RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL for the

LONDON RENT ASSESSMENT PANEL

HOUSING ACT 2004 section 62

LON/00AG/HMT/2006/0002 LON/00AG/HMT/2006/0003

Property:	**30 Mornington Crescent, London NW1 7RE** **93 Judd Street , London WC1H 9NE**
Appellants:	**Mr Leo Kaufman** **Anfil Limited**
Represented by:	Mr A Kramer (solicitor) Asserson Kramer
Respondents:	**The London Borough of Camden**
Represented by:	Mr A van den Bout (solicitor) Camden legal services
Dates of Hearing:	**November 13 and December 11, 2006**
Tribunal	Siobhan McGrath (Chairman) Mr T Sennett TWS MA FCIEH Mr C Gowman BSc MCIEH MCMI

30 Mornington Crescent, London WC1H 9NE

93 Judd Street, London NW1 7RE

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Decision and Reasons

Decision

1. The decision of the London Borough of Camden, made on July 27, 2006 not to serve a temporary exemption notice under section 62(2) of the Housing Act 2004, in respect of premises at 30 Mornington Crescent London NW1 7RE is confirmed. Accordingly the appeal is dismissed.

2. The decision of the London Borough of Camden, made on July 27, 2006 not to serve a temporary exemption notice under section 62(2) of the Housing Act 2004, in respect of premises at 93 Judd Street, London WC1H 9NE is confirmed. Accordingly the appeal is dismissed.

Reasons

Introduction and Background

1. In this matter the Tribunal was concerned with appeals by Mr L Kaufman and Anfil Ltd. against decisions by the respondents, the London Borough of Camden, not to serve temporary exemption notices (TEN) under section 62(2) of the Housing Act 2004, in respect of premises at 93, Judd Street and 30 Mornington Crescent. The issues in both cases are the same and both appeals are dealt with together in these reasons.

2. In April 2006, the provisions of the Housing Act 2004 (the Act) relating to the mandatory licensing of prescribed categories of houses in multiple occupation (HMOs) were brought into force. By section 61 of the Act, every HMO to which the

provisions are applied by regulation, is required to be licensed unless an interim or final management order is in place or a temporary exemption notice is in force in relation to it.

3. It is common ground that the properties at both 93 Judd Street and 30 Mornington Crescent are licensable HMOs. On June 29, 2006, Mr L Kaufman, on behalf of Anfil Ltd, and as the person managing or having control of the properties, wrote to the respondent council notifying them that he intended to take steps with a view to securing that the houses no longer needed to be licensed and applying for a temporary exemption notice under section 62 of the Act. In response, on July 3, 2006, the council asked for details of the steps that Mr Kaufman intended to take.

4. By letters dated July 24, 2006, in respect of each property Mr Kaufman wrote as follows:

"The above building is currently arranged with each flat/unit having its own bath and kitchen facilities, but share one W.C. for every two flats.
Your planning department has advised me that I do not require planning permission to provide a toilet for the sole use for each of these flats. It is therefore my intention to provide these so that there will be no shared kitchen, bathroom nor W.C. at the above address.
I would therefore request a temporary exemption notice...."

5. Following receipt of the letters, the respondents took advice from their development control and planning service and decided not to serve a temporary exemption notice. The decision was recorded in a notice dated July 27, 2006, which was served on Mr Kaufman on July 28, 2006. The reasons given for the refusal in each case are as follows:

"1. The Development Control and Planning Service have confirmed that permission is required before commencing any works on a Grade II listed building. No application has been received as of the decision date.
2. The Development Control and Planning Service have confirmed that self containment of a House in Multiple Occupation is contrary to policy in the Council's Unitary Development Plan and is unlikely to get planning permission or listed building consent.
3. That any application for planning permission and listed building consent is unlikely to be processed and works completed, within the 4 month period of the temporary exemption notice."

6. On August 7, 2006, Mr Kaufman lodged appeals against both decisions. Directions were given for the production of documents and for the appeals to be heard on November 13, 2006.

The Inspection

7. On the morning of November 13, 2006, the Tribunal inspected the two properties. Mr Kaufman attended the inspection of Mornington Crescent but not Judd Street. No representative attended from the London Borough of Camden. We inspected both the exterior and internal common parts of 30 Mornington Crescent, which is a grade II listed Georgian terraced house with brick and stucco façade under a slated roof on four floors plus basement. The house has been converted at some indeterminate point in the past into a self contained basement flat and 9 rooms to the upper floors. These rooms are arranged such that three lettings on the ground floor share a w.c. compartment at that level and on each of the upper floors two rooms share a w.c. The Tribunal noted that the w.c. compartments, which are sited on landings, contain hand washing facilities. Individual lettings were not inspected .

8. We were also given access to 28 Mornington Crescent for comparative purposes where we saw the internal common parts and the interior of the first floor front flat. This studio flat, which the Tribunal entered with the express permission of the tenant, comprised one room with kitchen recess, a small bathroom with full suite and mezzanine sleeping platform, was presented as being the arrangement as proposed within the front rooms to the properties subject of the appeal. A w.c was sited on the landing of the first floor presented as available for the exclusive use of the tenant of the first floor rear room. Externally the house was similar to number 30 and appeared in reasonable decorative repair.

9. At 93 Judd Street the Tribunal was only able to inspect the exterior of the property which is A modest terraced property of similar age to Mornington Crescent and again subject to grade II listing and having a brick façade, four floors plus basement. The ground floor is arranged as commercial premises and entry to the first to top floor rooms is via a door to the side of the shop. There appeared to be no one at either the shop or rooms above at the time of our inspection and access to the interior could not,

therefore, be gained. The property presents in a poor condition compared to Mornington Crescent with some wants or decoration and repair to exterior.

The Hearing

10. At the hearing Mr Kaufman and Anfil Ltd were represented by Mr Kramer of Asserson Kramer (solicitors) and Camden were represented by Mr A van den Bout of Camden legal services.

11. Having inspected the properties, the Tribunal had a clear picture of the works proposed to bring the houses out of the licensing regime. At the outset of the hearing, those proposals were clarified and confirmed as follows:

(a) The present layout and use of 30 Mornington Crescent and 93 Judd Street is such that each flat or unit has its own kitchen and bathroom but that there is shared use (between two tenancies) of each W.C. situated in the common parts;

(b) The proposal is that some flats will be altered so that the bathroom within the unit will be provided with a W.C. and that other flats will then be given exclusive use of the W.C. situated in the common parts across the hall on the same floor. For the appellant this was said to amount to self-containment;

(c) Similar works have already been carried out to 28 Mornington Crescent.

12. Having regard to these proposals the Tribunal were concerned that, as a matter of law, the proposed works might not, in themselves, bring the houses out of the licensing regime. The respondent council were therefore asked whether they wished to make submissions on this point. Having taken instructions, Mr van den Bout stated that it was the council's view that if the works were carried out the flats/units would be self-contained within the meaning of the legislation and therefore outside of the licensing regime.

13. On the basis of that concession, the Tribunal proceeded with the hearing. However, it soon became clear that the main issue between the parties, namely whether planning permission and/or listed building consent was necessary for the proposed works, and if so whether it was likely to be granted, could not be dealt with without the production of further evidence which was not available on the day. In

particular, correspondence from the council's planning department was produced by Mr Kaufman that seemed to contradict Camden's main case.

14. Accordingly, the hearing was adjourned until December 11, 2006 and directions were given for the production of further evidence, including expert planning evidence for Mr Kaufman.

15. At the outset of the adjourned hearing, Mr van den Bout asked the Tribunal to consider argument on the issue of self-containment. The Tribunal decided to allow the earlier concession to be withdrawn and to treat the issue as another ground on which the council could rely in not issuing a TEN notice. Although the concession had been made on instructions and had been made by a legal representative, the Tribunal considered that this important issue of law ought to be resolved since it affected the outcome of the whole case. Mr Kramer, on behalf of Mr Kaufman doubted whether the concession could be withdrawn in this way but subject to that, did not object to the procedure adopted. Both parties asked that a determination be given on the self-containment issue as a preliminary matter.

The Statutory Provisions

16. Section 254 contains the definition of a house in multiple occupation. Subsection (1) provides:

"(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."

17. In this case, the Tribunal is concerned with the standard test and the converted building test. Section 254(2) provides:

"(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…;
(c) the living accommodation is occupied by those persons as their only or main residence …..;

(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."
By subsection (8) "basic amenities" means – a toilet; personal washing facilities or cooking facilities.

18. All of these conditions are at present fulfilled at the subject properties. The flats or units of accommodation are not self-contained and significantly there is sharing of one of the basic amenities, namely the W.C.s which are situated in the common parts.

19. Section 254(4) provides:

"(4) A building or a part of a building meets the converted building test if –
(a) it is a converted building;
(b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);
(c) the living accommodation is occupied by persons who do not form a single household…
(d) the living accommodation is occupied by those persons as their only or main residence …..;
(e) their occupation of the living accommodation constitutes the only use of that accommodation;
(f) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation"

For this test to be fulfilled it is not necessary to demonstrate that there is any sharing of basic amenities but the accommodation provided must not be self-contained. Buildings which contain *only* self-contained flats are not presently subject to mandatory licensing.

20. Section 254(8) also gives a definition for "self-contained flat" as follows:

" 'self-contained flat' means a separate set of premises (whether or not on the same floor) –
(a) which forms part of a building;
(b) either the whole or a material part of which lies above or below some other part of the building; and
(c) in which all three basic amenities are available for the exclusive use of its occupants."

21. Section 257 provides:

"257(1) For the purposes of this section a "converted block of flats" means a building or part of a building which –
(a) has been converted into, and
(b) consists of,
self-contained flats.
.....
(6) In this section "self-contained flat" has the same meaning as in section 254."

The issue and the submissions

22. The issue for the Tribunal's preliminary determination is as follows: is a flat a self-contained flat for the purposes of section 254 of the Housing Act 2004, if one of the basic amenities, namely a W.C., is not contained within the main unit of accommodation but is situated in another part of the building although retained for the exclusive use of the tenant of that flat.

23. For Camden it was submitted that such an arrangement did not amount to self-containment. Mr van den Bout referred to the definition of self-contained flat in section 254(8) and submitted that the requirement in subsection (c) was that the basic amenities should be *in* the flat. That, he submitted was the effect of the words "in which".

24. Mr van den Bout contended that the interpretation of other legislation dealing with the meaning of a flat or separate set of premises would not assist the Tribunal in the interpretation of this new legislation since the particular definition of self-containment with reference to the basic amenities was novel and peculiar to this particular Act. He added that different approaches had been taken in, for example, planning and valuation law.

25. Mr Kramer made three main submissions on behalf of Mr Kaufmann:
(a) First, he drew an analogy with cases decided under the Rent Acts and submitted that whether a unit of accommodation could be considered to be "separate" was a matter of fact and degree and that it was not necessary for the rooms making up the flat to be physically contiguous. He referred the Tribunal to *Woodfall's Landlord and Tenant law* paragraph 3.22 in relation to assured tenancies;
(b) Secondly, he referred the Tribunal to three cases decided in relation to council tax namely: *Clement (Listing Officer) v Bryant* [2003] EWHC 422 (Admin), *Rodd v.*

Ritchings [1995] 2 EGLR 142 and *McColl v. Sabbacchi (Listing Officer)* [2001] EWHC Admin 712. Each of these cases deals with the interpretation of article 2 of the Council Tax (Chargeable Dwellings) Order 1992 which defines "self contained unit" to mean, so far as is relevant "a building or part of a building……which has been constructed or adapted for use a separate living accommodation". He submitted that those authorities should be applied by analogy to the instant case and that, in effect, they demonstrated that self-containment did not require the degree of attachment argued for by the respondents.

(c) Finally, in his submission although paragraph (c) of the definition of "self-contained flat" imposed a requirement that all three basic amenities "are available for the exclusive use of its occupants," so that there would be no sharing, it was not a requirement that those amenities be situated within the flat as long as they were situated within "a separate set of premises".

26. Mr Kramer also drew the Tribunal's attention to a report prepared by the respondents on 28 Mornington Crescent, which has already had similar adaptations carried out to it as those proposed for the subject properties. At paragraph 8 of that report, reference is made to the fact that the property currently has self contained flats and that accordingly it does not fall within the requirements of mandatory licensing. He submitted that this demonstrated that the respondents themselves took the view that the works would, in fact, result in self containment for the purposes of section 254.

The decision and reasons

27. For the following reasons, the Tribunal considered that the works proposed by Mr Kaufmann would not have the effect of providing self-containment within the meaning of section 254 and that accordingly, even if the works were carried out, both properties would remain subject to the mandatory licensing regime.

28. The Tribunal did not consider that the cases relating to the council tax legislation assisted in this context. In particular the wording of the 1992 Order was significantly different than that under consideration here.

29. The Tribunal accepted the proposition that in other contexts, whether there is a "separate set of premises" is a matter of fact and degree. This was made clear, for example in *The Honourable Charles Cadogan et al v. McGirk* 1996 73 P & CR 483. However, it considered that the definition of "self-contained flat" in section 254 requires interpretation within its own context and decided that the words "in which" in paragraph (c) of the definition mean that any unit of self-containment must include the three basic amenities within a single unit of accommodation so that it would not be necessary for an occupier to leave that accommodation to access any of those basic amenities. The Tribunal considered that this interpretation gives the wording of the section its ordinary and natural meaning.

30. Further weight is given to this interpretation if the several definitions of an HMO are considered together. The standard test in section 254(2) sets out the criteria for the most familiar HMOs, where basic amenities are shared between two or more separate households. However the converted building test in section 254(4) does not require such sharing. It seems therefore that the converted building test may be fulfilled even where basic amenities are provided for the exclusive use of households but where the arrangement of the units of accommodation falls short of self-containment. Otherwise there would be no clear difference between section 254(4) and section 257.

31. Even if the Tribunal is wrong in its interpretation and self-containment should be considered as an issue of fact and degree, it decided that the provision of a W.C., which could only be accessed from the main unit of accommodation by crossing a communal passageway, would not, in context be sufficiently proximate to satisfy the test that there be a separate set of premises.

32. Finally, the Tribunal rejected any suggestion that an opinion offered in respect of 28 Mornington Crescent could affect the true legal position on self-containment in the subject properties.

Costs

33. At the close of the hearing, the Tribunal considered whether the conduct of the proceedings should attract an award of costs under paragraph 10 of schedule 12 to the Commonhold and Leasehold Reform Act 2002.

34. On behalf of the respondents it was submitted that an award of cost should be made in their favour because Mr Kaufmann had failed to disclose relevant and important correspondence prior to the first day of the hearing. The Tribunal accepted that this failure did cause the respondents difficulty. However the correspondence in question emanated from the respondents' own planning officers and to an extent it was for the council themselves to ensure that all relevant materials were known to them and made available to the Tribunal. Accordingly no order for costs was made on this application.

35. An application for costs was also made on behalf of Mr Kaufmann. The issue of self-containment was pivotal to the Tribunal's decision. That issue and the underlying facts were clearly identified by the Tribunal itself at the outset of the first day of hearing. However no attempt was made on behalf of the respondents to retract the concession made by Mr van den Bout right up until the morning of the adjourned hearing itself. During the four week interval between the two days of hearing no indication was given to the applicant by the respondent that an application might be made to re-open the issue. In consequence, Mr Kramer was taken wholly by surprise and the Tribunal felt obliged to allow him a short adjournment of about three hours to research the issue before making submissions. During that time Mr Kaufman's planning expert was constrained to wait to discover whether he would be required to give evidence. The Tribunal considered that additional costs were incurred by the applicant as a direct result of the unreasonable manner in which the self-containment issue was raised and ordered the respondent to pay £500 costs.

36. No application was made for the re-imbursement of the application fee.

Chairman .....

Date 21.12.06.