**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2017] UKUT 264 (LC)**
**UTLC Case Number: HA/29/2016**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***HOUSING ACT 2004 – Rent Repayment Orders – whether Tribunal has discretion to refuse - reasons***

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)**

**BETWEEN:**

**THE LONDON BOROUGH OF NEWHAM**
**Appellant**

**and**

**JOHN FRANCIS HARRIS**
**Respondent**

**Re: Flat 187 Grange Road, London E13 0HA**

**Before: Siobhan McGrath, Chamber President – First-tier Tribunal (Property Chamber) sitting as a Judge of the Upper Tribunal (Lands Chamber)**

**Sitting at: The Royal Courts of Justice**

**16th May 2017**

*Mr S Madge-Wyld* for the appellants instructed by the London Borough of Newham
*Ms F Julian* for the respondent instructed by Tolhurst Fisher solicitors

**© CROWN COPYRIGHT 2017**

The following cases are referred to in this decision:

*Parker v Waller* [2012] UKUT 301

*Tanfern Ltd v Cameron-MacDonald (Practice note)* [2000] 1 W.L.R. 1311

*Piglowska v Piglowska* [1999] 1 W.L.R. 1360.

## DECISION

## Background

1. This is an appeal against the decision of the First-tier Tribunal (Property Chamber) and concerns Rent Repayment Orders (RROs) under the Housing Act 2004. The Tribunal decided that even where the mandatory conditions for an RRO have been made out, the Tribunal retains a residual discretion whether or not to actually make an order.

2. The Housing Act 2004 introduced a regulatory regime where certain landlords of residential property are required to obtain a licence from their local authority if they wish to engage in the letting of accommodation. The core provisions relate to specified houses in multiple occupation and are contained in Part 2 of the Act. This matter however is concerned with Part 3 of the Act which deals with the selective licensing of other residential accommodation.

3. Under Part 3 a local authority may designate an area to be subject to selective licensing and where it does so, all landlords of residential accommodation are required to hold an appropriate licence. From 1st January 2013 the London Borough of Newham introduced borough-wide licensing for all privately rented properties. The respondent, Mr Harris is a landlord within the area and failed to obtain a licence for his property at 36 Crofton Road, London E13 8QS.

4. One of the consequences of failing to obtain a licence is that applications may be made to the First-tier Tribunal for orders requiring rent to be repaid to a tenant or housing benefit to be repaid to a local authority. In this case the London Borough of Newham made such an application but in a decision dated 18th August 2016, the Tribunal declined to make an order. The Tribunal also refused permission to appeal but on 11th January 2017, the Deputy President of the Upper Tribunal (Lands Chamber) gave permission because he said:

> "The extent of the discretion to make rent repayment orders conferred on the first-tier tribunal by sections 96 and 97 of the Housing Act 2004, is a matter of considerable importance. The facts underlying the proposed appeal raise a number of features….which make this an appropriate case for the Tribunal to consider the scope of the FTT's powers"

The appeal was heard on 16th May 2017. The London Borough of Newham was represented by Mr Madge-Wyld and Mr Harris by Ms Julian both of counsel.

*Facts*

5. Broadly speaking the facts are not in dispute. Mr Harris is a landlord with properties located within the Borough of Newham but his main business is that of funeral director. One of his two properties in the area is 36 Crofton Road, London E13 8QS. The tenant of the flat had first rented the property from Mr Harris in 2003. It was common ground that the weekly rent of £125 had not been increased since the tenancy began and now represented about half of the average market rent for a property of that type. The tenant has been in receipt of housing benefit to cover the entirety of the rent since she moved in.

6. In 2012 Newham sent Mr Harris notification that he would be obliged to apply for a property licence when the selective licensing scheme commenced the following January. Initially it seems Mr Harris did not take any steps to obtain a licence but on 29th October, 2013 one of Mr Harris's staff registered for an online account with Newham on his behalf. On that same day and on two other occasions on 5th November, 2013, a partial application for a licence was made but all three attempts terminated at the stage of entering the property address

7. On 9th January, 2014 Newham wrote to Mr Harris at both the Crofton Road address and his office address (although using the wrong postcode) reminding him of the need to obtain a licence. On 30th January, 2014 Newham wrote again with a final warning to Mr Harris that he should apply for a licence or else would be at risk of prosecution and also of having a rent repayment order made against him.

8. On 15th October 2014, Mr Harris telephoned Newham and advised them that he believed he had already made an application for a licence. When he was informed there was no record of this he asked for a paper application to be sent to him instead but was told that as an enforcement officer had visited the property, advice would have to be taken.

9. On 20th November 2014 an officer from Newham telephoned Mr Harris to explain why a paper application could not be sent and as a result of the conversation on 24th November, Newham sent a notice of intended prosecution together with a hard copy of the licence application form. The notice gave Mr Harris two options: the first option was to accept a formal caution, to apply for a licence and pay specified costs; the second option was to go to the magistrates court to contest the prosecution but if found guilty to pay a fine of up to £20,000 plus costs, to still have to apply for a licence and to face the possibility that the authority would obtain a Rent Repayment Order from the FTT.

10. On 7th May, 2015, Mr Harris was served with a summons prosecuting him for the failure to obtain a property licence. On 18th May, 2015, Newham wrote to Mr Harris

agreeing to deal with the prosecution by offering him the opportunity to accept a caution. The letter states:

> "The council has reconsidered your case and are on this occasion willing to offer you a settlement upon the following basis –
>
> 1. To accept a simple caution
> 2. To obtain a property licence for your property at 36 Crofton Road
> 3. To pay the property licence fee of £500.00 plus payment of additional enforcement charge of £300.00
> 4. To pay the Council's legal costs of the prosecution proceedings in the sum of £300.00
> 5. The simple caution to be agreed, signed on each page, payment of the total sum of £1,006.96 and the licence application to be fully completed and submitted. All of the terms to be completed no later than 4 pm on the 28th May, 2015.

Please note that if you fail to comply with all the terms of the settlement being offered the council reserve the right to proceed with its prosecution proceedings against you."

11. On 21st May, 2015, Mr Harris made an application for a licence and accepted a caution. On 25th June 2015, Newham served Mr Harris with a notice of intended proceedings to obtain a rent repayment order against him and asking for his representations. On 21st July, 2015, Mr Harris responded as follows:

> "In response to your notice of 25th June 2015 please find below my written representations:
>
> 1. It was never my intention to avoid obtaining the necessary licence and you will see from your records that I attempted to register on line several times but on each occasion the process failed.
> 2. I would have responded promptly to the reminder letters from your department had they been sent to the correct address. Unfortunately, the letters were sent to London E16 5PA not E6 5PA and therefore not received by me or my office.
> 3. You will see from your records that I paid my fine immediately and instantly registered for the licence by post having been sent a paper copy of the application for registration.
> 4. I would also like you to take into consideration the amount of rent I have been charging for this property. I am not a greedy landlord. The monthly rent of £500 is extremely reasonable for a three bedroomed house in this area. I make no profit from this rental income and the DSS has benefitted from this low rent. This property could command a rent of at least £1,200 per calendar month in the public sector but my company has been a part of the London Borough of

Newham for over 130 years and I see this low rental as a way for me to give something back to the community.

Finally I accept I did not have the relevant licence for the period mentioned but I would like to emphasise that at no time was I deliberately avoiding obtaining this licence and would ask that you look favourably on this written representation."

12. An officer from Newham wrote in response to this letter on 12th August 2015, setting out the history of the communication about the licence and concluding that Mr Harris knew about the requirement to obtain a licence as he had licenced other properties and that "I accept that the monthly rent you charge £500 per month is below the market value. However, you were receiving public money of £5,801.43 housing benefit paid to you as the appropriate person for the property which required to have a licence but was operating without a licence."

13. On 19th October 2015, Mr Harris was granted a property licence and in 2016 the council applied to the FTT for a Rent Repayment Order.

*The Statutory Provisions*

14. As stated above the London Borough of Newham had designated the whole of its region as being subject to selective licencing under Part 3 of the Housing Act 2004. By section 95(1) of the Act a person commits an offence if he was a person having control or management of a house which is required to be licenced under Part 3 but is not so licensed.

15. It should be noted that this case relates to the Housing Act 2004. Subject to transitional provisions, the Housing and Planning Act 2016 replaced the legislation relating to applications for RROs in England from 6th April 2017 (although the provisions continue to apply in Wales). References therefore are to the provisions as they applied prior to that date.

16. Section 96 provides:

(1) For the purposes of this section a house is an "unlicensed house" if–

(a) it is required to be licensed under this Part but is not so licensed, and

(b) neither of the conditions in subsection (2) is satisfied.

……………………………..

(5) If–

(a) an application in respect of a house is made to the appropriate tribunal by the local housing authority or an occupier of the whole or part of the house, and

(b) the tribunal is satisfied as to the matters mentioned in subsection (6) or

(8), the tribunal may make an order (a "rent repayment order") requiring the appropriate person to pay to the applicant such amount in respect of the housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 97(2) to (8)).

(6) If the application is made by the local housing authority, the tribunal must be satisfied as to the following matters

(a) that, at any time within the period of 12 months ending with the date of the notice of intended proceedings required by subsection (7), the appropriate person has committed an offence under section 95(1) in relation to the house (whether or not he has been charged or convicted),

(b) housing benefit has been paid (to any person) in respect of periodical payments payable in connection with the occupation of the whole or any part or parts of the house during any period during which it appears to the tribunal that such an offence was being committed,

(c) that the requirements of subsection (7) have been complied with in relation to the application.

…………………………..

(8) If the application is made by an occupier of the whole or part of the house, the tribunal must be satisfied as to the following matters–

(a) that the appropriate person has been convicted of an offence under section 95(1) in relation to the house, or has been required by a rent repayment order to make a payment in respect of housing benefit paid in connection with occupation of the whole or any part or parts of the house.

(b) that the occupier paid, to a person having control of or managing the house, periodical payments in respect of occupation of the whole or part of the house during any period during which it appears to the tribunal that such an offence was being committed in relation to the house, and

(c) that the application is made within the period of 12 months beginning with–

(i) the date of the conviction or order, or

(ii) if such a conviction was followed by such an order (or vice versa), the date of the later of them.

……………………………"

17. Section 97 provides:

(1) This section applies in relation to orders made by residential property tribunals under section 96(5).

(2) Where, on an application by the local housing authority, the tribunal is satisfied–

(a) that a person has been convicted of an offence under section 95(1) in relation to the house, and

(b) that housing benefit was paid (whether or not to the appropriate person) in respect of periodical payments payable in connection with

occupation of the whole or any part or parts of the house during any period during which it appears to the tribunal that such an offence was being committed in relation to the house,

the tribunal must make a rent repayment order requiring the appropriate person to pay to the authority the amount mentioned in subsection (2A).

This is subject to subsections (3), (4) and (8).

(3) …………….

(4) A rent repayment order made in accordance with subsection (2) may not require the payment of any amount which the tribunal is satisfied that, by reason of any exceptional circumstances, it would be unreasonable for that person to be required to pay.

(5) In a case where subsection (2) does not apply, the amount required to be paid by virtue of a rent repayment order under section 96(5) is to be such amount as the tribunal considers reasonable in the circumstances.

This is subject to subsections (6) to (8).

(6) In such a case the tribunal must, in particular, take into account the following matters–

(a) the total amount of relevant payments paid in connection with occupation of the house during any period during which it appears to the tribunal that an offence was being committed by the appropriate person in relation to the house under section 95(1);

(b) the extent to which that total amount–

(i) consisted of, or derived from, payments of relevant awards of housing benefit, and

(ii) was actually received by the appropriate person;

(c) whether the appropriate person has at any time been convicted of an offence under section 95(1) in relation to the house;

(d) the conduct and financial circumstances of the appropriate person; and

(e) where the application is made by an occupier, the conduct of the occupier.

…………………………….

(8) A rent repayment order may not require the payment of an amount which–

(a) (where the application is made by a local housing authority) is in respect of any time falling outside the period of 12 months mentioned in section 96(6)(a); or

(b) (where the application is made by an occupier) is in respect of any time falling outside the period of 12 months ending with the date of the occupier's application under section 96(5);

and the period to be taken into account under subsection (6)(a) above is restricted accordingly.

……………………………………”

*The Decision of the First-tier Tribunal*

18. On 18th August 2016 the FTT considered Newham's application and declined to make a rent repayment order. Having rehearsed the facts set out above the Tribunal concluded as follows:

> "*Did the parties enter into a settlement thereby preventing the applicant from applying for an RRO?*
>
> 18. The respondent stated in his letter to the tribunal dated 7th April 2016 that "*I was given an opportunity to admit liability and pay a nominal fine which I accepted not realising that by doing so that another department within the council could then retrieve monies back through rent received.*" Taking all the evidence into account, the tribunal considers that the applicant entered into a settlement with the respondent on 21st May 2015 when he accepted the terms set out in their letter dated 18th May 2015 by signing the caution and making the application. Those terms were offered in settlement of the issue of the respondent's failure to licence the property. The subsequent application for an RRO is a direct consequence of such a failure and if the applicant wished to preserve their right to apply for an RRO they should have spelt that out in the letter dated 18th May 2015.
>
> 19. Section 96(5) of the Housing Act 2004 is clear that the tribunal "may" make an RRO if satisfied as to the matters in subsection (6). That clearly gives the tribunal a discretion as to whether to make an RRO at all. Given our findings in paragraph 18 above, the tribunal declines to make an RRO in this case."

*Grounds of Appeal and Submissions*

*The First Ground*

19. There are four grounds of appeal. The first is that the FTT made an error of law by deciding that it had a discretion whether or not to make a rent repayment order in circumstances where the criteria in section 96 Housing Act 2004 were satisfied.

20. On behalf of Newham, Mr Madge-Wyld submitted that the structure of the legislation is such that a Tribunal *must* make a rent repayment order under section 96(5) whenever the conditions in subsections (6) to (8) are satisfied. He said that the meaning of the word "may" in this section is permissive, it confers jurisdiction rather than giving the Tribunal a discretion as to whether or not to make an order at all. It is common ground in this case that the relevant section 96 conditions were satisfied: Mr Harris had admitted committing the offence of failing to licence the property; housing benefit had been paid in relation to that property and the notice conditions had been complied with by Newham. Therefore Mr Madge-Wyld says, the Tribunal has no choice but to make an order in accordance with section 97.

21. He said that this interpretation of the legislation is consistent with the provisions of section 97(2) which provides that where there has been a conviction, the Tribunal *must* make a rent repayment order requiring payment of the total amount of housing benefit paid during any period that an offence was being committed. The only time that a Tribunal could make an order for less than the total amount is where there are "exceptional circumstances." He argued that it would be odd, in view of the mandatory requirement to make an order in the full amount, if the Tribunal had the power to short circuit the requirement by deciding that no such order was to be made at all.

22. He said that this is also supported by section 97(5) which requires the Tribunal to make an award in such amount "as the Tribunal considers reasonable in the circumstances" and lists a number of relevant factors. Here he argued that it would be odd for Parliament to choose to structure the Tribunal's discretion as to the amount to be paid but to leave the Tribunal an unfettered discretion whether to make an order at all.

23. Mr Madge Wyld pointed out that in *Parker v Waller* [2012] UKUT 301 no mention of a discretion was made in the analysis of the statutory provisions. Furthermore he said, if there is an ambiguity then support for his contentions is to be found in the explanatory notes to section 74 of the Act (which deals with rent repayment orders for houses in multiple occupation). These state:

> "section 74 provides that where a landlord is actually convicted of an offence under section 72(1), and the LHA makes an application, the RPT is required to make a rent repayment order in respect of all Housing Benefit received by the landlord unless exceptional circumstances apply. In all other cases the RPT has discretion to make a rent repayment order for such an amount as is reasonable in the circumstances."

24. Finally, he said it was clear from the Parliamentary debate in the House of Lords and in particular the speech of Lord Bassam of Brighton that it was not intended the Tribunal would have a discretion.

25. In response Ms Julian submits that the Tribunal patently did not make an error of law. Section 96(5) explicitly provides that where the Tribunal is satisfied as to the matters in section 96(6) or (8) it *"may"* make an order. This, she says, can only have one meaning: the Tribunal has a discretion whether or not to make an Order. Any submission to the contrary flies in the face of a plain reading of the Act.

26. She accepted that the discretion contained in section 96(5) is clearly subject to section 97. However she contended that this does not mean that there is no discretion at all rather that the discretion was restricted when section 97(2) applied. She submitted that in light of the clear wording of the Act the Tribunal did not need to have recourse to the Explanatory Notes, to Hansard or *Parker v Waller* which did not in any event address the point.

*Decision on First Ground*

27. I find that the Tribunal does have a discretion whether or not to make a rent repayment order even when the conditions in section 96(6) or (8) are met. In my view section 96(5) is very clear: if "a tribunal is satisfied as to the matters mentioned in subsection (6) or (8) it *may* make an order." Had the draftsman intended that there should be no discretion for the Tribunal to make an order or not they would have used the word "must" or "shall." If the conditions in subsections (6) or (8) were not met then the Tribunal could not make an order and would not have a discretion to do so. To that extent the word "may" is permissive. If the conditions in subsections (6) or (8) are fulfilled and the Tribunal decides to make an order then it is necessary to consider section 97 of the Act. However in my view section 96(5) clearly means that the Tribunal should first decide whether or not to make an order before proceeding to decide the amount of the order. The word "may" therefore both confers jurisdiction and gives a discretion.

28. I do not consider that there is such ambiguity in the section which would make it permissible to have regard to Hansard. Even if this were not the case, I consider the extracts to which I was referred to be equivocal on the point as they are dealing with the amount of the order rather than the discretion to make an order at all. Equally I am not assisted by *Parker v Waller* [2012] UKUT 301 which does not deal with the point either.

29. It is correct that when the decision to make an order has been made, the Tribunal's discretion as to the amount of the order is restricted by section 97 so that on a conviction it must order the repayment of the whole amount of housing benefit subject to exceptional circumstances and where there is no conviction it must make such an award as is reasonable in the circumstances. However section 97 is predicated on an order already having being made under section 96. Section 97(1) states that "This section applies in relation to orders made by residential property tribunals under section 96(5)." I consider this reinforces my interpretation, the section does not come into play until there is an extant order under section 96(5). The mandatory provisions as to the amount of the order contained in section 97 are dependent upon an order having already been justified under section 96.

30. The task for the Tribunal therefore is as follows: firstly to decide whether the conditions in section 96(6) or (8) have been fulfilled; secondly to decide in the circumstances whether or not to make an order and finally if an order is made, then to determine the amount of the order having regard to the requirements of section 97. I should add that it will be a very rare case where a Tribunal does exercise its discretion not to make an order. If a person has committed a criminal offence and the consequences of so doing are prescribed by legislation to include an obligation to repay rent or housing benefit then the Tribunal should be reluctant to refuse an application for a rent repayment order. It should be borne in mind that in these cases it is a defence to argue

that there was a reasonable excuse for not obtaining a licence and if such a defence is successful then the conditions in section 96(6) or (8) would not be met in any event.

*The Second and Third Grounds*

31. I take these two grounds together. The second ground is that the Tribunal made an error of law in deciding that the terms of the settlement reached by Newham and Mr Harris on 21st May 2015 precluded the local authority from applying for a rent repayment order. Mr Madge-Wyld referred to the Tribunal's finding that "if the appellant wished to preserve their right to apply for an RRO they should have spelt that out in the letter dated 18 May 2015" and suggested that the inference to be drawn from this statement was that the Tribunal had decided that Newham, by entering into an agreement to settle the criminal proceedings with Mr Harris, lost its right to even apply for a rent repayment order.

32. I do not accept that submission. In order to understand the Tribunal's decision it is necessary also to consider its paragraph 19 where it is stated that: "section 96(5) of the Housing Act 2004 is clear that the tribunal "may" make an RRO if satisfied as to the matters in subsection (6). That clearly gives the tribunal a discretion as to whether to make an RRO at all. Given our findings in paragraph 18 above, the tribunal declines to make an RRO in this case" The basis of the Tribunal's decision was that it had a discretion to make an order and because of the settlement it declined to do so, it did not find that the settlement *per se* prevented the Tribunal from making an order.

33. At the hearing Mr Madge Wyld accepted that if a local authority had indeed entered into a binding agreement with an individual where they had clearly stated that they would not seek a rent repayment order then it would be wholly wrong for them to make an application to the Tribunal. That he said, was not the case here which brings us to the third ground of appeal which is that the Tribunal's decision not to make an order was one that no Tribunal properly directed on the law and facts of the case could have reasonably reached.

34. In dealing with this aspect of the appeal I bear in mind the guidance to which Ms Julian referred me in *Tanfern Ltd v Cameron-MacDonald (Practice note)*[2000] 1 W.L.R. 1311 that "the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible." Also that "An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself" (*Piglowska v Piglowska* [1999] 1 W.L.R. 1360.

35. The basis of the settlement between Newham and Mr Harris is set out in the letter of 18th May detailed at paragraph 10 above. Mr Madge-Wyld maintains that the letter only related to the criminal proceedings and was not expressed to be in full and final settlement of all issues arising from the failure to obtain a licence and that it was not a condition of the agreement that the appellant would not seek a rent repayment order. Moreover, he submitted, Mr Harris would have been aware from previous correspondence that he was, in addition to being prosecuted, separately liable to the making of a rent repayment order. Ms Julian pointed out however that the previous correspondence made a clear distinction between the option of accepting a formal caution which would also entail applying for a licence and paying costs and the alternative of prosecution which might also entail an application by the council for an RRO.

*Decision on Second and Third Grounds*

36. On the unusual facts of this case I do not think that the decision of the Tribunal can be said to have been an error of law or a decision that no reasonable Tribunal could have reached. I am satisfied that the Tribunal properly took account of the dealings between Newham and Mr Harris and that they gave the agreement between them appropriate weight. The Tribunal did not find that the settlement between the council and Mr Harris prevented them from making an RRO, rather they decided to exercise their discretion not to make an RRO on the basis of the evidence that they had heard. It would not be appropriate for me to interfere with the exercise of that discretion.

*The Fourth Ground of Appeal*

37. The final ground of appeal is that the Tribunal failed to give any reasons why it would have otherwise reduced the amount payable under the rent repayment order. This ground relates to paragraph 20 of the Tribunal's decision which is as follows:

> "*The Tribunal's discretion – factors to be taken into account*
> 20. Given the findings above, there is no need to consider the exercise of discretion under s97(6) in terms of the amount of the RRO, although the tribunal considers that there are several mitigating factors in this case which would have resulted in a considerably lower order than the total rent paid by housing benefit"

38. Mr Madge Wyld complains that the Tribunal failed to explain what the mitigating factors in the case were or to give any reasons why they justified a lower order being made. Ms Julian contends that as the Tribunal declined to make an order, the question of quantification under section 97(5) did not arise.

*Decision on Fourth Ground of Appeal*

39. I have no hesitation in rejecting this ground of appeal. The Tribunal's observations in paragraph 20 did not form part of the decision in the case and therefore there was no obligation to give reasons in justification.

*Conclusion*

40. For all of these reasons the appeal is dismissed.

Siobhan McGrath
Chamber President – First-tier Tribunal (Property Chamber) sitting as a Judge of the Upper Tribunal (Lands Chamber)

Date: 4th July 2017