FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BH/HMF/2020/0118**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**49 Springfield Road, London E17 8DD**
Applicant	**:**	**Mr Massyl Gueye**
Representative	**:**	**Mr John-Luke Bolton of Cambridge House Safer Renting**
Respondent	**:**	**Mrs Fakhra Hussain**
Representative	**:**	**Mr M Tahir, solicitor**
Type of Application	**:**	**Application for Rent Repayment Order under the Housing and Planning Act 2016**
Tribunal Members	**:**	**Judge P Korn** **Ms R Kershaw**
Date of Hearing	**:**	**8th March 2021**
Date of Decision	**:**	**18th March 2021**

DECISION

Description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we have been referred are in two electronic bundles, the contents of which we have noted. The decision made is set out below under the heading "Decision of the tribunal".

Decision of the tribunal

The tribunal makes no rent repayment order.

Introduction

1. The Applicant has applied for a rent repayment order against the Respondent under sections 40-44 of the Housing and Planning Act 2016 ("**the 2016 Act**").

2. The basis for the application, as clarified at the hearing, is that the Respondent was controlling an unlicensed house which was required under Part 3 of the Housing Act 2004 ("**the 2004 Act**") to be licensed at a time when it was let to the Applicant and was therefore committing an offence under section 95(1) of the 2004 Act. The Applicant had originally argued that, in the alternative, the Property was being used as a house in multiple occupation, but he abandoned that argument at the hearing.

3. The Applicant's claim is for repayment of rent paid during the period 27th July 2019 to 31st March 2020 amounting to £12,250.00 (originally the claim was for £14,000, but it later transpired that the Applicant had accidentally included the deposit in his calculations).

Applicant's case

4. In written submissions the Applicant states that between 1st April 2015 and 31st March 2020 the Property was within the area of a selective licensing scheme requiring all privately let properties to have a licence. The Respondent, who owns the Property, was renting the Property to the Applicant during the period of claim and did not hold the requisite licence at any point during that period.

5. The Applicant notes that the Respondent's position is that the Applicant was merely a lodger, not a tenant, and the Applicant accepts that a licence is not needed for properties with a resident landlord and one or two lodgers. However, the Applicant does not accept that he was a mere lodger.

6. The Applicant states that in order for a person to be classed as a lodger one condition is that the occupier must share facilities such as a kitchen or bathroom with the landlord/owner. In the present case, in the Applicant's submission, there were no shared facilities.

7. The hearing bundle contains an email from the local housing authority confirming that the Property was not licensed during the period of claim. It also contains proof of the Respondent's ownership of the Property, a copy of an Assured Shorthold Tenancy Agreement in favour of the Applicant dated 27th July 2019, proof of rental payments and relevant copy correspondence including exchanges of text/WhatsApp messages.

8. The Applicant states that he lived at the Property from 28th July 2019 to 1st May 2020. He lived there with his wife, his baby son (who was born at the Property in January 2020), his uncle and his uncle's son. The rent paid was for three bedrooms, two bathrooms and a kitchen.

9. The Applicant viewed the Property in early July 2019 together with his uncle. To enter the Property, he and his uncle had to go through a main front door that led into a corridor. In that corridor there were two doors, one numbered 49A and the other 49B. They entered 49B and were told that they would be renting 49B. For the first 7 months of their occupancy the Applicant and his family quietly enjoyed the use of 49B, the only shared area being the corridor. Then in March 2020 the Respondent tried to regain access to 49B and gave the Applicant what purported to be an eviction notice.

10. At the hearing the Applicant's representative noted that the eviction notice stated that the Respondent was "seeking to live on the property again", which suggested that she agreed that she was not living there at the time.

Respondent's case

11. The Respondent states that she and her husband decided that they would rent out the Property for an initial 6 months and that they themselves would move to Bradford to seek better work opportunities, being also mindful that Bradford was less expensive to live in than London.

12. In July 2019 she advertised the Property to let for £2,200 per month. She then received an offer from the Applicant who said that the maximum that he could pay was £1,750 per month for three bedrooms but that he was willing to share the Property with the Respondent as her lodger. She and her husband decided to accept this offer and to change their plans accordingly. It was agreed that the Respondent and

her son would stay at the Property whilst her husband and three daughters would move to Bradford.

13. Before signing the tenancy agreement with the Applicant, the Respondent checked the legal position with the local housing authority and was told that for up to two lodgers no licence was needed. The Applicant told her that he needed one bedroom for personal use, one for guests and one for storage.

14. The Respondent's husband tried to settle in Bradford but could not do so, and on 30th November 2019 the Respondent gave the Applicant two months' notice to vacate. In January 2020 the Applicant's wife gave birth and as a result he requested an extension to 28th February 2020. On 1st February 2020 the Respondent gave him a second notice, this time to vacate on 28th February 2020. At the start of February 2020, the Applicant's uncle and son started to live at the Property to help to look after his wife and baby but after 2 weeks the Respondent asked the Applicant to tell them to leave. The Applicant then started locking the doors to the lounge and kitchen. Despite several oral and written requests, the Applicant then failed to vacate the Property by the agreed date. The Respondent also refers to there having been a fight on 10th April 2020 and to the police being called by her son.

15. The Respondent states that there is only one property – 49 Springfield Road. There is no 49A or 49B. The Applicant and the Respondent agreed to share the kitchen, lounge and first floor bathroom. The Respondent lived in the Property for the whole period of the Applicant's occupancy and paid full council tax, TV licence, water bill and internet bill. Gas and electricity were paid on a 'pay as you go' basis at the Applicant's request. Furthermore, she notes that in the application itself the Applicant states that "the total amount of people living at the property was 6, including Mrs Fakra" (presumably meaning Mrs Fakhra Hussain) and therefore it follows that even he accepts that she was living in the Property.

16. On 11th March 2020 the Respondent received a letter from the local housing authority stating that the Property appeared to be privately rented and suggesting that it needed a licence. In response, she emailed the local housing authority on 24th March 2020 explaining the situation (i.e. why she believed that no licence was needed) and adding "please correct us if otherwise". She did not hear back from them and neither did they come to inspect the Property to verify the position.

17. The Respondent used an assured shorthold tenancy agreement for the arrangement with the Applicant, but she is a layperson and now appreciates that she should not have used this form of agreement for a lodger. She also states that the Applicant has misled the tribunal by not providing a full copy of the tenancy agreement, as it is missing the page containing sections 41-46. She has included in her hearing

bundle what she states is a full copy and which shows that the intention was for the Property to be shared.

18. At the hearing the Respondent's representative said that the tenancy agreement relates to 49 Springfield Road and that the Applicant had not provided any evidence that there was a 49A and a 49B.

Follow-up points

19. The Applicant's position was that sections 41-46 of the tenancy agreement were simply missing and that it was convenient for the Respondent to add these sections and to include wording about the Applicant being a lodger.

20. The Respondent's representative countered by referring the tribunal to the separate – and quite faint – continuous numbering in the top right-hand corner of the Respondent's version which in his submission showed not just that the version supplied by the Applicant was missing sections 41-46 but that there was indeed a missing page.

Witness evidence

21. There is a witness statement from the Applicant, and he was cross-examined on it at the hearing by the Respondent's representative.

22. There are various witness statements in support of the Respondent's case. One is from the Respondent herself, one from her husband, one from her son, one from her brother-in-law (Mr Muhammad Ishfaq), one from another relative (Mr Asam Ashfaq) and one from a neighbour (Mr Haroon Sultan). The Respondent and her husband were cross-examined on their statements at the hearing by the Applicant's representative, and the other witnesses apart from Mr Sultan were made available to be cross-examined but were not in fact cross-examined. These witness statements all confirmed the relevant witness's agreement with the Respondent's position insofar as the relevant matters were within that witness's knowledge.

23. It is noted that the Respondent said in cross-examination that the Applicant was only given a key to the outside door, and yet in her witness statement she stated that he frequently locked internal doors.

Relevant statutory provisions

24. Housing and Planning Act 2016

Section 40

(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 …

(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 by that landlord.

	Act	***section***	***general description of offence***
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

Section 41

(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.

Section 43

(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 has been convicted).

(2) A rent repayment order under this section may be made only on an application under 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with – (a) section 44 (where the application is made by a tenant) …

Section 44

(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 the table.

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

Housing Act 2004

Section 95

(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part … but is not so licensed.

Tribunal's analysis

25. The Respondent accepts that the Applicant was in occupation of the Property during the period 28th July 2019 to 31st March 2020 pursuant to a tenancy agreement dated 27th July 2019 and that he made periodic payments in respect of that occupation. She also accepts (or at least does not deny) that the Property was, for the whole of that period, in an area of selective licensing requiring all privately let properties to have a licence, subject to certain exceptions.

26. However, the Respondent argues that no licence was needed in this case because the arrangements fell within an exception to the requirement to license the Property, namely that the Respondent was herself living at the Property and that the Applicant was merely her lodger. The Applicant, for his part, accepts that the Property would not have needed a licence if the Respondent had in fact been living there herself with a maximum of two lodgers, but he disagrees with the Respondent's factual analysis of the situation.

27. Neither party has brought any evidence as to the details of the selective licensing scheme in question. In particular, neither party has provided any evidence as to what the precise test is under this scheme as to when the relevant exception applies. Nevertheless, it appears to be common ground that the key issue is whether the Applicant had exclusive possession of the Property as a tenant or whether he shared occupation – including the use of certain facilities such as the kitchen and/or a bathroom – with the Respondent and her son.

28. We note the number of witness statements in support of the Respondent's position. However, all but one come from the Respondent or from relatives of the Respondent. The one exception is the statement of a neighbour, and he is the one person who was not available to be cross-examined. There is therefore no truly independent witness evidence which corroborates the Respondent's position. In addition, we did not find the Respondent's or her husband's responses in cross-examination particularly convincing, including the Respondent's response regarding the locking of doors.

29. In addition, the living arrangements as described by the Respondent are rather unconventional to say the least, and it is strange that she and her family would have changed their plans so radically and so quickly simply on the strength of the Applicant having offered a lower rent so soon after the Property was advertised. We also note that the eviction notice dated 30th November 2019 referring to the agreement with the Applicant as a lodgers' agreement was countersigned by Mr Ashfaq as witness, which is unusual and might suggest that it was created as a self-serving piece of evidence to bolster the Respondent's claim that the Applicant was merely a lodger.

30. However, there is a big question regarding the tenancy agreement itself. Whether or not it is true that the Respondent used an assured shorthold tenancy agreement by accident, the fact remains that the Applicant's bundle contains a copy tenancy agreement which jumps from clause 40 at the bottom of one page to clause 47 at the top of the next page. In addition, the missing clauses were not drawn to the tribunal's attention by the Applicant in his statement of case and the Applicant did not comment on this issue until effectively forced to respond to the Respondent's analysis of what the Respondent submits is a complete copy of the tenancy agreement and which contains clauses referring to the Applicant as a lodger.

31. It is possible that the tenancy agreement when signed was – for whatever reason – missing clauses 41-46 and that the Respondent spotted this point and decided to fabricate a new page containing references to the Applicant being a lodger. However, our view is that the simpler and more likely explanation is that the page itself was indeed missing from the version of the tenancy agreement included in the Applicant's bundle. This would either be by accident or because it

did not suit the Applicant's case, but we do not need to decide which of these it is.

32. In addition, the Applicant was not particularly persuasive in cross-examination, although it is possible that this was partly due to a relatively poor command of English in the context of a video hearing. Furthermore, there was no witness evidence in support of his position other than his own. We also note that the Applicant states in his application that the Respondent was living at the Property, and whilst it may be that this was some form of argument in the alternative or that it was based on some confusion on his part or the part of his representative, it does not help his case.

33. Finally, we note the contents of the Respondent's email of 24th March 2020 and her uncontested evidence that the local housing authority did not follow up on the question of whether the Property did in fact require a licence.

34. Under section 43(1) of the 2016 Act, the tribunal may only make a rent repayment order if satisfied beyond reasonable doubt that the landlord has committed an offence. This is the criminal standard of proof, and it differs significantly from the civil standard of proof under which the tribunal only has to be satisfied on the balance of probabilities. Whilst we have not found the Respondent's evidence or supporting witness statements particularly convincing, for the reasons listed above we also have concerns about the strength of the Applicant's evidence. Therefore, taking all of the evidence in the round, we are not satisfied beyond reasonable doubt that the Respondent has committed an offence.

35. As we are not satisfied beyond reasonable doubt that an offence has been committed it follows that we are unable to make a rent repayment order.

Cost applications

36. There were no cost applications. Mr Tahir for the Respondent made a general, unparticularised claim for damages, but as explained at the hearing the tribunal has no jurisdiction to entertain such a claim.

Name: Judge P Korn **Date:** 18th March 2021

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.