the Applicant and the offence was committed in the period of 12 months ending with the day on which the application to the Tribunal was made, namely 19th June 2020. By virtue of a a shorthold tenancy agreement dated 27th February 2019, the Applicant was a tenant of the Property to the date of the application to the Tribunal (and thereafter) and had paid rent and other monies throughout this period as evidenced by bank transfers.

Discretion to make a Rent Repayment Order

38. Having considered the matter, including the Respondent's written submission, we were satisfied that there was no ground on which it could be argued that it was not appropriate to make a Rent Repayment Order in the circumstances of this case.

Amount of Rent Repayment Order

39. In accordance with section 44 of the 2016 Act, the amount of an Order must relate to rent paid in a period, not exceeding 12 months during which the landlord was committing the offence under section 95(1) of the 2004 Act. If we accept that the 'tacit approval' letter relates to the subject Property, the Respondent ceased to commit the offence on 31st July 2020 when the application for the HMO Licence was duly made. The offence was being committed in the 12 months prior to the date of the application to the Tribunal, namely 20th June 2019 to 19h June 2020.

40. The amount that the landlord is required to pay in respect of a period must not exceed the rent paid in respect of that period. We exclude the Applicant's payment of £200 on 9th February 2019 as it is outside the relevant period. We also exclude the payment of £485 paid on 28th June 2019 as this was the deposit required under the tenancy agreement to be held until the expiry or sooner determination of the tenancy in accordance with the Compulsory Tenancy Deposit Protection Scheme provisions of the Housing Act 2004.

41. Subject to the excluded payments above, during the relevant period, the Applicant paid the sum of £5407.05. (rounded down to £5407). This is calculated as follows - 17th July 2019 to 19th June 2020 inclusive =339 days at £15.95 a day (£485 rent per month x 12 months divided by 365 days). The Respondent has not disputed the Applicant's statements regarding payments and we have the evidence of the redacted bank statement extract. We should deduct from this an amount to reflect the services included. The Respondent failed to respond to the Directions to provide evidence of the cost of any such outgoings. Based on our general experience, and acknowledging that 5 rooms were let, we deduct £30 per calendar month to reflect the cost of included services, (£30 x 12 months divided by 365 days=0.99 pence per day. 339 days x 0.99=£336). £5407 deduct £336 leaves a total of £5071.

42. We had regard to the case of *Vadamalayan v Stewart and others* (2020 UKUT 0183) which concerned the calculation of a Rent Repayment Order under section 44 of the 2016 Act. The Upper Tribunal held that:

> *'18. ...under the current statute, in the absence of the provision of reasonableness, it is difficult to see a reason for deducting either a fine or a financial penalty, given Parliament's obvious intention that the landlord should be liable both (1) to pay a fine or civil penalty, and (2) to make a repayment of rent.*
>
> *19. The only basis for deduction is section 44 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. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence.*

53. The provisions of the 2016 Act are rather more hard edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in Parker v Waller [2012 UKUT 0301]. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances.'

43. We have therefore not deducted from the £5071 rent paid the costs of the expenses incurred in maintaining the Property, including repairs, service charges, ground rent and mortgage payments.

Conduct

44. We do not find anything in the conduct of the Applicant or the Respondent that justifies a deduction to be made from the £5071 paid.

Financial

45. Despite the Directions stating that he should provide details of his financial situation, the Respondent has not provided such information and we are therefore unable to take his financial circumstances into account.

Conviction

46. We have no evidence that the Respondent has been convicted of any housing related offences or received any financial penalties.

47. Based on all the evidence and the factors identified above, we decided that an appropriate level for the Rent Repayment Order would be 100% of the rent paid.

48. By Section 47 of the 2016 Act, a Rent Repayment Order is recoverable as a debt. If the Respondent does not make the payment of £5071 to the Applicant within 28 days of the date of this decision, or fails to come to an arrangement for payment of the said amount which is reasonable and agreeable to the Applicant, then the latter can recover the amount in the County Court.

Costs

49. No application for costs was made by any party and we make no order as to costs.

Appeal

50. If any party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

.....

Judge T N Jackson