



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

**Case Reference** : **LON/00AY/HMK/2019/0059**

**Property** : **Flat 2, 282 Camberwell New Road,  
London SE5 0RP**

**Applicants** : **Cesar Montero Curbelo  
Oscar Espasa De Gispert  
Kevin Adrila Sanchez  
Sylvie Le  
Brayan Andrey Ardila Sanchez**

**Representative** : **Mr Horne (Solicitor Advocate)**

**Respondents** : **Andrew Brown  
Visionary Properties Ltd**

**Representative** : **Mr Paul Wright (Counsel)**

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

**Tribunal Member** : **Judge Robert Latham  
Duncan Jagger MRICS**

**Date and Venue of  
Hearing** : **9 December 2019 at  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **19 December 2019**

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**DECISION**

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## **Decision of the Tribunal**

The Tribunal dismisses this application for a Rent Repayment Order (“RRO”). The Applicants have failed either to adequately particularise the grounds upon which they contend that either respondent has committed an offence under section 72(1) of the Housing Act 2004 or to adduce sufficient evidence to satisfy us beyond reasonable doubt that either respondent has committed such an offence.

### **The Application**

1. The Tribunal is required to determine an application under section 41 of the Housing and Planning Act 2016 (“the 2016 Act”) for RROs in respect of Flat 2, 282 Camberwell New Road, London SE5 0RP (“the flat”). The flat is on split levels consisting of two bedrooms, a bathroom, reception room, kitchen and roof terrace
2. On 6 August 2019, Justice for Tenants issued the application. The following were specified as applicants: (i) Cesar Montero Curbelo; (ii) Oscar Espasa De Gispert; (iii) Kevin Adrilla Sanchez; (iv) Sylvie Le; and (v) Brayan Andrey Ardila Sanchez. The following were specified as respondents: (i) Andrew Brown and (ii) Visionary Properties Ltd. A RRO was claimed in the sum of £24,600 for the period 1 January 2018 to 1 January 2019. The application form included a statement of truth which was attested by the five applicants.
3. The applicants attached an Assured Shorthold Tenancy (“AST”) to the application, dated 23 October 2017, for a term of 11 months from 26 October 2017 to 25 September 2018. The landlord was stated to be Visionary Properties Ltd. The following were specified as tenants: (i) Cesar Montero Curbelo; (ii) Oscar Espasa De Gisper; and (iii) Kevin Daniel Adrilla Sanchez.
4. On 29 August, the Tribunal wrote to Justice for Tenants to inquire why the application had (i) been issued against both Andrew Brown and Visionary Properties Ltd; and (ii) specified two applicants who were not named as tenants on the tenancy agreement. On 2 September, Justice for Tenants responded.
5. On 12 September, the Tribunal gave Directions. These are given to enable the Tribunal to determine such applications fairly by indicating to the parties how they should present their cases. Many parties appearing before this Tribunal are unrepresented. By 18 October, the Applicants were directed to file a Bundle of Documents to include the following:
  - (a) “The application and accompanying documents
  - (b) These and any subsequent directions
  - (c) Any expanded statement of the reasons for the application

- (d) Full details of the alleged offence, with supporting documents from the local housing authority, if available (**Note:** the tribunal will need to be satisfied **beyond reasonable doubt** that an offence has been committed)
  - (e) A copy of the tenancy agreement
  - (f) The official copies of the freehold title and any leasehold title to the property
  - (g) Evidence of rent payments in the applicable period (see Annex)
  - (h) A calculation on a weekly/monthly basis of the amount of rent paid in the applicable period, excluding any universal credit/housing benefit
  - (i) The name(s) of any witnesses who will give evidence at any hearing, with a signed and dated statement/ summary of their evidence, stating that it is true (and see Notes below)
  - (j) Any other documents to be relied upon at the hearing.”
6. An Annex to the Directions specified the issues that the tribunal would need to consider. The Notes included the following guidance on the provision of witness statements:

“Witness statements should identify the name and reference number of the case, have numbered paragraphs and end with a statement of truth and the signature of the witness. Original witness statements should be brought to the hearing. In addition, witnesses are expected to attend the hearing to be questioned about their evidence, unless their statement has been agreed by the other party. The tribunal may decline to hear evidence from any witness who has not provided a statement in accordance with the above directions.”

- 7. The Applicants filed an extensive Bundle of Documents. However, this did not include any witness statements from any of the Applicants.
- 8. On 21 November 2019, the Respondents filed a Bundle of Documents. It is not necessary to consider this, as the Respondent elected not to rely on it.
- 9. On 6 December, the Applicants filed a Bundle in Response. This included extensive documents relating to an application which has been issued by other tenants against Visionary Properties Ltd. This application has not yet been determined. The relevance of this material was not apparent.

### **The Hearing**

- 10. The Applicants were represented by Mr Horne, a Solicitor advocate, instructed by Justice for Tenants. He explained that Justice for Tenants were a Not for Profit Organisation which were acting on the basis of a success fee of 36%. He was accompanied by Mr Curbelo. None of the other

applicants were present. We were told that one Applicant had returned to France. Some of the others were at work.

11. The Respondent was represented by Mr Paul Wright, Counsel, instructed by Hodders Law, Solicitors. He provided a Skeleton Argument. He emphasised that a pre-condition to the making of a RRO was the requirement on the Applicants to satisfy the Tribunal “beyond reasonable doubt” that “a landlord” has committed “an offence to which this Chapter applies”. He intended to put the Applicants to strict proof on this. He raised two further issues: (i) whether two of the Applicants had the standing to bring the application; and (ii) the quantum of any RRO, were we to be satisfied that an offence had been committed.

12. The following facts were agreed:

(i) Mr Brown is the registered proprietor of 282 Camberwell New Road (see p.73 of the Applicants’ Bundle).

(ii) Mr Brown is the sole shareholder and director of Visionary Properties Limited (p.87-90).

(iii) Visionary Properties Limited has a substantial portfolio of properties registered in the name of the company. The Applicants provided particulars of five such properties (see p.149-153).

(iv) On 1 January 2016, the London Borough of Southwark introduced an Additional Licencing Scheme which would apply to the flat, were it to be a House in Multiple Occupation (“HMO”).

(v) The relevant tenancy commenced on 26 October 2017. On 25 September 2018, the tenants vacated the flat.

(vi) The offence on which the Applicants sought to rely was one under section 72(1) of the Housing Act 2004 (“the 2004 Act”), namely the control or management of an unlicensed HMO.

13. Mr Wright took two points on the alleged offence:

(i) The Applicants had failed to prove that the flat was an HMO; and/or

(ii) The Applicants had failed to particularise or prove which Respondent had control of or was managing the flat.

Both advocates were familiar with the recent decision of the Upper Tribunal in *Goldsbrough v C A Property Management Ltd* [2019] UKUT 311 (LC).

14. At the beginning of the hearing, Mr Horne made two applications:
- (i) To amend the twelve month period over which the RRO was sought from “1 January 2018 to 1 January 2019” to “26 October 2017 to 25 September 2018”. The Tribunal was not willing to permit the Applicants to backdate their claim to 26 October 2017. No explanation was provided as to why the Applicants had initially sought a RRO for a period of three months after the tenants had vacated the flat. Indeed, the Applicants had filed evidence purporting to show that they had made rent payments after they had vacated (see p.33-34). In the event, it transpired that these were electronic payments made to a “P Lukov” which had no relevance to this case. Further, no evidence had been adduced of any payments prior to 29 January 2018. The Tribunal was satisfied that the period over which the RRO was sought should have been specified accurately in the application form.
  - (ii) To call Mr Curbelo to give evidence, despite the fact that he had not filed any witness statement. The Tribunal was not willing to permit this. The requirement for witness statements was clearly identified in the Directions. These are quasi-criminal proceedings where an offence must be proved to the criminal standard of proof. A Respondent is entitled to know the case that he has to answer.
15. The Tribunal informed Mr Horne that Mr Curbelo would be restricted to the evidence which was specified in the application form which had been attested by a statement of truth. Mr Horne sought to prove his case on the basis of this limited evidence. He was willing to tender Mr Curbelo for cross-examination. However, Mr Wright indicated that he had no questions to put to the witness.
16. After Mr Horne had presented the Applicants’ case, Mr Wright elected to call no evidence. The Tribunal has therefore had no regard to the material filed by the Respondent. The issue for the Tribunal is whether the Applicants have proved to the criminal standard that either Respondent has committed an offence under section 72(1) of the 2004 Act.

### **The Status of two of the Applicants**

17. Mr Wright took the preliminary point that Sylvie Le and Brayan Andrey Ardila Sanchez have no standing as applicants as they are not named as tenants. We agree. However, this is largely academic as the three named tenants are jointly and severally liable for the rent and would be entitled to a RRO in respect of any rent which they had paid or which had been paid by others on their behalf.
18. Mr Horne sought to argue that the written tenancy agreement was a pretence and that the substance and reality of the situation was that:
- (i) all five applicants were tenants; and

(ii) Mr Brown was the landlord.

19. The role of this Tribunal is to construe agreements, against the background facts, to identify the substance and reality of the contractual relationship between landlord and tenant. In *Street v Mountford* [1985] AC 809, Lord Templeman referred to “sham devices” and “artificial transactions”. In the later decision of *A.G. Securities v Vaughan* [1990] 1 AC 417 (at p.462), he preferred to substitute “the word ‘pretence’ for the references to “sham devices” and “artificial transactions”.
20. There is no evidence in the current case that the written tenancy agreement is a “pretence”. The Applicants have adduced no evidence as to the circumstances in which the tenancy was granted and how five occupants came to be occupying this flat with two bedrooms and a living room. There is no evidence that Visionary Properties Ltd is a company of straw. The evidence is rather that it has a significant property portfolio.
21. Mr Horne sought to refer us to a number of text messages that indicated that Mr Brown was aware, after the tenancy was granted, that there were more than three people occupying the flat. However, this would not make any additional occupant a tenant.
22. Other text messages suggest that Mr Brown collected rent from the tenants in cash. However, this is equally consistent with Mr Brown collecting rent on behalf of the Company.

### **The Offence under section 72 of the 2004 Act**

23. Section 72(1) of the 2004 Act provides:

“(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.”
24. Mr Wright argued that the Applicants have failed to adduce sufficient evidence to satisfy us beyond reasonable doubt
  - (i) that the flat was an HMO; and/or
  - (ii) that either Respondent was a “landlord” who had control of or was managing the flat.

### **The HMO Issue**

25. Section 254 of the 2004 Act defines an HMO:

(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.”

26. In neither the application form (at p.16) nor their “Full Details of the alleged offence” (at p.1-5) do the Applicants particularise the basis upon which they contend that the flat was an HMO. Mr Wright was willing to accept that they were relying on “the standard test”. However, he argued that the Applicants had failed to prove two essential elements:

(i) The living accommodation was occupied by persons who do not form a single household: No evidence was adduced relating to the relationship between the Applicants.

(ii) The living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it. The five occupants come from abroad, apparently from Spain and France. The only evidence on which the Applicants rely in support

of the rent that they paid is evidence of cash withdrawals from their banks (at p.33-34). There are a number of months when individual occupants made no relevant cash withdrawals. Mr Wright suggests that this shows that they were not staying permanently at the flat and that their main residences may have been in their countries of origin. The text messages suggest that there were occupants apart from the five Applicants, for example Brian Ardila (at p.83).

### Control and Management

27. Section 263 of the 2004 Act defines the following terms:

(i) “person having control” 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), or who would so receive it if the premises were let at a rack-rent.”

(ii) “rack-rent” means “a rent which is not less than two-thirds of the full net annual value of the premises.”

(iii) “person managing” means “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) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises.....; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments; and includes, where those rents or other payments are received through another person as agent or trustee, that other person.”

(iv) References in the Act to any person involved in the management of a HMO include references to the person managing it.

28. Although the Applicants have chosen to bring the application against both Mr Brown and Visionary Properties Limited, they do not specify in either the application form (at p.16) nor their “Full Details of the alleged offence” (at p.1-5) the basis on which it is contended that either respondent has committed an offence under section 72(1) of the 2004 Act. The concepts of “person having control” and “person managing” an HMO are complex. However, any applicant seeking to prove to the criminal standard of proof that a person has committed a criminal offence has a duty to particularise



the offence and adduce sufficient evidence to prove the essential ingredients of the offence. The Applicants have failed to do this.

29. The Tribunal asked Mr Horne who the Applicants were contending was the “person having control” and the “person managing” the flat. This obvious question apparently took him by surprise. When pushed, he stated that the Applicants were contending that Mr Brown was both “person having control” and the “person managing” the flat. He was unable to explain why, in these circumstances, Visionary Properties Limited had been joined as a respondent. The Tribunal pressed Mr Horne as to whether he was sure that this was how the Applicants intended to frame their case. He responded that he was.
30. We suspect that this exchange was an important factor in Mr Wright’s decision to call no evidence on behalf of the Respondents and to put the Applicants strictly to proof. Mr Wright responded that Visionary Properties Limited was the “person having control” as it received the rack-rent. This was received on behalf of the Company and was processed through the Company’s accounts. Further, Visionary Properties Limited was also the “person managing” the flat. Mr Brown had granted the Company a legal interest in the property as a result of which it was entitled to receive the rents.
31. In his Reply at the end of the hearing, Mr Horne sought to resile from his earlier position. He suggested that it was for the Tribunal to determine who was the “person having control” and the “person managing” the flat. We do not accept this. It is not for this Tribunal to step into the arena and frame the relevant offence in respect of which a RRO is sought. This is the responsibility of the party who has brought the application. The Directions gave clear guidance as to what the Applicants would need to prove, including “full particulars of the alleged offence”.

### **The Tribunal’s Determination**

32. The Tribunal accepts Mr Wright’s submission that the Applicants have failed to prove their case that an offence has been committed under Section 72(1) of the 2004 Act to the criminal standard of proof. Mr Horne presented the case on the basis that Mr Brown was both the “person having control” and the “person managing” the flat. He has failed to satisfy us beyond reasonable doubt that Mr Brown was such a person.
33. We also accept that the Applicants have failed to prove to the criminal standard that the flat was an HMO at the material time. We are not satisfied that these Applicants occupied the flat as their “only or main residence”. There is an absence of evidence as to how these Applicants came to occupy the flat or of the relationship between them.
34. The Tribunal reaches this decision with some regret. Had the Applicants’ advisors adequately particularised an offence and adduced the evidence required to prove it, it is possible that three of the five Applicants might have been entitled to a significant RRO.

35. In the light of this finding, it is not appropriate to order the Respondents to refund to the Applicants any of the tribunal fees which they have paid.

**Judge Robert Latham**  
**19 December 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.