UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2023] UKUT 40 (LC)

UTLC No: LC-2022-349

Royal Courts of Justice, Strand,
London WC2A 2LL

7 February 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – landlord in control of unlicensed HMO – pending application and reasonable excuse defences – quantum of repayment order – s.72(4)and (5), Housing Act 2004 – s.44, Housing and Planning Act 2016 – appeal allowed

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

BETWEEN:

MR PAUL FASHADE

Appellant

-and-

MS MAILNA ALBUSTIN (1)
MR JEREMIAH JOHNSON TAYLOR (2)
MS HAYLEY WHITEHORN (3)

Respondents

Re: 316 Devonshire Road,
Lewisham,
London SE23

Martin Rodger KC, Deputy Chamber President

Decision on written representations

The following cases are referred to in this decision:

Acheampong v Roman [2022] UKUT 239 (LC)

Ficcara v James [2021] UKUT 38 (LC)

I.R. Management Services Ltd v Salford City Council [2020] UKUT 81 (LC)

Williams v Parmar [2021] UKUT 244 (LC)

Introduction

1. This appeal concerns an HMO at 316 Devonshire Road in Southeast London owned by the appellant, Mr Fashade, which remained unlicensed for the whole of the period from 13 August 2020 to 13 January 2022. The greater part of that period coincided with national lockdowns and other public health measures taken in response to the Covid-19 pandemic.

2. Between 15 December 2020 and 16 December 2021 the HMO was occupied by tenants who included Ms Albustin and Mr Taylor, the first and second respondents; for part of that period Ms Whitehorn, the third respondent, was also one of the tenants.

3. On 4 May 2022 the First-tier Tribunal, Property Chamber (the FTT) made a rent repayment order against the appellant under section 44, Housing and Planning Act 2016, requiring him to repay £8,350.39 to Ms Albustin and Mr Taylor (jointly) and a further £2,880.55 to Ms Whitehorn.

4. The order was made on the basis that the FTT was satisfied that throughout the period of twelve months predating 16 December 2021, the appellant had committed the offence, contrary to section 72(1), Housing Act 2004, of being in control or management of an unlicensed HMO; (the FTT referred incorrectly in its decision to the offence under section 95(1), 2004 Act, but nothing turns on that slip).

5. Mr Fashade now appeals against the FTT's decision on two grounds.

6. First, Mr Fashade's case before the FTT was that the HMO had originally been properly licensed but that the licence had expired during the pandemic and he had been unable to renew it; he claimed that he received no answer to his requests for information about how to obtain a new licence despite attempting to contact the local authority online, by email and by telephone. It is said that in reaching its decision the FTT took no account of Mr Fashade's efforts to obtain a licence, either when determining that he had committed an offence or when setting the appropriate penalty, because he was unable, at that time, to provide copies of his emails to the local housing authority. The first issue is whether the FTT dealt appropriately with Mr Fashade's evidence on that aspect of the case.

7. Secondly, the FTT based its assessment of the amount of rent to be repaid by Mr Fashade on the total amount of rent paid by the three tenants during the relevant period of their occupation of the HMO. It made some small deductions to reflect utility bills which were covered by the rent but it is said that it made no assessment of the seriousness of the offence and considered wrongly that in the absence of specific mitigating factors the amount it should award should be the maximum amount possible.

8. None of the parties are professionally represented and the Tribunal directed that the appeal be determined on the basis of their written submissions, without an oral hearing.

Relevant statutory provisions

9. Part 2 of the Housing Act 2004 (the 2004 Act) provides for the licensing of house in multiple occupation (HMOs). It has never been in issue that at all material times Mr Fashade's house at 316 Devonshire Road in Lewisham was an HMO which was required by section 61, 2004 Act to be licensed.

Offences and defences

10. By section 72(1) of the 2004 Act a person commits an offence if they have control of or are managing an HMO which is required to be licensed under Part 2 of the Act but is not so licensed. The offence is subject to three statutory defences, two of which are relevant to this appeal.

11. Section 72(4) provides that in proceedings against a person for an offence under subsection (1) it is a defence that, at the material time –

> "(a) a notification had been duly given in respect of the house under section 62(1), or
>
> (b) an application for a licence has been duly made in respect of the house under section 63
>
> and that notification or application was still effective (see subsection (8))."

12. There was no notification under section 62(1) in this caseso section 72(4)(a) is not relevant.

13. An application under section 63 is an application for an HMO licence.

14. Subsection (8) of section 72, to which attention is drawn in subsection (4), provides that notification or application will still be "effective" if it has not been withdrawn by the applicant or determined adversely by the local housing authority, or, if it has been so determined, that the time for an appeal has run out, or an appeal has been brought but not concluded.

15. The effect of section 72(4)(b) is that a person who is in control of or managing an unlicensed HMO does not commit an offence contrary to section 72(1) if they have "duly made" an application for a licence for the HMO and their application remains undetermined or subject to an appeal.

16. Section 72(5) provides a separate defence where the person having control of or managing an unlicensed HMO had a reasonable excuse for doing so.

17. In *I.R. Management Services Ltd v Salford City Council* [2020] UKUT 81 (LC) the Tribunal explained that the burden of proving a defence of reasonable excuse was on the person controlling or managing the HMO, and they must do so only on the balance of probability. It was not necessary for the tenant or local authority seeking a remedy for an offence to show that there had been no reasonable excuse, nor was it necessary that the defence be provided to the criminal standard of proof, beyond reasonable doubt.

18. The same principle applies to the defence under section 72(4)(b). It is for the manager or controller of the HMO to prove on the balance of probability that they had duly applied for a licence if they wish to avoid liability for the offence under section 72(1).

Quantum of rent repayment orders

19. Section 43 of the Housing and Planning Act 2016 (the 2016 Act) gives the FTT power to make a rent repayment order when it is satisfied, beyond reasonable doubt, that a landlord has committed any of the offences listed in section 40, which include the offence of being in control of an unlicensed HMO contrary to section 72 of the 2004 Act.

20. Section 44 provides instructions on how the amount of a rent repayment order is to be determined. By subsection (2) the amount to be repaid "must relate to the rent" paid during the period, not exceeding 12 months, when the landlord was committing the relevant offence. In determining the amount the tribunal is directed by subsection (4), to take into account in particular three factors, namely: the conduct of the landlord and the tenant; the financial circumstances of the landlord; and whether the landlord has at any time been convicted of a housing offence.

21. In *Williams v Parmar* [2021] UKUT 244 (LC) the Tribunal (Sir Timothy Fancourt, Chamber President) confirmed that in assessing the amount of a rent repayment order it was not right to award the full amount of the rent (less payments for utilities), subject only to deduction for good conduct on the part of the landlord, poor conduct by the tenants, or the landlord's financial circumstances. It was necessary in each case to consider the seriousness of the offence (a crucial element of the landlord's conduct) and to fix the amount of the order having regard to its seriousness and all other relevant considerations, including those particularly identified in subsection (4).

22. The Tribunal (Judge Cooke) gave further guidance on the quantification of rent repayment orders in *Acheampong v Roman* [2022] UKUT 239 (LC). It recommended, at paragraph 21, the following approach:

a. That the tribunal first ascertain the whole of the rent for the relevant period (less any relevant award of universal credit).

b. That it then deduct so much of that sum as is shown to represents payment for utilities or services consumed by the tenant and included in the rent such as for gas, electricity or internet access, but not the landlord's costs of property acquisition or maintenance.

c. That it next consider the seriousness of the offence, both as compared to the other housing offences listed in section 40 and compared to other examples of the same type of offence. The tribunal should ask itself what proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this particular offence? That represents the default penalty in the absence of any other factors but it may be higher or lower in light of the final step.

d. The tribunal should finally consider whether any deduction from, or addition to, that figure should be made in the light of other factors, including in particular the conduct of the parties, the landlord's financial circumstances and any previous convictions, as listed in section 44(4).

The evidence before the FTT

23. I have been provided with a substantial volume of material, much of which was not shown to the FTT. In determining the appeal I have taken account only of those documents which were provided to the FTT. No good reason has been given why other relevant documents were not supplied in good time to be used at the original hearing. It is clear that email communications with the local housing authority were accessible to Mr Goodsell (Mr Fashade's letting agent) and that he was later able to provide copies to Mr Fashade which he now wishes to rely on in the appeal. The only documents to which I have had regard are the parties' statements of case for the appeal, and the material which the FTT read before the hearing. That material includes a bundle of documents prepared by Mr Fashade which contained his statement of case and his own and Mr Goodsell's witness statements.

24. The hearing before the FTT was conducted by remote video platform. Mr Fashade was represented by Mr Goodsell and the former tenants represented themselves.

25. The FTT confirmed in its decision that it had read the documents supplied by the parties (other than some submitted shortly before the hearing by Mr Fashade). It will therefore have been aware of Mr Fashade's case, as recorded in his statement of reasons for opposing the application, that the property had been licensed as an HMO from 2015 until 2020 but that "unfortunately the licence was up for renewal during the period of the global pandemic and a series of lockdowns." The statement continued:

> "LC [Lewisham Council] were fully aware that the licence obtained in 2015 reference 201500088, was due to expire mid pandemic. Attempts were made to renew the licence online however the system would not allow us to input details and it was obvious the system was having technical issues. Attempts were also made to contact LC by phone but the advertised number was not being answered.

> Finally emails were sent to LC regarding the licence renewal these were acknowledged by LC who stated they would get in contact with us. Please see CG01 & CG02. LC did not follow up on this statement but during this time we were able to obtain HMO renewals with neighbouring boroughs."

26. The documents referred to in this extract from Mr Fashade's statement of case were included in the FTT's bundle. CG01 was an email from Mr Fashade to the email address of Lewisham's private sector enforcement team on 20 March 2020 which made no mention of 316 Devonshire Road but requested permission to use additional rooms at a different HMO to enable tenants to self-isolate during the pandemic. CG02 was a separate email to Mr Fashade from the same enforcement team also dated 20 March 2020 but bearing a different subject heading and timed three hours after CG01, stating that it was an automated response and that a further response would follow within 5 working days. CG02 was not exhibited as part of a chain of emails so it was not obvious what message it was in response to.

27. Mr Fashade's formal witness statement dated 25 February 2022 was supported by a statement of truth. In it he provided a further account of his dealings with Lewisham Council. He stated that in March 2020 attempts were made to initiate a licence renewal online "but this was unsuccessful due to a technical fault". Attempts were also made to contact the relevant team by telephone but there was no answer. He said that he had sent emails to Lewisham on two occasions asking for guidance and direction on how to deal with the renewal and on each occasion he received an automated response saying that the Council would be in contact with him. He went on: "therefore I believed they had the matter in hand … We were in the midst of a global pandemic, I was aware how this had impacted on organisations service delivery as much as it impacted on individuals so I awaited contact from Lewisham Council as stated in their emails." Mr Fashade said he had been dealing with other borough councils at the same time and had not been "hiding or evading my responsibilities as a landlord". He continued his statement with the following:

> "I believe the above explanation should be a reasonable excuse because although I made attempts to renew the licence, I have no control over Lewisham Council's systems and response times to do so."

And finally:

> "I do not believe any offence has been committed under the 2004 Act."

28. The FTT also had a witness statement from Mr Goodsell which recorded that he had been appointed to manage the HMO in December 2020. Referring to a visit to the HMO by one of Lewisham's enforcement officers, Mr Goodsell said this:

> "In regard to the licence renewal, I was surprised that Peter Boyle, licensing and enforcement officer attended and the property was not on the register. I spoke with Paul regarding this. I attempted to renew online and over the phone on 1st

July 2021 but was experiencing technical difficulties. I worked tirelessly with Lewisham Council to complete the works that was required…."

29. Mr Goodsell exhibited a detailed chronology of events to his witness statement which was intended to respond to allegations from the former tenants that repairs had not been attended to in a timely manner. Entries in June and July 2021 recorded the following:

> "30 June 2021 - Patrick informed me that council had visited regarding the HMO licence and have encouraged each person that was in to make a claim for a rent repayment order, no licence at the premises.
>
> 1 July 2021 – Housemates refusing to tell who visited from the council, Lewisham Council didn't know however confirmed licence had expired. I tried to rectify this by applying online but their system will not work.
>
> 7 July 2021 – meeting with Lewisham Council regarding HMO licence and inspect what's needed to re-licence the property."

30. Mr Goodsell also exhibited two emails he had sent to the tenants after he became aware that the property was not licensed. The first was dated 2 July 2021 and gave notice of an inspection to be carried out the following week; in it Mr Goodsell also recorded that a Council representative had visited the property on 30 June. The second email was dated 9 September 2021 and gave notice of a further inspection on 20 September, informing the tenants: "to finalise our HMO renewal the Council are attending to inspect the works that have been completed."

31. This account of the relevant evidence provided to the FTT is not intended to be comprehensive. The tenants provided a substantial body of evidence of their own about the condition of the property and the behaviour of Mr Fashade and his contractors. Mr Fashade also provided statements from other witnesses which the FTT said it read but did not place reliance on because they did not attend the hearing. But the witness statements of Mr Fashade and Mr Goodsell were no more than three pages each and although they mainly responded to the tenants' allegations, Mr Fashade's made it clear that he relied on a defence of reasonable excuse and both asserted that efforts had been made to apply for a licence in March 2020 and again in July 2021 but on both occasions there had been technical difficulties. By 9 September 2021 Mr Goodsell's email was referring to the inspection of work "to finalise our HMO renewal".

The FTT's decision

32. Two separate applications were made to the FTT for rent repayment orders, one by Ms Albustin and Mr Taylor, who had been tenants of one room in the HMO for a full year ending in December 2021, and one by Ms Whitehorn, whose tenancy lasted from 28 December 2020 until 28 May 2021. The need for a licence for the HMO and the fact that there had not been one for the whole of the period of the former tenants' occupation were not in dispute.

33. In paragraph 4 of its decision the FTT reminded itself that "a landlord who fails to obtain a valid licence is committing a criminal offence under section 95(1), Housing Act 2004". Apart from identifying the wrong section (section 95 concerns houses within Part 3 of the 2004 Act, not HMOs) this statement was incomplete. In view of the statutory defences provided by subsections (4) and (5) of section 72 and the issues in the case before it, a fuller statement might have been that a landlord who fails to obtain *or to apply for* a valid licence, and who has no reasonable excuse for managing or controlling an unlicensed HMO, commits a criminal offence. The way the FTT directed itself in paragraph 4 is of some significance because there is no reference anywhere else in its decision to either of the relevant defences.

34. In paragraph 7 of its decision the FTT noted that the tenants based their claim on the absence of a licence, and on allegations of "breach of covenant (violent re-entry, harassment and breach of quiet enjoyment) and failure to comply with an improvement notice". That was a correct description of the tenants' case and a lot of the material put in evidence was directed towards the harassment allegations. The FTT nevertheless said that it would confine its consideration to the licensing offence, and it made no findings of fact about the tenants' other complaints. This has significance for the second issue in the appeal, as it indicates that the FTT's decision to order repayment of the maximum possible amount was intended solely to penalise the licensing offence.

35. When it described the property the FTT referred to the fact that Mr Fashade had been required to undertake a number of repairs and improvements to the property as a condition of the grant of a new licence (paragraph 11). Those repairs were required following an inspection by the local authority in response to complaints from the tenants (paragraph 13). These observations indicate that the FTT was aware of the contents of Mr Goodsell's witness statement.

36. In paragraph's 15 and 16 of its decision the FTT gave an account of Mr Fashade's case. It referred to the expiry of the previous licence in July 2020 before the tenants took up residence at the property, before continuing:

> "15. … He [Mr Fashade] said that he and Mr Goodsell, his property manager, had attempted to renew the licence but that they had been unable to do so because of the pandemic. He said that they had emailed the local authority and had attempted to renew the licence online but had not been able to complete the procedure. He was unable to demonstrate any evidence of emails or phone calls to the Council and although an application was eventually successful, the commencement date of the new licence (February 2022) post-dated the dates when all the applicants had left the property.
>
> 16. He was also unable to produce to the Tribunal any evidence to show on what date his actual application for a new licence was made, the Tribunal therefore had no option but to treat the property as having been without a licence for the entire period of the Applicants' occupation."

37. On that basis the FTT was satisfied beyond reasonable doubt that Mr Fashade had committed an offence of being in control or management of an unlicensed HMO.

38. In determining the amount of rent to be repaid the FTT said that it could not exceed the total rent paid by the tenants during the relevant period. It referred to various negative aspects of Mr Fashade's conduct and discounted any suggestion of financial hardship. It declined to take account of items of expenditure and outgoings which could not be shown to relate to this property and then said, at paragraph 25:

> "For that reason the Tribunal is only able to deduct from the maximum award a proportion of the council tax and water charges appropriate to each applicant's period of residence."

It proceeded to calculate the award for each of the tenants on that basis. The order made in favour of Ms Whitehorn covered the period up to 28 May 2021, while the award made jointly to Ms Albustin and Mr Taylor was for rent up to 16 December 2021.

The appeal

39. The two grounds on which permission to appeal was granted are identified at paragraphs 6 and 7 above.

Issue 1: The FTT's treatment of the evidence

40. The first ground of appeal concerns the FTT's treatment of Mr Fashade's case that he had been unable to renew the original HMO licence because of the pandemic and had received no response to his requests for information.

41. The evidence about the efforts made by Mr Fashade and Mr Goodsell to obtain a licence was potentially relevant at two stages of the FTT's determination. First, it was relied on explicitly as amounting to a reasonable excuse for the absence of a licence and therefore as providing a defence to the underlying criminal offence. Secondly, if it did not establish a complete defence to the application, it was also potentially relevant in mitigation of the seriousness of the offence. The FTT might have considered that a landlord who made repeated but unsuccessful attempts to obtain a licence, both by his own efforts and by instructing his agent, was less culpable than a landlord who ignored his obligations and wilfully failed to obtain a licence.

42. Mr Fashade's attempts to apply for a licence ultimately succeeded and, as the FTT recorded, he was granted a new licence with effect from 10 February 2022. That raised a third question, namely whether in respect of any part of the period ending on 16 December 2021 Mr Fashade could rely on the defence provided by section 72(4)(b), 2004 Act i.e. that an application for a licence has been duly made and remained undetermined.

43. Neither party focussed specifically on any of these issues in their submissions on the appeal. Mr Fashade sought to vindicate his conduct by referring to material which he did not provide to the FTT until after it had made its decision. He is not entitled to do so. The issue in this appeal is whether the FTT could properly reach the conclusion it did on the evidence supplied to it, not whether it might have reached a different conclusion on different evidence. For their part, the former tenants directed their efforts at rebutting Mr Fashade's submissions.

44. The FTT did not make any findings about what Mr Fashade and Mr Goodsell had done and it did not address the defence of reasonable excuse at all. In paragraph 15 of the decision it said that Mr Fashade had been "unable to demonstrate any evidence of his emails or phone calls to the council". That statement might be taken to imply that the FTT considered what Mr Fashade himself said in his witness statement was not evidence, but I doubt that is what it meant. I assume it meant that the emails had not been produced, nor was there evidence of when they had been sent or of the dates of any phone calls. But if that was what the FTT meant it raises two questions: first, what did it make of the evidence which there was about dates of emails; and second, what did it make of the evidence about efforts to contact the Council using its online application portal?

45. Mr Fashade's evidence was that he applied for a new licence online in March 2020; the email he referred to in connection with that evidence was dated 20 March 2020, and although it concerned a different property it showed he was in email contact with the Council about HMOs at that time. He also referred to subsequent telephone calls and emails without providing dates. Mr Goodsell's evidence was more specific. He said that he had attempted to renew over the telephone on 1st July 2021, and when he could not do so he tried online on the same date but was prevented by technical problems. The FTT did not say whether it accepted any of that evidence. Nor did it say whether it accepted or rejected the claim that Mr Fashade had a reasonable excuse (even if it was for only part of the period in issue) or even record that the defence was being relied on.

46. I am inclined to think that someone who knew that they had been unsuccessful in their attempt to obtain a licence using an online portal would not be able to demonstrate that technical problems provided them with a reasonable excuse for continuing to manage an unlicensed HMO. It would at least be necessary for them to prove what other steps they had taken, when they took them, and what the outcome had been. For that reason it was important that Mr Fashade produce the correct email showing when he contacted the Council about this HMO and what the response had said; he should also have given evidence of the date he telephoned the Council (even if only approximate) and of any visits he claimed to have made to its offices. Evidence about when steps were taken was critical. An unresponsive online system or an unanswered email sent in March 2020 would be unlikely to provide a reasonable excuse for failing to renew a licence which was not due to expire until 13 August. In my judgment, even accepting Mr Fashade's own evidence at face value, it was too imprecise to support a defence of reasonable excuse in relation to any part of the period to which the rent repayment orders relate. It follows that the FTT's conclusion that the section 72 offence had been committed is not undermined by its failure to make any findings about what Mr Fashade himself did or about the effect of the covid lockdown on

the local housing authority's response to requests for assistance in completing the application process.

47. Mr Goodsell's evidence did not suffer from the same lack of precision. He gave clear evidence of a failed attempt to renew the licence over the telephone on 1st July 2021, and a second failed attempt to renew online on the same date. Moreover, it is apparent from Mr Goodsell's witness statement that his efforts were a reaction to the attendance at the HMO of a Council representative on 30 June. That is important, as Mr Goodsell's chronology of events indicates that it was the Council visit which galvanised him into making an application. The FTT made no finding about when that application was made, but it did find that the licence took effect on 10 February after a number of repairs had been carried out. It failed to make any connection between the licence eventually granted and Mr Goodsell's efforts beginning on 1 July. Nor did it refer to his email of 9 September 2021 in which he gave notice to the tenants of a further inspection by the Council the purpose of which was "to finalise our HMO renewal". That email did not prove the date on which the successful application for a licence had been made (which was the question the FTT considered in paragraph 16 of its decision) but applying the civil standard of proof it should have been sufficient to satisfy the FTT that the application had been made by 9 September 2021 at the latest.

48. Neither Mr Fashade nor Mr Goodsell referred in their witness statements to the date on which they finally succeeded in submitting an application for a licence. Nor did they refer to the defence in section 72(4)(b). But Mr Fashade did not have legal representation and in those circumstances it was the responsibility of the FTT to use its own expertise to identify the legal issues and potential defences suggested by the primary facts. In *I.R. Management Services Ltd*, at paragraph 31, I said this about the defence of reasonable excuse:

> "… the issue of reasonable excuse is one which may arise on the facts of a particular case without an appellant articulating it as a defence (especially where an appellant is unrepresented). Tribunals should consider whether any explanation given by a person managing an HMO amounts to a reasonable excuse whether or not the appellant refers to the statutory defence."

The same onus falls on the FTT in relation to the defence under section 72(4)(b). If the evidence shows that an application has been made on or by a particular date falling within the period for which a rent repayment order is being sought, that is enough to provide a defence from that date, whether or not the person in control of the HMO knows it.

49. For these reasons I am satisfied that on the evidence provided to the FTT it was wrong to conclude that Mr Fashade had committed the offence of being in control of or managing the HMO after 9 September 2021. The first ground of appeal succeeds to that extent.

50. The order made in favour of Ms Whitehorn was in respect of rent paid in the period up to 28 May 2021, and none of that period is affected by my conclusion on the first issue. The same is not true of the order in favour of Ms Albustin and Mr Taylor which was for twelve

months rent up to 16 December 2021. The sum of £8,350 awarded to them ought therefore to be reduced by a little over three months to a sum of less than £6,262. Whether that is the only reduction to be made to their award, and whether any reduction is required to Ms Whitehorn's award, depends on the second issue in the appeal.

Issue 2: The FTT's approach to the quantum of the award

51. The FTT based its calculation of the amount of rent to be repaid on the total amount paid by the three tenants during their period of occupation of the HMO with only small deductions to reflect utility bills which were covered by the rent. It made no assessment of the seriousness of the offence and having found no mitigating factors it simply concluded that the amount to be awarded should be the maximum amount possible.

52. The FTT's approach was wrong for two reasons.

53. First, because it should have made specific findings about the efforts Mr Fashade and Mr Goodsell both claimed to have made to obtain a licence, which was capable of being relevant conduct whether or not it provided a complete defence. The amount of any mitigation would depend on the relevant facts and the problem in this case is that the FTT made no findings about what Mr Fashade and his agent did. The requirement imposed on the decision maker by section 44(4), 2016 Act, to take into account the conduct of the landlord and the tenant is not optional, and a decision which omits to take account of relevant material relied on by one or other party is liable to be set aside.

54. The second problem with the FTT's approach is that it takes no account of the seriousness of the offence and assumes a starting tariff equal to the full amount paid. That approach was questioned by the Tribunal in *Ficcara v James* [2021] UKUT 38 (LC) and rejected in *Williams v Parmar* (decided eight months before the FTT's decision), where, at paragraph 25 the President said:

> "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 s.44(4)."

55. More recently, in *Acheampong v Roman*, a case decided after the FTT made its decision, the Tribunal (Judge Cooke) reviewed the relevant cases and concluded, at paragraph 17:

> "There are no rules as to the amount to be repaid; there is no rate card. But it is safe to say that if the landlord is ordered to repay the whole of the rent (after deduction of any payment for utilities), without consideration of the seriousness of the offence, or in a case that is far from the most serious of its kind, it is likely that something has gone wrong and that the FTT has failed to take into consideration a relevant factor."

56. That is what has happened in this case, and it provides a second reason why the FTT's decision on the quantum of the rent repayment orders cannot stand. It applies as much to the order made in Ms Whitehorn's favour as it does to Ms Albustin and Mr Taylor's order.

Disposal

57. For the reasons given above the decision of the FTT is set aside.

58. I have considered whether I have sufficient information to enable me to substitute a determination of my own for that of the FTT but I have concluded that I do not. I have read the evidence provided to the FTT, but in the absence of clear findings of fact on relevant issues I am not in a position to determine the appropriate order. The FTT's omissions were not all one way. Early in its decision it said that it would not take account of the tenants' allegations of acts of harassment and breaches of covenant by their landlord, but it gave no good reason for limiting the scope of the proceedings in that way and the material on which the tenants wished to rely, if proven, would be capable of influencing the amount of the award in their favour.

59. In the circumstances I will remit the tenants' application for rent repayment order to a differently constituted FTT panel for redetermination. The material which the parties wanted to put in evidence on this appeal but which I have refused to take into account may be made available to the FTT which hears the case. Within 21 days the parties should apply to the FTT for further directions.

Martin Rodger KC,
Deputy Chamber President

7 February 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.