FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00FK/HMF/2022/0001-6**
Property	**:**	**36 Cobden Street, Derby, DE22 3GX**
Applicants	**:**	**(1) Jessica Curran (2) Lauren Simpson (3) Clara Stub-Normal (4) Oliver Bath (5) Aime Wood (6) Olivia Fee**
Respondents	**:**	**TCW Manchester Ltd and Tariq Khan**
Type of Application	**:**	**Rent Repayment Order - Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge C Kelly (Chair)** **A McMurdo**
Date of Decision	**:**	**22 November 2022**

DECISION

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1. *The parties and the property*

2. This is an application for a rent repayment order by the tenants of a property, situated at 36 Cobden Street, Derby, DE22 3GX ("the Property"). The application is made pursuant to section 41 Housing and Planning Act 2016 ("the 2016 Act"). The Respondents are (1) TCW Manchester Ltd, the managing agent, together with (2) Mr Tariq Khan, the legal owner of the Property and the landlord.

3. The Property was accepted to be a House in Multiple Occupation ("HMO") pursuant to the provisions of the Housing Act 2004 ("the 2004 Act").

4. The Applicants represented themselves in person, with Ms Jessica Curran, taking the lead and making submissions to the Tribunal on her behalf and that of the other Applicants. Whilst there were some interjections from other members and further submissions from some of the Applicants, in particular, Ms Clara Stub-Norman, the case was conducted primarily by Ms Curran. There was no attendance by Mr Oliver Bath and Ms Lauren Simpson, who we were told had other commitments.

5. The Respondent was represented by Mr Dover of counsel. Mr Tariq Khan attended the hearing, together with his brother, Mr Tahir Khan, and a representative of the managing agent, Mr Ben Nica.

The background

6. The Applicants entered into a tenancy agreement in respect of the Property which was for the period 1 July 2021 to 30 June 2022 ("the Tenancy Agreement"). Amongst other things, the Tenancy Agreement provided for a monthly rent for the first two months, July and August, in the sum of £1,430, being half the regular rental payable thereafter of £2,860.

7. The first two months were half price due to the fact that the individuals did themselves occupy the Property at this time, with it being used by them solely for storage purposes until 1 September 2021. The rental thus equated to £238.33 per person per month for the first two months and £476.66 per person per month from 1 September 2021 onwards. All utility bills, gas, electricity, water, internet and television licence, were included within the monthly rental figures, without being specifically attributed a value, pursuant in the Tenancy Agreement.

8. The Applicants seek a rent repayment order on the basis that the property required to be licensed under Part 2 of the Housing Act 2004 but was not so licensed. The Applicants also stated that they experienced a number of difficulties with the property. In particular, they cite the following:

    (a) A gas leak, which was identified upon them taking residence on 1 September 2021, but which it was accepted was immediately addressed by a gas network engineer who isolated the appliance

found to be at risk (believed to be Cadent), and which was fixed and reconnected later that same day by a contractor on behalf of the landlord Respondent;

(b) Issues with the fire alarm, which it was recognised by the parties, was troublesome and due to fault which led to it being constantly triggered and which was addressed for a period of c. 2 months by way of isolating the electricity supply to it at the fuse board;

(c) Water leaks at the property, seemingly from an upstairs shower, which caused water to percolate through the walls/ceiling and lead to light fittings downstairs collecting that water; and

(d) A fire door would not shut properly, the cause of which, however, was in dispute – essentially, the Applicants say that there was a difficulty closing the fire door given that the same would not fit flush with the frame, and that there may have been difficulties with the hinges, that caused that problem to arise; the Respondents contend that the cause of the difficulty was due to it being propped open and items being hung on the door, which caused some of the underlying difficulties preventing the door from closing.

9. There were some additional minor issues raised, such as a doors that locked and could not be re-opened without the keys and could lead to individuals being unable to regain access to their rooms if they had left the keys in them. Perhaps the one primary criticism from the Applicants relevant to all aspects, apart from the gas leak, is the length of delay in correcting the defects complained of.

10. The Applicants seek repayment of rent for the entire period of their tenancy, having demonstrated to the Tribunal's satisfaction, and with no challenge being made by the Respondent, that all rent had been paid by them for the entire period concerned. Therefore, the Applicants effectively sought, by the application notice, the rent repayment order of £26,280.12. However, during the course of submissions, the Applicants accepted that the sums paid, which are relevant for the purposes of this application were as follows:

(a) the sums of £1,430 paid for each of July and August 2021;

(b) the sum of £2,860 for the months of September, October, November, December 2021 and January 2022;

(c) the sum of £1,430 was refunded to them by the Respondents by reason of an agreement reached between them, the precise basis for which was in issue, albeit with both parties recognising that it was some form of compensation for the difficulties encountered during their stay.

11. The Applicants sought to insist upon rent being repaid for the period of 1 July 2021 until March 2022, which is the date when Derby Council say that they had received a valid HMO licence application. They recognised that the a

defence exists at the point at which an application for a license is made. In this case, however, there was a dispute about when an application for a licence was indeed made and thus when any defence under 72 of the 2006 Act would apply.

12. There is no dispute, nor could there realistically be, that an application was made to the local housing authority, Derby City Council, such form having been received by it on 10 January 2022, such being supported by the payment of a fee. To the extent, however, that Derby City Council suggests that the application was compliant in March 2022, there was no explanation as to why this might be so, but presumably, it was due to additional supporting documents being requested.

Issues between the parties

Has an offence been committed?

13. The first issue for the Applicants was to demonstrate that an offence had been committed, pursuant to the 2004 Act. The Respondents took no issue with the fact that Mr Tariq Khan, and TCW Manchester Ltd, were responsible for controlling and managing an unlicensed HMO and specifically, that the Property was a HMO. Accordingly, they would be guilty of an offence.

14. The Tribunal, however, proceeded to satisfy itself nevertheless that the Property was indeed an HMO, properly so called, and that both Respondents were responsible for either controlling or managing it without a valid licence and thus guilty of an offence.

15. As this was a property which was converted, according to evidence which the Tribunal accepts from Mr Tahia Khan, the relevant test is that of the "converted building" test set out in section 254(4) of the 2004 Act, being the following:

(a) that it is a converted building (section 254(4)(a)), in light of the evidence from Mr Tahia Khan, that the premises was converted relatively recently, in excess of the budgeted figure of £106,000 and that the conversion was, as he put it, a "*substantial conversion*", in which he was responsible for the redesign of the same;

(b) that the Property consists of one or more units of living accommodation that do not consist of self-contained flats (section 254(4)(b)), which in this case, the Tribunal is satisfied is so, given the description of the Property, and the benefit of a video demonstrating the same, produced following an application made by the Respondent to adduce the same, at the start of the hearing, which was not opposed by the Applicants and accepted by the Tribunal;

(c) that the living accommodation is occupied by persons who do not form a single household (section 254(4)(c)), and in this instance, the evidence of Ms Curran, which again was unopposed, was that none of the individuals in the Property were related in any way, and would

therefore otherwise be in a single household by reference to section 258;

(d) that the living accommodation is occupied by those persons as their only or main residence or they had to be treated as so occupying it (section 254(4)(d)), of which the Tribunal is further satisfied, given the evidence of Ms Curran, again uncontested, that the individuals were full-time students on a university course, all of whom were in years 2 and 3 at the relevant time, and who would be deemed therefore to live in the accommodation as their only or main residence by reason of section 259(2);

(e) that the occupation of the individuals in the living accommodation constitutes the only use of that accommodation (section254(4)(e), again, the Tribunal is satisfied that such criteria is met, there being no evidence that the use of the accommodation by the individuals for anything other than living accommodation;

(f) that rents were payable, or other consideration provided, in respect of at least one of the persons in occupation in the accommodation (section 254(4)), of which the Tribunal was satisfied, on the basis that each of the individuals had entered into the Tenancy Agreement, under which rent was paid by each and all of them.

16. In the circumstances, the Tribunal has no hesitation in concluding beyond a reasonable doubt that the Property is and was at all material times, a HMO as defined by section 254 of the 2004 Act. It has six occupants and required licensing.

17. Furthermore, Mr Nica, on behalf of TCW Manchester Ltd, gave evidence that the rent was initially received by TCW Manchester Ltd, then subsequently paid across to Mr Tariq Khan, as landlord. He gave evidence that a commission was deducted, in the region he believed (he was unsure at the point of giving evidence) was in the sum of circa 10 %. The flow of the rental payments was not an issue in the proceedings and the Tribunal has no hesitation in accepting Mr Nica's evidence about that. Section 263 of the 2004 Act states that a "*person having control*" means the person who receives the rack rent for the premises, in this case, Mr Tariq Khan.

18. The Tribunal further accepts the evidence of Mr Nica and indeed Mr Tariq Khan, that TCW Manchester Ltd was carrying out management activities in relation to the Property, and therefore concludes, that it is satisfied, beyond reasonable doubt, that:

(a) Mr Tahir Khan is guilt of an offence of controlling a HMO as the recipient of the rack rent; and
(b) TCW Manchester Ltd is guilty of the offence of controlling and managing a HMO, without a relevant licence having been granted in respect of the Property as required by section 61 of the 2004 Act.

19. The failure to licence the HMO constitutes an offence pursuant to section 72(1) of the 2004 Act, which sets out the following:

"(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 licenced"

What is meant by "occupation"?

20. There is, however, an important issue as to the points in time at which the offence takes place, which is relevant to the available amount of rent that can be taken into account of the purposes of making a rent repayment order. There are two key issues for consideration:

    (a) the definition of a HMO is by reference to it being "occupied" (see sections 254(2)(a) (the living accommodation must be occupied), 254(2)(c) (the occupation must be as the main residence) and 254(2)(d) the occupation must constitute the only use of the accommodation) in particular.

21. The battleground between the parties was in relation to the period between 1st July 2020 and 31st August 2020, as this was not, it was said by Respondent, "*occupied*" at that time, and thus, the rent in that period was not to be within the reach of a rent repayment order, not least because, no offence had been committed until 1st September 2020 when the individuals occupied the Property.

22. Unfortunately, neither party was able to adduce any authority to address the meaning of "*occupation*" in this context and thus, the Tribunal must do the best it can. The key point is whether there must be a physical presence of the individuals in the Property for it to be occupation. What is the difference, for example, between personal effect and items being moved into the Property and stored for a two month period, versus an extended two month holiday? Is there a difference if the periods are reduced, for example, to say, two weeks, or a month? Does this have a different outcome? Would it be the case that a typical absence would lead to a property no longer being "occupied" by the tenants?

23. A large number of other pieces of legislation uses the term occupier, without defining it, although, perhaps unhelpfully, the term is set out, in a slightly circular definition, in s.262 of the 2004 Act:

> *"(6) In this Act "occupier", in relation to premises, means a person who—*
> *(a) occupies the premises as a residence, and*
> *(b) (subject to the context) so occupies them whether as a tenant or other person having an estate or interest in the premises or as a licensee;*
> *and related expressions are to be construed accordingly.*

This subsection has effect subject to any other provision defining "occupier" for any purposes of this Act."

24. An occupier is thus somebody in occupation.

25. Although in the context of land registration matters, in *Abbey National Building Society v Cann*[1], Lord Oliver stated that:

> "*occupation is a concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied. It does not necessarily, I think, involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy, I should have thought, on behalf of his employer. On the other hand, it does, in my judgment, involve some degree of permanence and continuity which would rule out mere fleeting presence. A prospect tenant or purchaser who is allowed, as a matter of indulgence, into property in order to plan decorations or measure for furnishings would not, in ordinary parlance, be said to be occupying it, even though he might be there for hours at a time…*"

26. There is seemingly a difference between possession and occupation, the former characterised by the quality of exclusive possession, and no doubt the reason for the use of the term "occupation" in the context of houses in multiple occupation. It seems that the question of occupation is one of fact, determined by reference to the specific case in question, but which requires some degree of permanence.

27. The very granting of the Tenancy Agreement provides for a right to occupy, but that of itself does not, in this Tribunal's judgment, amount to occupation in and of itself. There must be something more and in this case, that is the intended presence of the individuals themselves.

28. Applying those observations in this case and taking account of the fact that the first two months were negotiated at half price on the basis that the Applicants would be using the premises for storage and not moving in until 1 September 2021, then in our judgment, the Applicants were not in "*occupation*" until 1 September 2021. It follows, therefore, that the offence under the 2004 Act was not committed until 1 September 2021.

29. Additionally, to the extent that the meaning of occupation is ambiguous, as indeed it is, the benefit of that ambiguity ought properly be given to the Respondents give the quasi-criminal nature of the sanction that may flow. Our conclusion on this issue is consistent with this approach, although not determined by it.

When does the defence under s.72(4) of the 2004 Act apply from?

30. Section 72(4) states:

[1] *[1991] AC 56 (at 93)*

"(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))"

31. During the course of the hearing, documents were emailed to the Tribunal by Mr TahirKhan, evidencing the fact, that Derby City Council had granted the HMO licence, with effect from 24 October 2022, subject to what appeared to be fairly standard conditions. There is no doubt, therefore, that the application remained "*effective*" at all periods up until and including the tribunal hearing.

32. The key issue between the parties was the date at which an application was first "*duly made*" to the Council for a licence in respect of the Property. It was the Respondent's position in their statement of case, that an application was submitted on 29 August 2020. If that was correct, then there would be an absolute defence to the entirety of these proceedings. However, during the course of evidence being provided, the Respondents witnesses accepted that the correct date should have been 26 August 2021 and as such, it would never could be a complete defence.

33. The Respondents argued that the application they say was made on 26 August 2021 had not been received for some reason by the council. Mr Nica said he made the application – the other of the Respondents' witnesses were going only on what they had been told about this application being made.

34. Mr Nica had exhibited a copy of the application form which he said he submitted in his witness statement and a number of inconsistencies in the dates within that document were a focus of exploration by the Tribunal. In particular, the declaration date on the application form was stated as 29 August 2021, but other dates, such as the date of notification of the interested parties, in one instance, was 8 January 2022. That is, of course, the date a fee was paid (there was an emailed receipt from Derby City Council provided) with a letter from the Council confirming receipt of the application on 10 January 2022.

35. There was no contemporaneous evidence produced to support what Mr Nica, and Mr Tahir Khan had said, in relation to the submission of the 29 August 2021 application. The Respondents' suggested that there were difficulties with Derby City Council's portal, and that indeed, the evidence of Mr Nica was that it was not uncommon for such difficulties with Derby City Council's systems. However, what is clear, is that no fee, in the amount of £833 or

otherwise was paid in the Respondents' own case, at the point of the application that was said to be made on 29 August 2021.

36. In terms of the evidence given by Mr Nica, the Tribunal found him an unsatisfactory witness, who appeared to be confused as to parts of his evidence concerning the content of the dates in the application notice. Mr Nica explained he had changed all the dates in the form when re-submitting it in January 2022, from the earlier submission he say she made in August 2021 (which he referenced as August 2000 in his witness statement but said this was an error), whereas clearly, is not correct as the declaration date predates the date of notice being given to Zahida Khan, which was said to be on 8 January 2022. Hence, the declaration date had not changed. It may well be that the form was simply submitted without updating the declaration date, but that would be contrary to what Mr Nica had told us.
37. The Tribunal takes account of the fact that an email was sent to Mr Nica, dated 15 October 2021 at 10.40 am, from Derby Council which stated:

"I can confirm that we have not received a valid application for an HMO licence for this property. I have checked our records and nothing has been submitted".

38. It was suggested, in submissions, that something had to trigger the receipt of that email. Of course, that is true, and it is likely to have been a direct enquiry by Mr Nica and/or Mr Tariq Khan. However, the evidence of Ms Curran, which the Tribunal accepts, was that an attendance from Derby Council in mid October 2021, possibly 15 October 2021 had occurred. It is the Tribunal's judgment that it was that visit that triggered the enquiry being made of the Council and the email referenced being received. It was not, as Mr Dover might have wanted us to accept, a regular chasing email seeking clarity as to the progress of an application without instigation from Derby Council itself.

39. In any event, there is a further issue that arises in relation to the section 72 defence applying with effect from 29 August 2021, even if the Tribunal had found otherwise as a matter of fact. That is because no fee was paid at that time.

40. The application form submitted on behalf of the Respondent, it is said, in August 2021, specifically set out the following:

"This fee must be paid to the authority. If you complete the application online, you must pay it by debit or credit card. The current HMO Licensing Fee for a new licence is £833…"

41. Section 63 of the 2004 Act states as follows:

"(1) An application for a licence must be made to the local housing authority.
(2) The application must be made in accordance with such requirements as the authority may specify.
(3) The authority may, in particular, require the application to be accompanied by a fee fixed by the authority…"

42. In the circumstances, the Tribunal is satisfied that the local authority was entitled to stipulate, and did so stipulate, that a fee be paid when making the application. Hence, for the purpose of a section 72 defence, where the application is not paid for, it cannot be said to have been "*duly made*" unless and until that fee was paid.

43. During the course of submissions, Mr Dover sought to suggest that payments might be made at a different stage and receipt of the application notice, and whilst it is entirely possible that that might be so, there cannot be in the Tribunal's judgment, an application duly made until the relevant fee is processed. The Tribunal is conscious that the licensing regime under the 2004 Act, which local authorities seek to self-fund, by receipt of the relevant fees, and the local authority would have been within its entitlement to take no further action on the application unless and until the relevant fee had been paid.

44. For all those reasons, having considered the evidential matters on the balance of probability, the Tribunal is satisfied that:

    (a) An application for a HMO license was not submitted, as a matter of fact, on 29 August 2021 as claimed*;* and

    (b) that even if such application had been submitted, then it would not have been "*duly made*" given the absence of a fee being paid until 8 January 2022.

45. Taking account of the above, the Tribunal is satisfied that an offence has been committed for the period 1 September 2022 to 8 January 2022, such being the date that the application was said to have been submitted by Mr Nica on behalf of Mr Khan. Whilst there is some difference on dates of receipt of the application between 8 and 10 January 2022, the Tribunal accepts Mr Nica's evidence that the application was submitted when the fee was paid for on 8 January 2022.

46. The relevant period for consideration, therefore, for any rent repayment order, is 1 September 2021 to 8 January 2022.

Should the Tribunal make a rent repayment order?

47. The thrust of the Applicant's position was that although this was a newly refurbished property, which the Tribunal accepted was at an exemplary standard, from the video evidence provided, there were delays in addressing important issues relating to health and safety. In particular, there was a key focus was upon the failure to address defects in the fire alarm systems for a two-month period. There was no dispute that it took this long, although Mr Nica says he attempted to get somebody out to sort it on a number of occasions.

48. The reason for the delay in securing a contractor to address the fire alarm was not entirely clear, it would appear that there were some difficulties on the part

of Mr Nica. Nevertheless, the Tribunal takes the view that a period of two months to correct issues of such importance was unacceptable and repairs should have been effected sooner.

49. Additionally, the Tribunal's attention was drawn, during the course of receipt of the Respondent's evidence, to the fact that a gas safety certificate, dated 12 June 2021 referred only to the central heating boiler system. It was accepted by all concerned, that there was an additional gas appliance, namely a gas hob, which was not referenced on the safety record sheet. Technically, therefore, there is a failure to comply with the relevant regulations in relation to the certification of gas installations.

50. It is important to note, however, that this is a landlord that appears to have largely done all within his reasonable power to ensure the relevant steps were taken to provide a property of the requisite standard, indeed, well beyond it in this instance as it happens. The Tribunal reviewed a video of the Property, it was of an exceptionally high standard. The failure to certify the gas hob is likely to have been a failure of the contractors, with no evidence being adduced either way on that issue, the Tribunal takes little account of it when assessing the overall degree of culpability of the landlord Respondent.

51. It should be noted, however, that there is a degree of overlap between the managing agent and landlord in this case, TCW Manchester Ltd, being a family company, over which Mr Tariq Khan described he had some "*oversight*". Quite what that oversight might be, however, the Tribunal was unable to drill down sufficiently, but there is clearly some informal arrangement between the parties with them all working together to achieve their objectives. Further, it is clear that Mr Tariq Khan has a significant reliance upon Mr Nica and not unreasonably so given his professed expertise in managing properties similar to this in day-to-day terms.

52. The Tribunal can, of course, only make a rent repayment order against the landlord that receives the rent. Mr Dover suggested that any rent repayment order, if made, should be no more than 25% of the rent paid in the relevant period of the offence.

53. Having considered matters, the Tribunal does consider that rent repayment order should be made, albeit, one that is not substantial given that the level of fault on the part of the landlord Respondent is low. The Tribunal takes this view recognising that, whilst the failures in this case were of the managing agent, there was a degree of "*oversight*" by Mr Tariq Kahn, and indeed, such was the nature of the relationship between the agent and Mr Tariq Khan that he did have some involvement such that he is likely to have known of, and had some ability to influence, the repair of the fire alarm system and potentially some of the smaller issues at the Property.

54. The Tribunal recognises that a fundamental purpose of the rent repayment order regime is deterrence, to ensure that landlords do not benefit from their failure to license where required. In this case, a number of other applications for HMO's were evidenced by the Respondents to demonstrate that Mr Nica does indeed make such applications, and the Tribunal accepts that, but what

is not clear from those documents produced is when those applications were made and whether they may have been late. Nonetheless, the Tribunal recognises that applications for various other properties were made and that there is some merit in the argument, implicitly advanced in this case, that there was no need to consider deterrence a significant factor at least as regards this landlord and his managing agent.

55. We additionally take account of the financial resources of the landlord Respondent, his uncontested evidence being that he has limited funds and has had to take out loans to meet his day to day living needs.

56. Taking account, therefore, that the Property was of a high standard, that the landlord engaged constructively with the Respondents with the landlord on issues raised and indeed, the agreement reached between them in or around November 2021, to compensate for the difficulties experienced and the financial position, a fair resolution would be an order for the landlord Respondent to be ordered to pay the tenants the sum of £1,500. This is approximately 15% of the rent paid in the relevant period, being at the full sum of £2,850 for 4.2 months, with a refund of £1,430 taken account of, and deducing utilities at £50 per month per each of the Applicants, a figure accepted by the Applicants as being a reasonable sum for such services.

57. Accordingly, the Respondent, Mr Tariq Khan, must pay to each of the six applicants in the proceedings the sum of £250 within 14 days of the date of service of this decision, thus being a total award in these proceedings of £1,500.

Judge C Kelly