UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 42 (LC)

UTLC Case Number: RRO/8/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – application by local housing authority for repayment of universal credit – whether exceptional circumstances justifying repayment of less than the full amount received – sections 45, 46 Housing and Planning Act 2016 – appeal dismissed

BETWEEN:

MS MICHELLE DAWN EDITH BALL **Appellant**

and

SEFTON METROPOLITAN BOROUGH COUNCIL **Respondent**

Re: The Cresta Hotel

83 Manchester Road

Southport

Martin Rodger QC, Deputy Chamber President

12 February 2021

By remote video platform

The appellant appeared in person assisted by Michael Ball

Jac Armstrong for the respondent

The following cases are referred to in this decision:

London Borough of Newham v Harris [2017] UKUT 264 (LC)

Vadamalayan v Stewart [2020] UKUT 183 (LC)

Introduction

1.
Where a landlord has been convicted of an offence relating to housing to which Chapter 4 of Part 2 of the Housing and Planning Act 2016 applies, the local housing authority may apply to the First-tier Tribunal (Property Chamber) (FTT) under section 41 of the Act for a rent repayment order to recover universal credit received by the landlord in respect of rent payable under the tenancy of the premises concerned. The amount which a landlord may be required to repay must not exceed the amount of universal credit the landlord received during a period of up to 12 months, but if the FTT decides to make an order section 46 requires that the amount must be the maximum that the FTT has power to

order unless it considers that, by reason of exceptional circumstances, it would be unreasonable to require the landlord to pay it in full.

2.
This appeal concerns a rent repayment order made by the FTT on 29 January 2020 in favour of the respondent, Sefton Metropolitan Borough Council, against the appellant, Michelle Ball, who had been convicted of the offence of being in control of an unlicensed HMO contrary to section 72(1), Housing Act 2004.

3.
The FTT ordered the appellant to repay £13,293.27, which was the full amount of the universal credit she had received to meet the rent payable by tenants of rooms at the Cresta Hotel, Southport, in the period of 12 months ending on 15 August 2018. With the permission of this Tribunal the appellant now appeals that decision.

The facts

4.
As she explained in a statement provided to the FTT the appellant owned and ran the Cresta Hotel between December 2003 and September 2018. She had had no previous experience of running a hotel.

5.
Although described as a hotel, the Cresta Hotel was simply a three-storey house with five letting bedrooms and a basement flat occupied by the appellant. The tenants of the rooms shared bathroom facilities and a communal kitchen but did not form part of a single household. The building was therefore a house in multiple occupation which was required to be licensed under Part 2 of the Housing Act 2004.

6.
For the most part the residents of the Cresta Hotel were people in need of emergency accommodation who obtained the appellant’s contact details from the respondent’s homelessness services. Unlike some landlords the appellant did not require a deposit and was content to accommodate tenants whose rent would be met by direct payments of universal credit.

7.
The appellant explained to the FTT that she had not obtained an HMO licence because she had believed that a hotel did not need one and because she understood the respondent was aware of the manner in which the building was occupied and raised no objection. Eventually, on 15 August 2018, the respondent inspected the Hotel and formed the impression that it was being used as an HMO.

8.
On 15 May 2019 the appellant pleaded guilty at the Sefton Magistrates Court to the offence of having control of an unlicensed HMO contrary to section 72(1), Housing Act 2004. She was ordered to pay a fine of £5,000 with costs of £1,466 and a surcharge of £170.

9.
As it is required to do by section 48, 2016 Act where it becomes aware that a person has been convicted of a relevant offence, the respondent then considered whether to apply for a rent repayment order. On 27 June 2019 it issued a notice of intended proceedings under section 42 informing the appellant that it proposed to apply for an order to recover the full amount of universal credit she had

received in the 12 months preceding her conviction. The appellant's solicitor wrote briefly in response to the notice of intention but did not dissuade the respondent from making the application.

The relevant statutory provisions

10.
The amount of a rent repayment order which may be made in favour of a local housing authority is determined in accordance with section 45, 2016 Act. For the offence of having control of an unlicensed HMO the amount must "relate to universal credit paid" in respect of a period, not exceeding 12 months, during which the landlord was committing the offence (section 45(2)). The amount must not exceed the amount of universal credit the landlord received in respect of rent under the tenancy for that period (section 45(3)). Section 45(4) identifies a number of matters which "in particular" the FTT is required to take into account when determining the amount to be repaid; they are the conduct of the landlord, the financial circumstances of the landlord, and whether the landlord has at any time been convicted of an offence to which Chapter 4 applies.

11.
Section 46 is concerned with the amount of a rent repayment order following conviction. So far as is relevant to this appeal section 46 provides:

(1)
Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be a maximum that the tribunal has the power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2)
Condition 1 is that the order –

(a)
is made against a landlord who has been convicted of the offence, or

(b)
...

(3)
Condition 2 is that the order is made –

(a)
…

(b)
in favour of a local housing authority.

(4)
...

(5)
Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable to require the landlord to pay.

The FTT's decision

12.

Before reaching its decision the FTT reviewed the facts and reminded itself of the relevant statutory provisions. There was no dispute that the appellant had committed a relevant offence, nor that the respondent had complied with the necessary procedural steps. The FTT concluded that it had jurisdiction to make the order and referred to the fact that in London Borough of Newham v Harris [2017] UKUT 264 (LC) this Tribunal had said that it would be a very rare case in which a tribunal could decide not to exercise its discretion where a criminal offence had been committed. The FTT was satisfied that it was appropriate to make an order in the circumstances of this case.

13.
As this appeal concerns the FTT's exercise of its discretion I will cite in full the direction it gave itself in paragraphs 31 and 32 of its decision:

"31. As a consequence of section 46 of the 2016 Act the tribunal must order the maximum amount potentially repayable unless it is satisfied that, by reason of exceptional circumstances, it would be unreasonable to require repayment of some or all of the relevant sum. These statutory provisions (in contrast to those which apply where there has not been a conviction) confirm that it is only in exceptional circumstances that the tribunal can order anything other than the full amount paid by the local authority in rent during the relevant 12 months period whilst the offence was being committed. Parliament has clearly decreed as a matter of public policy that housing benefit/universal credit should be repaid where a landlord has failed to obtain the necessary HMO licence.

32. There is little guidance as to what might constitute exceptional circumstances but the tribunal is of the opinion that the ordinary meaning of the word "exceptional" inevitably sets a very high threshold, and that personal circumstances such as the tenant's [the FTT must have meant "landlord's"] financial position will not normally meet the test. It is significant that the terms of section 46 when contrasted with those of section 44 show that it is only where there has not been a conviction that the Tribunal must have regard to the conduct of the parties and the landlord's financial circumstances."

14.
The FTT then stated that it had carefully considered all of the evidence and in particular the comments made in the appellant's witness statement and by her solicitor in response to the notice of intended proceedings. It had nonetheless concluded that the circumstances of the case "do not amount to an instance of such exceptional circumstances as would allow it to make an order of anything other than the maximum amount." On that basis the FTT ordered the appellant to repay the full amount she had received in the relevant 12-month period.

The appeal

15.
The appellant had implied in her application for permission to appeal that the Cresta Hotel was, in effect, approved by the respondent for the purpose of housing individuals who would otherwise be homeless and suggested that she had therefore been entitled to assume that any regulatory requirements were satisfied. The Tribunal gave permission to appeal principally because of the appellant's complaint that tenants were housed at the direction of the local housing authority. That appeared to have been a matter to which the FTT had given no particular weight and the Tribunal suggested that it may have been a factor relevant to the decision to make an order at all.

16.

On closer examination I am satisfied that there is nothing in this ground of appeal. There is no suggestion in the evidence that the respondent inspected the hotel before 15 August 2018, the date on which it first formed the impression that an offence was being committed. The fact that a local housing authority may direct tenants to a particular establishment cannot be taken as a waiver of the general law or as an encouragement to the proprietor to believe that enforcement action will not be taken if a regulatory offence is found to have been committed. The responsibility for complying with the requirements to obtain a licence for an HMO falls squarely on the landlord in control of the HMO.

17.
In any event, as the respondent's counsel, Mr Armstrong, pointed out, the FTT had been aware of the appellant's case that tenants were sent to her by the respondents and it cannot be said to have failed to take it into account when deciding that this was an appropriate case in which to exercise its discretion to make a rent repayment order.

18.
At the hearing of the appeal the appellant was represented by her brother, Mr Michael Ball, who made a number of well-focused points on her behalf. He emphasised his sister's financial circumstances as the main ground of her appeal.

19.
The £10 per day which the appellant received for letting each of the five rooms in the hotel had to cover all the running and utility costs including gas, electricity, water, insurance, TV licence and Wi-Fi. She also had to meet interest on the loan she had used to purchase the hotel. When all of these expenses were taken into account the appellant made a loss on operating the hotel and for that reason she had had to sell it to her brother.

20.
Mr Ball also explained that electricity supplied to the tenants was not metered and the cost of supply could not be recharged to them. There was no incentive for tenants to moderate their electricity consumption and as a result the bills that had to be met by the appellant were very high. The tenants housed in the Cresta Hotel were often disruptive and considerable damage was caused which had to be repaired at the appellant's expense.

21.
Mr Ball argued that the FTT had failed to take these expenses into account when directing the amount of the rent repayment order and he referred to the decision of this Tribunal (Judge Cooke) in Vadamalayan v Stewart [2020] UKUT 183 (LC) in support of the submission that where utilities are the responsibility of the landlord and must be paid out of the rent received, the FTT can deduct the cost from the rent to arrive at a net figure before deciding how much the landlord should be ordered to repay. Mr Ball acknowledged that the appellant's own living expenses were part of the total costs. He was nevertheless able to demonstrate from the material provided to the FTT that the total utilities costs exceeded £10,600 in the period to which the order related, and that if 20% was deducted as an allowance for the appellant's own use it still left a figure in excess of £8,500 to which mortgage interest of more than £2,500 ought to be added.

22.
The approach adopted by the Tribunal in Vadamalayan is not applicable in this case. As Mr Armstrong pointed out, where a landlord has been convicted and an order is sought by a local housing authority section 46(1) requires that the amount to be repaid should be the maximum that the FTT has power to order. The matters identified in section 45(4), which include the financial circumstances of the

landlord and which must be taken into account when determining the amount of an order where there has been no conviction, are specifically to be disregarded. It is not possible, therefore, to argue successfully that the FTT ought to have deducted the cost of utilities from the universal credit received. It was prohibited from doing so by section 46(1).

23.
The only basis on which an order for repayment may be reduced in a case to which section 46 applies is where section 46(5) can be relied on, that is, where, by reason of exceptional circumstances, it would be unreasonable to require the landlord to repay the maximum amount possible. While section 46(1) rules out consideration of the landlord's financial circumstances (or any of the other matters in section 45(4)) when calculating the maximum which the FTT has power to order a landlord to repay, once the FTT has calculated that sum there is nothing in section 46(5) which prevents it from taking the landlord's financial position into account when it considers whether exceptional circumstances would make it unreasonable to require the landlord to repay the maximum sum.

24.
Mr Ball was therefore quite entitled to rely on the appellant's inability to run the business at a profit in support of his submission that exceptional circumstances made it unreasonable to order the appellant to repay what was, in effect, the whole of the gross income generated by the business. No landlord conducting an HMO does so in the expectation of making a loss from the enterprise.

25.
This appeal is not a rehearing of the respondent's application for a rent repayment order. It is a review of the FTT's decision to make one. It is not for this Tribunal to decide if exceptional circumstances make it unreasonable for the appellant to be required to repay the maximum amount. Whether circumstances are exceptional is a matter of assessment for the FTT. It would only be if the FTT had misdirected itself in law or had failed to take a relevant matter into account when making that assessment that this Tribunal would be justified in interfering with its determination that circumstances were or were not exceptional.

26.
In paragraph 32 of its decision the FTT considered that the threshold for exceptional circumstances was very high. I agree. The FTT then went on to say that "personal circumstances such as the tenant's financial position will not normally meet the test". The FTT contrasted the factors in section 44(4) and section 46 and stated that "it is only when there has not been a conviction that the Tribunal must have regard to the conduct of the parties and a landlord's financial circumstances." I do not think these directions disclose any error of approach on the part of the FTT. It is clear that the FTT was not saying that personal circumstances such as the tenant's financial position can never be the basis of a finding of exceptional circumstances. It thought they will "not normally" meet the threshold. Nor was the FTT saying that in a case under section 46, the Tribunal must not take into account the conduct of the parties and the landlord's financial circumstances. It was pointing out, rather, that the FTT was only obliged to take those matters into account in cases where there had been no conviction.

27.
I am also satisfied that the FTT was fully aware of the relationship between the appellant's business income and outgoings. The resulting imbalance might have been regarded as exceptional by some tribunals. Obviously, the need for the operator of an HMO to meet utility bills and other running expenses and the fact that these might sometimes be substantial is nothing out of the ordinary and could not amount to exceptional circumstances. Nor could the need for a landlord to meet finance

costs. Nevertheless, for a landlord to make a loss from operating an HMO, and for the deficit to be caused not by bad debts or vacancies but by exceptionally high running costs relative to the rent paid from public funds, might have been regarded as sufficiently out of the ordinary to amount to exceptional circumstances. But that was a judgment for the FTT, and the FTT did not think so. It stated in paragraph 34 that it had carefully considered the evidence and in particular the matters advanced in mitigation on behalf of the appellant but it had nevertheless concluded that the circumstances of the case were not exceptional. That was an assessment which was open to it on the evidence and is not one with which this Tribunal can interfere.

28.
The second matter on which Mr Ball relied was the FTT's failure to take into account the interest payments which the appellant had to meet. The FTT was aware of these payments and took them into account. There was no error of approach in its treatment of those sums.

29.
The third matter on which Mr Ball relied was that his sister was not a professional landlord. That appears undoubtedly to be the case but it cannot be said to be an exceptional circumstance whether viewed in isolation or together with the other facts of this case.

30.
Reliance was also placed on the fact that the appellant had not had proper legal representation either at the Magistrates Court or in the conduct of these proceedings. As far as the criminal proceedings in the Magistrates Court are concerned, it is not open to a person who has been convicted of a criminal offence to seek to diminish or contradict the conviction in other proceedings. Mr Ball did not seek to go behind the conviction (which followed a guilty plea) and his main concern was that the local housing authority was professionally represented before the FTT whereas his sister was not. That is not a matter which is relevant to whether the circumstances of the case are exceptional or not. Nor does the fact that one party is represented before the FTT and the other is not provide a ground of appeal. The FTT is very experienced in determining cases involving unrepresented individuals and it is clear from its direction on the law that it had well in mind the possibility that a finding of exceptional circumstances might enable it to mitigate the penalty it would otherwise be required to impose. There is nothing in the suggestion that the proceedings were unfair because the appellant was not represented.

31.
I am therefore satisfied that the FTT was entitled to come to the conclusion it did on the question of exceptional circumstances. Having reached that conclusion the FTT had no alterative other than to make the order which it made, requiring the repayment in full of the universal credit received by the appellant in the period of 12 months during which she was committing the offence. That outcome reflects the policy of the 2016 Act that a landlord who has been convicted of a relevant housing offence may not ordinarily retain rent received from public funds.

32.
I should add that Mr Armstrong sought permission to rely on a number of witness statements of council officers and others concerning the respondent's practices in assisting homeless people to find accommodation. The intended purpose of that evidence was to undermine any suggestion that the respondent might be taken to have sanctioned the management of the HMO without a licence because it directed tenants there. That material could have been put before the FTT (the appellant having made the point in her solicitor's letter responding to the notice of intention to apply for a rent

repayment order). The respondent did not rely on the evidence before the FTT and I refused to permit it to rely on it on the appeal. In the event, the additional evidence would have made no difference to the outcome of the appeal.

33.
For these reasons I dismiss the appeal.

Martin Rodger QC

Deputy Chamber President

18 February 2021