

UPPER TRIBUNAL (LANDS CHAMBER)



[2023] UKUT 233 (LC)

UTLC Case Number: LC-2023-187  
Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

*HOUSING – RENT REPAYMENT ORDER – maximum liability where not all tenants are applicants – joint and several liability for rent – order to be calculated by reference to the amount actually paid by the applicants*

**BETWEEN:**

**CLARA FEIGE VILA MOREIRA (1)  
ZACHARY GANNY ADEOLA GBADEBO (2)  
PIPER LOUISE SARAH SAMUEL (3)**

**Appellants**

**-and-**

**NICHOLAS AND VARUNI MORRISON**

**Respondents**

**Re: 3 Colindeep Gardens,  
London,  
NW4 4RU**

**Upper Tribunal Judge Elizabeth Cooke  
Determination by written representations  
Decision Date: 21 September 2023**

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The following cases are referred to in this decision:

*Kowalek and another v Hassanein Ltd* [2022] EWCA Civ 1041

*Sturgiss and another v Boddy* [2021] EW Misc 10 (CC)

1.

## **Introduction**

1. This is an appeal from a rent repayment order made by the First-tier Tribunal against the respondent landlords, Mr and Mrs Morrison. The tenants who applied for the order are three of the five tenants who lived in the house at the relevant time; they appeal the order made in their favour, with permission from the FTT. They say that instead of making an order that the respondents repay 70% of the rent the three of them paid (three-fifths of the whole) the FTT's order should have been for repayment of 70% of the whole of the rent because each had been jointly and severally liable to the respondents for the whole.
2. The appeal has been decided under the Tribunal's written representations procedure. The appellants' grounds of appeal were drafted by Clark Edward Barrett of Represent Law Ltd, and the respondents have not been legally represented.

## **The factual background**

3. On 16 September 2020 the respondents entered into a tenancy agreement with the three appellants and two other tenants, Federico Pantaleoni and Yehia Shamseldin. As there were five occupiers the property was a house in multiple occupation, and was required to be licensed under Part 2 of the Housing Act 2004 until Yehia Shamseldin died on 23 June 2021. The property was not licensed.
4. Section 41 of the Housing and Planning Act 2016 makes provision for a tenant to apply to the First-tier Tribunal for a rent repayment order where a landlord has committed one of several specified offences including the offence of being in control of or managing a house in multiple occupation which was required to be licensed and was not, under section 72(1) of the Housing Act 2004. The respondents made an application to the FTT for a rent repayment order in May 2022.
5. The FTT found that the offence had been committed and it decided to make a rent repayment order. It recorded that the rent for the property was £2,817 per month, and that the total for the period 16 September 2020 to 23 June 2021 was therefore £26,001. It said at its paragraph 19:

“The rent was paid by Ms Samuel, who acted, with the agreement of all parties, as the lead tenant in respect of rent. It was accepted that Ms Samuel collected rent from the other Applicants, and, when she had done so, paid the rent to the Respondents from her account.

20. On the evidence, therefore, each of the Applicants in this application, as a matter of substance, paid a fifth of the total, and that three fifths of the total that was paid over from Ms Samuel's bank account was the total of their personal contributions.
6. The FTT decided that since applicant had paid one fifth of the rent the maximum possible rent repayment order was £5,200 per applicant. The FTT rejected the argument that the rent repayment order should be calculated by reference to the whole of the rent on the basis that each tenant was jointly and severally liable for the whole under the terms of the tenancy agreement.

7. The FTT went on to consider the seriousness of the offence and the conduct of the parties, and ordered that the appellants repay £3,640 to each of the three tenants, representing 70% of the maximum. Subsequently it gave the appellants permission to appeal its decision that the repayment was to be calculated by reference to the rent they had paid rather than to the whole of the rent.

### **The arguments in the appeal**

8. The appellants' primary argument is that the tenancy agreement was a joint tenancy with five individuals being the tenant. Each individual was jointly and severally liable for the whole rent. The rent was indivisible, and the FTT should have based its assessment of the amount to be repaid on the whole rent, rather than on three fifths of it. They make three points in the grounds of appeal, the first being that the FTT erred in its interpretation of the statute.

9. Section 44(3) of the Housing Act 2004 states:

“(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.”

10. For the tenants it is argued that the language of section 44(3) supports their position since the reference is to rent “paid”, and not to “rent paid by any person”, in contrast to the provision about universal credit “paid to any person”; the intention must have been to set the maximum at the whole of the rent. If Parliament had meant to limit the rent to that which was paid by any person it would have said so.

11. At paragraph 25 of its decision the FTT said this:

“Section 44 of the 2016 Act deals with the calculation of an RRO. By section 44(2), “[t]he 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 ...”. As the terminology of the section (and indeed, this Part of the Act as a whole) makes clear, a rent repayment order is made in respect of an individual tenant. The part does not refer to a tenant’s liability to pay rent, but rather to what rent he or she has actually paid. That concrete payment is in issue is reinforced by the reference to the landlord being obliged (ie by an order) to “repay”. That implies (as does the title of the order itself) that the order is limited to that which was paid in the first place. If an order could amount to more than what was paid by an individual tenant, it would not be a *repayment*.”

12. I believe the intention was to refer to section 44(3), since that is the provision quoted. I respectfully agree with the FTT’s analysis; the word “repayment” is crucial. An order that the landlord pay to the tenant a sum that he or she might have had to pay but had not in fact paid, that would not be a repayment.

13. Moreover, the tenants' argument ignores the wording of section 44(2), which says that the amount of the rent repayment order "must relate to the rent paid during the period mentioned in the table" and sets out a table with two columns. The left hand column lists the offences and the right hand column is headed "the amount must relate to rent paid *by the tenant* in respect of"(emphasis added) and then lists the relevant periods for the different offences, the period for a section 72(1) offence being a period not exceeding twelve months during which the landlord was committing the offence. So what is relevant is payment by the tenant, not liability to pay, and not payment by anyone else.

14. Second, the tenants take issue with what the FTT said in its paragraph 26, following on from the words quoted above:

"This approach, which emphasises real payment and consequent repayment in the construction of section 44 echoes the approach of the Court of Appeal (and Upper Tribunal) in *Kowalek and another v Hassanein Ltd* [2022] EWCA Civ 1041 ...(see the passage from paragraph [18] following). Albeit while dealing with a different issue, the Court's discussion proceeds on the basis that the core criterion is actual payment (during the relevant period), not some broader concept of entitlement or liability."

15. *Kowalek* was about a rent repayment order made on the application of tenants who had been in substantial rent arrears during the period when the landlord was committing the offence. The order was calculated by reference to rent they had paid during that period and in respect of that period. The Court of Appeal upheld the decision of the Upper Tribunal that rent arrears paid after the landlord had ceased to commit the offence could not be taken into account.

16. The tenants argue that the FTT was wrong to rely upon *Kowalek*. They point out that the FTT found that the rent of £26,001 was paid in full. *Kowalek* is about the effect of arrears; the FTT should not have relied upon *Kowalek* to reduce the maximum rent repayment order to £15,600; in doing so the FTT was "essentially stating that there were arrears of £10,400." That was not the effect of the FTT's decision. The FTT decided, consistent with *Kowalek*, that the maximum rent repayment order is the rent actually paid by the individual applicant tenant during the period in which the landlord was committing the offence. There is no merit in the tenants' argument about *Kowalek*.

17. Third, the tenants disagree with the FTT, which said that it would be inequitable for them to receive a rent repayment order for shares of rent that they did not pay. On the contrary, they say, it is contradictory and unfair that they should each be jointly and severally liable for the whole rent yet can only get a rent repayment order by reference to their share of the rent. The landlord benefits from joint and several liability; if a rent repayment order by contrast is calculated only in relation to the fraction paid by an individual then the landlord is having his cake and eating it.

18. On this point the tenants rely upon the decision of HHJ Luba KC in *Sturgiss and another v Boddy* [2021] EW Misc 10 (CC), a county court decision about an application for

damages for failure to protect a deposit. The applicants were two of the three tenants, yet the landlord was ordered to pay a penalty calculated by reference to the whole of the deposit pursuant to section 214(4) of the Housing Act 2004 which reads:

“(4) The court must order the landlord to pay to the applicant a sum of money not less than the amount of the deposit and not more than three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.”

19. For the landlord it was argued that the penalty should be calculated by the share of the deposit attributable to the applicant tenants only, being two-thirds of the whole rather than all of it. The judge at paragraph 85 explained that liability was not severable in that way, and added :

“If that is more than equity would suggest should be recovered by these two claimants alone, it has always been open to the other co-tenants to join in the claim. They have elected not to do so.”

20. Similarly, it is argued for the appellants, the rent repayment order should be calculated by reference to the whole of the rent.

21. The answer to that submission is that the decision in *Sturgiss* was made under a very different statutory provision. Section 214(4) of the 2004 Act is not a provision about repayment, but about the payment of a penalty. It is useful to compare section 214(3A) which applies where the tenancy has ended (which was not the case in *Sturgiss*) in addition to section 241(4) and provides:

“(3A) The court may order the person who appears to the court to be holding the deposit to repay all or part of it to the applicant within the period of 14 days beginning with the date of the making of the order.”

22. That subsection enables repayment of all or part of the deposit; thus where an applicant had paid a part of the deposit payable by a group of joint tenants the court can order that tenant's own contribution to be repaid (since it would make no sense to order “repayment” of an amount that that applicant had not paid). But the penalty prescribed in section 214(4) is not a repayment and it is calculated with reference to the whole of the deposit.

23. A rent repayment order must be an order for repayment of what an applicant has paid and not of what they might have had to pay in circumstances that did not arise, for example where one of their fellow tenants had failed to pay their contribution. That is obviously correct as a matter of language, and I do not see that fairness to the tenants requires any other construction; I do not agree that their joint and several liability for the rent makes it fair that a rent repayment order should be calculated by reference to rent they have not paid.

24. Moreover to do so would be very unfair to the landlord. It would mean that each tenant could apply alone for a rent repayment order and each could receive a rent repayment

order calculated by reference to the whole rent, with draconian consequences for the landlord. A rent repayment order is itself a penalty; to multiply it in that way cannot be right and is not an available construction of the statutory language.

## **Conclusion**

25. In conclusion, I am not persuaded by any of the arguments made for the tenants. The appeal fails and the FTT's decision is upheld.

**Upper Tribunal Judge Elizabeth Cooke**

**21 September 2023**

## **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.