UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDERS – time for landlord to prepare for the hearing – whether tenant should have been allowed to give evidence in chief at the hearing – case management decisions by the First-tier Tribunal – repayment of rent to tenant who paid for herself and her partner – the First-tier Tribunal's exercise of discretion in fixing the amount of the award.

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

BETWEEN:

EUGENE DOWD

Appellant

-and-

ANA MARTINS (1)
HAYLEY WELLS (2)
AL DRENNAN (3)
IVANA NAGYOVA (4)

Respondents

Re: 36B The Avenue,
Worcester Park,
Surrey, KT4 7EY

Judge Elizabeth Cooke
Heard on: 8 September 2022
Decision Date:

Mr Paul Brennan for the appellant
Mr Cameron Neilson on Justice for Tenants for the respondents

The following cases are referred to in this decision:

Acheampong v Roman and others [2022] UKUT 239 (LC)
Hallett v Parker [2022] UKUT 165 (LC)
Williams v Parmar [2021] UKUT 244 (LC)

Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FTT") to make a rent repayment order against Mr Dowd on the basis that he had committed the offence of being in control of or managing a house in multiple occupation ("an HMO") that required a licence and was not licensed, contrary to section 72(1) of the Housing Act 2004. Mr Dowd appeals with permission from the First-tier Tribunal on five grounds.

2. The appellant was represented by Mr Paul Brennan of counsel, and the respondent tenants by Mr Cameron Neilson of Justice for Tenants.

The legal background

3. There is no dispute as to the relevant law. Part 2 of the Housing Act 2004 requires houses in multiple occupation ("HMOs") specified in the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018 to be licensed by local housing authorities, and section 72(1) provides that it is an offence to manage or be in control of an HMO which is required to be licensed and is not.

4. Section 72 also provides:

> "(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time– …
>
> (b) an application for a licence had been duly made in respect of the house under section 63,
>
> and that notification or application was still effective (see subsection (8)).
>
> (5) In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse–
>
> (a) for having control of or managing the house in the circumstances mentioned in subsection (1) …"

5. Section 41 of the Housing and Planning Act 2016 enables tenants to apply for a rent repayment order where their landlord has committed any of the offences listed in section 40, during the 12 months ending on the day the application was made. Seven offences are listed, ranging from licensing offences to the eviction or harassment of the occupiers contrary to section 1 of the Protection from Eviction Act 1977.

6. Section 43 of the 2016 Act provides that the FTT may make a rent repayment order if it is satisfied beyond reasonable doubt that the relevant offence has been committed. Section 44 states that the amount ordered to be repaid "must relate to the rent" paid during the period,

not exceeding 12 months, when the landlord was committing the offence, and section 44(4) provides:

> "(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."

The factual background and the decision of the FTT

7. The appellant is the freeholder of 36 The Avenue, Worcester Park, Surrey; it was described by the FTT as a large house divided into four self-contained units, the largest of which, flat 36B, is the subject of these proceedings. It contains three bed-sitting rooms, and from 7 July 2019 onwards it was occupied by five persons living in more than two separate households; from that date therefore it required an HMO licence pursuant to the Housing Act 2004.

8. The five occupiers were Mr Drennan and Ms Nagyova, who shared a room and paid £650 per month for it, Mr Da Silva and Ms Martins who shared a room and paid £750 per month, and Ms Wells who paid £650 per month. All five made an application to the FTT on 1 September 2021 for a rent repayment order on the ground that the appellant had committed the offence created by section 72(1) of the Housing Act 2004. Mr Da Silva withdrew from the application before the hearing, but the amount of rent claimed remained the same.

9. The FTT heard the application on 23 November 2021 and found that the property was required to be licensed from 7 July 2019, that the appellant applied for an HMO licence on 6 April 2021, and that he was a person managing the property. It accepted that he did not get a licence because he did not know he needed one until December 2020, but found that he did not have the defence of reasonable excuse. Accordingly the FTT declared that it was satisfied beyond reasonable doubt that the appellant had committed the section 72(1) offence from 7 July 2019 to 6 April 2021, and made a rent repayment order.

10. The FTT gave the appellant permission to appeal on five grounds.

11. Ground 1 could not be pursued unless the appellant was allowed to adduce fresh evidence. I heard the application to adduce it at the start of the hearing and refused to allow it to be adduced. Accordingly ground 1 was not pursued.

Ground 2

12. Ground 2 is that the appellant was given insufficient notice of the hearing before the FTT and that therefore the FTT should either have struck out the tenants' application or should have adjourned the hearing on 23 November 2021.

13. The tenants made their application on 1 September 2021, and on the same date sent a copy of it by email to the appellant in accordance with the notes to the FTT's application form, which ask the applicant to serve the application on the landlord. He did not receive it and it is presumed that it went into his junk email folder (although the FTT made no finding of fact to that effect). On 19 October 2021 the FTT gave directions and sent them, by email, together with a copy of the application to the appellant. The directions listed the matter for hearing on 23 November. The appellant asked for an extension of time for production of a hearing bundle, which was granted. At the hearing before the FTT the appellant was represented by his former wife, Mrs Anne Dowd, who protested about the short notice of the hearing and the way the tenants had served the application. The FTT nevertheless proceeded.

14. On exploring this ground with Mr Brennan at the hearing it became clear that the FTT had followed its usual procedure in sending the application to the landlord with its directions. The respondents had already served the application using the landlord's email address to do so, because the tenancy agreement gave that as his address for service, and it is difficult to see why they should not have done so.

15. The FTT's decision to proceed with the hearing was a case management decision with which the Tribunal will not interfere in the absence of any error of law or irrationality. I see no reason to criticise the FTT either in making its directions or in proceeding with the hearing. Importantly, the appellant through Mrs Dowd did not suggest to the FTT that there were documents or evidence he needed to obtain and had not been able to get hold of in the time available to him.

16. Accordingly this ground of appeal fails.

Ground 3

17. Ground 3 arises from the fact that of the four tenant applicants to the FTT, all but one made witness statements. Ms Wells did not, and was allowed to give evidence in chief at the hearing.

18. The appellant says that this was unfair. Having received three witness statements he was entitled to assume that only three tenants were claiming rent repayment orders and that Ms Wells would not be allowed to pursue her application. I do not accept that. All the applicants signed the FTT application form, in which they set out the facts on which their claim was based, with a statement of truth. The applicant was aware that Mr Da Silva had withdrawn but had been given no indication that anyone else had. He cannot have been surprised by Ms Wells' claim.

19. The evidence Ms Well gave at the hearing was very brief, accounted for in a short paragraph by the FTT which said that she confirmed that her statement in the bundle was true, and that she had had a good relationship with the landlord. She mentioned some mould in her room which she had cleaned. The appellant cannot point to anything in her evidence that he wanted to challenge but could not because it was unexpected. The prejudice to him was the fact that she was allowed to give evidence and to maintain her claim when she had not taken the trouble to produce a witness statement.

20. Again this is a case management decision and there is no possible reason to challenge the FTT's sensible decision to allow Ms Wells to confirm at the hearing the contents of her statement. This ground of appeal fails.

Ground 4

21. As I mentioned there were five occupants in Flat 36B from July 2019 onwards; but two of them shared a room and so there were only three tenancy agreements. Mr Da Silva and Ms Martins shared a room and were joint tenants. During September 2021 – at a time therefore when the appellant says he had not had notice of the application to the FTT - Mr Da Silva approached the appellant and said that he wanted to stay on as tenant and that he was withdrawing from the application for a rent repayment order. The two of them reached an agreement and Mr Da Silva withdrew from the FTT proceedings.

22. Ms Martins remained one of the applicants, and she claimed the repayment of the rent that she had paid for the two of them as a couple for the room, which the FTT said was £8,019.88 for the relevant period after deduction of payments for utilities. The FTT made a reduction in the total claimed by all the tenants of 25% in light of the factors set out in section 44(4) (which I discuss further under ground 5) and ordered a repayment to Ms Martins of £6,014.91.

23. The appellant says this is unfair. The withdrawal of Mr Da Silva has made no difference to him because Ms Martins has been repaid the rent for both of them. The fact that they were jointly and severally liable for rent does not mean that one person can claim back the whole.

24. Mr Neilson argued that there was no challenge to the fact that Ms Martin had paid the rent, and the rent repayment order must be related to the amount paid. That is true, but whether or not the order made conformed to the requirements of the statute it cannot possibly have been fair. I agree with Mr Brennan that the amount to be repaid from the rent paid by Ms Martins, whatever it proved to be after consideration of the factors in section 44(4), must be divided by 2. Otherwise, either Mr Da Silva will (behind the scenes) get his rent back despite having withdrawn his application, or Ms Martins will be repaid two persons' rent. That remains my view even though the rent she paid was not twice the rent Ms Wells paid and the payments seem to have been assessed on the basis of the room rather than the number of individuals.

25. This ground of appeal succeeds. The Tribunal sets aside the FTT's decision as to what was to be repaid to Ms Martins; it will substitute its own decision after consideration of ground 5.

Ground 5

26. Finally we tread again some ground that will be very familiar to those who have followed the series of decisions made by the Tribunal as to how rent repayment orders are to be quantified. The day before the hearing the Tribunal published its decision in *Acheampong v Roman and others* [2022] UKUT 239 (LC) in which it endeavoured to provide a succinct summary of the approach that was deprecated in *Williams v Parmar* [2021] UKUT 244 (LC)

and to set out in positive terms how the FTT was to approach the quantification of awards. Mr Brennan and Mr Neilson had understandably not read Acheampong but were familiar with what the Tribunal had said in *Williams v Parmar*. Both accepted that it is not appropriate to regard the full rent claimed by a tenant as the starting point for quantification, in the sense that the only flexibility the FTT can have is to make deductions from that figure in the light of good conduct by the landlord or poor conduct by the tenant. Instead, as the Tribunal put it in paragraph 21 of *Acheampong*, the FTT should:

a. Ascertain the whole of the rent for the relevant period;

b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.

c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:

d. Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

27. In the present case steps a and b were carried out. The FTT then noted that when the HMO licence was issued the local housing authority made no reference to any repair or other work being outstanding; that rents had not increased for some time before the licence was issued; that the appellant had attended to his obligations as a landlord in a reasonably responsible manner and was a "reasonable, if somewhat naïve landlord". It accepted that he had no income apart from the rent from Flats 36A, B and C and a small pension from his former employer and that his monthly outgoings left him with a deficit of £6,908.50. It took into account the fact that the appellant was unaware of the need for an HMO licence until December 2020, when he found out about it by chance, and that he then allowed three months to elapse before getting a licence. Taking all those factors into consideration – in terms of the conduct of the landlord and his financial circumstances – the FTT reduced the headline figure (rent less utilities) by 25%.

28. That was not the correct approach because no consideration was given to the seriousness of the offence. The order made was therefore artificially pushed to the top of the scale because the only thing the FTT did with that headline figure was to make a deduction in the light of the landlord's conduct in respects other than the offence itself and of his financial circumstances. The FTT in effect fettered its discretion, and its decision is therefore set aside.

The Tribunal's order

29. In light of the success of grounds 4 and 5, rather than remitting the matter to the FTT, the Tribunal makes use of the FTT's findings of fact and substitutes its own decision, as follows.

30. First, I take the headline or maximum figures from the FTT's decision:

Ms Martins £8,019.88 (to be divided by 2 as explained under ground 4)

Mr Drennan and Ms Nagyova £6,300.04

Ms Wells £6,919.88

The figures are different because the rents paid were slightly different and also the period in respect of which a claim was made differed. The details are set out in the FTT's decision and are not in dispute so I do not need to do anything other than pick up the maxima that the FTT began with – in effect I am starting at the end of step b in paragraph 26 above.

31. I then consider the seriousness of the offence. Mr Brenan argued that this offence is one of the least serious of those in respect of which a rent repayment order could be made, and that it was also at the bottom of the scale of section 72(1) offences. He compared it with the award in *Hallett v Parker* [2022] UKUT 165 (LC) where the landlord was ordered to repay 25% of the rent claimed. Mr Brennan suggested that a starting point of 25% or even 20% was appropriate in the present case.

32. Mr Neilson pointed out the differences between the present case and *Hallett.* In that case the landlord had engaged an agent and had relied upon it to let her know when a licence was required. And she had applied for a licence as soon as one was needed. Mr Neilson was understandably reluctant to name a starting point, but said that Mr Brennan's suggestion of 25% or even 20% of the rent was too low.

33. I take the view that this offence was significantly more serious than that committed by the landlord in *Hallett v Parker,* albeit low in the overall scale of section 72(1) offences, which in turn are generally less serious than others for which a rent repayment order can be made. I would take as a starting point 45% of the rent.

34. I do not regard the landlord's conduct as a "reasonable" landlord as meriting any move away from that starting point, whether upwards or downwards; it is simply what is to be expected. The evidence relating to the landlord's financial circumstances indicates that an order will cause him some difficulty and he will need to adjust some of his outgoings, but I take the view that that is not a reason for any further reduction.

35. Accordingly the amounts to be repaid by the appellant are:

Ms Martins £8,019.88 x 45% divided by 2 = £1,804.47 which I round to **£1,800**

Mr Drennan and Ms Nagyova £6,300.04 x 45% = **£2835**

Ms Wells £6,919.88 x 45% = **£3,113.**

Upper Tribunal Judge Elizabeth Cooke

16 September 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.