UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 165 (LC)
UTLC Case No: LC-2021-477

Royal Courts of Justice,
Strand, London WC2

24 June 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – proper approach – factors relevant to determination of sum to be repaid – whether FTT's failure to take account of suggested mitigation an error of law – sections 40, 44, Housing and Planning Act 2016 – appeal allowed and decision remade

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

BETWEEN:

ROBERT HALLETT

Appellant

-and-

ALEX PARKER (1)
LAUREN ROSENBERG (2)
JOSEPH LANDES (3)

Respondents

Re: 29A Christchurch Avenue,
London NW6

Martin Rodger QC, Deputy Chamber President

Heard on: 10 May 2022

Karol Hart, of Freemans Solicitors, for the applicant
Francesca Nicholls, of Flat Justice, for the respondents

The following cases are referred to in this decision:

Aytan v Moore [2022] UKUT 027 (LC),

Ekwezoh v LB Redbridge [2021] UKUT 180 (LC)

Rakusen v Jepsen [2020] UKUT 298 (LC)

Vadamalayan v Stewart [2020] UKUT 183 (LC)

Williams v Parmar [2021] UKUT 244 (LC)

Introduction

1. The issue in this appeal is whether the First-tier Tribunal (Property Chamber) (the FTT) took into account all relevant matters when it made a rent repayment order requiring a landlord to repay the full amount of the rent he had received from tenants during the period to which the order related. The FTT was satisfied that the appellant landlord had been in control of an unlicensed HMO let to the respondent tenants.

2. Chapter 4 of Part 2 to the Housing and Planning Act 2016 (the 2016 Act) confers power on FTT to make rent repayment orders where a landlord has committed an offence to which the Chapter applies. Those offences are identified in section 40(3), 2016 Act and include the offence of being in control of an unlicensed HMO contrary to section 72(1), Housing Act 2004 (the 2004 Act). In such a case section 44(2), 2016 Act provides that a repayment order made in favour of a tenant must relate to rent paid by the tenant in a period, not exceeding 12 months, during which the landlord was committing the offence.

3. Limits on the amount of a rent repayment order are found in sections 44 to 46, 2016 Act. An order must not exceed the rent paid during the relevant period (less any award of universal credit paid in respect of rent) (section 44(3)). In determining the amount to be paid the FTT must "in particular" take into account the conduct of the parties, the financial circumstances of the landlord, and whether the landlord has been convicted of a relevant housing offence (section 44(4)). Where the landlord has already received a financial penalty or been convicted of the offence in respect of which the order is to be made, and where that offence is not a licensing offence, section 46 provides that the amount of the order is to be the maximum that the tribunal has power to order.

4. In *Williams v Parmar* [2021] UKUT 244 (LC) the Tribunal (Mr Justice Fancourt, Chamber President) emphasised the need for tribunals making rent repayment orders to conduct an evaluation of all relevant factors before deciding on the amount of the order, rather than starting from an assumption that the full rent should be repaid unless there is some good reason to order repayment of a lesser sum.

5. The FTT made the decision which gives rise to this appeal on 6 July 2021, that is, before the Tribunal's decision in *Williams v Parmar.*

6. At the hearing of the appeal Mr Hallett, the appellant, was represented by Mr Karol Hart, solicitor advocate, and Mr Parker, Ms Rosenberg and Mr Landes, the respondents, had the benefit of lay representation by Ms Francesca Nicholls, of the "Flat Justice" group. I am grateful to them both for their submissions.

The facts

7. Mr Hallett owns a lower ground floor flat in a converted house at 29A Christchurch Avenue in the London Borough of Brent. The flat was originally his home but for the last 15 years he has not lived there but has let it to tenants. He is a music promoter who travels extensively abroad and for many years he employed a letting agency to find tenants for the flat and to

take up references. Until the letting with which this appeal is concerned, he had let the flat exclusively to families.

8. In 2015 the local housing authority introduced an additional licensing scheme under the Housing Act 2004 (the 2004 Act). The scheme required all HMOs in the borough to be licenced. The new scheme did not apply to Mr Hallett's flat while it was let to families and he was unaware of its introduction.

9. In September 2019 Mr Hallett let the flat to the three respondents. They are not members of the same family and do not form a single household in the sense explained by section 258, 2004 Act. When they occupied the flat it became an HMO, applying the standard test in section 254(2), 2004 Act and the person in control of it therefore required a licence. The appellant was not told of the need for a licence by his letting agent and he did not obtain one.

10. Once the flat was let, the appellant assumed responsibility for management and did not use his letting agents as managing agents.

11. On 10 March 2020 the respondents complained to the local housing authority that the shower in the flat was in need of repair and that Mr Hallett had not done anything about it. After consulting its records, the authority formed the provisional view that the flat was an HMO and that it required to be licensed. It notified Mr Hallett of that conclusion on 1 April and on 3 April he applied for a licence.

12. When they were informed that the flat was an unlicensed HMO the tenants applied to the FTT for a rent repayment order. The period the flat was unlicensed was from 13 September 2019 to 3 April 2020 and, apportioned to that time, rent of £11,712.75 was paid by the respondents to Mr Hallett.

The FTT's decision

13. The FTT made its decision after a hearing conducted remotely at which both parties were represented. Mr Hallett admitted that the flat ought to have been licensed. He argued that he had not committed the relevant offence because in the circumstances he was entitled to rely on the defence provided by section 72(5), 2004 Act, that he had a reasonable excuse for having control of the house without a licence. His excuse was that he had entrusted the letting of his property to a reputable letting agent which had failed to inform him that he needed to obtain one.

14. In her submissions to the FTT on behalf of the tenants Ms Nicholls relied on the decision of this Tribunal in *Vadamalayan v Stewart* [2020] UKUT 183 (LC) which was said to be authority for the proposition that the full amount of rent paid by the tenants should be the starting point in determining the amount of a repayment order.

15. The FTT rejected Mr Hallett's defence. It found that although he had used agents to provide letting services his arrangement with them was "*ad hoc*" and he had assumed personal responsibility for day-to-day management of the premises during the tenancy. It said that

he ought fully to have delegated his management responsibilities if he was unable or unwilling to comply with them because of his absences from the country and his lack of experience of property management. In those circumstances the FTT found that Mr Hallett's reliance on a letting agent was not a reasonable excuse for his having control of an unlicensed HMO.

16. At paragraphs [41] to [43] the FTT expressed its conclusions. Omitting its discussion of the reasonable excuse defence, it said this:

> "41. The tribunal noted that no information had been provided concerning Mr Hallett's financial circumstances for the tribunal to take into account…
>
> 42. The tribunal noted that the property was in a fairly good condition, and notwithstanding the tenants' complaints and Mr Hallett's counter complaints we find no adverse conduct on behalf of either party. Nevertheless, we consider that nothing that has been put before the tribunal mitigates the failure to licence or provides a reasonable excuse.
>
> 43. The tribunal therefore makes a rent repayment order in the sum of £11,712.75 and an order for the cost of the application fee of £100 and the hearing fee of £200 to be reimbursed."

The appeal

17. Mr Hallett was granted permission to appeal on the ground that, by failing to give any weight to the matters he had relied on in mitigation of the rent repayment order, the FTT had failed in its obligation under section 44(4)(a), 2016 Act, to take into account the conduct of the landlord. He did not seek to challenge the FTT's conclusion that he did not have a reasonable excuse.

18. In presenting the appeal Mr Hart submitted that although an order requiring repayment of the full amount of the rent paid by a tenant was permissible, such a draconian order should be reserved for the most serious cases. That was apparent from section 46, which obliges the FTT to order repayment of the maximum permitted sum where a landlord has either been convicted of one of the relevant housing offences identified in section 46(3)(a), or has received a financial penalty in respect of such an offence. The offences to which section 46 applies have less of a regulatory flavour and are generally more serious than the offences under sections 72(1) and 95(1), 2004 Act concerned with licensing. Section 46(3)(a) offences include the use of violence for securing entry to premises, eviction or harassment of the occupiers of residential premises, failure to comply with an improvement notice or a prohibition order and breach of a banning order. Parliament had left licensing offences out of that list thereby indicating that it did not intend that they should attract the harshest penalties, even where there has been a conviction. The circumstances of this case, which involve a non-professional landlord who let a single property which was in reasonably good condition and who relied for advice on a letting agent who failed to warn him of the need for a licence, was at the lower end of any rational scale of seriousness and the FTT had therefore erred in law in imposing the a penalty right at the top of the available range.

19. On behalf of the respondents, Ms Nicholls submitted, quite rightly, that section 46 deals with circumstances in which the FTT is obliged to impose the maximum rent repayment order within its power. That does not mean that it has no discretion to impose the maximum penalty in other cases. Her general submission was that the FTT had been aware of the matters relied on by the appellant and had taken them into account in deciding that the appropriate order was for the repayment of 100% of the rent paid by the tenants. That was an exercise of the FTT's discretion which ought not to be disturbed by this Tribunal.

Discussion

20. The original rent repayment order regime in section 73 and 74 of the 2004 Act applied only to the offence of operating an unlicensed HMO. By section 74(5) (in cases not involving the receipt of housing benefit or universal credit towards rent) the amount to be repaid was to be "such amount as the tribunal considers reasonable in the circumstances." The 2016 Act, in contrast, not only extended the housing offences in respect of which a rent repayment order could be made to include serious offences of violence and harassment, amongst others, but it also abolished the yardstick of reasonableness and replaced it with the direction in section 44(2) that the amount of the order must "relate to rent paid", identifying in section 44(4) the three matters which the tribunal "must, in particular, take into account." As the President said in *Williams*, at [24]: "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."

21. It would be fair to say that the Tribunal has not found it easy to provide guidance on how these provisions ought to be applied. The Act itself provides few pointers and the policy underlying some of its provisions is difficult to detect (why in section 46(3) cases, for example, has Parliament chosen to make the severest sanction mandatory only where the landlord had already been convicted or received a financial penalty?).

22. Generally, however, as the Tribunal pointed out in *Rakusen v Jepsen* [2020] UKUT 298 (LC), at [64], the purpose of the repayment regime is not compensatory (an unlicensed HMO may be a perfectly satisfactory place to live):

> "The policy of the whole of Part 2 of the 2016 Act is clearly to deter the commission of housing offences and to discourage the activities of "rogue landlords" in the residential sector by the imposition of stringent penalties."

23. In *Williams*, at [43], the President referred to official guidance to local authorities which identified punishment, deterrence, and deprivation of financial benefits received as a result of offending behaviour as underlying policy considerations which ought to be taken into account by tribunals when determining the amount to be repaid

24. Some further indication of the general intention of the promoters of the 2016 Act can be formed by considering the explanation of the purpose of Part 2 given to the Public Bill Committee of the House of Commons by the Parliamentary Under-Secretary of State for Communities and Local Government, Mr Marcus Jones:

> "Clause 12 summarises the provisions in Part 2 of the Bill. It explains that this Part is about tackling rogue landlords and letting agents. The Government value the private rented sector. As I have said, it is an important part of our housing market, housing 4.4 million households in England. We want to support good landlords who provide decent, well-maintained homes for people, and avoid unnecessary further regulation on them. Most private landlords provide a decent service to their Tenants but we know that they are a small number of landlords and letting agents who do not manage their lettings or properties properly, sometimes exploiting their tenants – and the public purse, through housing benefit – by renting out sub-standard, overcrowded and dangerous accommodation. These landlords and letting agents often do not respond to legitimate complaints by tenants. These are the rogues that this Part applies to.…
>
> The majority, good landlords, will not be affected by this Part. However, they will benefit from it, since standards and compliance with the law across the sector will be set on a level playing field and good landlords who work hard for their tenants and comply with the law will cease to face unfair competition from the rogue landlords who ignore the law and their obligations."
>
> [Hansard 24 November 2015]

25. This explanation of the purpose of Part 2, with its battery of measures again "rogue landlords", suggests that the power to make rent repayment orders should be exercised with the objective of deterring those who exploit their tenants by renting out substandard, overcrowded or dangerous accommodation. The differential treatment of licensing offences and more serious offences in section 46, and the greater flexibility given to tribunals when ordering rent repayment in the former category, are likely to be a reflection of that objective.

26. Tribunals should also be aware of the risk of injustice if orders are made which are harsher than is necessary to achieve the statutory objectives.

27. It is apparent from the FTT's decision that it started with a presumption, often applied after the decision in *Vadamalayan*, that a rent repayment order should require the full amount of the rent to be repaid unless there is some good reason to discount it. That is clear from the extract from its decision reproduced above in which, after finding there to be no aggravating or mitigating factors, it said that "therefore" it would make an order which (although it did not say so expressly) was for repayment of the full amount received by Mr Hallett.

28. The FTT's approach was wrong in principle. As the President explained in *Williams*, at [26]:

> *"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)."

29. The President also explained, at [41], that the conduct which must be taken into account by the FTT in determining the amount to be repaid includes the conduct constituting the relevant housing offence itself, and the penalty should reflect the relative seriousness of that offence:

> "The circumstances and seriousness of the offending conduct of the landlord are comprised in the "conduct of the landlord", so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise."

30. I therefore agree with Mr Hart's submission that where section 46 does not apply, an order requiring repayment of the full amount of the rent received by a landlord should be reserved for the most serious offences justifying the most exemplary sanction. Where the offence concerned is a failure to licence an HMO, or an individual house, section 46 indicates that it was not Parliament's intention that the maximum penalty should usually be imposed. Circumstances may exist where such an order may be appropriate (for repeat offending, for example) but they will be the exception, not the rule.

31. In paragraph [42] of its decision the FTT said that "nothing that has been put before the tribunal mitigates the failure to licence or provides a reasonable excuse". It is important not to elide those two concepts. A landlord who has a reasonable excuse for managing an unlicensed HMO has not committed an offence, and no question of mitigation arises. On the other hand, circumstances which have been relied on by a landlord but which have been found by the tribunal not to supply a reasonable excuse may nevertheless need to be taken into account when it determines the appropriate amount of rent to be repaid. In this case, the FTT explained why the employment of an agent did not provide a reasonable excuse (because the agent was involved only in letting the property, not in managing it), but it ought also to have considered whether the failure of the agent to alert Mr Hallett to the need to obtain a licence was a mitigating factor which deserved to be taken into account.

32. The circumstances in which reliance on an agent may provide a reasonable excuse for a landlord neglecting to licence an HMO were considered by the Tribunal in *Aytan v Moore* [2022] UKUT 027 (LC), at [40]. Smaller landlords should be encouraged to seek the assistance of professional managing agents, because in general their tenants are likely to benefit; even where the statutory defence is not made out, the same encouragement should be reflected in the application of sanctions (as the Tribunal recognised in *Ekwezoh v LB Redbridge* [2021] UKUT 180 (LC), a financial penalty case where the landlord's decision to employ an agent was an important factor in justifying the imposition of no penalty).

33. It might also have been thought relevant to the issue of mitigation that Mr Hallett is a small landlord, letting out a single property, and that the FTT accepted that he was unaware of the need to obtain a licence. It was rightly critical of his failure properly to inform himself, especially when he was out of the country for prolonged periods and had "little time for the finer details of management", but a small landlord who fails, through ignorance, to comply with a regulatory requirement might be thought to deserve some leeway. In that regard, the fact that the FTT found that property to be "in fairly good condition" is also capable of providing mitigation. The object of HMO licensing is to contribute to the achievement of

satisfactory housing standards. If a landlord has provided accommodation of a decent standard, despite failing to obtain a necessary licence, the punishment appropriate to the offence ought to be moderated.

34. In short, this was clearly not a case justifying the most stringent penalty available to the FTT. It arrived at that sanction because it assumed that the default order should be for the repayment of the full amount of the rent unless some particularly meritorious conduct justified a reduction. As I have explained that approach was wrong in principle and for that reason I set aside the FTT' decision.

35. I would add that I do not accept Mr Hart's submission that the fact that the local authority has decided not to prosecute a landlord for an offence should be treated as what he called a "credit factor" which should significantly reduce the amount to be repaid. Section 44(4) does of course require that the FTT take into account whether the landlord has at any time been convicted of a relevant housing offence. I accept also that a landlord's general good character as evidenced by an absence of convictions for other housing offences is a relevant consideration in their favour. But there are many demands on the resources of local authorities and the opportunity for tenants to apply for rent repayment orders is likely to be only one of a number of reasons why a prosecution may not have taken place. When it comes to the particular offence for which an order is sought, what matters are the relevant facts and the tribunal's assessment of how serious the offence is, not whether the local authority has decided to take action of its own.

Redetermination

36. Ms Nicholls had no instructions whether the tenants would prefer their application to be remitted to the FTT for further consideration or determined afresh by this Tribunal. Mr Hart encouraged me to provide closure for all parties by substituting my own decision rather than sending the case back to the FTT. As neither party seriously challenged the FTT's findings of fact I can base my own decision on those findings without the need to hear additional evidence. In those circumstances by far the better course is for this Tribunal now to make a determination of the appropriate order.

37. In fixing the appropriate sum I take account of the following: that the offence is not of the most serious type; that proper enforcement of licensing requirements against all landlords, good and bad, is necessary to ensure the general effectiveness of licensing system and to deter evasion; that Mr Hallett failed to take sufficient steps to inform himself of the regulatory requirements associated with letting an HMO; that this was the first occasion on which he had let the property to a group of tenants who did not form a single household, and hence the first occasion when a licence was required; that he was not alerted by his letting agent to the need to obtain a licence, when he might reasonably have expected he would be (especially as the same agent had previously let the property on his behalf in circumstances which meant no licence was required); that the condition of the property was fairly good; that he applied for and was granted a licence as soon as he became aware that one was required; that he lets no other property.

38. Taking all these matters into account I determine that the appropriate order in this case is for the repayment of £1,000 to each of the three tenants, the total figure of £3,000 representing approximately 25% of the sum paid by the tenants in rent in the period of about seven months during which the offence was being committed.

Martin Rodger QC,

Deputy Chamber President

24 June 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.