UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – Landlord found to have committed multiple housing offences – whether more than one rent repayment order may be made – sections 40-44, Housing and Planning Act 2016 - appeal dismissed

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

BETWEEN:

ROSA FICCARA (1)

VALENTINA PATERMO (2) **Appellants**

MARILENA BALISTRERI (3)

and

HANNAH JAMES **Respondent**

Re: 28 Malden Crescent,

London

NW1 8HD

Martin Rodger QC, Deputy Chamber President

3 February 2021

by remote video platform

Francesca Nicholls, of “Flat Justice”, for the appellants

Nicholas Towers for the respondent

The following cases are referred to in this decision:

ESS Production Ltd (in administration) v Sully [2005] EWCA Civ 554

Rakusen v Jepsen [2020] UKUT 298 (LC)

Vadamalayan v Stewart [2020] UKUT 183 (LC)

Introduction

1.
Can a tenant obtain more than one rent repayment order under Chapter 4 of Part 2, Housing and Planning Act 2016, if their landlord has committed more than one offence to which that Chapter

applies? That is the question which arises on this appeal from a decision of the First-tier Tribunal (Property Chamber) (the FTT) given on 25 June 2020.

2.
The FTT made only one rent repayment order in favour of each of four former tenants of a flat in London against their former landlord, the respondent, Hannah James. It was satisfied that she had committed separate offences under section 72(1), Housing Act 2004, and sections 1(2) and 1(3), Protection from Eviction Act 1977. The former tenants, three of whom are now appellants, asked the FTT to make separate rent repayment orders in respect of each of the three offences, but it refused to do so.

3.
The FTT also refused permission to appeal, but permission was granted by this Tribunal. Subsequently the respondent sought permission to cross appeal, but for reasons which I will explain that application had not been considered by the time the Tribunal heard the appeal. I will consider it once I have determined the issue of principle raised by the appeal.

4.
The appeal was conducted by remote digital platform. The appellants were represented by a lay advocate, Francesca Nicholls, of the “Flat Justice” organisation, and the respondent was represented by counsel, Nicholas Towers. I am grateful to them both for their submissions.

The statutory provisions

5.
Rent repayment orders are one of the suite of attritional measures in Part 2, Housing and Planning Act 2016 aimed at discouraging the activities of rogue landlords and property agents. The provisions have recently been reviewed by the Tribunal in some detail (including in Rakusen v Jepsen [2020] UKUT 298 (LC)) and it is not necessary to repeat that review in this appeal.

6.
The issue raised by the appeal is an issue of interpretation, in particular of sections 40, 43 and 44.

7.
Section 40(1) states:

“(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.”

The seven offences to which the Chapter applies are identified in numbered rows in a table in section 40(3), and include each of the offences which the FTT found the respondent had committed.

8.
As section 40(2) explains, a rent repayment order may require the landlord under a tenancy either to repay an amount of rent paid by a tenant, or to pay a local housing authority an amount in respect of an award universal credit paid in respect of rent under the tenancy.

9.
Section 43(1) provides that the FTT may make a rent repayment order if it is satisfied beyond reasonable doubt “that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).”

10.
By section 41(2)(b) an application a rent repayment order must be made within 12 months of the offence being committed.

11.
Where the FTT decides to make a rent repayment order in favour of a tenant section 44(1) states that "the amount is to be determined in accordance with this section." By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which is then set out. For the offences of harassment or unlawful eviction contrary to the 1977 Act the amount must relate to rent paid by the tenant in the period of 12 months ending with the date of the offence. For the HMO licensing offence, the amount must relate to rent paid by the tenant in a period, not exceeding 12 months, during which the landlord was committing the offence.

12.
By section 44(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."

In determining the amount to be repaid the FTT is required by section 44(4) to take into account, in particular, the conduct of the landlord and the tenant, the financial circumstances of the landlord, and whether the landlord has at any time been convicted of an offence to which Chapter 4 applies.

The facts found by the FTT

13.
The FTT made careful and comprehensive findings of fact covering the relevant events of which the following is a summary.

14.
28 Malden Crescent is a three-bedroomed former council flat in Camden. The appellant became the registered proprietor of the long lease of the flat on 3 May 2018 pursuant to an order of the County Court made on 15 March 2018 in proceedings between her and a former business partner. At that time four tenants lived in the flat, Ms Po, Ms Balistreri, Ms Patermo and Ms Ficcara. Ms Ficcara signed a new tenancy agreement with the appellant on 25 July 2018 for a further term of six months, and the other three tenants entered into their own new agreements on 7 August 2018.

15.
Ms Po moved out of the flat on 31 March 2019 and the three appellants were excluded by the respondent on 28 July 2019.

16.
On 12 November 2019 each of the tenants applied to the FTT for a rent repayment order under section 41, Housing and Planning Act 2016. Each application alleged that the respondent had committed three distinct offences to which Chapter 4 of Part 2 to the 2016 Act applied.

17.

The first offence alleged was that, contrary to section 72(1), Housing Act 2004 the respondent had had control of or was the person managing a house in multiple occupation which was required to be licenced but which was not so licenced. In respect of that offence the only issue was whether the flat was an HMO. The London Borough of Camden has designated its entire district as an area for additional licensing of HMOs on 15 June 2015 and the designation applied to all HMOs occupied by three or more persons comprising two or more households. The FTT was satisfied beyond reasonable doubt that the tenants of the flat were not a single household and that the flat was an HMO. In reaching that conclusion it found that the respondent had fabricated the signatures of the appellants on a document which purported to confirm that they were members of a single family. The FTT was satisfied that they were not and that they did not form a single household, and found that the offence had been committed by the respondent between 15 March 2018 and 28 July 2019.

18.
The second offence of which the respondent was accused was that, contrary to section 1(3) and 1(3A), Protection from Eviction Act 1977 she had done acts likely to interfere with the peace or comfort of the appellants with intent to cause them to give up the occupation of the flat or to refrain from exercising rights or pursuing remedies in respect of it. The FTT found that all elements of the offence were made out. It was satisfied beyond reasonable doubt the respondent had engaged in conduct with the intention of encouraging the tenants to leave the flat, including the use of intemperate language, pre-emptively increasing the rent without following agreed procedures in the tenancy agreements, giving the appellants one month's notice to leave the flat when they were entitled to more, being aggressive and threatening to kick the appellants out, threatening to move into the empty room in the flat with others after Ms Po had left, and finally moving in on 27 July 2019.

19.
The third offence alleged was that, contrary to section 1(2) of the 1977 Act, the appellant had unlawfully deprived the appellants of their occupation of the flat without reasonable cause to believe that they had ceased to reside there. The FTT was satisfied beyond reasonable doubt that on 28 July 2019 the respondent had changed the locks on the flat and refused entry to the appellants on the fabricated grounds that earlier the same day they had agreed immediately to move out. The FTT was satisfied that the respondent had concocted a story alleging that threats had been made against her and concluded that she knew that what she was doing was wrong.

The FTT's decision

20.
The FTT was therefore satisfied that the appellant had committed three relevant criminal offences and it had power under section 42(1), 2016 Act to make rent repayment orders in favour of each of the tenants.

21.
The FTT recorded the appellants' submission that there should be a separate rent repayment order for each of the three offences with each ordering repayment of the maximum of 12 months' rent. It rejected that submission and held that it had power to award only one rent repayment order per tenant, however many offences a landlord had committed. It reasoned that the order was "for the repayment of rent" and could not exceed the amount of rent paid. The fact that multiple offences had been committed could be taken into account as relevant conduct on the part of the landlord when determining the amount to be repaid under section 44(4)(a), 2016 Act, but the total amount ordered could not exceed 12 months' rent.

22.
The FTT rejected the tenants' submission that the rent paid by them in the relevant 12 months was simply a measure for calculating the amount to be repaid which could be applied to multiple offences. A rent repayment order was far from the only method by which a landlord could be punished or a tenant could be compensated for the offences of harassment and unlawful eviction. Having regard to the seriousness of the offences and the manner in which the appellant had conducted the proceedings the FTT concluded that there was no reason to reduce the sum payable below the maximum permissible amount. Each of the tenants paid a different rent but the FTT calculated that in the last 12 months of their occupation Ms Po had paid £9,400, Ms Balistreri and Ms Patermo had jointly paid £10,800, and Ms Ficcara had paid £8,520 and it made orders for the repayment of those sums to each of them.

The appeal

23.
Ms Nicholls began her submissions by drawing attention to the disparity in the awards made to the former tenants. Ms Po had been awarded more than the other three tenants despite the fact that only the licensing offence had been committed during her occupation. The harassment and unlawful eviction occurred after her departure from the flat yet, because she paid a higher rent, the FTT's approach of making only a single award meant she received a greater sum than her fellow tenants who had been subjected to those offences. That outcome, Ms Nicholls suggested, was clearly unfair and unlikely to have been Parliament's intention.

24.
Ms Nicholls submitted that the key difference between the old form of rent repayment orders under the Housing Act 2004 and the new regime under the 2016 Act was that the new orders applied to a much greater range of offences. Orders could be made under the 2004 Act only for the offence of being in control of an unlicensed HMO. When it enlarged the list of threshold offences to the seven in section 40(3), 2016 Act Parliament must be understood to have intended that rent repayment orders could be made whenever any of the offences was committed.

25.
The period under section 44(2) to which a rent repayment order could relate was different in the case of offences of harassment and eviction from the five other categories of offences, and the offences themselves were very different. Ms Nicholls argued that a separate order ought to be made in respect of each period identified under section 44(2) and for each offence found to have been committed during that period. Any different approach risked multiple offences going unpunished, at least by a rent repayment order. Parliament cannot have intended a tenant who had been the victim of numerous offences to be compensated to the same extent as a tenant whose landlord had committed only one offence, and that perhaps a relatively modest one.

26.
I do not accept Ms Nicholls' submissions.

27.
Before considering the meaning of Chapter 4 it should be remembered that an aid to its interpretation is provided by section 6 of the Interpretation Act 1978 which states that in any Act, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular. It follows that, unless it would be inconsistent with a particular provision of the Act, or with its general intent, references in sections 40, 43 and 44 to "a rent repayment order" and to "an

offence" must be understood to mean "order or orders" and "offence or offences". For the same reason the reference in section 44(2) to the, or a, "period of 12 months", could mean more than one such period provided that would not be inconsistent with some other feature of the legislation.

28.
Very clear guidance is provided by section 44 as to the amount which may be ordered to be repaid under a rent repayment order. Section 44(3) sets the limit. The amount a landlord may be required to repay in respect of a period must not exceed the rent paid in respect of that period less any relevant award of universal credit paid in respect of rent under the tenancy during that period. It is significant that the limit is expressed by reference to a period of time, and the rent paid in respect of that period of time, rather than by reference to a particular offence. If a number of offences are committed in the same period, the application of section 44(2) will result in a single period of time, rather than multiple periods of time each of the same duration and commencement. The amount which may be made the subject of a rent repayment order must relate to the rent paid by the tenant in respect of that period.

29.
I therefore do not accept the appellant's submission that section 44(2) should be understood as creating separate periods for each offence committed. I agree with the FTT and with Mr Tower's submission that the description of these orders as rent "repayment" orders indicates that Parliament's intention was that the sum actually paid should be reimbursed and not multiples of the same sum.

30.
Mr Towers suggested that the language of section 44 should be contrasted with the statutory scheme for the protection of tenant's deposits. Section 214(4), Housing Act 2004 provides that where a tenant's deposit has not been protected as required by the scheme, the court must order the landlord to pay to the tenant "a sum of money not less than the amount of the deposit and not more than three times the amount of the deposit". I agree that language of that sort would have been employed if Parliament had intended that the amount that a landlord could be required to repay could exceed the rent paid in respect of the period identified in section 44(2). Very clear language would be required to confer on the FTT a power to order "repayment" of a sum greater than had originally been paid.

31.
As for Ms Nicholls' submission that it would be unfair for a tenant who had sustained several wrongs to be limited to a single rent repayment order, the purpose of rent repayment orders is primarily to deter landlords from committing housing offences rather than to compensate tenants who have experienced the consequences of those offences. An unlicensed HMO may be a perfectly satisfactory place to live, and may give rise to no disadvantage to the tenant requiring compensation, yet such a tenant is just as able to apply for a rent repayment order as a tenant who has been unlawfully evicted. A tenant who has suffered loss or damage as a result of an unlawful eviction or a breach of a landlord's repairing obligation need not rely on a rent repayment order for compensation and has additional rights to claim damages (a rent repayment order is not an award of damages).

32.
A further answer to Ms Nicholls' submission that a tenant whose landlord has committed more offences should benefit from a more generous repayment than one who has experienced only a single offence is that section 44(4) leaves it to the FTT to determine the amount that the landlord may be required to repay. It identifies three factors which "in particular" the FTT must take into account, but it does not exclude other factors. First amongst those relevant factors is the conduct of the landlord,

which must include the conduct which amounts to the relevant housing offence or offences. One would naturally expect that the more serious the offence, the greater the penalty.

33.
In Vadamalayan v Stewart [2020] UKUT 183(LC) the Tribunal (Judge Cooke) pointed out that unlike section 74(5), 2004 Act, section 44 of the 2016 Act does not identify reasonableness as a relevant yardstick for measuring the amount to be repaid. It did not say that the sum repayable should be the same irrespective of the seriousness of the offence or offences committed by the landlord. If more than one offence has been committed, the FTT may properly take that into account when considering what repayment to order, as it did in this case. I will return to Vadamalayan at the end of this decision.

34.
The proper interpretation of section 44(3) is therefore that the amount repayable in respect of a single period may not exceed the rent paid during that period, no matter how many offences an order, or orders, relate to.

35.
But that is not a complete answer to the appeal. Where a number of offences have been committed the application of section 44(2) may yield different periods applicable to different offences which may be distinct or overlap and which may, in aggregate, exceed 12 months. On the facts of this case the FTT found that the licensing offence was committed from 15 March 2018 until 28 July 2019, a period of 16 months and 13 days. The harassment occurred during July 2019 and the unlawful eviction took place on 28 July 2019. For the harassment and eviction offences the relevant period was the 12 months ending with the date of the offence, but for the licensing offence it could be any period, not exceeding 12 months, during which the offence was being committed. How is section 44(2) to be applied to those facts?

36.
Section 44 provides no real guidance on the treatment of overlapping periods or multiple offences except that the amount repayable in respect of the relevant period must not exceed the rent paid during that period. The FTT's response was that it had power to award only one rent repayment order per tenant and that the maximum repayment it could order was of 12 months' rent.

37.
Although their case was not developed in argument beyond the extreme position that each separate offence, whenever it was committed, should result in the repayment of a sum equal to 12 months' rent, an intermediate argument is available to the appellants. That is that an order should be made in respect of the licensing offence for the period commencing on 15 March 2018, and in respect of the harassment and eviction offences for the period ending on 28 July 2019, resulting in aggregate in repayment of rent for the whole of the period of more than 16 months during which the appellant was landlord and was committing offences.

38.
While I acknowledged that that is a possible construction of section 44, I do not believe it is what the section envisages. It is a general principle of law that a person should not be penalised except under clear law; that principle gives rise to a presumption of statutory interpretation sometimes referred to as the presumption against doubtful penalisation (Bennion on Statutory Interpretation, 7th ed, para 26.4). In ESS Production Ltd (in administration) v Sully [2005] EWCA Civ 554, Arden LJ said, at [78]:

“the principle against doubtful penalisation … should be applied to the imposition of a civil liability as well as to the imposition of criminal liability.”

As Bennion explains, this presumption is not absolute and the weight to be given to it is likely to be influenced by the severity of the penalty in question, thus: “If the detriment is severe, the principle will be correspondingly powerful.”

39.
The penalty which section 44 allows is a draconian one, potentially depriving the landlord of the whole of the rent received for the relevant period. It may be imposed in addition to either criminal penalties, or civil financial penalties which a local housing authority may pursue under section 249A, Housing Act 2004. In an appropriate case the tenant in whose favour an order is made may also pursue a civil claim for damages.

40.
Had Parliament intended that more than 12 months’ rent could be repayable I believe it would have said so much more clearly in section 44(3). I also think it improbable that Parliament intended that the penalties to which a landlord would be exposed would be capable of varying depending on when offences were committed. My conclusion, therefore is that 12 months’ rent is the maximum which a landlord can be ordered to repay on an application under section 41, irrespective of the number, timing or duration of the offences committed.

The application for permission to cross-appeal

41.
On 12 August 2020 the respondent sent an application for permission to appeal the FTT’s decision to the Tribunal by email, together with draft grounds of appeal. She did not complete the Tribunal’s standard form T602 giving contact details and other information and when she was asked by the Tribunal’s staff if she had made a prior application to the FTT for permission, as the Tribunal’s procedural rules require, she did not respond. Nothing further was heard from the respondent until shortly before the hearing of the appeal, when she asked for her application for permission to appeal to be considered.

42.
The respondent has provided medical evidence which would persuade me to waive any procedural irregularities if her proposed grounds of appeal had any realistic prospect of success. But having considered them I am satisfied that they do not.

43.
Ground 1 complains that the FTT permitted the tenants to rely on two joint witness statements signed by all four of them. The FTT was critical of that feature of the tenants’ case and I agree it is bad practice, but it was for the FTT to decide how to respond to it. The tenants were all available to be cross examined, and there is no reason to think the form of their statements affected the outcome of the application.

44.
Ground 2 suggests the FTT was wrong to allow the tenants to refer to emails from the respondent to the tenants which were marked “without prejudice”. I have not been shown the emails but the FTT referred to them because they contained threats which were relied on as part of a course of harassment. Nothing in the FTT’s decision suggests they included genuine offers of settlement of a

dispute, and assuming they did they would nevertheless not be privileged if, as the FTT found, they were part of the conduct which amounted to the commission of an offence under the 1977 Act.

45.
Ground 3 suggests the FTT was not entitled to find without expert handwriting evidence that the signatures on a document relied on by the respondent were not those of the tenants. The document purported to confirm that the tenants were all members of the same family, but they gave evidence that they had not signed the document and had not seen it until the respondent produced it in the proceedings. The FTT was undoubtedly entitled to accept that evidence.

46.
Ground 4 is an application for permission to rely on new evidence, including household bills and a statement she made to the police. Neither would have been likely to make any difference to the outcome of the proceedings, and the FTT was aware of the complaints the respondent had made to the police.

47.
Finally, the respondent complains that she was subject to disproportionate questioning by the FTT. There is nothing in that ground. In its refusal of permission to appeal the FTT did not accept the respondent's description of the hearing but, even if it is accurate there was nothing improper or procedurally irregular in the FTT probing the evidence on fiercely contested incidents in order to reach the truth.

48.
In short, none of the suggested grounds of cross-appeal has any realistic prospect of success.

The FTT's discretion under section 44

49.
Earlier in this decision I referred to the Tribunal's decision in Vadamalayan, in which it 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.

Disposal

52.
For these reasons the FTT was correct to refuse to make rent repayment orders for sums exceeding 12 months' rent for each of the appellants. I therefore dismiss the appeal and refuse permission to cross appeal.

Martin Rodger QC

Deputy Chamber President

20 February 2021