



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BA/HMK/2019/0036**

Property : **35 Cliveden Road, London
SW19 3RD**

Applicant : **Danile Sotila**

Representative : **In person**

Respondent : **1. Mirza Hassan and Fatima Hassan
(landlords)
2. Sunny Bay Limited (Lucy Wang)
(managing agents)**

Representative : **Lucy Wang**

Type of Application : **Application for a Rent Repayment
Order by Tenant – Sections 40, 41,
43 & 44 of the Housing and
Planning Act 2016**

Tribunal Members : **Judge Robert Latham
Stephen Mason BSC FRICS FCIArb**

**Date and Venue of
Hearing** : **17 July 2019 at
10 Alfred Place, London WC1E 7LR**

Date of Decision : **19 July 2019**

DECISION

Decision of the Tribunal

1. The Tribunal makes a rent repayment orders ('RRO') in the sum of £718.36 against Mirza Hassan and Fatima Hassan (the landlords). The said sum is to be paid by 16 August 2019.
2. The Tribunal determines that the Respondent landlords shall also pay the Applicants £300 by 16 August 2019 in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. The Tribunal is required to determine an application under section 41 of the Housing and Planning Act 2016 (“the Act”) for a RRO in respect of 34 Cliveden Road, London, SW19 3RD (“the property”). The Applicant was the tenant of the ground floor front room between 19 May 2018 and 18 February 2019. He paid a rent of £600 per month. He sought a RRO in the sum of £5,400, namely the total rent which he had paid during the tenancy. He also sought a refund of the administration charge of £180 and reference fee of £30 which he had paid on the grant of the tenancy.
2. On 24 April, the Tribunal gave Directions, pursuant to which both parties have filed their bundles of documents.

The Hearing

3. Mr Sotila appeared in person. Miss Lucy Wang and Mr Giuseppe di Nicola appeared on behalf of the Respondents. The Tribunal heard evidence from Mr Sotila and Miss Wang. There was a significant difference between the parties as to the circumstances in which the tenancy was granted. However, this is not directly relevant to our decision.
4. Mr Sotila issued the application against both the landlords and their managing agents. The Tribunal is satisfied that the landlords are the relevant respondent against which any RRO should be made.

The Law

5. The law in this area is complex. We annex the relevant statutory provisions to this decision. At the commencement of the hearing, we highlighted the following:
 - (i) The Tribunal may make a RRO if satisfied beyond reasonable doubt, that “a landlord” has committed a relevant offence (section 43(1) of the Act).
 - (ii) The relevant office in this case is “control or management” of an unlicensed HMO under section 72(1) of the Housing Act 2004 (“HA 2004”) (section 40(3) of the Act).
 - (iii) A landlord commits an offence if he is a person having control of or managing an HMO which is required to be licensed, but is not so licensed (section 72(1) HA 2004).
 - (iv) It is a defence if the landlord has made an application for a licence (section 72(4) HA 2004). Thus, any continuing offence will cease on the date that an application is made.

(v) In the current case, it must be established that the property is a HMO which falls within “any prescribed description of HMO” (section 55(2) HA 2004).

(vi) The relevant description is prescribed by the Multiple Occupation (Prescribed Descriptions) (England) Order 2006 (SI 2006/371) This provision came into effect on 6 April 2006. One requirement is that the HMO is occupied by “five or more persons”. This provision ceased to have effect on 30 September 2018 when it was replaced by SI 2018 No.221.

The Background

6. The property at 35 Cliveden Road is a two storey semi-detached property to which a third storey (a roof space room) has been added. There are now five bedrooms and a living room. The ground floor front room which was let to Mr Sotila, would originally have been a second living room. There is a shared kitchen, bathroom and toilet.
7. Mirza and Fatima Hassan have let the property for a number of years. In an e-mail dated 4 June 2018, the London Borough of Merton (“Merton”) have confirmed that the property was licenced, but did not have a HMO licence. An application form was sent to the owners on 27 October 2016, but was not returned.
8. In about April 2018, the owners instructed Sunny Bay Limited to let the property. It is apparent that they were anxious to let it as soon as possible. Mr Sotila stated how he had seen the ground floor front room advertised at a rent of £650 per month on the “spareroom” website. Ms Wang showed him round the property. Luisa Rodriguez and Andrea Briones were also present at the viewing and were shown different rooms.
9. Mr Sotila complained about the state of the ground floor front room. There were cigarette burns on the carpet. Ms Wang agreed to reduce the rent to £600 per month. She also agreed to have the room cleaned. After Mr Sotila moved into the room, the landlord replaced the bed and the wardrobe. The landlord also provided a new fridge freezer, kettle and toaster. Mr Sotila was required to pay a deposit of £600. He initially paid £500 but on 18 May paid £910, namely £600 for the first month’s rent; £100 to top up his deposit, an administration fee of £180 and a referencing fee of £30.
10. Mr Sotila stated that he understood that he was being granted a 12 month Assured Shorthold Tenancy of the ground floor front room at a rent of £600 per month. He had a key to his room. He would have shared use of a living room, kitchen, bathroom and toilet. He did not know the other tenants. He moved into occupation on 19 May 2018. He recalled this as it was a Saturday. He was working as a chef at the time.

11. Ms Wang suggested that the property was rather let as a “house share”. She relied on the tenancy agreement which had been signed by five tenants, Harry Chu (18 May 2018), Daniel Sotila (23 May 2018), Luisa Rodriguez (16 May 2018), Andrea Briones (Undated), and Venislav Todorov (23 May 2019). This purported to grant a joint tenancy to the five tenants at a rent of £3,000 per month for a year from 19 May 2018. She suggested that each tenant was jointly and severally liable for the full rent and that each tenant had the right to access all rooms in the house.
12. The Tribunal is satisfied that this written agreement does not reflect the substance and reality of what was agreed. The written agreement was rather a “pretence” (see *A.G. Securities v Vaughan* [1990] 1 AC 417). Separate rents were agreed for each room reflecting the quality of that room, Mr Chu paying £700, Ms Rodriguez £550, Ms Briones £600 and Mr Todorov £550 per month. There was no contemplation that if the other tenants defaulted on their rent, Mr Sotila would be obliged to pay £3,000 per month.
13. The Respondents have sought to argue that the five tenants moved in on different dates and that the property did not become a HMO which required to be registered until 20 June 2018, when Mr Todorov moved into his room. The evidence as to when the tenants took up physical occupation is unclear. The date on which the tenants signed the tenancy agreement is not relevant as Mr Sotila paid his deposit and first months’ rent some days before he signed the agreement. We have found that this agreement was a pretence. The critical factor is that each tenant paid rent for their individual rooms from 19 May 2018. From this date, they had both legal “possession” and “occupation” of their individual rooms.
14. In a letter dated 11 June 2019, Merton have confirmed that Sunny Bay Limited submitted an application to licence the property as a HMO on 25 June 2018. Both parties accepted this evidence. The effect of this is that the continuing offence of controlling or managing an unlicensed HMO would have ceased on this date as a result of the statutory defence afforded by section 72(4)(a) HA 2004.
15. Mr Sotila had understood that his tenancy would continue until 19 May 2019. In the event, he had to leave on 18 February 2019. It seems that one of the tenants served a Notice to Quit and the owners took this as a notice which terminated the tenancies of all five tenants. Thereafter, the owners recognised that they needed to grant separate tenancies in respect of each room. Mr Sotila was not granted a new tenancy.

Our Determination

16. The Tribunal is satisfied beyond reasonable doubt that the Respondent has committed an offence under section 72(1) of the 2004 Act. We are satisfied that:
 - (i) Since 6 April 2006, a licence has been required for any HMO falling within the description prescribed by the Licensing of Houses

in Multiple Occupation (Prescribed Descriptions) (England) Order 2006.

(ii) The property is an HMO falling within the definition falling within the “standard test” as defined by section 254(ii) of the 2004 Act. In particular:

- (a) it consists of five units of living accommodation not consisting of self-contained flats;
- (b) the living accommodation is occupied by persons who do not form a single household;
- (c) the living accommodation is occupied by the tenants as their only or main residence;
- (d) their occupation of the living accommodation constitutes the only use of that accommodation;
- (e) rents are payable in respect of the living accommodation; and
- (f) the households who occupy the living accommodation share the living room, kitchen, a bathroom and a toilet.

(iii) The Respondent failed to licence the HMO as required by section 61(2) of the 2004 Act. This is an offence under section 72(1). On 19 May 2018, the property was let to five tenants without a licence. Merton received an application for a licence on 25 June 2018 when the offence ceased.

(iv) The offence was committed over the period of 19 May and 24 June 2018.

(v) The offence was committed in the period of 12 months ending on 11 April 2019, the date on which the application was made.

17. The 2016 Act gives the Tribunal, a discretion as to whether to make a RRO, and if so, the amount of the order. Section 44 provides that the period of the RRO may not exceed a period of 12 months during which the landlord was committing the offence. The amount must not exceed the rent paid by the tenants during this period, less any award of universal credit paid to any of the tenants. We are satisfied that the Applicant was not in receipt of any state benefits and that he paid the rent from his earnings.
18. During the period 19 May and 24 June 2018, the Applicant paid rent of £718.36, namely one month and six days. The RRO only relates to the rent paid during the period that the offence was committed. It cannot extend to any administration charge or reference fee paid by the Applicant.

19. Section 44 of the Act, requires the Tribunal to take the following matters into account:
- (i) The conduct of the landlord.
 - (ii) The conduct of the tenants.
 - (iii) The financial circumstances of the landlord.
 - (iv) Whether the landlord has at any time been convicted of an offence to which Chapter 4 of the 2016 Act applies, namely the offences specified in section 40. There is no relevant conviction in this case.
20. In determining the amount of any RRO, we have had regard to the guidance given by the George Bartlett QC, the President of the Upper Tribunal (“UT”) in *Parker v Waller* [2012] UKUT 301 (LC). This was a decision under HA 2004 where the wording of section 74(6) is similar, but not identical, to the current provisions. The RRO provisions have a number of objectives: (i) to enable a penalty in the form of a civil sanction to be imposed in addition to the 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. There is no presumption that the RRO should be for the total amount received by the landlord during the relevant period. The Tribunal should take an overall view of the circumstances in determining what amount would be reasonable. The fact that the tenant will have had the benefit of occupying the premises during the relevant period is not a material consideration. The circumstances in which the offence is committed is always likely to be material. A deliberate flouting of the requirement to register would merit a larger RRO than instances of inadvertence. A landlord who is engaged professionally in letting is likely to be dealt with more harshly than the non-professional landlord.
21. The UT went on to consider the RRO that was appropriate in that case. In considering the profit made by the landlord during the relevant period, the UT considered it appropriate to make deductions for the costs of insurance, gas, electricity, water, council tax and cleaning. In the current case, the tenants were required to pay separately for gas, water and electricity.
22. Taking all relevant matters into account, we are satisfied that the RRO should be made in respect of 100% of the rent paid by Mr Sotila during the relevant period, namely £718.36. We are satisfied that the Respondents took an informed decision to let the property before applying for a HMO licence. The property had previously been let without a licence. The owners were reluctant to delay any further letting pending the submission of an application for a licence. Further, the Tribunal is not impressed by

the tenancy agreement which the Applicant was required to sign. Landlords and letting agents must recognise that any written agreement should reflect the substance and reality of what has been agreed between the parties. In this case, Mr Sotila was granted a tenancy of a single room at a rent of £600 per month.

23. The Tribunal further orders that the Respondent should refund the tribunal fees of £300 paid by the Applicant pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge Robert Latham
19 July 2019

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of Relevant Legislation
Housing Act 2004

55 Licensing of HMOs to which this Part applies

(1) This Part provides for HMOs to be licensed by local housing authorities where—

- (a) they are HMOs to which this Part applies (see subsection (2)), and
- (b) they are required to be licensed under this Part (see [section 61\(1\)](#)).

(2) This Part applies to the following HMOs in the case of each local housing authority—

- (a) any HMO in the authority's district which falls within any prescribed description of HMO, and
- (b) if an area is for the time being designated by the authority under [section 56](#) as subject to additional licensing, any HMO in that area which falls within any description of HMO specified in the designation.

72 Offences in relation to licensing of HMOs

(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)).

254 Meaning of “house in multiple occupation”

(1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if–

- (a) it meets the conditions in subsection (2) (“the standard test”);
- (b) it meets the conditions in subsection (3) (“the self-contained flat test”);
- (c) it meets the conditions in subsection (4) (“the converted building test”);
- (d) an HMO declaration is in force in respect of it under section 255; or
- (e) it is a converted block of flats to which section 257 applies.

(2) A building or a 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;
- (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
- (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 (see section 259);
- (d) their occupation of the living accommodation constitutes the only use of that accommodation;
- (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; 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.

Housing and Planning Act 2016

40 Introduction and key definitions

- (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.
- (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –
 - (a) repay an amount of rent paid by a tenant, or
 - (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

- (3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let to that landlord.

| | <i>Act</i> | <i>section</i> | <i>general description of offence</i> |
|---|-----------------------------------|---------------------------|--|
| 1 | Criminal Law Act 1977 | section 6(1) | violence for securing entry |
| 2 | Protection from Eviction Act 1977 | section 1(2), (3) or (3A) | eviction or harassment of occupiers |
| 3 | Housing Act 2004 | section 30(1) | failure to comply with improvement notice |
| 4 | | section 32(1) | failure to comply with prohibition order etc |
| 5 | | section 72(1) | control or management of unlicensed HMO |
| 6 | | section 95(1) | control or management of unlicensed house |
| 7 | This Act | section 21 | breach of banning order |

- (4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

- (1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
- (2) 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.
- (3) A local housing authority may apply for a rent repayment order only if –
 - (a) the offence relates to housing in the authority’s area, and
 - (b) the authority has complied with section 42.
- (4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

43 Making of a rent repayment order

- (1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord had been convicted).
- (2) A rent repayment order under this section may be made only on an application under section 41.
- (3) The amount of a rent repayment order under this section is to be determined with –
 - (a) section 44 (where the application is made by a tenant);
 - (b) section 45 (where the application is made by a local housing authority);
 - (c) section 46 (in certain cases where the landlord has been convicted etc).

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 this table.

| <i>If the order is made on the ground that the landlord has committed</i> | <i>the amount must relate to rent paid by the tenant in respect of</i> |
|---|---|
| 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 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,
 - (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.

Licensing of Houses in Multiple Occupation (Prescribed Descriptions)
(England) Order 2006/371

3.— Description of HMOs prescribed by the Secretary of State

- (1) An HMO is of a prescribed description for the purpose of [section 55\(2\)\(a\)](#) of the Act where it satisfies the conditions described in paragraph (2).
- (2) The conditions referred to in paragraph (1) are that—

- (a) the HMO or any part of it comprises three storeys or more;
- (b) it is occupied by five or more persons; and
- (c) it is occupied by persons living in two or more single households.

- (3) The following storeys shall be taken into account when calculating whether the HMO or any part of it comprises three storeys or more—

- (a) any basement if—
 - (i) it is used wholly or partly as living accommodation;
 - (ii) it has been constructed, converted or adapted for use wholly or partly as living accommodation;
 - (iii) it is being used in connection with, and as an integral part of, the HMO; or
 - (iv) it is the only or principal entry into the HMO from the street.
- (b) any attic if—
 - (i) it is used wholly or partly as living accommodation;
 - (ii) it has been constructed, converted or adapted for use wholly or partly as living accommodation, or
 - (iii) it is being used in connection with, and as an integral part of, the HMO;
 - (c) where the living accommodation is situated in a part of a building above business premises, each storey comprising the business premises;
 - (d) where the living accommodation is situated in a part of a building below business premises, each storey comprising the business premises;
 - (e) any mezzanine floor not used solely as a means of access between two adjoining floors if—

- (i) it is used wholly or mainly as living accommodation; or
 - (ii) it is being used in connection with, and as an integral part of, the HMO; and
- (f) any other storey that is used wholly or partly as living accommodation or in connection with, and as an integral part of, the HMO.