Neutral Citation Number: [2024] UKUT 40 (LC)

Case No: LC-2023-418

UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT Ref: LON/00AP/HMF/2022/0183 and LON/00AP/HMF/2022/0168

Royal Courts of Justice, Strand,
London WC2A

12 February 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – purpose-built student accommodation – additional licensing scheme – failure to licence for 3 years – reasonable excuse defence – authority failing to consult providers of student housing before additional licensing designation – rent – treatment of utility costs paid by landlord – s.44, Housing and Planning Act 2016 – appeal and cross-appeal dismissed

BETWEEN:

LDC (FERRY LANE) GP3 LTD

Appellant

-and-

VALENTINA GARRO (1), JACK BEDFORD (2)
SOPHIE NEWMAN (3), CALLUM HAYNES (4)
JINRAN WANG (5) and SHRODDA GOSWAMI (6)

Respondents

Flats 201 and 601 North Lodge,
Lebus Street,
London N17

Martin Rodger KC, Deputy Chamber President

18 January 2024

Paul Whatley, instructed by Walker Morris LLP, for the appellant
George Penny, instructed by Flat Justice CIC, for the respondents

The following cases are referred to in this decision:

Acheampong v Roman [2022] UKUT 239 (LC)

Daff v Gyalui [2023] UKUT 134 (LC)

Hallett v Parker [2022] UKUT 165 (LC)

IR Management Ltd v Salford City Council [2020] UKUT 81 (LC)

Kowalek v Hassanein Ltd [2022] EWCA Civ 1041

Parker v Waller [2012] UKUT 301 (LC)

Vadamalayan v Stewart [2020] UKUT 183 (LC)

Williams v Parmar [2021] UKUT 244 (LC)

Introduction

1. This appeal is about a rent repayment order made against the appellant by the First-tier Tribunal (Property Chamber) (the FTT) under section 44, Housing and Planning Act 2016. The order was made because the appellant was found to have been in control of two unlicensed houses in multiple occupation (HMO), which is an offence contrary to section 72 of the Housing Act 2004.

2. The appellant is part of the Unite Group, one of the largest providers of purpose-built student accommodation in the country. The HMOs in respect of which the rent repayment order was made are two flats in North Lodge, a purpose-built block with accommodation for up to 528 students in "cluster flats" of between three and ten bedrooms with shared facilities.

3. The appellant's case before the FTT and on this appeal is that it had a reasonable excuse for having been in control of the unlicensed HMOs and that the rent repayment order ought therefore not to have been made.

4. The respondents in whose favour the order was made are all students who occupied individual rooms in the two flats at North Lodge during the 2020/21 academic year. They are dissatisfied with the order made by the FTT and, by a cross appeal, they invite the Tribunal to increase the amount of the rent to be repaid to them to the full amount they paid to the appellant. Through their representative, they also suggest that there is confusion and inconsistency in the approach being taken by the First-tier Tribunal to the quantification of rent repayment orders.

5. Permission for the appeal was given by this Tribunal but permission is still required for the cross appeal.

6. At the hearing the appellant was represented by Mr Paul Whatley and the respondents by Mr George Penny. I am grateful to them both for their submissions.

HMO licensing and student housing

7. Part 2, Housing Act 2004, is concerned with the licensing of HMOs. Section 61 requires any HMO to which Part 2 of the Act applies to be licensed unless a temporary exemption notice or management order is in force.

8. The circumstances in which Part 2 of the Act will apply to an HMO are provided for by section 55.

9. First, by section 55(2)(a) Part 2 applies to any HMO which falls within a prescribed description of HMO in regulations made by the Secretary of State. Originally, pursuant to regulations made in 2006, only HMOs of three storeys or more were prescribed for this purpose. Cluster flats of the sort found in North Lodge did not fall within the prescribed description because each flat generally comprised accommodation on the same level.

10. In 2018 a new classification of prescribed HMOs was adopted. By article 4 of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 the requirement that an HMO must be of three-storeys or more was dispensed with and most HMOs occupied by five or more persons living in two or more separate households became prescribed. An exception was made in the case of any HMO satisfying the self-contained flat test in section 254(3) and situated in a block comprising three or more self-contained flats. The cluster flats at North Lodge have the benefit of this exception and they are therefore exempt from mandatory licensing under section 55(2)(a).

11. The alternative route by which an HMO may fall within Part 2 of the Act is provided by section 55(2)(b) which applies where any district of a local housing authority has been designated by the authority under section 56 as being subject to additional licensing.

12. The treatment of purpose-built student accommodation under the Housing Act 2004 is a little complex. The starting point is that cluster flats like those at North Lodge satisfy the self-contained flat test in section 254(2), 2004 Act, and are therefore capable of being HMOs. They are nevertheless exempt from mandatory licensing because they fall within the three or more self-contained flats exception in article 4 of the 2018 Order. But because they are HMOs, they may still need to be licensed if an additional licensing scheme has been made under section 56 in terms sufficiently wide to apply to them.

13. Separately, Schedule 14, 2004 Act lists certain buildings, or parts of buildings, which are not HMOs other than for the purposes of Part 1 of the Act (which is concerned with the enforcement of housing standards). If a building, or part of a building, falls within one of these categories it will not be an HMO at all and will not require licensing on any basis under Part 2.

14. By paragraph 4(1) of Schedule 14, a building or part of a building is not an HMO if it is occupied solely or principally by full-time students and is managed by a specified educational establishment or other specified manager of student accommodation. The Secretary of State is given power by paragraph 4(2)-(4) to specify educational establishments and other persons who manage student accommodation, but that power has not been utilised to specify managers which are not themselves educational establishments.

15. The appellant is not a designated educational establishment and the cluster flats at North Lodge therefore remain HMOs capable of coming within an additional licensing scheme.

16. Finally, section 233, 2004 Act enables the Secretary of State to approve codes of practice for the management of HMOs, including HMOs which are excluded from the scope of Part 2 because they are of a description falling within Schedule 14. Codes of practice have been approved for student accommodation, and the current version is found in the Housing (Approval of Code of Management Practice) (Student Accommodation) (England) Order 2022, replacing an earlier 2006 Order. The appellant subscribes to the 2022 Code. Presumably, conformity with an approved code of practice would be one of the matters which the Secretary of State would be likely to take into account when deciding whether to specify a manager for the purpose of paragraph 4 of Schedule 14, if that power ever came to be exercised.

The facts

17. North Lodge is one of three student housing blocks providing a total of 1,446 units of accommodation owned by the appellant in the London Borough of Haringey, where the Borough Council is the local housing authority.

18. On 12 February 2019 Haringey designated the whole of the Borough as an area of additional licensing under section 56. The designation came into force on 27 May 2019 and lasts for a period of 6 years. It applies to all HMOs which are not already subject to mandatory licensing under section 55(2)(a). Haringey could have provided for exemptions in favour of particular types of HMO, such as those managed by operators of purpose-built student accommodation who subscribe to an approved code of practice, but it did not do so.

19. Before a local housing authority may make a designation under section 56 it is required by section 56(3) to take reasonable steps to consult persons who are likely to be affected by the designation, and to consider any representation they may make. Haringey did not consult the appellant before making the 2019 designation because it was unaware that it was a large scale provider of housing in the Borough and likely to be affected by the proposed designation.

20. Once a designation has been made, the authority is required to publicise it by a notice published under section 59(2). Thereafter, for as long as the designation remains in force, it must make copies of the notice available to the public in accordance with prescribed requirements.

21. Publication requirements have been prescribed by regulation 9 of the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006. These require publication of the section 59(2) notice on the authority's website within 7 days of a designation being made. The authority must also send a copy of the notice of designation to any person who responded to the consultation conducted under section 56, and to organisations which represent the interests of landlords, tenants, managing agents or letting agents within the designated area.

22. Material before the FTT suggested that Haringey complied with these statutory notification requirements. But it was unaware that the appellant was the manager of student housing in the Borough and it took no steps specifically to notify it of the additional licensing designation.

23. The appellant did not become aware of the designation when it came into force and it continued to manage the building after May 2019 without licencing the individual HMOs within it. Unless it had a reasonable excuse for that state of affairs, and for as long as it did not make an application, the appellant was thereby committing the offence, contrary to section 72(1), 2004 Act, of being a person having control of or managing an unlicensed HMO.

24. The circumstances in which the appellant became aware of the additional licensing designation are unclear. It first contacted Haringey on 1 July 2022, more than 3 years after the designation came into effect, asking for confirmation whether a licence was required for

North Lodge and another building under the additional licensing scheme. Whether that inquiry was the result of the appellant's own research or was precipitated by questions raised by or on behalf of its tenants is not clear. There was evidence before the FTT that from May 2022 Flat Justice had been contacting local housing authorities in London with purpose-built student accommodation in their areas to enquire whether they were licensed, but the date from which they first began to correspond with Haringey is not apparent.

25. Nevertheless, on 1 July 2022 the appellant's London Universities Operations Manager, who was responsible for HMO licensing in London, notified Haringey that the appellant believed it had 221 licensable HMOs in its three blocks in the Borough. Haringey was uncertain about how to deal with an application covering so many HMOs and it was not until 13 September that it confirmed that an application would be needed in respect of each cluster flat containing three or more bedrooms. The total cost of licences for the three buildings would be £110,500.

The applications and the FTT's decision

26. In August 2022 the respondents applied to the FTT for rent repayment orders. The amounts claimed by each of the respondents ranged from just over £6,500 to almost £9,200 and represented the full amount they had each paid during the 12 month period in respect of which an order could be made. In support of their applications they provided details of problems they had encountered in occupying the flats during the Covid 19 pandemic period when restrictions were in force. They also identified a number of appliances which needed to be replaced and made other complaints about the management of the building.

27. In its statement of case for the FTT the appellant asserted that it ought to have been consulted before the additional licensing scheme was introduced. Had it been consulted it would also have been notified when the scheme was made. As it was, it did not become aware of the scheme until in or around July 2022. It asserted that it had a reasonable excuse for managing the property without a licence although it did not, in terms, say what that excuse was. Reading between the lines, it blamed Haringey for the fact that it was unaware of the additional licensing scheme and the need to apply for a licence.

28. The FTT was unimpressed by this defence. In its decision handed down on 11 May 2023 it pointed out that the appellant could have challenged any failure by Haringey to consult by an application for judicial review, but it had not done so. The FTT rejected what it described as "the central tenor" of the appellant's argument, namely, that as a provider of student housing which is exempt from mandatory licensing it was entitled to "special consultation treatment" which excused it from making its own investigations into the existence and effect of the designation on its property.

29. The FTT noted the evidence that, before the designation took effect, it was advertised in local newspapers, through a landlord's forum, and by circulation to landlord "governing bodies" and to Haringey's landlord and agent mailing list. The FTT was satisfied that the designation was widely advertised, and that Haringey had complied with its obligations under the 2006 Regulations. It concluded:

> "The respondents cannot excuse their failure to licence on the basis that the local authority did not go one step further and contact them directly. The reasonable excuse defence is rejected."

30. As the reasonable excuse defence was the appellant's only answer to the application for rent repayment orders, the FTT was satisfied that the offence had been established and proceeded to address the factors relevant to its assessment of the amount of rent to be repaid. It directed itself by reference to recent decisions of this Tribunal, in particular *Williams v Parmar* [2021] UKUT 244 (LC), *Hallett v Parker* [2022] UKUT 165 (LC) and *Acheampong v Roman* [2022] UKUT 239 (LC). It found the allegations of misconduct relied on by the applicants were "unimpressive" and had been "formulated to try to boost the penalty rather than based on genuine complaint" and made no adjustment on account of them. Relying on information about the cost of utilities supplied to the whole building, it then adjusted the rent claimed by each tenant downwards by £40 per month to reflect the fact that those costs had been met by the appellant on the tenants' behalf. It then had regard to the seriousness of the offence and concluded that repayment of 50% of the total rent (net of the allowance for utilities) was appropriate. The amounts awarded varied from £3,042 to £4,370 and totalled just over £23,000.

The appeal

31. The appellant was granted permission to appeal on four grounds relating to the dismissal of its reasonable excuse defence and on an additional ground concerning the quantum of the FTT's award.

32. The first ground of appeal was that the FTT was wrong to reject the appellant's contention that Haringey had failed to appreciate that the additional licensing designation would affect purpose built student accommodation which was otherwise exempt from mandatory licensing. That proposition had featured significantly in the appellants criticisms of Haringey before the FTT, but the FTT had found no evidence to support it, and in particular, no evidence at the level of Haringey's policy makers to show what they had or had not taken into account. It did not consider that inferences drawn from statements made by front line housing officers made up for that deficiency.

33. The short answer to this ground of appeal is that any suggested failure on the part of Haringey to take account of the particular circumstances of purpose built student accommodation when designing the additional licensing scheme cannot provide a reasonable excuse for the appellant's failure to comply with the scheme once it was introduced. As the FTT pointed out, such an omission by Haringey (if established), might have provided grounds for the appellant to seek a judicial review of the scheme, but that is as far as it goes. It is not suggested that an additional licensing scheme could not lawfully be made to apply to the type of student accommodation managed by the appellant, as the appellant clearly appreciated, because it employed a member of staff with specific responsibility for licensing its HMOs. In those circumstances, Haringey's decision making process is simply irrelevant.

34. In any event, the FTT was right that the evidence did not establish what Haringey's policy makers had or had not taken into account, only that the housing team responsible for

licensing HMOs were taken aback to receive, three years into the period of the scheme, a request from the appellant to licence 221 HMOs of which the officers had previously been unaware. There is no evidence that the appellant had informed Haringey that it was managing three blocks of student accommodation in the Borough, which explains why it was not consulted, nor is there evidence whether other providers of such accommodation were consulted.

35. It is convenient to deal with the fourth ground of appeal at this point. It is said that the FTT had regard to an irrelevant consideration when it suggested that the appellant could have addressed any failure of consultation by judicial review proceedings. The appellant says it could not have done so because it did not become aware of the additional licensing designation until three years after the scheme was introduced, and so would have been out of time for any judicial review proceedings. This ground misunderstands the point the FTT was making, which was that none of the evidence of Haringey's decision making which would have been available in the context of a judicial review was available to it as there had been no judicial review challenge. In the absence of evidence from decision makers, the FTT was being asked by the appellant to draw inferences about what had or had not been overlooked from emails written by individual housing officers who were unlikely to have had any involvement in formulating the licensing scheme or considering what, if any, exemptions ought to be allowed. The FTT did not fall into error by pointing out that "if they [the appellant] had challenged the local authority properly via judicial review they could have sought disclosure" of policy documents.

36. The second ground of appeal is similar to the first, in that it focusses on what Haringey is said to have done wrong, this time that it had failed to consult as required by section 56(3) and failed in its duty to identify those who were likely to be affected by the designation of the additional licensing area.

37. It is not known what consultation Haringey undertook before making its designation, and it does not appear to have been asked for an account. It was not obliged by section 56(3) to consult any individual landlord, merely "to take reasonable steps to consult persons who are likely to be affected by the designation". It may or may not have consulted providers of purpose built student accommodation of whom it was aware; all that is known is that it did not consult the appellant of whose existence in the Borough it was unaware. In my judgment the FTT was entitled to find that none of this established a defence of reasonable excuse for the appellant.

38. The appellant is in the position of many landlords who discover that have been committing an offence because they were unaware that a licensing scheme, mandatory or additional, applies to their property. Occasionally ignorance has been accepted as providing a reasonable excuse (generally where there has been a reasonable excuse for that ignorance) but usually it has not. The answer given to such landlords by tribunals has most often been that the responsibilities of managing residential property are not to be undertaken carelessly, and that managers and landlords are expected to make themselves aware of the current licensing or other regulatory requirements which affect their business. Generally, the bigger a landlord's business, the more difficult it will be to provide a reasonable explanation for a failure to keep up to date. Landlords are assisted in keeping up to date by the obligation placed on local authorities to publicise additional licensing schemes. If an additional scheme had not been properly advertised ignorance of it might be reasonable especially if it

could be shown that a landlord had taken reasonable steps to keep informed but had nevertheless been unaware of the scheme.

39. In this case, the appellant is one of the largest providers of student accommodation in the country. It had signed up to a code of management practice which, as Mr Penny pointed out, specifically requires providers of student housing to be aware of HMO licensing requirements and ensure they comply with them. Yet the appellant provided no evidence of any steps it had taken to keep itself informed of licensing requirements in Haringey, despite HMO licensing being one of the responsibilities of its London Universities Operations Manager. As the Tribunal explained in *IR Management Ltd v Salford City Council* [2020] UKUT 81 (LC) the burden of proving the existence of a reasonable excuse falls on the person seeking to rely on it, and that burden cannot be discharged without relevant evidence of what the person did in the particular circumstances. Before the FTT the appellant relied on the evidence of its Head of Operations for London, Mr White, but he had no personal responsibility for ensuring licensing requirements were adhered to. His account of conversations with the person who was responsible, Ms Stringer, suggested that at the relevant time the appellant's procedures were not standardised and depended on a local housing authority making it aware of a licensing requirement or on ad hoc checks by local staff. No evidence was provided about how frequently such checks were made and in this case three years passed before the appellant became aware of the Haringey scheme. By focussing on the alleged absence of consultation with interested parties the appellant concentrated its evidence on the wrong target and this ground of appeal also fails.

40. The third ground of appeal was that the FTT erred in law by suggesting that the appellant's position on consultation amounted to a contention that it was entitled to "special consultation treatment". But that is not what the FTT decided. The "central tenor" of the appellant's reasonable excuse defence, as the FTT saw it, was "that as a student provider of housing which is exempt from the mandatory licensing requirements, they are entitled to special consultation treatment *which excuses them from making their own investigations* into the existence and effect of the designation on their own properties" (emphasis added). The FTT's criticism was of the appellant's passive approach to its licensing responsibilities. The FTT's characterisation of the appellant's case was not inaccurate. By advancing no evidence about steps it may have taken to keep itself informed of licensing requirements in the locality the appellant's case amounted to nothing more than an attempt to deflect blame for its own shortcomings onto Haringey. The FTT rightly rejected that case.

41. The appellant's single ground of appeal on the quantum of the repayments ordered by the FTT is that the FTT failed to give adequate reasons for setting the award at 50% of the net rent paid by the tenants and failed to explain why it was ordering repayment of a sum greater than the 25% ordered by this Tribunal in the case of *Hallett v Parker*.

42. Despite Mr Whatley's submissions to the contrary, the facts of *Hallett v Parker* were strikingly different from those of this case. For many years Mr Hallett let his former family home through a letting agent. At that time it was not an HMO because it was occupied by families. In 2019 it was relet through the same agent to three individuals who did not form a single household and it therefore became an HMO and licensable under a scheme of additional licensing introduced in 2015. The agent did not alert Mr Hallett to the need to obtain a licence, and he was unaware of it. The FTT ordered repayment of the full amount of the rent paid by the three tenants, but its assessment was set aside on appeal and an order

for repayment of 25% of the rent was substituted on a redetermination by this Tribunal. The factors which led to that assessment were identified at paragraph [37], as follows:

> "In fixing the appropriate sum I take account of the following: that the offence is not of the most serious type; that proper enforcement of licensing requirements against all landlords, good and bad, is necessary to ensure the general effectiveness of the licensing system and to deter evasion; that Mr Hallett failed to take sufficient steps to inform himself of the regulatory requirements associated with letting an HMO; that this was the first occasion on which he had let the property to a group of tenants who did not form a single household, and hence the first occasion when a licence was required; that he was not alerted by his letting agent to the need to obtain a licence, when he might reasonably have expected he would be (especially as the same agent had previously let the property on his behalf in circumstances which meant no licence was required); that the condition of the property was fairly good; that he applied for and was granted a licence as soon as he became aware that one was required; and that he lets no other property."

43. No two cases are the same, and in any event, a decision of this Tribunal on the quantum of a rent repayment order in an individual case creates no binding precedent which must be followed by the FTT. Such decisions provide guidance and promote consistency, but they are not the only answer which a properly directed tribunal would be entitled to arrive at. Even if there had been a much greater similarity between the facts of the two cases, the FTT would have been under no obligation to comment on *Hallett* or explain why it considered a higher award was appropriate in this case, unless it was necessary to do so to explain why a particular argument was being rejected. But the facts of this case were very different from those of *Hallett* and the FTT was entitled to assess the appropriate penalty for this offence committed by this landlord at 50% without commenting on the earlier case.

44. The appellant is right that the FTT gave no detailed reasons for selecting 50% as the appropriate penalty rather than some other figure, but it identified the factors it was taking into account and there was little more that could be said. I can see nothing wrong with the explanation given at paragraph [45], although it must be read against the background of the facts already found by the FTT. It said this:

> "The offence is not considered at the serious end of the scale either comparing the offence to other offences or other cases of the same offence. The respondents should have been aware of the need to license but this was not a deliberate breach. Hopefully they will ensure that they don't fall foul of the law again. No addition is made for conduct for the reasons already give. We consider that a 50% penalty is appropriate."

45. For these reasons I dismiss the appeal on all grounds.

The proposed cross-appeal

46. When they filed their respondents' notice, the respondents included grounds of cross-appeal for which they sought the Tribunal's permission. Having considered those grounds, the

Tribunal directed that the application for permission to cross-appeal would be considered at the hearing of the appeal and, if permission was granted, the cross-appeal would be determined at the same hearing.

47. The original grounds of cross appeal raised four separate issues each of which was concerned with the amount of the rent which the FTT ordered to be repaid. They were:

    1. That the FTT had given insufficient consideration to the respondents' complaints about the condition of the property and had failed to adjust the award upwards to take account of them.
    2. That the FTT had been wrong in principle to reduce the amount of the rent to be repaid because the landlord met the cost of utilities both because there was insufficient evidence of the cost incurred and because it any such deduction was inconsistent with section 44, Housing and Planning Act 2016 and the definition of "rent" in section 56.
    3. That the FTT had been wrong to treat a failure to obtain an HMO licence as an offence which was not "at the most serious end of the scale".
    4. That the FTT's award did not reflect the Upper Tribunal's guidance that higher awards should be made in cases involving professional landlords.

48. In his oral presentation Mr Penny did not pursue ground 3 and combined parts of the other written grounds to focus on two propositions, namely (1) that the FTT had failed to take sufficient account of material factors in assessing the sum to be repaid, and (2) that the FTT had erred in law by reducing the amount of the rent to be repaid because the landlord had paid for the cost of utilities.

49. Having heard the oral argument I refuse permission to appeal on the first of Mr Penny's grounds of appeal (which combined all or parts of the original grounds 1 and 4). The FTT formed a negative view of the respondents' case about the condition of the flats and the various other allegations of "misconduct" levelled against their landlord and there is no basis on which this Tribunal, which has not heard the evidence or been taken through the relevant written records, could reach a different conclusion. The FTT also took account of the scale of the landlord's business. When a tribunal makes an assessment involving a large number of different considerations, unless an appellant can point to some clear error such as a failure to take account of something relevant, or taking account something irrelevant, or a result which falls outside a rational range, it is not for this Tribunal to interfere with that assessment simply because more weight might have been given to one factor or another.

50. I grant permission to appeal on the second of Mr Penny's grounds, to the extent that it raises a question of principle of general application. I refuse permission on that part of the ground which challenges the FTT's assessment of the sufficiency of the evidence relied on by the appellant to demonstrate the cost it incurred in the provision of utilities.

Rent repayment orders where the landlord is responsible for utility bills

51. It is clear from the examples of FTT decisions quoted in the application for permission to cross-appeal and from others which the Tribunal has seen that the quantification of rent repayment orders is a subject on which views still differ; most panels appear to follow

guidance given by this Tribunal, but a rump energetically espouses an alternative approach. In the assessment of penalties, fairness and the maintenance of respect for the law both require that tribunals adopt a consistent approach, even if, within a settled framework, one panel may be more influenced than another by a particular factor or one may be disposed to be more lenient or more punitive than another.

52. In England, rent repayment orders are part of the suite of measures provided for by Part 2, Housing and Planning Act 2016 to punish and deter the activities of "rogue landlords and property agents" (as they are designated in the title to Part 2). The circumstances in which an order may be made are explained in section 43 and the amount of order to be made in favour of tenants (as opposed to local housing authorities to which different considerations apply) are explained in section 44.

53. 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."

54. The table referred to in section 44(2) specifies that in the case of a licensing offence contrary to section 72(1), Housing Act 2004, 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".

55. The modern meaning of "rent" is straightforward and does not require reference to antique legal concepts. It is simply "a payment which a tenant is bound by his contract to make to his landlord for the use of the land" (*Woodfall: Landlord and Tenant,* 7.001). For the purpose of Chapter 4 of Part 2 of the 2016 Act (i.e. the rent repayment order provisions) "rent" is defined in section 52(1) as including any payment which could be taken into account under section 11 of the Welfare Reform Act 2012 in the calculation of an award of

universal credit. Such payments include "any liability of a claimant to make payments in respect of the accommodation they occupy as their home" (section 11(1).

56. In *Acheampong v Roman* [2022] UKUT 239 (LC) the Tribunal reviewed some of its decisions under section 44 and suggested an approach to the quantification of rent repayment orders which would be consistent with them. That approach was as follows:

> "20. The following approach will ensure consistency with the authorities:
>
> a. Ascertain the whole of the rent for the relevant period;
>
> b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.
>
> c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step;
>
> d. Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).
>
> 21. I would add that step (c) above is part of what is required under section 44(4)(a). It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked."

57. In this case, the FTT directed itself by reference to the guidance in *Acheampong* and adjusted the amount of the rent repayment downwards at step (b) to reflect the fact that the appellant met the cost of heating, lighting, electricity and broadband utilised by its tenants.

58. Mr Penny submitted that this adjustment was wrong in principle, and that step (b) suggested by the Tribunal in *Acheampong* was impermissible. His contention was that section 44(2) directs that the amount of a rent repayment order "must relate to rent paid" during the relevant period. By making a deduction from the rent paid and basing the amount to be repaid on what Mr Penny called a "net rent", tribunals were not complying with that direction. Nor were they entitled to take the fact that the landlord had paid for the cost of utilities into account under section 44(4)(a) or (b), because such payments were not "conduct" on the part of the landlord, nor were they the "financial circumstances of the landlord".

59. The earliest example of a deduction being made by this Tribunal from the amount of rent to be repaid to reflect the cost of utilities supplied at the landlord's expense predates section 44 of the 2016 Act. *Parker v Waller* [2012] UKUT 301 (LC) was an appeal against a rent repayment order made under section 73, Housing Act 2004. Section 73 was concerned solely with HMO licensing offences and originally applied to both England and Wales, but it ceased to apply to England with effect from the commencement of Part 2 of the 2016 Act on 6 April 2017. Under section 74(2), 2004 Act, the amount of a rent repayment order was to be "such amount as the tribunal considers reasonable in the circumstances" taking into account a number of matters listed in section 74(6), including the conduct and financial circumstances of the landlord.

60. In *Parker v Waller* the landlord of an HMO had failed to obtain the necessary licence and had been convicted and fined £525 by the magistrates. Subsequently, the residential property tribunal (RPT) ordered that he repay the full amount of the rent he had received from his six tenants in the 12 months before their application under section 73, 2004 Act, a sum of more than £15,400. In reaching that decision the RPT refused to take into account that the landlord had had to pay utility costs out of the rent he received from the tenants, because those did not relate either to the landlord's conduct or his financial circumstances and because "the Act does not differentiate between rent payments which are purely rent and rent payments which may include utilities costs." The landlord appealed.

61. The Tribunal (George Bartlett QC, President) considered that what might be "reasonable in the circumstances" depended on the objective which a rent repayment order was intended to achieve. That objective was obscure, and the Tribunal therefore felt entitled to consult Hansard for assistance. There it found reference in a speech by the promoter of what became sections 73 and 74, 2004 Act to the purpose of the provisions being to "prevent a landlord from profiting from renting properties illegally". That was the basis of the proposition, at [42], that "it would not be appropriate to impose upon [the landlord] an RRO amount that exceeded his profit in the relevant period."

62. Consistent with that general approach, amongst the points which the Tribunal said should be borne in mind (at [26]) was that:

> "(vi) Payments made as part of the rent for utility services count as part of the periodical payments in respect of which an RRO may be made. But since the landlord will not himself have benefited from these, it would only be in the most serious case that they should be included in the RRO."

At [33] the Tribunal addressed the RPT's conclusion that because the landlord's payment of utility costs was not a matter of his conduct or his financial circumstances, it was not a material consideration. That was an error because "the matters set out in section 74(6) are not the only potentially material considerations".

63. The earliest case in which the Tribunal considered the quantification of rent repayment orders under the new regime introduced by the 2016 Act was *Vadamalayan v Stewart* [2020] UKUT 183 (LC). A rent repayment order was set aside because inadequate reasons had been given by the FTT. The Tribunal then redetermined the application. It explained that the direction in section 74(2), 2004 Act, that the amount of a rent repayment order was to

be "such amount as the tribunal considers reasonable in the circumstances" no longer applied. Its replacement, section 44, 2016 Act provided no support for limiting the rent repayment order to the landlord's profits.

64. In *Vadamalayan* the landlord invited the Tribunal to deduct from the rent which was to be repaid costs which he had incurred on furnishings, fittings, repairs and improvements to the property, as well as running costs such as insurance and agent's fees. None of the costs were for utilities provided at the landlord's expense and consumed by the tenant, but in explaining its decision the Tribunal recognised, at [16], that:

> "In cases where the landlord pays for utilities, as he did in *Parker v Waller*, there is a case for deduction, because electricity for example is provided to the tenant by third parties and consumed at a rate the tenant chooses; in paying for utilities the landlord is not maintaining or enhancing his own property. So it would be unfair for a tenant paying a rent that included utilities to get more by way of rent repayment than a tenant whose rent did not include utilities. But aside from that, the practice of deducting all the landlord's costs in calculating the amount of the rent repayment order should cease."

65. The decision in *Vadamalayan* was interpreted by some as requiring that the full amount of the rent paid by the tenants should be repaid unless something in the tenant's conduct or the landlord's financial circumstances justified a reduction. As the passage quoted above makes clear, that was always a misreading of *Vadamalayan* as far as the cost of utilities supplied at the landlord's expense was concerned.

66. In *Williams v Parmar* [2021] UKUT 244 (LC) the Tribunal (Sir Timothy Fancourt, President) confirmed that section 44 did not create a presumption in favour of maximum recovery and the factors which a tribunal could take into account were not limited to those identified expressly in section 44(4). As the President explained, at [25]:

> "[…], 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)."

67. In fixing the amount to be repaid tribunals should take account of the purposes intended to be served by the jurisdiction, identified by the President at [43] as:

> "[…] 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."

68. The order made by the Tribunal in *Williams v Parmar* took as its starting point the rent paid by the tenants, after deducting the agreed cost of the utilities provided by the landlord for which no additional charge was made, before making a further deduction to reflect the seriousness of the offence and the particular circumstances of the case (see [52] and [55]). The President obviously considered that these deductions were consistent with what he had said at [25] and with the direction in section 44(4) that the amount to be repaid must "relate to" the rent paid during the relevant period.

69. It is therefore surprising to find the view being expressed, both in argument in this appeal, and in decisions of particular constitutions of the FTT, that the approach explained in *Acheampong*, and in particular, the deduction of costs of utilities or services paid for by the landlord but consumed by the tenant, is inconsistent with section 44 and impermissible.

70. A number of propositions about the suggested illogicality of the authorities were advanced in the tenants' application for permission to cross-appeal (not settled by Mr Penny, but supported by him in his oral presentation), including:

    (a) That the deduction of the cost of utilities is inconsistent with the Tribunal's statement in *Vadamalayan*, at [15] that "There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order".

    (b) That the approach does not take account of the fact that part of the cost of utilities is likely to represent a standing charge, which the landlord would have to incur even if the property was empty.

    (c) That the decision to offer a property at an inclusive rent is a marketing decision which the landlord is free to make, in the same way as a landlord may offer a flat in a furnished or unfurnished condition, yet the cost of furnishing a flat is not allowed as a deduction.

71. None of these points provides a good reason why the cost of utilities cannot properly be taken into account by way of an allowance when determining the quantum of a rent repayment order. Dealing first with the points made in the grounds of cross-appeal:

    (a) The quotation from *Vadamalayan* is taken out of context and is the conclusion of a passage (at [15])) in which the Tribunal explained why the cost of expenditure on the landlord's own property could not be a legitimate allowance. It is then followed by the passage quoted at [64] above in which the Tribunal distinguished payments made by the landlord for services consumed by the tenant. There is no inconsistency in this differential treatment. In paying for electricity or water consumed by the tenant the landlord is not maintaining or improving its own property, it is meeting a cost which is solely for the benefit of the tenant and over which the landlord is unlikely to have much control. The principal justification for that allowance remains as the Tribunal explained it in *Parker v Waller,* namely, "the landlord will not himself have benefited from these".

    (b) The expense the landlord would incur if the property was empty is irrelevant to the amount which should be repaid to the tenant in order to achieve the statutory objectives of punishment, deterrence, and deprivation of benefits gained through law breaking.

Additionally, as I suggested in *Daff v Gyalui* [2023] UKUT 134 (LC), at paragraph [58], rent repayment orders are "a blunt instrument which cannot be wielded with much subtlety or precision", and it is neither necessary nor appropriate to analyse individual bills in the manner suggested. What is required is an "evaluative exercise" (as it was described by the President in *Williams v Parmar*, at [53]) not an arithmetical calculation.

(c) Once again, considerations of how else a property might have been let and what effect a different bargain might have had on the return the landlord might have achieved are nothing to the point. The purpose of rent repayment orders does not include the achievement of equivalence between sums payable to tenants occupying on different terms.

72. Mr Penny highlighted the suggestion in *Vadamalayan*, at [16] (see [64] above), that electricity, for example, is consumed at a rate determined by the tenant and that it "would be unfair for a tenant paying a rent that included utilities to get more by way of rent repayment than a tenant whose rent did not include utilities". Neither of these considerations, he submitted, could provide a principled basis on which the cost of utilities could be deducted from the amount of an award.

73. To my mind fairness to individual tenants is not a relevant consideration in the quantification of rent repayment orders. The regime introduced by the 2016 Act is not intended to compensate tenants for a wrong they have suffered; it is intended to deter and punish landlords who fail to comply with their obligations, whether or not their tenants have suffered any disadvantage as a result, and to encourage compliance in future. In *Kowalek v Hassanein Ltd* [2022] EWCA Civ 1041, Newey LJ explained the policy underlying the legislation as follows:

> "Consistently with the heading to part 2, chapter 4 of part 2 of the 2016 Act, in which section 44 is found, has in mind "rogue landlords" and, as was recognised in *Jepsen v Rakusen* [2021] EWCA Civ 1150, [2022] 1 WLR 324, "is intended to deter landlords from committing the specified offences" and reflects a "policy of requiring landlords to comply with their obligations or leave the sector": see paragraphs 36, 39 and 40. "[T]he main object of the provisions", as the Deputy President had observed in the UT (*Rakusen v Jepsen* [2020] UKUT 298 (LC), [2021] HLR 18, at paragraph 64; reversed on other grounds), "is deterrence rather than compensation". In fact, the offence for which a rent repayment order is made need not have occasioned the tenant any loss or even inconvenience (as the Deputy President said in *Rakusen v Jepsen*, at paragraph 64, "an unlicensed HMO may be a perfectly satisfactory place to live") and, supposing damage to have been caused in some way (for example, as a result of a failure to repair), the tenant may be able to recover compensation for it in other proceedings. Parliament's principal concern was thus not to ensure that a tenant could recoup any particular amount of rent by way of recompense, but to incentivise landlords.

74. In the context of a scheme of penalties which must "relate to rent paid" there will never be equivalence between the sums to be repaid to individual tenants in different circumstances. The tenant of an expensive flat let in good condition but without a licence may recover more than the tenant of a much less desirable property in poor condition. That is the consequence

of the statutory scheme and the priority given by Parliament to the objective of deterrence. From the perspective of a tenant, a rent repayment order will always be a windfall, enjoyed in addition to statutory or common law rights to be compensated for any wrongs they may have suffered. For those reasons it does not seem to me that considerations of fairness as between individual tenants have any part to play in the quantification of orders.

75. That does not mean that the other factors mentioned in *Vadamalayan* are unimportant. The fact that utilities are provided to the tenant by third parties and consumed at a rate the tenant chooses reflects the true justification for treating these costs differently from the cost of repairs, maintenance, insurance, mortgage repayments and the like. That justification remains as it has always been: "in paying for utilities the landlord is not maintaining or enhancing his own property" (*Vadamalayan*, at [16]); and "the landlord will not himself have benefitted from these" (*Parker v Waller*, at [26]).

76. In his oral submissions Mr Penny put his main argument on a rather different basis. He suggested that an allowance to reflect costs incurred by a landlord in the provision of services consumed by a tenant was simply not permitted by section 44(4), which requires that the amount of the order must "relate to rent paid". To allow a deduction of any costs incurred by a landlord would be to cause the amount to relate to "net rent" rather than to rent paid.

77. I do not accept this argument. In *Williams v Parmar* the President explained, at [25], that the calculation of the amount of the order must relate to the total amount of the rent paid "in some way". Thus, the amount "may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both". There is nothing inconsistent with section 44(4) in any of those approaches since each assessment takes as its starting point the amount of rent paid by the tenant during the relevant period as the section requires.

78. It is, of course, for individual tribunals, guided by appellate decisions which bind them, to determine the appropriate relationship between rent paid and rent to be repaid in the cases which come before them. But in making that determination one of the relevant circumstances which the Tribunal should have regard to, where it arises on the facts, is that the landlord has made payments for utilities consumed by the tenant.

79. Finally, in their written grounds of application for permission to cross-appeal, the respondents' representatives made the striking claim that they are "not alone in our rejection of the UT guidance on deducting utilities from rent" and suggested that "a number of FTT judges have made strong objections in their judgments to the guidance given in *Vadamalayan* in this respect". The decisions of FTT panels cited in support of these claims do not live up to the fanfare with which they were trailed. One panel has repeatedly made the point relied on in this appeal that the decision to offer a property at an inclusive rent is a marketing judgment made by a landlord for its own commercial reasons, and in that respect is no different from a decision to let premises furnished rather than unfurnished. That may well be true, and it is undoubtedly the case that all aspects of the bargain will influence the amount of the rent paid by the tenant, but it does not seem to me to detract from the point that payments made for utilities are different from payments made on furnishing or property maintenance because the latter equip or preserve the landlord's property while the former do not.

80. The other concern expressed by the same panel is that the rent payable under a tenancy is a single undivided sum which cannot be apportioned between an amount paid for utilities and a part which relates exclusively to the use of the property. That may be true, but again it does not seem to me to be a point of any consequence. The statutory direction is that the amount of a rent repayment order must relate to the rent paid; that means it must relate to the whole of the rent. But the statutory direction also necessarily requires that the assessment take account of other relevant circumstances, one of which will often be that the landlord has paid the cost of utilities consumed by the tenant. The decision maker is entitled to take account of that expenditure when determining the amount to be repaid and is encouraged by this Tribunal's guidance to do so. That has now become the settled approach amongst FTT panels. Mischaracterising it as "disregarding part of the rent" and suggesting that there is no basis in law or practice for it is a misinterpretation of section 44 and is inconsistent with *Williams v Parmar* and the subsequent Upper Tribunal cases.

Disposal

81. For these reasons the appeal and the cross-appeal are both dismissed.

Martin Rodger KC,

Deputy Chamber President

12 February 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.