UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 027 (LC)

UTLC Case Numbers: LC-2021-389

LC-2021-187

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

APPEALS FROM DECISIONS OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

HOUSING – RENT REPAYMENT ORDER – defence of reasonable excuse – amount of rent to be repaid – First-tier Tribunal's discretion

BETWEEN:

LC-2021-389

JAGTAR SINGH AYTAN (1)

NIRMALA DEVI AYTAN (2)

SAJJAN SINGH AYTAN (3)

Appellants

-and-

THEO MOORE (1)

JACK RUDMAN (2)

ELLIOT SCHNEIDERMAN (3) Respondents

Flat 7, 1 Richard Street, London, E1 2JP

Mr Alex Cunliffe for the appellants, instructed by Certus Solicitors

Ms Clara Sherratt of Justice for Tenants for the respondents

6 January 2022

Royal Courts of Justice

LC-2021-187

IAN WILSON

Appellant

-and-

MICHAEL ARROW (1)

ADELE EDWARDS (2)

MARK WISELKA (3)

OWEN STONEMAN (4)

Respondents

1 The Ridges, Guildford, GU3 1LJ

Determination by written representations

Written representations made for the appellant by Freeman Solicitors

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Judge Elizabeth Cooke and Judge Siobhan McGrath

The following cases are referred to in this decision:

Ficcara and others v James [2021] UKUT 38 (LC)

Awad v Hooley [2021] UKUT 55 (LC)

Parker v Waller [2012] UKUT 301 (LC)

R (Mohamed & Lahrie) v LB Waltham Forest [2020] EWHC 1083 (Admin)

Vadamalayan v Stewart and others [2020] UKUT 183

Williams v Parmar [2021] UKUT 244 (LC)

Introduction

1.
This is the Tribunal's decision in two appeals from rent repayments orders made by the First-tier Tribunal ("the FTT"). Both raise an issue which has been the subject of a number of recent decisions of this Tribunal, namely the amount of rent to be repaid when such an order is made. One of the appeals also concerns the defence of reasonable excuse to the offence of managing or being in control of a house in multiple occupation which is required to be licensed and is not.

2.
We heard the appeal brought by Mr Aytan and others (LC-2021-389) by remote video platform on 6 January. The appellants were represented by Mr Alex Cunliffe of counsel, and the respondent tenants by Ms Clara Sherratt of Justice for Tenants. The appeal brought by Mr Wilson (LC-2021-187) was determined under the Tribunal's written representations procedure; written representations were made on Mr Wilson's behalf by Freemans, solicitors, and the respondents were not represented.

3.
In the paragraphs that follow we set out the legal background, and then determine the appeals in turn.

The legal background

4.
The legal background to both appeals is the requirement for certain houses in multiple occupation ("HMOs") to be licensed. It is a criminal offence to manage or be in control of an HMO that is required to be licensed and is not so licensed. Among the possible consequences of committing that offence is that a landlord may be ordered to repay up to twelve months' rent to the tenants.

5.

In more detail: section 254 of the Housing Act 2004 (“the 2004 Act”) defines HMOs using a number of tests, including the “standard test” in subsection (2) which states that a building or part of a building is an HMO if:

“(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);

(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(d) their occupation of the living accommodation constitutes the only use of that accommodation;

(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and

(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.”

6.
Not all HMOs satisfying the test set out above need to be licensed. Section 61 of the 2004 Act requires every HMO to which Part 2 of the 2004 Act applies to be licensed, subject to certain exemptions that are not relevant here. Part 2 of the 2004 Act applies, according to section 55(2), to

(a) any HMO falling within any prescribed description of HMO, and

(b) any HMO in an area that is designated under section 56 as subject to additional licensing if it is within the description specified in the designation.

7.
Regulations made under section 61 prescribe descriptions of HMO for the purposes of section 55(2)(a), including a building occupied by five or more persons living in two or more separate households. But a designation under section 56 may require, for example, the licensing of HMOs occupied by three or more persons in two or more separate households.

8.
Section 72 of the 2004 Act provides, insofar as relevant, as follows:

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part … but is not so licensed.

(5) In proceedings against a person for an offence under subsection (1) … it is a defence that he had a reasonable excuse … for having control of or managing the house in the circumstances mentioned in subsection (1) …”

9.
Commission of that offence may lead to a criminal prosecution and conviction, or to the imposition by the local housing authority of a financial penalty pursuant to section 249A of the Housing and Planning Act 2016 (“the 2016 Act”). Furthermore, the tenants or the local housing authority may apply to the FTT for a rent repayment order.

10.
Section 43 of the 2016 Act provides:

“(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).

…

(3) The amount of a rent repayment order under this section is to be determined in accordance with –

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc).”

11.
Section 44 of the 2016 Act provides:

“(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 …

(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.”

12.
The table referred to in s.44(2) states that in the case of the offence of controlling or managing an unlicensed HMO, 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”.

13.
Section 46 of the 2016 Act provides that in certain cases where the FTT decides to make a rent repayment order, the amount is to be the maximum that the FTT has power to order (being 12 months’ rent), disregarding the matters which it would otherwise have to take particularly into account under section 44(4) (and 45(4) which is in identical terms). Rent repayment orders made in response to an offence under section 72 of the 2004 Act fall into this category only where the applicant is the local housing authority and where either the landlord has been convicted of the offence or has received a financial penalty. Subsection (5) adds the following proviso:

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

14.
Provisions relating to rent repayment orders were first enacted in the 2004 Act. It became the practice of the First-tier Tribunal when making orders under those provisions, following the Tribunal’s decision in Parker v Waller [2012] UKUT 301 (LC) , to order landlords to repay only the profit element of the rent, deducting for example the cost of repairs and expenditure that the landlord was obliged under the terms of the tenancy to incur and which enhanced his own property and enabled him to charge rent for it.

15.
In Vadamalayan v Stewart and others [2020] UKUT 183 the Tribunal held that that was not a correct response to the provisions of the 2016 Act and that the practice should cease. A rent repayment order is about the repayment of rent, not the repayment of profit, although it is appropriate to deduct from the amount to be repaid sums that were included in the rent for the tenants’ benefit, such as utilities which they consumed. At paragraph 12 the Tribunal (Judge Cooke) referred to

“the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent.”

16.
That reference to a starting point has given rise to some difficulties, and has led the FTT in some cases to take the view that it should order a landlord to repay the whole of the rent unless it is possible to make deductions in light only of good conduct by the landlord or bad conduct by the tenants, or of financial difficulties on the landlord’s part. That approach leaves no room for the FTT to reflect, in its award, the seriousness of the offence committed by the landlord, nor to make any allowance for the absence of convictions in accordance with section 44(4)(c).

17.
In Ficcara and others v James [2021] UKUT 38 (LC) the Deputy President, Martin Rodger QC, said:

“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.”

18.
Similarly in Awad v Hooley [2021] UKUT 55 (LC) the Tribunal (Judge Cooke) said at paragraph 40:

“The only clue that the statute gives is the maximum amount that can be ordered, under section 44(3). Whether or not that maximum is described as a starting point, clearly it cannot function in exactly the same way as a starting point in criminal sentencing, because it can only go down; however badly a landlord has behaved it cannot go up. It will be unusual for there to be absolutely nothing for the FTT to take into account under section 44(4). The statute gives no assistance as to what should be ordered in those circumstances; nor can this Tribunal in the absence of a suitable appeal.”

19.
The future appeal to which the Tribunal looked forward in Ficcara and in Awad turned out to be Williams v Parmar [2021] UKUT 244 (LC), where the Tribunal (The Hon. Sir Timothy Fancourt, President) said at paragraph 23:

“the terms of s.46 show that, in cases to which that section does not apply, there can be no presumption that the amount of the order is to be the maximum amount that the tribunal could order under s.44 or s.45. The terms of s.44(3) and (4) similarly suggest that, in some cases, the amount of the order will be less than the rent paid in respect of the period mentioned in the table in s.44(2), though the amount must “relate to” the total rent paid in respect of that period.

24. It therefore cannot be the case that the words “relate to rent paid during the period …” in s. 44(2) mean “equate to rent paid during the period …”. It is clear from s. 44 itself and from s. 46 that in some cases the amount of the RRO will be less than the total amount of rent paid during the relevant period. S. 44(3) specifies that the total amount of rent paid is the maximum amount of an RRO and s. 44(4) requires the FTT, in determining the amount, to have regard in particular to the three factors there specified. The words of that subsection leave open the possibility of there being other factors that, in a particular case, may be taken into account and affect the amount of the order.

25. However, the amount of the RRO must always “relate to” the amount of the rent paid during the period in question. It cannot be based on extraneous considerations or tariffs, or on what seems reasonable in any given case. The amount of the rent paid during the relevant period is therefore, in one sense, a necessary “starting point” for determining the amount of the RRO, because the calculation of the amount of the order must relate to that maximum amount in some way. Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).

26. … Vadamalayan is authority for the proposition that an RRO is not to be limited to the amount of the landlord’s profit obtained by the unlawful activity during the period in question. It is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in s. 44(4).”

20.
In Williams v Parmar the President set aside the decision of the FTT to order the landlord to repay the whole of the rent for the relevant period, because the FTT had erred in taking the view that it had no discretion to award a lesser sum. At paragraph 39 the President said:

“I am not clear what the FTT meant in [20] when it said that the decision in Vadamalayan deprived it of discretion to increase the amount of the orders. The 2016 Act does not permit orders to be made in amounts greater than the amount of rent paid by a tenant during the relevant period. The FTT then appeared to look for meritorious conduct on the part of the landlord that might justify reducing the adjusting starting point.

40. It seems to me that the FTT took too narrow a view of its powers under s. 44 to fix the amount of the RROs. For reasons already given, there is no presumption in favour of the maximum amount of rent paid during the period, and the factors that may be taken into account are not limited to those mentioned in s. 44(4), though the factors in that subsection are the main factors that may be expected to be relevant in the majority of cases.

41. In my judgment, the FTT also interpreted s. 44(4)(a) too narrowly if it concluded that only meritorious conduct of the landlord, if proved, could reduce the starting point of the (adjusted) maximum rent. The circumstances and seriousness of the offending conduct of the landlord are comprised in the “conduct of the landlord”, so the FTT may, in an appropriate case, order a lower than maximum amount of rent repayment, if what a landlord did or failed to do in committing the offence is relatively low in the scale of seriousness, by reason of mitigating circumstances or otherwise. In determining how much lower the RRO should be, the FTT should take into account the purposes intended to be served by the jurisdiction to make an RRO: see [43] below.

21.
At paragraph 43 the President referred to:

“guidance to local authorities issued under Chapter 3 of Part 2 of the 2016 Act, entitled “Rent Repayment Orders under the Housing and Planning Act 2016: Guidance for Local Authorities”, which came into force on 6 April 2017. … Para 3.2 of that guidance identifies the factors that a local authority should take into account in deciding whether to seek an RRO as being the need to: punish offending landlords; deter the particular landlord from further offences; dissuade other landlords from breaching the law; and remove from landlords the financial benefit of offending.

22.
At paragraph 51 the President added:

“ It seems to me to be implicit in the structure of Chapter 4 of Part 2 of the 2016 Act, and in sections 44 and 46 in particular, that if a landlord has not previously been convicted of a relevant offence, and if their conduct, though serious, is less serious than many other offences of that type, or if the conduct of the tenant is reprehensible in some way, the amount of the RRO may appropriately be less than the maximum amount for an order. Whether that is so and the amount of any reduction will depend on the particular facts of each case. On the other hand, the factors identified in para 3.2 of the guidance for local housing authorities are the reasons why the broader regime of RROs was introduced in the 2016 Act and will generally justify an order for repayment of at least a substantial part of the rent.”

23.
In substituting the Tribunal’s own decision the President noted that the landlord was a first offender, with no relevant convictions, but that she was a professional landlord who must be taken to have known the licensing requirement for licensing an HMO. Her failure to apply for one was unexplained and it seemed that she had overlooked it. There was nothing in her financial circumstances or her conduct to justify reducing the amount of the RROs. She applied for a licence only after an environmental health officer had visited and pointed out some serious deficiencies in the property,

which would not have been eligible for a licence without substantial work; in particular, one of the bedrooms was too small. The Landlord was ordered to repay 80% of the rent for the relevant period to four of the five tenants, and to the fifth, who had the under-sized room, 90%. At paragraph 53 of his decision the President said:

“53. The factors identified above, which illustrate the kind of evaluative exercise that the tribunal needs to conduct when making an RRO in a case where the maximum amount provisions do not apply, indicate that this was a reasonably serious offence of its kind, though not the most serious case that could be imagined.”

24.
Accordingly the approach described in paragraph 16 above, and which the President at paragraph 39 of his decision in Williams v Parmar identified as incorrect, should no longer be taken.

25.
We now consider in turn the two appeals before us.

(1) the Aytan appeal (LC-2021-389)

The factual background

26.
The factual background to this appeal is not in dispute and can be summarised briefly. The appellants purchased 1, Richard Street in 1997 and re-developed it, converting the upper floors into nine residential flats which were described by the first respondent in his witness statement as a completely new-built development. Flat 7 has three bedrooms, and on 15 March 2019 it was let to the respondents on an assured shorthold tenancy. A year later the tenants wanted to renew their tenancy and a fresh agreement was made on 4 March 2020 for a letting for 12 months from 15 March 2020. The tenants left on 14 March 2021.

27.
Clause 7.11.1 of each of the assured shorthold tenancy agreements requires the tenant to use the flat only as “a strictly private residence in single occupation”. However, it is not in dispute that the landlords were aware that there were three tenants who did not form a single household .

28.
The letting was arranged for the landlords, and the property managed, by Net Lettings Ltd, of 36-40 Copperfield Road, London. The landlords have not produced an agreement between themselves and Net Lettings, but their bundle in the FTT included the registration of Net Lettings at Companies House, and some advertising material including a pamphlet headed “Why choose us?” and a “Landlords’ Guide”, details of Net Lettings’ accreditation by the UK Association of Letting Agents and the National Landlords Association. They also produced the Property Ombudsman’s “Code of Practice for Residential Letting Agents”.

29.
When the property was first let to the respondents it did not need an HMO licence. It was an HMO with only three residents and therefore fell outside the requirements that apply nationally to HMOs with five or more tenants in two or more households (paragraph 7 above). However, on 31 October 2018 the local housing authority made an additional licensing designation, whose effect was that the property required a licence from 1 April 2019 when the designation came into force, shortly after the respondents’ tenancy commenced.

The decision in the FTT

30.
After leaving the property in March 2021 the tenants applied to the FTT for a rent repayment order. The landlords did not dispute that the property should have had a licence but pleaded the defence of reasonable excuse under section 72(5) of the 2004 Act. They argued that they had been unaware of the additional licensing designation; that they were not consulted before the designation was made, although at the hearing they conceded that there was no evidence that the local housing authority had failed to comply with its obligations to publicise the scheme; that the letting was organised and managed by Net Lettings which was, so far as they were aware, a reputable agency; that the designation came into force after the start of the tenancy; that the tenancy agreement required the property to be used as a single household; that they applied for a licence on 14 October 2020, soon after receipt of a letter from Flat Justice on behalf of the tenants which alerted them to the problem.

31.
The FTT was unimpressed by these arguments. It said:

“8. If a defendant did not know that there was an HMO which was required to be licensed, that would be relevant to the defence of reasonable excuse: R (Mohamed & Lahrie) v LB Waltham Forest [2020] EWHC 1083 (Admin) … at paragraph 44.

9. However, the only matter of which the Respondents claim to be ignorant is the Council’s additional licensing scheme. According to the First Respondent’s evidence, Net Lettings showed them the tenancy agreement so the Respondents knew that the property was to be used as a house in multiple occupation for 3 people, despite the aforementioned terms of clause 7.11.1.”

32.
The FTT went on to say that the landlords, as professional landlords, would be expected to be aware of their obligations. They had not produced their agreement with Net Lettings and so could not show that the agents were required to be responsible for licensing the property or for alerting the landlord to the need for licensing, but in any event:

“Even if there is such a contractual obligation, that is merely the basis for apportioning legal responsibility between them – it cannot relieve the Respondents of their own legal responsibility to ensure their properties comply with any relevant licensing requirements.”

33.
Accordingly the FTT found that the landlords had committed the offence in section 72(1). It went on to consider the level of rent repayment order that should be made. It quoted at some length from the Tribunal’s decision in Vadamalayan, and drew from that decision the conclusion that the amount to be repaid:

“16. … should be calculated by starting with the total rent paid by the tenant within time period allowed under section 44(2) of the 2016 Act, from which the only deductions should be those permitted under section 44(3) and (4).

17. In Ficcara v James [2021] UKUT 38 (LC) the Upper Tribunal judge, Martin Rodger QC, expressed concerns (at paragraphs 49-51) whether it is correct to use the full amount of rent paid as the “starting point”. However, he said that this issue is a matter for a later appeal. In the meantime, the Tribunal must follow the guidance in Vadamalayan.

18. In Awad v Hooley [2021] UKUT 0055 (LC) Judge Cooke also expressed concerns (at paragraph 40) that using the total rent as the starting point means it cannot go up, however badly a landlord behaves, thereby limiting the effect of section 44(3). However, with all due respect, this stretches too far the analogy between RROs on the one hand and criminal penalties or fines on the other.

19. Levels of fines in each case are set relative to statutory maxima which define the limit of the due sanction and the fine for each offender is modulated on a spectrum of which that limit defines one end – effectively the maximum fine is reserved for the most serious cases. However, an RRO is penal but not a fine. The maximum RRO is set by the rent the tenant happened to pay, not by the gravity of the offence. It is possible for a landlord who has conducted themselves appallingly to pay less than a landlord who has conducted themselves perfectly (other than failing to obtain a licence) due to the levels of rent each happened to charge for their respective properties.

20. There is nothing wrong with or inconsistent in the statutory regime for RROs if a particular RRO can't be increased due to a landlord's bad conduct. It is the result which inevitably follows from using the repayment of rent as the penalty rather than a fine. The maximum RRO, set by the amount of the rent, is a cap, not the maximum or other measure of the gravity of the parties' conduct. A landlord's good conduct or a tenant's bad conduct may lower the amount of the RRO, as happened in Awad v Hooley when the tenant withheld their rent, and that is how section 44(3) finds expression."

34.
The FTT went on to find that there was nothing in the evidence about the conduct of the landlords or the tenant to justify a lower award. It noted the tenants' complaints that there were some problems with the lift, cleaning, paintwork, and an issue about rubbish collection, but took the view that these points were "not sufficiently significant to impact on the calculation of the RRO". As to the landlords' financial circumstances the FTT was aware that the landlords own the rest of the building, and referred to the various directorships they hold in property companies which indicated, the FTT found, that the rent from this property was not their only or main income. They were ordered to repay the whole of the rent for the relevant 12 month period.

35.
The landlords have permission to appeal, on the grounds that the FTT erred in law and failed to take into account relevant considerations first in finding that they did not have the defence of reasonable excuse, and second in law in ordering the landlords to repay the whole of the rent. Permission to appeal was granted before Tribunal's decision in Williams v Parmar had been handed down.

The appeal: (1) the defence of reasonable excuse

36.
The appellants say that the FTT misdirected itself in relying upon R (Mohamed & Lahrie); that the landlords had a reasonable belief that the agent would inform them of any licensing requirements which justified their failure to catch up with the additional licensing designation and to obtain a licence; and that the FTT was wrong to find that they were professional landlords.

37.
We are as unimpressed with these arguments as was the FTT.

38.
The appellants say that the FTT made a false distinction (in its paragraphs 8 and 9, quoted above at paragraph 31) between ignorance of the existence of an HMO and ignorance of the additional

licensing designation, and that the FTT was wrong to make its decision about their claimed defence in “principal reliance” upon that case. We agree with the appellant that ignorance about an additional licensing scheme is as likely to be relevant to the defence as is ignorance about the fact that the property is an HMO – although neither will in itself provide a defence. But the FTT clearly did not make its decision in “principal reliance” upon that distinction. As Ms Sherratt argued, it went through the landlords’ arguments carefully and made it clear that it did not think that they amounted to the defence of reasonable excuse. We agree and we find it difficult to see how the FTT could have found otherwise.

39.
So far as the landlords’ relationship with the Net Lettings is concerned, the appellants did not provide any evidence about their contractual arrangements. We note that although Net Lettings’ publicity materials does make general reference to keeping the landlord up to date with legal requirements, there is no reference in those materials either to the 2004 Act or to the 2016 Act, and we think that that in itself would make a prospective client wonder whether the agents were aware of licensing requirements and whether they expected to be responsible for making sure landlords knew about them. There is nothing in the materials that we have seen that would give a reasonable landlord any confidence that he was safe to rely upon silence from Net Lettings to reassure him that he had not failed to comply with any licensing requirements.

40.
We would add that a landlord’s reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themself of the licensing requirements without relying upon an agent, for example because the landlord lived abroad.

41.
As to the finding that the landlords were professional landlords who could be expected to be aware of legal requirements, the appellants argue that they were not professional landlords. True, they own the building and let out nine flats. But they do so in their own name. They have not chosen to do so through limited companies, which is how they manage their commercial property portfolio and which is why they hold numerous directorships in property companies.

42.
This is a specious argument. The landlords are the owners, in their own names or through limited companies, of multiple properties. The FTT was correct to find that they obviously do not derive their only or main income from this one flat. Whether that makes them “professional landlords” or simply the landlords of multiple properties, they are clearly investors in property who can be expected to take responsibility for the legal responsibilities that go with their receipt of rent from tenants.

43.
The FTT did not misdirect itself and did not fail to take any relevant consideration into account. The appeal relating to the defence of reasonable excuse fails.

(2) Did the FTT make an error of law in deciding how much the landlords should repay?

44.

The appellants say that the FTT's order that they repay the whole of the rent for the relevant 12-month period was wrong in law.

45.
They make a preliminary point that before determining the amount of the order, the FTT should have considered whether to make a rent repayment order at all. There is no substance in that point. The FTT did not articulate that first step but it clearly took the view that an order should be made; and in the circumstances we do not think that there could have been any plausible argument that an order should not have been made.

46.
However, the appellants go on to say that the FTT was wrong to rely on Vadamalayan as authority for the award of the maximum amount in the absence of any factors that might reduce it, and thereby limited the circumstances that it was able to take into account. It is argued that whereas the Deputy President in Ficcara said that it remained to be decided in a later appeal whether the full rent should be used as a starting point from which only deductions could be made, the FTT treated that point as having been decided by Vadamalayan.

47.
That is undoubtedly what the FTT did, and indeed it explained why it did so; we have quoted at length from the decision in the FTT (paragraph 33 above) so that its view is set out clearly. It followed the approach that the President criticised at paragraph 39 of Williams v Parmar. Ms Sherratt for the respondents argued that the FTT had been correct in its interpretation of Vadamalayan, Ficcara, and Awad v Hooley; but the decision in Williams v Parmar has now been made – since the grounds of appeal were drafted - and the position is clear. The FTT in assessing the level of the order that should be made is not to take the full rent as the starting point from which only deductions can be made; that would be to ignore the effect of section 46. Williams v Parmer decides that, in cases to which section 46 does not apply, there can be no presumption that the amount under the order is to be the maximum amount that the tribunal could order under s.44 or s.45. In such cases, section 44(4) requires the FTT to have regard in particular to the conduct of the landlord or the tenant, the financial circumstances of the landlord and whether the landlord has any relevant previous convictions. Other factors may be taken into account, including the purposes intended to be served by the jurisdiction to make an RRO.

48.
We make no criticism of the FTT which based its reasoning on the decisions in Vadamalayan and Ficcara. But it is clear from Williams v Parmar that it adopted the wrong approach and thereby limited the scope of its discretion. The decision must be set aside.

49.
As we have all the relevant information we can substitute the Tribunal's own decision. In doing so we wish to make it clear that it is not appropriate for a tribunal to indulge in a fine-grained examination of every aspect of the parties' conduct, which would be disproportionate, nor in a detailed comparison of one landlord with another, which is unlikely to be accurate. The FTT must weigh the evidence and make a balanced decision. However, that exercise need not be a detailed forensic exercise as long as all relevant circumstances are taken into account and the outcome falls within the reasonable range of responses available to the Tribunal.

50.
We are required to look in particular at the factors identified in section 44(4):

“(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.”

51.
As to (a), there is no evidence about the conduct of the tenants and no suggestion that they have been anything other than satisfactory. The FTT found as a fact that although the tenants had some complaints about the lift, rubbish collection and so on, there was nothing in those complaints that could make any difference to the amount of the order. So the only conduct we can consider is the appellants’ failure to get a licence despite being landlords of multiple properties; as well as owning the nine flats in this building, they have extensive commercial property interests and company directorships. They are serious investors in property, and with that investment come responsibilities. There were no practical difficulties standing in the way of their getting hold of the relevant information about licensing. Turning to (c), the appellants have not suggested that they have any financial difficulties There is no suggestion that the landlords have any relevant convictions.

52.
Ms Sherratt argues that the landlords’ conduct was so serious that it justifies an award in the full amount of the rent. She says that these are professional landlords, that they had no system in place for keeping up to date about licensing requirements, and she points to the fact that the length of time for which the property was left unlicensed. She says that the landlords were interested only in taking the rent and otherwise washed their hands of the property. We accept all those points, but we do not think that taken together they justify an order in the maximum amount in the circumstances of this case where there is no specific, evidenced harm to the tenants. Whilst it will never be right to make a point by point comparison between different landlords, it will always be realistic to consider whether there is evidence for example that the property was dangerous or that the tenants suffered physical or economic hardship as a result of the absence of a licence, none of which happened in this case.

53.
We take a serious view of the landlords’ conduct in this case. They own and let out nine residential flats in this particular building, which by themselves must yield a substantial income; in addition, their roles in a number of commercial property companies indicate that they are also major investors in property. On the other hand, the condition of the property was good. We asked Mr Cunliffe what level of award he thought would be appropriate if we were not persuaded that the landlords had a defence, and he suggested 50% of the rent. We take the view that that would be a disproportionate deduction, and that a modest deduction of 15% from the maximum rent is appropriate.

Conclusion in the Aytan appeal

54.
The appeal succeeds on the quantum point and the FTT’s order that the appellants repay the whole of the rent for the 12-month period, being £31,200, divided equally between the respondents is set aside. The Tribunal substitutes its own decision that the appellants are to repay 85% of that sum, being £26,520 , divided equally between the respondents.

The Wilson appeal (LC-2021-187)

The factual background and the FTT’s decision

55. The FTT stated the facts very briefly. Mr Wilson is the freehold owner of 1, The Ridges, Guildford, and rooms in the house have been let to individuals who share facilities. On 1 October 2018 the Licensing of Houses in Multiple Occupation (Prescribed Description) Order 2018 came into force, which changed the definition of an HMO requiring a licence, so that a house occupied by five or more people in two or more households fell within the definition regardless of how many storeys it had. From that date Mr Wilson's property, which was let to five individuals, required a licence, and Mr Wilson accepts that it did not have one; he applied for a licence on 20 November 2019.

56. Five tenants applied to the FTT for a rent repayment order in respect of the 12-month period ending on 20 November 2019, but the first applicant subsequently accepted that he had paid no rent during that period. No order was made in his favour, but the FTT made orders in favour of the other four applicants who are therefore the respondents to this appeal. The first respondent, Mr Arrow, started to pay rent on 10 August 2019, the rest were paying rent throughout the 12-month period.

57. The FTT found that throughout that period Mr Wilson did not know that the property needed a licence; he is a member of the Resident Landlord Association but did not look at their website except to check for updated forms of tenancy agreement, which he did not need during this period. As the FTT put it, "Here there was a ready source of professional advice available to [the landlord] to which he turned a blind eye." Accordingly the FTT did not accept that Mr Wilson had the defence of reasonable excuse (section 72(5) of the 2004 Act) and found that he committed the offence of managing an HMO which ought to have been licensed but was not, from 1 October 2018 to 20 November 2019.

58. The offence was not committed after that date because section 72(4) of the 2004 Act provides a defence once a valid application has been made. However, the property was not immediately eligible for a licence. It required fire doors and fire alarms, which were not fitted until November 2020, a year later.

59. Turning to the amount to be ordered, the FTT discussed Vadamalayan at its paragraph 39, focussing on the ratio of the decision which was the disapproval of Parker v Waller and of the confinement of rent repayment orders to the profit element of the rent. It then said at paragraph 40:

"Following Vadamalayan, the proper approach is to start with the maximum amount, then decide what weight to be given to the findings in relation the factors identified in section 44 and what deductions if any should be made to the maximum amount."

60. The FTT then looked at the facts, including the requirement for fire safety works which "reveal a less than safe environment for the 5 tenants". It found that the offence "was of a relatively short duration and caused by ignorance", but that Mr Wilson was a professional landlord, albeit on a small scale. It ordered him to repay the full rent for the 12-month period, apportioned between the tenants (we come back to that apportionment later), after deducting utilities and Council Tax which Mr Wilson paid for the tenants out of the rent.

The appeal

61. The FTT's decision was made on 11 February 2021, after the decision in Vadamalayan but before Ficcara (20 February 2021) and before Awad v Hooley (12 March 2021). Mr Wilson sought permission to appeal which was granted by the Tribunal in June 2021 on the ground that the appeal raised the same issue as the Tribunal identified in Ficcara, namely whether the FTT was right to take the whole rent as its starting point. The parties wanted the appeal to be determined on the basis of

written representations, and the Tribunal so ordered. Before a determination could be made, however, the appeal in Williams v Parmar was heard by the President on 28 July 2021, and the parties were therefore given the opportunity to make further written representations after his judgment was handed down, which they did. The Tribunal then decided that it would determine this appeal at the same time as the Aytan appeal since they raise the same issue. Accordingly, events outside the parties' control have meant that they have had to wait longer for a decision than we or they would have liked.

62. The respondents in their initial response to the application for permission to appeal argued that Mr Wilson should not now be permitted to argue that he should repay less than the full rent when he did not do so before the FTT. But the Tribunal's successive decisions have now cast further light on the issues raised by the legislation and Mr Wilson's argument is correct: the Tribunal's decision in Wil liams v Parmar now makes it clear that the FTT's description in its paragraph 40 (quoted above) of what was decided by Vadamalayan was incorrect. The FTT followed the approach we described in paragraph 16 above, and thereby misdirected itself as to the scope of its discretion just as did the FTT in WIllams v Parmar. Again, we make no criticism of the FTT, which did not have the assistance of later decisions of the Tribunal, but its decision must be set aside.

63. Again, the Tribunal has all the information needed to re-make the decision.

64. The FTT described Mr Wilson as a professional landlord, on a small scale, and clearly he is not an investor in multiple properties. He has rented out a house that used to be his home. That carries responsibilities, even if Mr Wilson does not make his living from rent. He has not provided any evidence about his financial circumstances. Again, there is no suggestion that he has any relevant convictions. The compelling factor in this case is the absence of important fire safety features, in particular fire doors and alarms, which gave rise to a dangerous situation for the tenants throughout the time they lived at the property until the problems were finally remedied in November 2020. We regard that as a very serious matter. The respondents in the written representations made following the decision in Williams v Parmar argue that if any further reduction is made from the full rent it should be only a modest one, and taking particular account of the dangerous condition of the property we agree. Accordingly we make only a 10% deduction from the rent to be repaid to the tenants.

Conclusion in the Wilson appeal

65. The FTT calculated the amounts to be paid to the four tenants by deducting from the rent paid during the relevant 12 month the payments made by the landlord in respect of utilities and dividing the resulting sum in proportion to the time each tenant spent living at the property. We set those amounts out here alongside the amounts that we now determine to be payable (being 90% of the FTT's order, rounded to exclude the pence):

Tenant FTT's order Amount now payable

Edwards £6,075.59 **£5,468**

Wiselka £6,075.59 **£5,468**

Stoneman £5,688.60 **£5,119**

Arrow £1,489.87 **£1,340**

66. Those are therefore the sums now to be paid by Mr Wilson to the four respondents.

Judge Elizabeth Cooke Judge Siobhan McGrath

Dated 31 January 2022

Right of appeal

Any party to this case 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.