

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*HOUSING – RENT REPAYMENT ORDER – calculation of the rent paid in respect of the relevant period – factors to be taken into account when determining the amount of rent to be repaid – relevance of conduct to the relationship of landlord and tenant – discretion of the First-tier Tribunal*

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

**BETWEEN:**

**MRS KATHRYN AWAD**

**Appellant**

**and**

**MRS BARBARA HOOLEY**

**Respondent**

**Re: 14 Wellington Road  
Hastings  
TN34 3RN**

**Upper Tribunal Judge Elizabeth Cooke  
9 March 2021  
By remote video platform**

Mr Robert Denman for the appellant, instructed by Holden & Co LLP

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The following cases are referred to in this decision:

*Chan v Bilkhu* [2020] UKUT 289 (LC)

*Ficcara v James* [2021] UKUT 38 (LC)

*Vadamalayan v Stewart* [2020] UKUT] 183 (LC)

## **Introduction**

1. This is an appeal from the decision of the First-tier Tribunal (“the FTT”) in making a rent repayment order against the respondent, Mrs Hooley, in favour of the appellant Ms Awad. The appellant has permission from the FTT to appeal on seven grounds; the thrust of all the grounds of appeal is that the sum ordered to be repaid by the respondent was too low.
2. I heard the appeal by remote video platform on 9 March 2021; the appellant was represented by Mr Robert Denman of counsel and Mrs Hooley presented her own case; I am grateful to them both, and also to all concerned for their patience on a day when (unusually) the remote video platform was not in helpful mode.
3. In the paragraphs that follow I look first at the factual and legal background to the appeal, and then at the grounds of appeal in two groups. Grounds 1, 2 and 3 are a challenge to the FTT’s calculation of the maximum amount that could be ordered, while grounds 4 to 7 are a challenge to the exercise of its discretion in making the order.

## **The factual and legal background**

4. The findings of fact made by the FTT are not in dispute in the appeal.

### *The tenancy*

5. 14 Wellington Road, Hastings is a six-bedroomed property and was the respondent’s home until 2013. She let it to the appellant on 10 June 2017 at a rent of £1,200 per month. In October 2019 she issued a claim for possession of the property on the grounds of the appellant’s rent arrears. An order for possession was made on 17 January 2020; the appellant appealed and the possession order was set aside by consent because the respondent accepted that she had failed to comply with the requirements for service of a notice under section 8 of the Housing Act 1988. The appellant is still living in the property.

### *The Housing Act offence*

6. On 14 February 2020 the appellant applied to the FTT for a rent repayment order under the Housing and Planning Act 2016 (“the 2016 Act”) because throughout her tenancy the property was a house requiring a licence under a selective licensing scheme under Part 3 of the Housing Act 2004 (“the 2004 Act”) and it did not have one.
7. It was agreed before the FTT that the local housing authority adopted a selective licensing scheme under section 80 of the 2004 Act on 26 October 2015; from that point onwards section 85 of the 2004 Act required any private landlord renting out a property in an area that included Wellington Road to obtain a licence, and it was a criminal offence under section 95 of the 2004 Act to manage or be in control of a house that was required to be licensed and was not.

8. It was not in dispute before the FTT that the respondent committed the offence from the start of the tenancy until she applied for a licence on 12 February 2020 (since section 95(3) of the 2004 Act provides the landlord with a defence once an application has been made).

*Rent repayment orders*

9. The statutory provisions relating to rent repayment orders are found in the 2016 Act. Section 40 reads as follows:

“(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table...”

and the offences listed in the table that follows include the offence created by section 95 of the 2004 Act, “control or management of an unlicensed house”.

10. Section 43 provides that a rent repayment order may be made by the FTT on an application by the tenant under section 41 (which may be made if the offence was committed in the period of 12 months ending on the day the application was made, as it was in this case). Section 43 provides that the FTT may make an order only if it is satisfied beyond reasonable doubt that the offence has been committed.
11. Sections 40 to 43 also make provision for the local housing authority to apply for a rent repayment order to recover housing benefit paid to the landlord while the offence was being committed.
12. Section 44 provides:

“(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in the table...”

and the table states that for the offence created by section 95 of the 2004 Act the relevant period is “a period, not exceeding 12 months, during which the landlord was committing the offence”.

Section 44 continues:

“(3) The amount that the landlord may be required to repay in respect of a period must not exceed—

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) In determining the amount the tribunal must, in particular, take into account—

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord, and

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.”

13. The appellant sought a rent repayment order for a period of seven months from 4 December 2018 to 11 July 2019. The FTT observed that that was the period when she made the most payments towards her rental liability.
14. The FTT found that the rent paid in respect of the relevant period (and therefore the maximum the respondent could be ordered to pay, according to section 44(3)(a)) was £4,201.09. In the light of the matters that it took into account under section 44(4) the FTT ordered the respondent to repay 25% of that amount. As I indicated above, three grounds of appeal relate to the way the rent paid in respect of the relevant period was calculated, and the remaining four grounds relate to the amount that the respondent was ordered to repay.

### **Grounds 1, 2 and 3 and the calculation of the maximum amount**

15. The FTT appended to its decision a schedule of all the payments made to the respondent towards the rent during the tenancy, from its beginning until the hearing before the FTT, by the appellant, by those living with her from time to time, and by the local housing

authority by way of housing benefit. I can summarise the position as found by the FTT as follows:

- a. At the start of the relevant period (on 4 December 2018) the appellant's rent arrears stood at £3,132.95.
  - b. Eight payments of £1,200 fell due during the relevant period (from 4 December 2018 to 11 July 2019).
  - c. During that period the appellant paid £7,334.04.
  - d. During that period the respondent was also paid £655.76 in housing benefit.
  - e. At the end of that period the arrears stood at £4,743.15.
16. In determining the maximum amount payable by the respondent for the purposes of section 44(3) the FTT did not count the housing benefit received during the relevant period, pursuant to section 44(3)(b) (where the reference to universal credit applies equally to housing benefit).
17. Moreover, the FTT subtracted from the £7,334.04 paid by the appellant the arrears at the start of the relevant period on the basis that the landlord would have attributed the first receipts from the tenant during the relevant period to the arrears. As it explained at its paragraph 37:
- “Section 44(3) confirms that the maximum the Tribunal can order a landlord to repay is *“the rent paid in respect of that period”* (emphasis added). As rent arrears had accrued prior to the Relevant Period, the Tribunal is satisfied that it would be standard accounting practice for any landlady/landlord or council/housing association to apply any payments made during the Relevant period firstly to any arrears that had accrued prior to the date of payment. Therefore because of the accrued rent arrears, the Tribunal found that any payments actually made by Ms Awad in the relevant Period should be treated as being made “in respect of” earlier periods when rent had not been paid, before being applied to the rent due during the Relevant period.”
18. The first ground of appeal is that the FTT should not have subtracted the arrears. Mr Denman rightly did not pursue that ground. Whether or not an individual landlord regarded or accounted for the first payments made during the relevant period as going to the arrears, the reasoning set out by the FTT seems to me to be an entirely fair way to calculate the rent paid “in respect of” the relevant period for the purposes of section 44(3)(a).
19. Ground 3 is that having subtracted the arrears at the start of the period the FTT should have added back the arrears at the end. Mr Denman rightly did not pursue that ground; the arrears were never paid and could not have fallen within the maximum payment defined by section 44(3).

20. Ground 2 was that the housing benefit received during the period should have been attributed to the arrears rather than to the current rent, so that it reduced the arrears rather than reducing the rent to be repaid by the respondent. Mr Denman argued that the accounting principle to which the FTT referred in its paragraph 37 (quoted above) should apply equally to the housing benefit received during the relevant period.
21. I do not accept that argument. First, as Mr Denman conceded, housing benefit is not paid to cover arrears. It is paid in respect of the rent due for the preceding four weeks. Second, Mr Denman's approach is inconsistent with section 44(3)(b) which states that the maximum amount does not include universal credit (now) or housing benefit (during the relevant period in this appeal) "paid (to any person) in respect of rent under the tenancy during that period"; there is no mention of attributing housing benefit to a different period for this purpose. Third, as Mrs Hooley pointed out, the local housing authority is entitled to seek to recover that benefit; she should not have to pay it back twice.
22. So the FTT's calculation of the maximum amount payable stands and the appeal fails in that respect.

#### **Grounds 4 to 7 and the FTT's discretion**

##### *The FTT's determination of the amount to be repaid*

23. Having determined the maximum amount payable, the FTT turned to the matters it had to take into account "in particular" pursuant to section 44(4) (set out above at paragraph 12). It was not in dispute that section 44(4)(c) was irrelevant.
24. The FTT considered first the conduct of the respondent. It noted that the tenant made no allegations against her save that she did not have a licence. It accepted that the respondent was not a professional landlord and had no idea that she needed a licence; that she spent a lot of money renovating the property, and did not take a deposit from the tenant; that she let the house to the appellant out of sympathy for her and her children and tried to befriend and assist her.
25. The FTT then went on to consider the conduct of the tenant. A number of allegations were made by the respondent, of which the FTT considered two to be significant, namely the considerable rent arrears accrued throughout the tenancy and amounting at the time of hearing to over £15,000, and the appellant's failure to allow an electrician entry to the property so that the respondent could obtain an EPC, and her cancellation of pre-arranged visits. The FTT made clear that it was aware of the appellant's limited means, but it was unimpressed by her failure to provide any explanation as to why she had paid so little to top up the housing benefit, which she knew did not fully cover the rent.
26. As to the respondent's financial circumstances the FTT accepted that the rent is her only income.
27. In conclusion the FTT said:

“Having considered these matters in the round the Tribunal considers that although the Respondent has committed an offence under s5 of the Housing Act 2004 by failing to obtain a licence before letting her home to Ms Awad, the amount of the maximum rent repayment that could be ordered should be reduced by 75%. This is to reflect the Applicant’s continued, persistent, deliberate and very significant breach of the terms of the tenancy as regards payment of the rent and her obstructive behaviour in preventing the Respondent from carrying out inspections.”

### *The grounds of appeal*

28. The fourth ground of appeal is that the FTT was wrong to reduce the maximum amount by reason of the tenant’s conduct. It is argued that that conduct – the failure to pay rent, and the obstruction of inspections – had nothing to do with the offence. Mr Denman argued that the FTT is not to make a generalised “good tenant/bad tenant” assessment; the conduct of the tenant is relevant to the amount of the order only if it is a true aggravating or mitigating factor in the sense appropriate to criminal sentencing, and therefore only if it had an effect on the offence itself – for example, if that conduct hindered the landlord in applying for the licence. The failure to pay rent was irrelevant to the failure to get a licence, and the obstruction of inspections was at least in part after the respondent applied for a licence.
29. Furthermore, Mr Denman argued that in deciding not to prosecute the respondent or to impose a civil penalty the local housing authority has already given the respondent credit for mitigating factors and she should not be given further credit.
30. Alternatively if this was relevant conduct it should not be taken into account insofar as it occurred before (ground 5) or after (ground 6) the relevant period. Finally, by ground 7, it is said that even if the conduct of the tenant was a relevant consideration the reduction by 75% of the maximum amount payable was far too much in the context of a penalty that is intended to be harsh and to operate as a severe deterrent to landlords tempted to commit a Housing Act offence; only modest adjustments are permissible and the FTT should not have substantially extinguished the amount payable. The 2016 Act does not require that the amount ordered should be reasonable, as did the now repealed provisions of the 2004 Act.

### *Discussion*

31. The first thing to say is that I do not accept that the FTT had in mind only the appellant’s conduct when it reduced the amount payable. It devoted eight paragraphs to the respondent’s conduct, it also considered her financial circumstances, and it introduced its conclusions by saying that it considered matters in the round; I understand that to mean that the FTT reached its conclusion in light of the matters considered, at some length, under section 44(4) (a), (b) and (c). In its closing comment the FTT highlighted the tenant’s conduct, but it had in mind all three factors.
32. Second, there is no substance in the idea that the local authority may already have taken into account the landlord’s conduct when deciding whether or not to prosecute or to



impose a civil penalty; that decision may have been taken for various reasons, and it is not for the FTT to ignore the words of section 44(4) as a result of speculation about the local authority's decisions or policy.

33. Mr Denman is challenging the FTT's exercise of its discretion. The Tribunal will not interfere with that discretion unless it was exercised on a wholly incorrect basis or the FTT reached a conclusion outside the range of reasonable decisions open to it.
34. Mr Denman's argument is that the tenant's conduct was not relevant because it did not aggravate or mitigate the offence. In support of that argument he cited the Deputy President's reference to "aggravating and mitigating factors" in *Ficcara v James* (see below). I do not read the Deputy President's words in that way. I think that Mr Denman's concept of what might be regarded as an aggravating factor or a mitigating factor in criminal sentencing may be unduly narrow, but in any event this is not a criminal sentencing exercise. It is a determination of a penalty, at the FTT's discretion, in light in particular of the factors listed in section 44(4). The FTT is expressly directed to take the tenant's conduct into account; it is not directed to consider that conduct only insofar as it had an effect upon the offence itself, although of course the conduct must be relevant.
35. The same applies of course to the landlord's financial circumstances; so in *Chan v Bilkhu* [2020] UKUT 289 (LC) the Tribunal was not persuaded that the landlord's difficulty in letting out the property as a result of the pandemic was relevant to the level of a rent repayment order imposed in respect of the period from July 2018 to July 2019. But relevance will be a matter for examination in each case.
36. The circumstances of the present case are a good example of why conduct within the landlord and tenant relationship is relevant; it would offend any sense of justice for a tenant to be in persistent arrears of rent over an extended period and then to choose the one period where she did make some regular payments – albeit never actually clearing the arrears – and be awarded a repayment of all or most of what she paid in that period. That default, together with the respondent's kindness and the respondent's financial circumstances, led the FTT to make a 75% reduction in the maximum amount payable, and I see no reason to characterise any of those considerations as irrelevant or the decision as falling outside the range of reasonable orders that the FTT could have made.
37. That is an answer to all of grounds 4 to 7 and is all that needs to be said about the present appeal, which fails. Because this is the third decision of the Tribunal in the last few months about the effect of section 44 of the 2016 Act it may be helpful if I summarise the current position.
38. In *Vadamalayan v Stewart* [2020] UKUT] 183 (LC) the Tribunal said that it was no longer appropriate for rent repayment orders to be limited to the repayment of the profit element of the rent. Nor is it correct for the FTT to deduct from the maximum amount the amount of any fine or civil penalty imposed on the landlord:

“19. The only basis for deduction is section 44 itself. and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an

order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence.”

39. More recently in *Ficcara v James* [2021] UKUT 38 (LC) the Deputy President said this:

“49... the Tribunal's decision in *Vadamalayan* ... rejected what, under the 2004 Act, had become the convention of limiting the amount payable under a rent repayment order to the amount of the landlord's profit from letting the property during the relevant period. The Tribunal made clear at [14] that that principle should no longer be applied. In doing so it described the rent paid by the tenant as "the obvious starting point" for the repayment order and indeed as the only available starting point.

50. The concept of a "starting point" is familiar in criminal sentencing practice, but since the rent paid is also the maximum which may be ordered the difficulty with treating it as a starting point is that it may leave little room for the matters which section 44(4) obliges the FTT to take into account, and which Parliament clearly intended should play an important role. A full assessment of the FTT's discretion as to the amount to be repaid ought also to take account of section 46(1). Where the landlord has been convicted, other than of a licensing offence, in the absence of exceptional circumstances the amount to be repaid is to be the maximum that the Tribunal has power to order, disregarding subsection (4) of section 44 or section 45 .

51. It has not been necessary or possible in this appeal to consider whether, in the absence of aggravating or mitigating factors, the direction in section 44(2) that the amount to be repaid must "relate" to the rent paid during the relevant period should be understood as meaning that the amount must "equate" to that rent. That issue must await a future appeal. Meanwhile *Vadamalayan* should not be treated as the last word on the exercise of discretion which section 44 clearly requires; neither party was represented in that case and the Tribunal's main focus was on clearing away the redundant notion that the landlord's profit represented a ceiling on the amount of the repayment.”

40. I agree with that analysis. This appeal cannot be the last word either. It is no more than a useful example of an unimpeachable exercise of discretion on the part of the FTT, and says nothing further about the amount to be awarded in the absence of anything that weighs with the FTT under section 44(4). The only clue that the statute gives is the maximum amount that can be ordered, under section 44(3). Whether or not that maximum is described as a starting point, clearly it cannot function in exactly the same way as a starting point in criminal sentencing, because it can only go down; however badly a landlord has behaved it cannot go up. It will be unusual for there to be absolutely nothing for the FTT to

take into account under section 44(4). The statute gives no assistance as to what should be ordered in those circumstances; nor can this Tribunal in the absence of a suitable appeal.

## **Conclusion**

41. The appeal fails and the order of the FTT stands. At the hearing Mr Denman agreed that of course there is no question of Mrs Hooley having to make a payment to the appellant; the only issue in reality is the level of the arrears owed by the appellant to respondent, which is reduced by the amount ordered by the FTT.

**Judge Elizabeth Cooke**

**12 March 2021**