



Neutral Citation Number: [2024] UKUT 219 (LC)

Case No: LC-2024-244

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

FTT REF: BIR/OOFY/HMK/2022/0016

25 July 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – tenancy of unlicensed flat granted to joint tenants – application for rent repayment order by one tenant – whether FTT had power to order repayment of rent paid by both tenants – whether it did so – ss.40, 41, 44 Housing and Planning Act 2016 – appeal dismissed

BETWEEN:

MR MARTIN MARCUS

Appellant

-and-

MR DINO KWOK

Respondent

9 Enfield House,
18 Lower Pavement,
Nottingham NG1

Martin Rodger KC,
Deputy Chamber President

Decision on written representations

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No cases are referred to in this decision.

1. Can one joint tenant, applying alone for a rent repayment order, recover rent paid by their fellow joint tenant who has not themselves applied for an order? That is the issue for which permission to appeal was granted by this Tribunal against a decision of the First-tier Tribunal, Property Chamber (the FTT), made on 30 May 2023 requiring the appellant, Mr Martin Marcus, to repay rent of £3,025 to the respondent, Mr Dino Kwok.
2. On 5 October 2020 the respondent and his cousin, Mr Chun Hei Kwok, were granted a tenancy of a flat in Nottingham by the appellant. The tenancy agreement identified both tenants by name and recorded that the term of the tenancy would run until 4 April 2021 and then continue from month to month. The rent was £925 per month and the agreement specified that the tenants were jointly and severally liable for that amount (meaning that either of them could be held responsible for the full amount if the other did not fulfil their obligation). The tenancy ended in December 2021 when the property was vacated.
3. The flat was in an area designated under a selective licensing scheme under Part 3 of the Housing Act 2004 (the 2004 Act). The appellant did not have a licence and the FTT found that he did not have a reasonable excuse for letting the flat without one. He was later advised by a letting agent that he needed a licence and he then promptly applied for one, but that was not until 15 February 2022.
4. It is an offence, contrary to section 95, 2004 Act, for a person to have control of an unlicensed house without a reasonable excuse. The offence is one of those listed in section 40(3), Housing and Planning Act 2016 (the 2016 Act), in respect of which a rent repayment order may be made.
5. As section 40(2), 2016 Act explains, a rent repayment order is an order requiring the landlord under a tenancy of housing to repay an amount of rent paid by a tenant. Section 41(1) provides that a tenant may apply to the FTT for a rent repayment order. The amount of an order is determined in accordance with section 44(2) which specifies that, for the offence of having control of an unlicensed house contrary to section 95, 2004 Act, the amount must “relate to rent paid by the tenant in respect of a period, not exceeding 12 months, during which the landlord was committing the offence.
6. It is apparent from these provisions that a rent repayment order may only be made in respect of rent paid by the tenant who makes the application. The answer to the question posed at the start of this decision is clear: one joint tenant, applying alone for a rent repayment order, cannot recover rent paid by their fellow joint tenant who has not applied for an order.
7. On closer examination, however, the real issue in this appeal is whether that is the effect of the FTT’s order.
8. After the tenancy ended and he had vacated the flat Mr Kwok applied to the FTT for a rent repayment order for a total sum of £5,550.00. He did not explain why he was limiting his claim to a sum equal to only six months’ rent, when he could have claimed for the maximum period of 12 months during which the offence had been committed.
9. The FTT dealt with the application at a hearing which both parties attended on-line. I have seen an official transcript of that hearing. The respondent was asked by the FTT who had paid the rent. He answered “I was. Me and my cousin, we split the rent but my cousin he – his name is also on the tenancy but he has returned to Hong Kong, yes, so

that is why I am the sole applicant”. He later explained that “the agreement between me and my cousin, my brother, was that I would pay all the rent and utility bills and they would pay me back separately”.

10. The FTT was satisfied that an offence had been committed and that it was appropriate to make a rent repayment order. It considered the facts of the case (including the appellant’s personal circumstances and resources) and decided that a sum equal to 55% of the rent paid was the appropriate penalty. It recorded that Mr Kwok had “limited the period of claim to six months” on which it based a starting figure for the assessment of £5500 leading it to order repayment of £3,025.
11. The appellant was granted permission to appeal by this Tribunal on the single ground that the respondent had paid only half of the rent during the tenancy and that the other half had been paid by his cousin, Mr Chun Hei Kwok. It was said that the rent which the appellant had been ordered to repay to the respondent therefore included rent paid by his cousin, which it should not have done.
12. Neither party made submissions of any substance about this ground of appeal. In a statement of case dated 28 May Mr Kwok said that his application had been made “with the intention of reclaiming rent for both tenants” and that he and his cousin had agreed that they would share the rent recovered equally between them. This was supported by a statement from Mr Chun Hei Kwok saying that the two tenants had agreed to make a rent repayment application together but that he had had to return to Hong Kong before it was submitted. He asked to be made a party to the application so that he could claim the other half of the rent which the FTT had ordered be repaid.
13. In view of his evidence that he and his cousin had split the rent for the flat equally between them, it might have been assumed that the reason the respondent limited his claim to a sum equal to only 6 months’ rent, or £5,550, was that that was the portion of the year’s rent for which he had been responsible. The FTT did not deal with the reason for the claim being limited in that way, but it is a reasonable assumption. It is also supported by the respondent’s answer when he was asked by the FTT for an explanation in the following exchange taken from the transcript:

Judge: Now you have made a claim for the full amount of the rent to be repaid of the six months, six times £925. Why have you put it in at that number?

Mr Kwok: I think firstly I was – I believe we – I am entitled to that amount, that is why I put it in. And my – the biggest reason, really, it is Mr Marcus’ attitude after we informed him that we had decided to determine the tenancy.

Mr Kwok then explained why he considered Mr Marcus had behaved badly and that “that was the biggest reason why I felt that this application is required”.

14. In the absence of any other explanation for Mr Kwok having limited the claim to only half of the maximum which could have been applied for by both joint tenants, I read the first part of his answer to the FTT’s question (“I believe we – I am entitled to that amount ...”) as indicating that Mr Kwok intended to reclaim the half of the rent which he had paid and which he alone was entitled to recover. The explanation is not the clearest, but it is supported by what reads like a correction. He began with “I believe we ...” then corrected himself to ‘I am entitled to that amount’.

15. That reading of Mr Kwok's answer might appear to sit a little uncomfortably with the suggestion in his statement of case for the appeal that he and his cousin had agreed that they would share the amount recovered, but they are not irreconcilable. There is no reason why Mr Kwok should not have agreed to share the amount which he was entitled to claim on his own behalf.
16. A claim by Mr Kwok for repayment of the maximum 12 months' rent which could be requested would have failed, because Mr Kwok had not paid that amount himself and an order can only be made for repayment of rent which the tenant making the application has paid. Half of the total had been paid by his cousin, and it would have been necessary for them both to join in the claim to enable the full amount to be recovered. But Mr Kwok did not claim repayment of the full amount, but only half of it, which was the portion he had paid himself. Although the FTT described the claim as being for the full amount for six months there was no other reason to limit the claim to only half of the available period and it is more consistent with the statutory scheme and with Mr Kwok's explanation to see it as the whole of the rent which he had paid during the full 12 month period. Additionally, the FTT was aware that the rent had been paid by both tenants equally and it seems unlikely that it would have made no comment if it had thought part of the sum it was awarding represented rent paid by Mr Kwok's cousin.
17. After all of the material for the appeal had been submitted Mr Marcus supplied copies of invoices addressed by his own letting agent to Mr Chun Hei Kwok alone. He suggested that these showed that the rent had been paid only by the respondent's cousin and not by the respondent himself. It is not suggested that those invoices were shown to the FTT, which was satisfied that the respondent had paid half of the rent, and it is too late to raise a new point of fact on an appeal from its decision.
18. It is not possible for Mr Chun Hei Kwok to become a party to the application at this late stage, nor is it necessary for him to do so in order to avoid the FTT's order being disturbed.
19. For these reasons I am satisfied that the order made by the FTT was one which it was entitled to make and the appeal is dismissed.

Martin Rodger KC
Deputy Chamber President

25 July 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.