



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

Case reference : LON/00BH/HMF/2021/0135

Property : 3 Aylmer Road, London E11 3AD

Applicant : Diane Avienne Mahusay

Representative : Kaushalya Balaindra, caseworker
intern at Safer Renting, Cambridge
House

Respondents : Zaghams Gilani, also known as Syed
Mohammad Zaghams Gilani

Representative : Andrew Shipley of counsel instructed
by Cranbrook Solicitors

Type of application : Application for a rent repayment
order

Tribunal : Judge Adrian Jack, Tribunal Member
Steve Wheeler MCIEH

Date of Hearing : 11 November 2021

DECISION

Covid-19 pandemic:

Description of hearing: This has been a remote hearing which has not been objected to by the parties. The form of hearing was **V: CVPREMOTE**. The Tribunal had a physical and electronic bundles and written submissions from both sides.

The property

1. The property comprises a house over two floors. We were given a live stream video visit during the hearing by Mr Gilani, the respondent.
2. The front door of the house opens onto a hallway with the staircase to the upstairs directly opposite the front door, with a corridor continuing to the back of the house. The ground floor consists of a living room at

the front, a bedroom with access from the corridor, a kitchen and a WC/bathroom with a garden at the back. The downstairs living room has a ordinary domestic handle with a basic and old-fashioned type of internal lock (although we were told the key was not kept on the premises). The bedroom did not have a lock at all.

3. The upstairs contained a large bedroom at the front, a smaller room, a kitchen and a WC/shower room at the back. Mr Gilani submitted that the smaller room was a small bedroom, but in our judgment it was a moderate size of room, which could perfectly sensibly be used as a living room.
4. At the foot of the stairs was a door frame, which had been used for a partition door separating the upstairs premises from the ground floor. At the time of the video inspection, the door had been taken off its hinges. A key issue in the case is whether the door was installed before or after the applicant took up occupation.

The agreement

5. It was common ground that on 1st December 2019 what is described on its face as a “lodger agreement” was signed by the respondent (using the name of Syed Gilani), purportedly as licensor, and Nicolas Derly and the applicant, purportedly as “licensee (lodger)”. It purports to grant a licence to occupy the upstairs bedroom with use of “the facilities”.
6. Two points should be noted. Firstly, the freehold of the property is vested in Mr Gilani’s parents, Syed Naqib Gilani and Riffat Gilani. It is, however, conceded in the respondent’s statement of reasons for opposing application for rent repayment, para 2, that the licensor (or landlord) was the son, the respondent before the Tribunal. Apart from the concession in the pleadings, on any view in our judgment there is an estoppel, so that the respondent cannot deny his status as licensor or landlord vis-à-vis the applicant. Mr Shipley, who appeared as counsel for the respondent, did not argue the contrary.
7. Secondly, Mr Derly is not a party to the application, although he has potentially a joint claim with the applicant. The Tribunal’s Rules of Procedure 2013 do not have any provision which corresponds to CPR rule 19.3 (which applies in the Courts), so that does not debar the claim as currently brought by the applicant alone. Mr Shipley took no point on this.
8. It is common ground that the property was in principle subject to a private rented property licence under a scheme which the London Borough of Waltham Forest brought into force on 1st May 2020. However, the respondent’s case is that the property was exempt under article 2(1)(h) of the Selective Licensing of Houses (Specified Exemptions) (England) Order 2006 (SI 2006 No 370), which excludes “a tenancy or licence under the terms of which the occupier shares any accommodation with the landlord or licensor or a member of the

landlord's or licensor's family." Article 2(2) provides that "(f) an occupier shares accommodation with another person if he has the use of an amenity in common with that person (whether or not also in common with others); and (g) 'amenity' includes a toilet, personal washing facilities, a kitchen or a living room but excludes any area used for storage, a staircase, corridor or other means of access."

9. It can be seen that it does not matter in relation to liability whether the "lodger agreement" created a license or a lease. The respondent's case is that the applicant, her partner Mr Derly and their very young child were entitled to and did use the downstairs living room in common with him and his family. However, from a factual point of view it is very relevant whether the upstairs was a separate self-contained flat or whether the whole house was shared.
10. The law in relation to the difference between leases and licences is well established. In *Street v Mountford* [1985] AC 809 at pp 817-818 Lord Templeman speaking for a unanimous House of Lords held that the test is one as to whether the tenant or licensee has exclusive possession:

"In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own..."

If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant. In the present case it is conceded that Mrs Mountford is entitled to exclusive possession and is not a lodger. Mr Street provided neither attendance nor services and only reserved the limited rights of inspection and maintenance and the like set forth in clause 3 of the agreement. On the traditional view of the matter, Mrs Mountford not being a lodger must be a tenant.

There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The

grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.”

The partition door and the applicant’s behaviour

11. We turn then to the factual question: was the partition door installed before or after the lodger agreement was made? We remind ourselves that we must determine this issue to the criminal standard of proof, in other words so that we are sure. Another way this is sometimes put is that we must be satisfied beyond reasonable doubt.

12. The respondent’s case is that the partition door was only installed after the applicant had moved in. It was installed because there had been a deterioration in relations between his family and hers. In his witness statement he says:

“17. The applicant’s partner... because abusive to our neighbour and also had issues with alcohol and would often smoke within the house. This would cause issues myself, my young children and especially my vulnerable child. They also fell into arrears of £2,000, but I was sympathetic to this as I believe he had lost his job during the pandemic. Both the applicant and her partner’s behaviour became aggressive, they were anti-social and abusive towards me and my family. The police and the counsel’s Anti-Social Behaviour Team became aware of this. I have three young children with one being vulnerable. The applicant would often leave the front door open and large items were thrown down the stairs and indirect threats were made. I am a designated safeguarding lead and have received training through Hackney counsel. It was my primary concern to safeguard myself and my young family. The incidents of abuse, threats and violent behaviour that were perpetrated towards me and my family cause me a great deal of stress and I decided to erect a partition, so that interaction between the parties would be reduced to avoid contracting the police and minimise the anti-social behaviour.”

13. The applicant disputes this account. She says that there were incidents where the neighbours played music late into the night and her partner went to complain. She also accepts that her toddler would sometimes bang the walls to make a noise, as young children sometime do, but that this was nothing particularly untoward. No heavy items were thrown down the stairs. Her partner did smoke, but only in the kitchen upstairs and this was with the permission of the respondent. Relations deteriorated when her partner lost his job due to Covid. The respondent, and in particular, his mother, were wholly unsympathetic to the applicant’s position and had no compunction in asking her and her family to make themselves homeless in the middle of a pandemic.

14. The respondent has adduced no evidence to show when the partition door was installed. Normally it would be easy to produce an invoice for the door, the frame and the labour. There are text messages prior to the making of the lodger agreement referring to partitioning. The respondent says this refers to portioning the bedroom on the ground floor from sight from the stairs. The applicant says it refers to the door.
15. There is no evidence of complaints to the police or the Council prior to 27th January 2021, when the respondent served a notice to quit on the applicant and her partner. The notice to quit was followed on 3rd February 2021 with a complaint to Anabell Hassan, a Metropolitan Police neighbourhood officer that the applicant was guilty of “abusive and aggressive behaviour, shouting and swearing.” We note that the making of this complaint was long after the alleged breakdown in relations which the respondent says necessitated the installation of the partition door. We need to consider as part of our holistic assessment of the evidence whether the complaint was made in order to bolster the respondent’s attempt to evict the applicant and her family.
16. In our judgment the respondent was an unsatisfactory witness. The idea of the parties sharing the kitchens and bathrooms was in our judgment a nonsense. Quite apart from the logistics, the respondent and his family observed the Muslim dietary restrictions, whereas the applicant and her family ate pork. Indeed the respondent accepted that sharing kitchens was impractical. The fact that a witness is unsatisfactory does not of course mean he is lying. In particular it is important not to attach too much importance to a witness’s demeanour. Rather the Tribunal must consider the witness’s evidence against the whole of the evidence in a case.
17. By contrast, however, the applicant’s account was internally consistent and plausible. It is corroborated by the original listing by the respondent’s agent, Mr Mohammed Arif, (to which the applicant responded, resulting in the lodger agreement being made) of the property as a “large 1 bedroom first floor flat including all bills £1250 pcm”.
18. The applicant sought to rely on a witness statement of Anmol Rana, a licensing enforcement officer of the Court. He gives relevant evidence about the condition of the property when he inspected it on 31st January 2021, but cannot say anything about when the partition door was installed. We therefore ignore it in deciding the issue of the timing of the installation of the door.
19. We stand back and consider the evidence in the round. In our judgment, the respondent’s case on the timing of the installation of the door is very implausible and lacks corroboration. The breakdown in relations arose, we find (and the timings corroborate this), as a result of the arrears which accumulated after the respondent’s partner lost his job. We are sure that the applicant is telling the truth when she says

that the door was installed before she and her partner signed the lodger agreement.

20. We are also sure that there was no agreement that she and her family might use the downstairs living room or any other facilities in conjunction with the respondent and his family.
21. It follows that we are sure that the respondent has no defence under article 2(1)(h) of the 2006 Order and is liable in principle to the making of a rent repayment order against him. We have a discretion under section 43(1) of the Housing and Planning Act 2016 whether to make a rent repayment order at all, but in our judgment this is an appropriate case to do so, subject always to the amount of the order.

The amount of the rent repayment order

22. We turn then to the amount of rent repayment order which we should make. Section 44 of the 2016 Act provides:

“(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...

(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.”

23. The maximum is the amount of the rent paid in the relevant period less the appropriate figure for universal credit. In this case the relevant period is the rent paid from 1st May 2020 (the date from which the licensing requirement applied) to 10th February 2021 (the day before the respondent applied for a temporary exemption notice). From this it is common ground that we have to deduct a fair element of the utilities bills (which were for the whole of the property).

24. The tables on p 32 of the applicant’s bundle were agreed with respect to rent paid, the arrears and universal credit received. It was also agreed that deposit of £1250 was used towards paying off arrears and that the oldest arrears would be paid first. Given that the allowable claim period is between 1st May 2020 and 10th February 2021, the period is 9 months (May 2020 to January 2021) plus 10 days. The rent paid May 2020 to January 2021 was £10,150.00. The February 2021 rent paid was £1000 and so 10 days (out of 28) is £357.14. The total rent paid in and for claim period is £10,507.14.
25. The deposit of £1250 was also used to pay rent arrears. The earliest rent arrears of £750 were accrued in April 2020 (i.e. before the claim period) thus just leaving £500 of the deposit. This is therefore allocated to pay arrears in May and so now counts as rent paid during that month. Thus, total rent paid during the allowable claim period is £11,007.14.
26. Turning to universal credit, there is a need to apportion the February 2021 payment on the assumption as to the sum paid in arrears for February 2021 – 10 days would be £150.47 out of £421.33 for the month. Thus, the total for the claim period stands to be reduced down from £5,344.28 to £5,073.42.
27. As to utilities bills, Ms Balaindra submitted that a division of 60:40 between respondent and applicant would be appropriate on the basis that his was a family of five whereas hers was a family of three. We disagree. The flats were similar as would be the usage of heating and hot water. 50:50 would be normal. £750 per year equates to £60.50 per month or £2.05 per day. Therefore, 9 months and 10 days is £583.00.
28. Putting these figures together gives:

Total Rent Paid:		£11,007.14
LESS		
Universal Credit:	- 5,073.42.	
Utilities Bills:	- 583.00	5,656.42
		<hr/>
If it were 100%		£5,350.72

29. However, it is not automatic that the Tribunal makes an order in that amount. That figure is just the maximum.
30. Fancourt J, the President of the Lands Chamber of the Upper Tribunal held in *Williams v Parmar* [2021] UKUT 0244 (LC):

“24. It... cannot be the case that the words ‘relate to rent paid during the period...’ in section 44(2) mean ‘equate to rent paid during the period...’ It is clear from section 44 itself and from section 46 that in some cases the amount of the RRO will be less

than the total amount of rent paid during the relevant period. Section 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and section 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.

25. However, the amount of the RRO must always 'relate to' the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary 'starting point' for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in section 44(4).

26. In this regard, I agree with the observations of the Deputy President of the Lands Tribunal, Judge Martin Rodger QC, in *Ficcara v James* [2021] UKUT 0038 (LC), in which he explained the effect of the Tribunal's earlier decision in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC). *Vadamalayan* is authority for the proposition that an RRO is not to be limited to the amount of the landlord's profit obtained by the unlawful activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in section 44(4)."

31. We look first at the tenants' conduct. Apart from the fact that arrears have arisen (which was not their fault), we find that there is no relevant conduct. As regards the landlord, there are two matters. First, his attempt to evict the tenants in the middle of the pandemic. Second, the disrepairs identified by Mr Rana, although these are not of the most serious kind.
32. So far as the respondent's financial position is concerned, he is in work and the maximum sum which may be awarded is not likely to cause substantial financial hardship. He has not been convicted of any offence.
33. There are no other relevant factors in our judgment. Looking at the matter in the round and weighing these matters it is appropriate in the exercise of our discretion to award 80 per cent of the maximum. This

reduces the figure of £5,350.72 to £4,280.57. We shall make a rent repayment order in that sum.

Costs

34. We have a discretion as to who should pay the fees payable to the Tribunal. These comprise an issue fee of £100 and a hearing fee of £200. The applicant has won. In these circumstances in our judgment it is appropriate that the respondent should pay these costs.

DETERMINATION

- a) The Tribunal makes a rent repayment order whereby the respondent shall pay the applicant £4,280.57.
- b) The respondent shall pay the applicant the fees payable to the Tribunal in the sum of £300.

Name: Judge Adrian Jack

Date: 15 November 2021