



Neutral Citation Number: [2024] UKUT 155 (LC)

Case No: LC-2023-747

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: LON/00BG/HMF/2022/0108

3 June 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*HOUSING – RENT REPAYMENT ORDER – treatment of rent arrears from a period outside the period of repayment –discretion - arithmetical errors*

BETWEEN:

MS JENNY YI

Appellant

-and-

MR NICK HOBBS (1)

MR KEL ALAIKE (2)

Respondents

1 Observatory Mews,  
London,  
E14 3AZ

Upper Tribunal Judge Elizabeth Cooke  
Determination on written representations

The following cases are referred to in this decision:

*Acheampong v Roman* [2022] UKUT 239 (LC)  
*Kowalek v Hossanein Ltd* [2021] UKUT 143 (LC)  
*Vadamalayan v Stewart* [2020] UKUT 183 (LC)  
*Williams v Parmar* [2021] UKUT 244 (LC)

## **Introduction**

1. This is an appeal from rent repayment orders made by the First-tier Tribunal (“the FTT”) requiring the appellant, Ms Yi, to repay rent to two of her tenants at 1, Observatory Mews, London E14. An order in respect of a third tenant is unappealed.
2. The FTT’s order to repay rent to Mr Hobbs, the first respondent, is appealed on the basis that the FTT’s treatment of rent arrears was incorrect; the appeal against the order in favour of Mr Alaike, the second respondent, relates simply to arithmetical errors made by the FTT.
3. The appellant has represented herself; written submissions in response to the application for permission to appeal were made on behalf of both respondents by Mr Muhammed Williams, an officer of the local housing authority, the London Borough of Tower Hamlets. Once permission to appeal was granted it is the authority’s policy not to provide representation for tenants, and Mr Hobbs submitted a statement of case which largely repeated Mr Williams’ arguments.

## **The legal and factual background**

4. Part 2 of the Housing Act 2004 provides that certain houses in multiple occupation (“HMOs”) have to be licensed; regulations prescribe which HMOs have to be licensed, and a local housing authority may implement a scheme for additional licensing under section 56. Section 72 of the 2004 Act provides that it is an offence to manage or be in control of an HMO that is required to be licensed and is not licensed. That offence is one of those specified in section 40 of the Housing and Planning Act 2016, which means that the FTT may make a rent repayment order in favour of a tenant against a landlord if it is satisfied beyond reasonable doubt that the offence has been committed during the period of one year before the tenant's application.
5. The property is a five-bedroom house which has been let to individuals who share a kitchen. The registered proprietor is Ms Yi’s husband, who lives in China; Ms Yi has entered into tenancy agreements with the occupiers of the rooms in the house and the occupiers’ rent has been paid to her. The respondents lived in the property at a time when it should have had an HMO licence and was not licensed; although there were only three occupiers at the relevant time, a licence was required under a scheme for additional licensing operated by the local housing authority. The three occupiers – the respondents and one other, Mr Emmanuel Ezra – applied to the FTT in May 2022 for rent repayment orders on the basis that Ms Yi had committed the offence of managing or controlling the property when it should have been licensed and was not. The three applicants each paid rent in different amounts and each made an application in respect of a slightly different period, of 11 months up to 16 January 2022 in the case of Mr Hobbs and of 10.5 months up to 16 March 2022 in respect of Mr Aleike.
6. It was not in dispute before the FTT that the property should have been licensed at all times during the applicants’ occupation, and was not licensed until June 2022.
7. The FTT found that Ms Yi had committed the offence of managing an HMO that should have been licensed and was not throughout the periods in respect of which rent repayment orders were claimed. I have gone through the background to that finding swiftly because

there is no appeal from it; the appeal relates only to the amount that the FTT ordered Ms Yi to pay.

8. In considering the amount to be paid the FTT referred first to section 43(2) of the Housing and Planning Act 2016 which states that, for this offence the amount ordered to be repaid must relate to the amount paid by the tenant in respect of a period not exceeding 12 months during which the landlord was committing the offence. Section 43(4) of the 2016 Act then goes on to say:

“(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.”

9. The FTT considered those provisions. It said:

“20. As to the conduct of the Applicants, they appeared to be largely blameless save for the non-payment of rent by Mr Hobbs from July 2022 totalling £1,699. The Tribunal did not accept his evidence that he did so because he was concerned the Respondent was not his landlord. As a matter of contract, under the terms of his tenancy agreement she was.”

10. The FTT said that Ms Yi had “discharged her obligations in a responsible way” and rejected the tenants’ evidence of disrepair and environmental health concerns.

11. The FTT correctly referred to the Tribunal’s decisions in *Vadamalayan v Stewart* [2020] UKUT 183 (LC), *Williams v Parmar* [2021] UKUT 244 (LC) and *Acheampong v Roman* [2022] UKUT 239 (LC) and followed the steps set out in the latter case in deciding how much to order Ms Yi to pay. The FTT said at its paragraph 30:

“Adopting that approach, the Tribunal determined:

(i) the starting figure for the assessment of the RRO was the sums claimed by each of the Applicants set out application for the periods of time in respect of which the property was unlicensed;

(ii) then subtracted any element of that sum that represented payment for utilities that only benefited the tenant, e.g. gas, electricity and internet access;

(iii) whilst the Respondent was culpable by not applying for an HMO licence, the Tribunal was satisfied that it was not a deliberate act on her part. As stated earlier, the Tribunal did not consider the Respondent to be a rogue landlord. Her failure to obtain a licence for the house was inadvertent and she, therefore, bore a lower level of culpability.

(iv) the relevant conduct on the part of both parties has already been considered above.

(v) the financial circumstances of the Respondent are unknown. As the Tribunal understands it, the Respondent has not been convicted of any offence.”

12. As to step (ii) the FTT subtracted for each tenant the sum of £98.56 per month and there is no challenge to that figure. The FTT therefore took for each tenant the total claimed, less what they had paid for utilities, and (subject to an extra step for Mr Hobbs, which I will come to shortly) divided the resulting figure by 2, on the basis that a reduction of 50% was an appropriate reflection of Ms Yi’s culpability. Again there is no challenge to that deduction.
13. It is convenient now to address the appeal from the orders made in favour of the two respondents in turn

### **The appeal against the order in favour of Mr Hobbs**

14. The FTT set out its calculation as follows:

#### Mr Hobbs

Total rent claimed:	£7,700 (being £700 x 11)
Less Rent arrears	£1,699
Cost of amenities:	
£98.56 x 11	<u>£1,004.16</u>
	£4,996.84
Less 50%	<u>£2,498.42</u>
Total	£2,498.42

15. There are two obvious puzzles about that calculation. The first is that  $98.56 \times 11 = £1,084.16$ . The second is that the arrears have been deducted from the starting figure, before the division by two to mark the landlord’s low level of culpability. If the FTT intended to deduct the rent arrears from the amount payable it has not done so. It has only deducted half. The FTT did not explain why it did the calculation that way and Ms Yi argues that the deduction should have been made after the deduction of 50%, so as to give her credit, against what she had to pay, for the full amount of the arrears.
16. On receipt of the grounds of appeal the Tribunal gave the FTT the opportunity to provide further reasons for its calculation. In response the FTT identified the arithmetical error in the calculation of the amount payable for utilities, and acknowledged that if the rent arrears occurred outside the period in respect of which the order was made then “it perhaps should be a final reduction as suggested by the Respondent.” The FTT found as a fact that the arrears occurred outside the period in respect of which the order was made, at its paragraph 20.
17. Had the arrears accrued during the period of the order, then they would simply have been left out of account altogether because the order could relate only to the rent paid in respect of that period. As it was, Mr Hobbs paid his rent in full in the 11-month period to which

the order relates, and then fell into arrears a few months later. How should the FTT have responded to that?

18. This is a matter of the tenant's conduct, pursuant to section 44(4)(a). The FTT has a discretion as to how to respond to it and it is not a given that those arrears must be deducted, in whole or in part, from what the landlord has to repay.
19. In response to the grounds of appeal Mr Williams, in representations in response to the application for permission to appeal, made a number of points. First, he argued that because the arrears fell outside the period in respect of which the application was made the FTT had no discretion to take the arrears into account. That is manifestly incorrect. The Tribunal (the Deputy Chamber President, Martin Rodger KC) in *Kowalek v Hossanein Ltd* [2021] UKUT 143 (LC) agreed with the FTT that arrears accrued by the tenant outside the period relevant to the rent repayment order was a matter of the tenant's conduct and relevant to the calculation of the order; it upheld the FTT's decision to reduce the order made from £23,819.98 by 50% to £11,909.99, where the rent arrears amounted to over £8,000. That decision was upheld by the Court of Appeal ([2022] EWCA Civ 1041).
20. Second, Mr Williams said that during the period in which the arrears accrued Ms Yi should have had no involvement in managing the property because she was outside the UK at the time and the local housing authority required a manager to be in the country. I fail to see any relevance of this point even if it is correct; in any event it was not argued before the FTT and it is too late to argue a new point about Ms Yi's conduct.
21. Third, Mr Williams argued that in light of the sums involved, and since Ms Yi is not appealing against the finding that she committed an offence, it was not an appropriate use of the Tribunal's resources to entertain the appeal. He added: "The Respondents further note that, insofar as the FTT June Decision made no reference to inflation, even if the nominal amount of the RRO award were to remain unchanged, the economic value of that RRO award will be lower than it was at the time of the FTT June Decision, and so the passage of time will have in any event brought about a reduction of the sort the Applicant seeks." The latter point is obviously incorrect and in any event irrelevant. As to the general point about the importance of the appeal, in granting permission to appeal the Tribunal disagreed.
22. Mr Hobbs in his statement of case repeated those points, with some elaboration, and added allegations about the condition of the property which the FTT had rejected and which cannot be challenged in this appeal.
23. Reverting then to the arguments made by Ms Yi, was the FTT right to reduce the amount payable by only half the arrears, without explaining why? The lack of explanation is of course a problem in itself. But might there have been an available explanation for the decision? As I said above, it was clearly within the FTT's discretion to allow only half the arrears against the amount payable, and indeed one can imagine circumstances where no reduction might be made to reflect arrears, in light of the conduct of the landlord. But this was not such a case; the only relevant matter of conduct of either party was the rent arrears accrued by Mr Hobbs. The FTT's decision to reduce the amount payable by only 50% of those arrears is inexplicable and I set the decision aside. I can see no reason why the whole of arrears should not be set against the amount to be repaid, since there is no dispute about the amount of the arrears and the FTT found that no satisfactory explanation had been given for the arrears.

24. The Tribunal substitutes its own decision, taking into account the rent arrears and correcting the arithmetical error identified in the deduction for utilities, that the amount payable is calculated as follows:

Total rent claimed:	£7,700
Cost of amenities:	
£98.56 x 11	<u>£6,615.84</u>
Less 50% =	£3,307.92
Less rent arrears	<u>£1,699</u>
<b>Total</b>	<b>£1,608.92</b>

#### **The appeal against the order in favour of Mr Alaike**

25. The appeal against the order in favour of Mr Alaike rests purely on arithmetical errors, and the appellants' case is now agreed by the FTT to be correct.
26. The FTT's calculation of the amount payable in its decision was as follows:

Total rent claimed:	£8,637
Cost of amenities:	
£98.56 x 10.5	<u>£1,034.88</u>
	£7602.12
Less 50%	<u>£3,801.06</u>
Total	£4,801.06

27. In her grounds of appeal Ms Yi pointed out that the starting figure of £8,637 was wrong because Mr Alaike claimed 10 and a half months' rent at £750 per month and that the total is obviously wrong by £1,000.
28. In its refusal of permission to appeal the FTT did not address these points. In its response to the Tribunal's enquiry (see paragraph 14 above) the FTT agreed with Ms Yi's points and substituted the following calculation:

Total rent claimed:	£7,875 (being £750 x 10.5)
Cost of amenities:	
£98.56 x 10.5	<u>£1,034.88</u>
	£6,840.12
Less 50%	<u>£3,420.06</u>

**Total** **£3,420.06**

29. In responding to the application for permission on behalf of both respondents to appeal Mr Williams argued, as set out above in connection with Mr Hobbs, that the sums in issue as against the two respondents together were too small to merit the use of the Tribunal's resources; and again that inflation and delay would secure the reduction the appellant sought. The appeal against the order on favour of Mr Alaike rests simply on arithmetical errors and it is troubling that an officer of a public authority argued against their being corrected. The saving of the Tribunal's resources that Mr Williams sought could have been achieved by the conceding of the appeal.
30. The appeal is allowed in respect of the order in favour of Mr Alaike and the figure provided by the FTT in its revised calculation is substituted for the original figure.

### **Conclusion**

31. The appeal succeeds in respect of both orders. The figure payable to Mr Hobbs is now £1,608.92; the figure payable to Mr Alaike is now £3,420.06. These sums are payable immediately. In addition, the FTT's order that Ms Yi pay to the three respondents the sum of £150 in respect of the FTT application fee remains unappealed. If Ms Yi wishes to make an application to the Upper Tribunal for repayment by the respondents of the fees she has incurred in pursuing the appeal, pursuant to rule 10(14) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, and she may do so within 14 days of the date of this order.

Upper Tribunal Judge Elizabeth Cooke

3 June 2024

### **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.