



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

**Case Reference** : **MAN/00BY/HMF/2019/0111**

**Property** : **53, Grantham Street, Liverpool L6 6BU**

**Applicants** : **Kaja Szynkanuk  
Monika Minczuk**

**Respondent** : **Sophie Ezekpo**

**Type of Application** : **Application for a rent repayment order by  
tenant (no conviction)  
Sections 40-44 Housing and Planning Act  
2016**

**Tribunal Member** : **Mr J R Rimmer  
Mr J Faulkner**

**Date of Determination** : **31<sup>st</sup> July 2020**

**Date of Decision** : **13<sup>th</sup> August 2020**

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**DECISION**

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**Order:           The application for a Rent Repayment Order is refused in respect of each Applicant for the reasons set out herein**

**A.     Application**

1.     The Tribunal has received an application under Section 41 Housing and Planning Act 2016 (the Act) from the Applicants for a rent repayment order (RRO).
2.     The Tribunal has sent a copy of the application to the Respondents.
3.     Directions were given by the Deputy Regional Judge of the Tribunal for the further conduct of this matter.
4.     Those directions have been complied with sufficiently for the Tribunal to be able to determine the application. In the current circumstances the parties have consented to the matter being determined upon the papers submitted to the Tribunal, without a hearing.

**B     Background**

5.     The Applicants entered into an agreement in February 2019 for the occupancy of 53, Grantham Street Liverpool from 1<sup>st</sup> July 2019. After negotiation with the Respondent occupation only commenced on 14<sup>th</sup> September 2019.
6.     Difficulties arose in respect of the Applicants' occupation of the property, principally in relation to vermin infestation and the efforts to remedy the problem. They were such as to lead to a deterioration in relation to the relationship, resulting in a negotiated surrender of the occupation prior to the date upon which the agreement would otherwise have ended.
7.     The Applicants, both students, sought advice from within their academic environment and as a result of those enquiries they made application for a rent repayment order. The application was initially made on the basis of a failure on the part of the Respondent to licence 53, Grantham Street as a house in multiple occupation (an "HMO). It is quite clear that the property has never been a HMO and that if there had been a failure to comply with licensing requirements it was in relation to the selective licensing scheme for rented property then operated by the local housing authority, Liverpool City Council.
8.     Such an application for a rent repayment order can only therefore succeed if the Applicants are able to show that the property is let to them under a tenancy, or licence, that the licensing regime applies to it and that the Respondent has committed a relevant housing offence in respect of which a rent repayment order may be made.

9. Section 79 Housing Act 2004 provides:
- (1) This part provides for house to be licensed by local housing authorities where-
    - (a) They are houses to which this Part applies (see subsection (2)), and
    - (b) They are required to be licensed under this Part...
  - (2) This part applies to a house if-
    - (a) It is in an area that is for the time being designated under Section 80 as subject to selective licensing, and
    - (b) The whole is occupied either-
      - (i) Under a single tenancy or licence that is not an exempt tenancy or licence under subsections (3) or (4), or
      - (ii) ...

Regulation 2(h) Selective Licensing of Houses (Specified Exemptions) (England) Regulations 2006 excludes from the selective licensing regime houses where the occupier shares accommodation with the landlord or licensor.

10. It is contended by the Respondent that the agreement entered into by the Applicants is not a tenancy but a “house-share” or “lodging” agreement. Indeed, the agreement itself is described at its very top as an “Assured Shorthold Lodgers Agreement”. The rationale for this is that if the Respondent remained in occupation of the property; legally there would be no tenancy, or licence, required to be licenced under the licensing regime. The local council did confirm to the Respondent that in such a situation a licence would not be required.

### **The nature of the Applicants’ occupation.**

11. It appears to the Tribunal that the parties may have intended to create some form of lodging agreement; that is what the Respondent says in her submissions and the Applicants, in their application describe their occupation as:

“2 bedroomed house rented on per room basis sharing spaces of one bathroom, kitchen, dining room and living room”

Although this could also describe a means for two co-tenants to share accommodation, it is more suggestive of sharing with the landlord than with each other, particularly in the light of the description in paragraph 7.3 of the agreement of what accommodation is shared and what is for the exclusive use of the Applicants.

- 12 The Tribunal notes, however, that the agreement entered into may have some of the qualities a tenancy in respect of the whole of the house. In general terms there is a substantive difference in the occupation enjoyed under a tenancy when compared with a lodging agreement, or other situations where accommodation is shared with a landlord. Tenants have exclusive possession of the property: lodgers do not.
- 13 Notwithstanding that the Agreement is headed as noted in paragraph 10, above, and there are numerous references to “lodger”, or “lodging agreement” in paragraph 1, many of its terms are thereafter more consistent with a tenancy having been created. The following are numerous examples.
- (a) The beginning of the agreement describes the property as 53, Grantham Street, not merely any particular part of it, and thereafter at clause 2.1 “the landlord agrees to host and the lodgers agrees (sic) to take the property and contents for the Term at the rent payable...”
  - (b) The entirety of paragraph 3 and the raft of covenants contained therein are consistent with a tenancy and not a situation where a resident, or part-resident landlord would be frequently within the property.
  - (c) More particularly the covenant at 3.11 (not to assign, sub-let, or otherwise part with possession of the whole of the property)
  - (d) Paragraph 4.2 (there is no 4.1) refers to the tenants having quiet possession of the property (being 53, Grantham Street, not any limited part of it)
  - (e) Paragraph 6.3 refers to the landlord being able to rely on Ground 1 of Schedule 2 Housing Act 1988 if applicable. It would not be necessary to include this unless the landlord was currently excluded from occupation.
- 14 It would also be possible for there to be a tenancy of the accommodation occupied solely by the Applicants and the remaining accommodation shared with the landlord excluded from the tenancy as that is conceivably a further interpretation that could be placed upon the agreement
- 15 The Tribunal has already noted that running counter to the above observations are the references in the agreement to “lodger/lodging” and the sharing of accommodation.
- 16 If the first situation, of a tenancy of the whole property being created, has arisen then there can be no question of the Respondent remaining resident in the property. She has excluded her right to residence by the nature of the agreement she has entered into. In such a case the licensing provisions of the selective licensing scheme apply to the letting.

- 17 In either of the other situations, where the agreement is either a lodging agreement, with accommodation being shared with the landlord, or a tenancy of part of the property, leaving the Respondent conceivably resident in another part of the property, the licensing provisions will not apply, as confirmed in the communications between the Respondent and the City Council (the observations of the council officer being correct, according to the limited information provided by the Respondent and the nature of her enquiry).
- 18 The Tribunal must therefore make an initial determinations:
- Whether there is a tenancy of the whole house, or a part of the house, or a lodging agreement in respect of the house
  - If there is not a tenancy of the whole house, whether the landlord is resident so as to avoid the need to comply with the licensing provisions

### **Evidence and submissions**

- 19 In addition to the Application form and the tenancy agreement, material aspects of which have been referred to above the Tribunal received extensive submissions in various forms from the parties.
- 20 The Respondent is clear that the purpose of letting the property was to secure an occupant, or occupants, whilst she was away working in London. Once the Applicants had moved in it would appear that the agreement may have run its course in the absence of the vermin infestation which caused the Applicants considerable distress and inconvenience. No doubt it also caused financial concern for the Respondent
- 21 From what is said by the Respondent, and supported in part by the Applicants the Tribunal is able to determine that the Respondent was not living in the property when the Applicants moved in on 14<sup>th</sup> September, having made arrangements for delivery of the keys, and did not return to take up any right of occupation until after the Applicants had vacated the premises.
- 22 It would appear always to have been the Respondent's intention to return from time to time to share occupancy of the property with the Applicants, but did not in fact do so out of concern for their position once the infestation had been discovered. The negotiations and remedial arrangements in respect of the infestation took place at a distance without physical attendance by the Respondent.

- 23 Such an intention would be consistent with wishing to create an agreement and an arrangement falling short of granting a full tenancy to the Applicants and reserving some right of occupation to herself in the relatively short term.
- 24 The Applicants submissions support the absence of any actual return by the Respondent during their occupation. Indeed, it would appear that the Respondent was not in occupation at the time the keys were supplied at a later date than was originally intended under the agreement. The Respondent suggests that her failure to return at any time arose out of concern about the infestation and the effect upon the Applicants.
- 25 The greater concern the Applicants have would appear to be in respect of the infestation. The issue of a licence for the property, and the precondition in respect of that for there to be a tenancy or licence granting exclusive occupation, does not appear to enter their thinking until it is raised following complaint about the condition of the premises.
- 26 This does not mean that the parties may not have created a tenancy, notwithstanding the expressions used within the agreement that would contradict that view, if the balance of the evidence suggests that there was a grant of exclusive possession to the Applicants of 53, Grantham Street.
- 27 The Tribunal takes the view that where there is a written document purporting to reflect what the parties have done it is usually by far the best evidence of what they intended. Here the document is by no means clear. It is in many ways a good example of a little knowledge being a dangerous thing. It is completely inconclusive.
- 28 The Tribunal must therefore look at the surrounding circumstances to try to find what the parties intended to create. It takes the view that what was intended was some sort of agreement whereby the respondent could return at any time if she so wished. The fact that subsequently she did not in fact do so is not particularly relevant.
- 29 The information provided by all the parties is that they were happy to create some sort of sharing agreement, supported right from the drawing up of the agreement itself, right through to how it is described in the application form to the Tribunal.
- 30 It takes the view that having determined that to have been the intention of the parties, it should be very careful not to disturb that intention unless there is very clear evidence that the Tribunal should do so. It finds no such evidence here of such clarity.

- 31 In the light of those findings the agreement between the parties did not create a tenancy, or licence, of such a character as to require an application for selective licensing under the scheme provided by the local housing authority and in force at that time. Consequently, there can be no housing offence that is an essential requirement and prerequisite of an application for a rent repayment order.

J R RIMMER  
Tribunal Judge  
13 August 2020