UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 143 (LC)

UTLC Case Numbers: LC-2020-11

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – recoverability of rent paid after relevant housing offence had ceased -whether tenants' failure to pay rent and existence of substantial arrears to be taken into account as relevant matters of conduct – treatment of rental deposit – ss. 40-44, 52(2), Housing and Planning Act 2016 - appeal dismissed

APPEAL AGAINST A DECISION OF

THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MAREK AND KAHORI KOWALEK

Appellants

-and-

HASSANEIN LIMITED

Respondent

Re: Flat 13,

130 Kilburn Park Road,

London NW6

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

27 May 2021

Ms Brooke Lyne, instructed by Advocate, the Bar Pro Bono Unit, for the appellants

Mr Mathew McDermott, instructed by Benchmark LLP, Solicitors, for the respondent

The following cases are referred to in this decision:

Awad v Hooley [2021] UKUT 55 (LC)

Rakusen v Jepsen [2020] UKUT 298 (LC)

Thomas v Ken Thomas Ltd [2007] 1 EGLR 31

Introduction

1.
This appeal raises three questions of general importance in the determination of applications for rent repayment orders under Part 2 of the Housing and Planning Act 2016. The questions concern: first,

the treatment of payments made by a tenant after the landlord has stopped committing the relevant housing offence, but in respect of rent arrears which fell due while the offence was being committed; secondly, the treatment of rent deposits; and thirdly, whether the failure of the tenant to pay rent and the existence of substantial arrears are matters of conduct which can properly be taken into account when considering the amount to be repaid.

2.
The appeal is against a decision of the First-tier Tribunal, Property Chamber (the FTT) made on 9 September 2020 by which it ordered the landlord, Hassanein Ltd, to repay the sum of £11,909.99 to the tenants, Mr and Mrs Kowalek, which they had paid as rent under their tenancy of a modern four bedroom flat at 130 Kilburn High Road.

3.
Mr and Mrs Kowalek were granted permission to appeal by this Tribunal on three separate grounds covering the matters I have identified above. At the hearing of the appeal they were represented by Ms Brooke Lyne, of counsel, instructed by Advocate (the Bar Pro Bono Unit). The respondent landlord was also represented by counsel, Mr Mathew McDermott. The complexities of the “rogue landlord” provisions of the 2016 Act are gradually being exposed as further appeals come forward and this Tribunal is always greatly assisted by having good quality representation on both sides of the argument. I am very grateful to both counsel for their submissions, and particularly to Ms Lyne who provided her services pro bono.

The facts

4.
130 Kilburn Park Road is a modern apartment building which had only recently been completed when the respondent acquired the long lease of Flat 13, in 2018. The four-bedroom flat was one of two apartments in the building bought by the company as an investment. It instructed reputable letting agents to find tenants for the flat, and those agents found Mr and Mrs Kowalek.

5.
On 26 February 2019 the company granted Mr and Mrs Kowalek an assured shorthold tenancy of the flat for a term of 24 months, at a rent of £3,553.33 per month. They paid three months’ rent in advance and a tenancy deposit of £4,920, which was held under a tenancy deposit scheme.

6.
Following a designation by the local housing authority, which came into effect on 1 June 2018, the building fell within an area of selective licensing under the Housing Act 2004. It was the landlord’s case before the FTT that it had been unaware of the requirement to obtain a licence, not having been alerted to it by the authority or by its own letting agent. The FTT made no findings concerning the landlord’s state of knowledge but the explanation given by its director in evidence to the FTT does not seem to have been challenged. In any event, the respondent did not obtain a licence before it let the flat to the appellants.

7.
For reasons which were not investigated by the FTT or explained during the appeal the tenants stopped making regular payments of rent in August 2019. In the following nine months they made only three payments totalling £2,500, and substantial arrears accumulated. This prompted the landlord to serve notice of its intention to seek possession on 18 November 2019, by which time the

arrears were more than £8,000. In December 2019 possession proceedings were commenced by the landlord and these came before the County Court for the first time on 28 January 2020.

8.
On 10 January 2020 the tenants applied to the FTT for a rent repayment order, seeking repayment of £23,819.98, which is agreed to have been the full amount of the rent paid between 26 February 2019 and the date of the application. Later, the tenants wrote to the FTT requesting to amend their application to include two further sums: the first was a sum of £2,000 which they had paid on 28 January 2020, the day of the first hearing of the possession proceedings; and the second was the tenancy deposit of £4,920 which remained subject to the tenancy deposit scheme.

9.
The application for a rent repayment order was served on the landlord by the FTT on 25 January 2020 and two days later, on 27 January, it applied to the local housing authority for a licence, which was duly granted on 23 March 2020.

10.
The tenants vacated the flat on 24 March 2020 without having made any further payment of rent. In total during the period of their occupation they had paid £25,819.98 in rent, and had allowed arrears of at least £20,373.31 to accumulate (the landlord puts the arrears at £25,819, but without knowing the basis on which the tenants gave up their tenancy it is not clear whether a further month's rent also became payable on 26 March).

11.
The County Court proceedings have not yet been determined, but they are now concerned solely with the arrears of rent and any defences the tenants may rely on. The tenancy deposit is held by TDS, the tenancy deposit scheme, which has said that it will hold the sum until the conclusion of the court proceedings.

Rent repayment orders

12.
Jurisdiction to make a rent repayment order against a landlord which has committed a relevant housing offence is conferred on the FTT by Chapter 4 of Part 2, Housing and Planning Act 2016 (the 2016 Act) (section 40(1)).

13.
A rent repayment order is an order requiring a landlord to "repay an amount of rent paid by a tenant" (section 40(2)). "Rent" is given an extended meaning by section 52(2) which provides:

"For the purposes of this Chapter an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent."

14.
A rent repayment order may only be made where a landlord has committed an offence to which Chapter 2 applies (section 40(1)). Those offences are identified in a table in section 40(3), and row 6 in that table specifies having control or management of an unlicensed HMO contrary to section 95(1), Housing Act 2004 as one such offence. The FTT must be satisfied beyond reasonable doubt that a landlord has committed a relevant offence before it may make an order (section 43(1)).

15.

By section 43(3), the amount which a landlord may be required to repay under a rent repayment order is to be determined in accordance with sections 44 to 46. Where the order is made in favour of a tenant the appropriate provision is section 44, which is in the following terms:

“44. **Amount of order: tenants**

(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.

If the order is made on the ground that the landlord has committed	**the amount must relate to rent paid by the tenant in respect of**
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

(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.”

The FTT’s decision

16.
The FTT found that Flat 13 had not been licensed between the commencement of the tenancy on 26 February 2019 and the landlord’s application for a licence on 27 January 2020. As the property was required to be licensed under the selective licensing scheme, the FTT concluded that the landlord had committed an offence contrary to section 95, Housing Act 2004. It is regrettable that the FTT reached that conclusion without mentioning the statutory defence under section 95(4), 2004 Act which had been clearly and professionally pleaded in the landlord’s statement of case, namely, that it had a reasonable excuse for its failure to obtain a licence. The landlord has chosen not to raise that omission in a cross-appeal.

17.
Of relevance to the first issue in this appeal, the FTT referred to the payment of £2,000 in rent on 28 January 2020 but said that as it had been made on the day after the licence application had been submitted the payment was “outwith the scope of a rent repayment order”.

18.
The FTT had been informed by the tenants’ representative that the deposit of £4,920 has been retained by the landlord and was aware that entitlement to the deposit was the subject of a separate

dispute. The material before this Tribunal suggests that, contrary to the impression given to the FTT, the deposit was (and is) being held by the tenancy deposit scheme, but nothing turns on that. The FTT concluded that the deposit could not form part of the sum to be considered for the purposes of a rent repayment order because such an order could relate only to money paid "as rent". The FTT explained:

"The sum in dispute here was paid as a security deposit and not rent and therefore will be excluded by the Tribunal when considering a rent repayment order. As Counsel for the respondent company noted, the submission also wrongly looks into the future (to some unknown date) and presumes not only that all of the deposit will be retained but that it will all be retained in lieu of rent. Whilst this may happen, it has not happened yet."

19.
When considering the amount to be repaid, the FTT had regard to the conduct of the tenants in allowing substantial rent arrears to accrue. The payment of rent was, the FTT said, "the paramount duty of a tenant" and in this case that duty had clearly been breached. In assessing conduct the FTT also referred to "unsettled allegations of damage to the property on the applicants vacating the premises".

20.
The FTT concluded its assessment of the appropriate quantum of the order as follows:

"Consequently, while the tribunal started at the 100% level of the rent it thought that reductions were appropriate, proportionate and indeed necessary to take account of the factors in the Act. Therefore, the tribunal decided particularly in light of the rent arrears and the absence of a licence that there should be a reduction of 50% from the maximum figure of £23,819.98 giving a final figure of £11909.99. This figure represents the Tribunal's overall view of the circumstances that determine the amount of the rent repayment order."

The issues

21.
Permission to appeal was given on three issues:

1.
Whether a deposit offset as rent should be treated as having been paid as rent and be part of the sum which a rent repayment order may require a landlord to repay.

2.
Whether money paid after a landlord has ceased committing a relevant housing offence to discharge the tenant's liability for rent falling due while the offence was being committed, should be part of the sum which a rent repayment order may require a landlord to repay.

3.
Whether the existence of rent arrears amounts to relevant "conduct" which may be taken into consideration in determining the amount of a rent repayment order.

22.
At the hearing of the appeal Ms Lyne did not feel able to advance the first ground of appeal. It appears not to be the case that the deposit has been retained by the landlord and set off against rent, and its eventual destination awaits the decision of the County Court. Nevertheless, Ms Lyne and Mr

McDermott each made brief submissions on the issue of principle which I will return to after dealing with the two grounds of appeal which were pursued.

Issue 2: rent paid after commission of the offence has ceased

23.
On behalf of the tenants, Ms Lyne submitted that the sum of £2,000 paid as rent on 28 January 2020, one day after the landlord applied for a licence, should be included within the maximum sum that could be ordered to be repaid because the payment should be treated as having been paid to discharge arrears of rent which fell due during the period when the offence was being committed. The relevant statutory direction was found in section 44(2), which began by stating that the amount to be repaid must "relate to rent paid during the period mentioned in the table", before indicating (in the heading in the right-hand column of the table) that "the amount must relate to rent paid by the tenant in respect of" the periods identified; in this case, the relevant period for an offence in row 6 is "a period, not exceeding 12 months, during which the landlord was committing the offence".

24.
Ms Lyne submitted that rent paid after the offence has ended, but relating to an earlier time when the offence was being committed, was properly described as having been paid "in respect of" the period during which the landlord was committing the offence. She sought support for that submission from the recent decision of this Tribunal (Judge Cooke) in Awad v Hooley[2021] UKUT 55 (LC) which upheld a decision of the FTT that normal accounting practice required payments made during the relevant period to be attributed first to any arrears that had accrued prior to the date of payment (even if those arrears pre-dated the offence and so reduced the amount which could be made the subject of a rent repayment order).

25.
On behalf of the landlord Mr McDermott submitted simply that section 44(2) had the effect that a rent repayment order could only be made in respect of a sum paid at a time when the relevant offence was being committed. In this case the commission of the offence had ceased when the landlord applied for a licence, because section 95(3)(b), Housing Act 2004 provides that it is a defence to the offence of managing an unlicensed house that, at the material time, an application for a licence has been made and has not yet been determined.

26.
Ms Lyne suggested that an interpretation of section 44(2) which focussed only on the time when the relevant payment was made, and not on the period in respect of which the payment was made, might have undesirable consequences. A tenant who paid rent in advance at the start of a tenancy, perhaps for a period of twelve months, whose landlord began committing an offence shortly after the payment was received ought not to be prevented from obtaining a rent repayment order.

27.
I have no doubt that the FTT came to the correct conclusion on this issue, and that the effect of section 44(2) is not seriously in doubt.

28.
First, Mr McDermott is clearly correct (and Ms Lyne did not suggest otherwise) that a landlord ceases to commit an offence under section 95, Housing Act 2004 as soon as an application for a licence has been "duly made" and, not having been withdrawn, remains un-determined or, having been determined, remains open to appeal. That is the effect of section 95(3)(b) and (7)-(8). The qualification

that the application must have been “duly made” may have to be considered if it gives rise to an issue in another case, but it may be intended to exclude, for example, an application submitted without a necessary fee having been paid.

29.
Secondly, section 44(2) limits the amount of rent which may be the subject of a rent repayment order in two quite different respects. The first limitation focusses on when the payment was made: “the amount must relate to rent paid during the period mentioned in the table”. The second limitation is provided by the requirement in the table heading that “the amount must relate to rent paid by the tenant in respect of” the appropriate period. This focusses on the period in respect of which the payment was made - what the payment was for, not when it was made. Both conditions must be satisfied before a sum paid as rent can be the subject of a rent repayment order.

30.
Where the relevant offence is one of those in rows 3, 4, 5, 6 or 7 of the table in section 40(3) (all of which are offences committed over a period of time, rather than by acts committed on a single occasion) the period mentioned in the table in section 44(2) is “a period, not exceeding 12 months, during which the landlord was committing the offence”. The first limitation therefore means that, to be capable of being the subject of a rent repayment order, a sum must have been paid during the period, not exceeding 12 months, when the landlord was committing the offence. In the language of section 44(2), the amount to be repaid must “relate to rent paid during” that period. Rent paid before or after that period is therefore ineligible for consideration. The sum of £2,000 paid on 28 January 2020 was paid after the end of the period during which the landlord was committing the offence, and so was properly disregarded by the FTT.

31.
The second limitation, on which Ms Lyne’s submissions concentrated, is additional to the first and different from it. To be capable of being the subject of a rent repayment order, a sum must also “relate to rent paid by the tenant in respect of” the period, not exceeding 12 months, during which the landlord was committing the offence”. It is implicit in this formulation that an instalment of rent may need to be apportioned between periods before and after the landlord was committing the offence. If a tenant pays three months’ rent at the start of a tenancy to a landlord who fails to apply for a necessary licence until the end of the first month, so as to have committed an offence contrary to section 95(1), Housing Act 2004 throughout the first month but not thereafter, only the first month’s rent could be the subject of a rent repayment order. The remaining two months’ rent would not be eligible as they would not have been paid in respect of the period during which the landlord was committing the offence.

32.
Properly understood, there is no contradiction between the different parts of section 44(2), and no need to give priority to one over the other. The consequences which Ms Lyne suggested were undesirable are in fact quite consistent with the policy of the Act to deter the commission of housing offences and to encourage compliance by landlords with their licencing and other obligations. It is no surprise that a landlord is not at risk of having to repay rent paid by the tenant at a time when the landlord was not committing any offence.

33.
Nor is this conclusion inconsistent with anything said by the Tribunal in Awad v Hooley. The sum in issue in that case could not be the subject of a rent repayment order because, having been attributed

on normal accounting principles to the oldest arrears, it was not rent paid in respect of the period of 12 months during which the landlord was committing the offence, even though it may have been paid during that period. In other words, the sum in question satisfied the first restriction but could not be included in the rent repayment order because it failed to satisfy the second. I would add, without dissenting from anything said in Awad v Hooley, that, on normal contractual principles (rather than accounting principles), the attribution or appropriation of payments of rent to a particular period is the choice of the tenant, as the paying party; if the paying party does not appropriate the payment to a particular period when making it, as happened in Awad, the receiving party is entitled to do so as it chooses (see Thomas v Ken Thomas Ltd [2007] 1 EGLR 31 at [19]; Woodfall: Law of Landlord and Tenant, paragraph 7.023.2).

34.
I therefore dismiss the appeal on issue 2.

Issue 3: the relevance of rent arrears

35.
When determining the amount of a rent repayment order, section 44(4) requires the FTT in particular to take three matters into account. The first is the conduct of the landlord and the tenant. In this case the conduct of the tenants which the FTT took into account included their failure to pay rent for long periods during the tenancy and their accumulation of substantial arrears.

36.
Ms Lyne submitted that the existence of rent arrears was legally irrelevant and could not be taken into consideration, for two reasons. First, because it was no part of the policy underlying rent repayment orders that they should punish the conduct of tenants; the only relevant policy was to deter the commission of housing offences and to discourage the activities of “rogue landlords”. And secondly, because to reduce a rent repayment order because of the existence of substantial arrears would be “double counting”, as Ms Lyne put it. The FTT could only order the repayment of rent which had actually been paid, so a tenant in arrears could not benefit from an order to the same extent as a tenant who was fully paid up. The amount paid, and therefore the amount of any arrears, was already taken into account when assessing the maximum amount which could be ordered to be repaid; it should not then be taken into account for a second time when considering by how much that maximum should be reduced to reflect the tenant’s conduct.

37.
I do not accept Ms Lyne’s submissions. No question of double counting or punishment arises. A tenant in whose favour a rent repayment order is made cannot be regarded as being punished by a reduction in the amount of the order below the maximum permissible. From the point of view of the tenant, any repayment is a windfall. It is of course the case that some tenants in whose favour orders are made have been the victims of serious housing offences (harassment or unlawful eviction) or will have lived in hazardous or unpleasant conditions because of breaches of their landlords’ obligations. But that will often not be the case. As the Tribunal said in Rakusen v Jepsen [2020] UKUT 298 (LC) at [64], unlicensed accommodation may provide a perfectly satisfactory place to live, despite its irregular status, and the main object of rent repayment orders is deterrence rather than compensation.

38.
Section 44(4)(a) requires the FTT to take into account the conduct of the tenant when determining the amount of an order. No limit is imposed on the type of conduct that may be considered, and no more detailed guidance is given about the significance or weight to be attributed to different types of

conduct in the determination. Those questions have been left to the FTT to resolve. I can think of no reason why relevant conduct should not include the conduct of a tenant in relation to the obligations of the tenancy. Failing to pay rent without explanation (and none was offered to the FTT or on the appeal) is a serious breach of a tenant's obligations. Parliament intended that the behaviour of the parties to the tenancy towards each other should be one factor to be taken into account.

39.
Once it is determined that non-payment of rent is a matter which can properly be taken into account, it must be left to the FTT to decide what impact it should have on the amount to be repaid. In this case the substantial arrears were the main factor which the FTT relied on in limiting the amount of the order to half of the total rent paid, and I cannot see any basis on which that decision could be regarded as irrational or outside the FTT's discretion.

40.
I therefore dismiss the appeal on the second issue.

Issue 1: the treatment of the deposit

41.
I will deal finally with the FTT's treatment of the deposit paid by the tenants, although Ms Lyne quite properly did not feel able to advance submissions on that ground of the appeal once the facts had become clear.

42.
In short, both of the reasons given by the FTT for refusing to consider the deposit when calculating the maximum amount which could be made the subject of an order seem to me to be correct. The deposit was not "an amount of rent paid by a tenant", as section 40(2) requires, because it had not been paid as rent, but as security for the performance of the tenants' obligations. It was true that those obligations included the obligation to pay rent, which the tenants had breached, but that breach did not give the landlord immediate access to the deposit. It would therefore be premature to treat the sum as if it was rent; it may never become rent and may eventually be repaid to the tenants, or be used by the landlord to discharge other liabilities of the tenants (such as any order for the payment of costs of the County Court proceedings). A deposit cannot be included in a rent repayment order while it is still being held as a deposit.

43.
If a tenancy deposit which is held by a landlord, or by a deposit holder, is released from the terms on which it is held and is then used by the landlord to satisfy arrears of rent, the fact that it had not originally been paid as rent would not prevent it from being taken into account in calculating a rent repayment order. In those circumstances the extended definition of "rent" in section 52(2) would apply: "an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent." A tenancy deposit will not originally have been paid as rent, but may subsequently be offset against arrears of rent, and so fall to be treated as having been paid as rent. It would, of course, be necessary for both limbs of section 44(2) to be satisfied. I heard no argument on how they would be applied to a deposit treated by section 52(2) as having been paid as rent, so I say nothing about that issue.

Disposal

44.

Ms Lyne criticised the FTT's reasoning on other grounds on which permission to appeal had not been sought. In particular, the reference to "unsettled allegations of damage to the property on the applicants vacating the premises" in the paragraph dealing with the tenants' conduct suggested the FTT may have prejudged an issue on which it received no evidence. But no formal application to expand the grounds of appeal was made by Ms Lyne, perhaps wisely, as it might have provoked a cross application focussing on the FTT's omission to deal with the defence of reasonable excuse. I will therefore say no more about issues for which permission to appeal was not sought.

45.
For these reasons the appeal is dismissed.

Martin Rodger QC,

Deputy Chamber President

18 June 2021