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Case No: LC-2024-48

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: LON/00BG/HMG/2023/0019

19 June 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – landlord unaware of selective licensing scheme – whether reasonable excuse for controlling unlicensed house – quantum of rent repayment – whether excessive – conduct – s.95(4), Housing Act 2004; s.44, Housing and Planning Act 2016 – appeal allowed in part

BETWEEN:

JOHN ANTONY NEWELL

Appellant

-and-

JOE ABBOTT (1)
ALEKSANDER OKROJEK (2)

Respondents

Flat 9B Sandy's Row,
London E1

Martin Rodger KC, Deputy Chamber President

1 May 2024

The appellant, Mr Newell, represented himself
The respondents, Mr Abbott and Mr Okrojek, represented themselves

The following cases are referred to in this decision:

Acheampong v Roman [2022] UKUT 239 (LC)
Awad v Hooley [2021] UKUT 55 (LC)
Aytan v Moore [2022] UKUT 27 (LC)
Daff v Gyalui [2023] UKUT 134 (LC)
Dowd v Martins [2022] UKUT 249 (LC)
Ficcara v James [2021] UKUT 38 (LC)
Hallett v Parker [2022] UKUT 165 (LC)
Hancher v David [2022] UKUT 277 (LC)
Irvine v Metcalfe [2023] UKUT 283 (LC)
Kowalek v Hassanien Ltd [2021] UKUT 143 (LC)
Kowalek v Hassanien Ltd [2022] EWCA Civ 1041
Marigold v Wells [2023] UKUT 33 (LC)
Simpson House 3 Ltd v Osserman [2022] UKUT 164 (LC)
Williams v Parmar [2021] UKUT 244 (LC)

Introduction

1. This appeal raises two recurring issues about rent repayment orders made under Chapter 4 of Part 2 of the Housing and Planning Act 2016 (the 2016 Act). The first is whether a landlord who was unaware of the need to obtain a licence under Part 3 of the Housing Act 2004 (the 2004 Act) had a reasonable excuse for having control of an unlicensed house. The second is whether the First-tier Tribunal, Property Chamber (the FTT) erred in principle when it determined the amount of rent which the landlord should repay.

2. The appeal is brought by Mr John Newell, who is a solicitor and who was formerly the owner of a 3 bedroom flat at 9B Sandys Row, London E1 (the Flat). The respondents, Mr Joe Abbott and Mr Aleksandr Okrojek, were both tenants of the Flat, Mr Abbott from March 2019 until September 2022 and Mr Okrojek from a date in 2018 until September 2022. By its decision issued on 20 December 2023 the FTT ordered Mr Newell to repay each of the respondents rent of £5,760, a figure which represented 80% of the sum each of them had paid during the final 12 months of their tenancy of the Flat.

3. Mr Newell was granted permission to appeal by this Tribunal and represented himself at the hearing of the appeal, as did Mr Abbott and Mr Okrojek.

The facts

4. The Flat is in the London Borough of Tower Hamlets, in a ward which was made the subject of a selective licensing scheme under Part 3 of the 2004 Act in 2016. The scheme initially lasted for five years but it was renewed for a further five years in October 2021. It required that a licence be obtained for any dwelling which was not already subject to mandatory HMO licensing, and which was occupied by two or more people sharing facilities but living in separate households. The Flat was such a dwelling and required a licence.

5. Mr Newell did not have a licence. He let only one property, the Flat, and did not become aware of the selective licensing scheme when it was introduced, or when it was renewed. Information was sent by the Council to the owner's address shown in the register of title for the Flat at HM Land Registry, but Mr Newell had not kept that address up to date and the information did not reach him. Nor did any information about the scheme which may have been sent by the Council to the Flat itself.

6. Mr Newell did not employ an agent and adopted a low key approach to the management of the letting. When he first acquired the Flat in 2006 it was already let to a group of tenants whom he allowed to find replacements whenever one of their number left. One of the last group of tenants had lived in the Flat for eight years and she took responsibility for finding new tenants and explaining the letting arrangements to them. While the Flat may originally have been let as a whole to three joint tenants, the informal way in which vacancies were filled meant that by the time Mr Abbott and Mr Okrojek moved in, each of them understood that he was tenant of one room only, with the right to share the other facilities of the Flat. There were no written tenancy agreements and the FTT found that neither of the respondents had agreed to pay rent for the whole Flat to cover any vacancy.

7. The Flat is one of two flats on the upper storeys of a building with a restaurant on the ground floor. The other flat (No.9A) is also let, but its owner used a letting agent to manage the property. In February 2020 the agent told Mr Newell that No.9A needed an HMO licence and that the Council required the fire alarm system to be upgraded, including in the common parts. The expense of installing additional fire protection in the common parts was then shared between the two owners, with Mr Newell paying his contribution.

8. The agent also told Mr Newell that an officer of the Council had been trying to contact him. He attempted to get in touch with that officer by telephone and email, but by this time the first Covid-19 lockdown had been introduced and he received no response. If it occurred to Mr Newell that he might also need a licence for his Flat, he took no steps to apply for one. He told me that he had understood HMO licensing was for dwellings with five or more tenants and was unaware that selective licensing schemes were possible and had assumed that No.9A needed a licence because it was used for Airbnb rentals. Having contributed to the upgrading of the fire arrangements to satisfy the Council's requirements for the neighbouring flat, Mr Newell said he assumed the matter which the Council had tried to contact him about was resolved.

9. During the Covid-19 lockdown Ms Betts, the third resident of the Flat, moved out and it proved difficult to find a replacement. Mr Newell tried to persuade the respondents to sign a new tenancy agreement making them joint tenants of the whole flat, but they were not prepared to take that responsibility. Eventually they both moved out in September 2022 and Mr Newell sold the Flat. Their departure appears to have been amicable, and Mr Newell provided them with references and invited them to help themselves to any of the furniture in the Flat as he would have no use for it once the Flat was sold.

10. The respondents made their joint application to the FTT for rent repayment orders on 15 May 2023. The application was prepared with the assistance of an officer of the Council, and each claimed repayment of £7,200. In Mr Abbott's case the claim was stated to relate to the period from 18 July 2021 to 18 June 2022; in Mr Okrojek's case it was from 23 August 2021 to 29 July 2022. After hearing all three parties in person the FTT issued its decision ordering Mr Newell to repay each of the respondent's £5,760.

11. In the course of its decision the FTT recorded that Mr Newell did not dispute the need for a licence. It accepted that he had been unaware of the need to obtain one but dismissed his claim to have had a reasonable excuse for failing to do so. In dealing with quantum it first referred to a number of recent decisions of this Tribunal before considering the seriousness of the offence. Because the Flat had been unlicensed for such a long time, and Mr Newell had made no efforts to become aware of his obligations, the FTT considered that the offence was "at the serious end of the spectrum for the offence under section 95(1) of the 2004 Act" (i.e. the offence of managing an unlicensed house). It then listed numerous matters of conduct said by one side or the other to be relevant to the assessment of the sum to be repaid. It generally disparaged the examples relied on by Mr Newell, but made few, if any, specific findings of fact, referring to most of the evidence simply as "allegations". It concluded that an award of £7,200 would not be "proportionate to the respondent's offence, bearing in mind the purpose of the legislative provisions and all the circumstances as set out above". It considered that a sum equivalent to 80% of the full amount should be awarded.

The defence of reasonable excuse

12. It is a defence to the section 95(1) offence of having control of or managing an unlicensed house for the person concerned to show that they had a reasonable excuse for doing so (section 95(4)(a), 2004 Act). In this case Mr Newell maintained that he had such a defence in relation to the Flat.

13. In *Marigold v Wells* [2023] UKUT 33 (LC), in a passage quoted in full by the FTT in its decision, I drew attention to guidance given by the Upper Tribunal, Tax and Chancery Chamber, on how tribunals should approach a reasonable excuse defence.

> "(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
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> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

14. The Tribunal then made some observations about cases in which the reasonable excuse relied on was simply that the taxpayer or landlord, as the case may be, did not know of the particular requirement that had been breached. It gave no weight to the maxim that "ignorance of the law is no excuse", and acknowledged that ignorance of the law could indeed form the foundation of the defence:

> "Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

15. The same approach is even more obviously applicable in cases where the knowledge which is lacking is not of some aspect of the general law, such as whether a dwelling housing only three residents can be the subject of a licensing requirement, but is of a particular fact, such as whether a selective licensing scheme is in force or whether the number of occupants has increased to the point where licensing is required.

16. In this case the FTT directed itself by reference to the guidance given in *Marigold v Wells*. It then listed the matters on which Mr Newell relied as giving rise to a reasonable excuse. These were: first, that he had been unaware of the existence of the selective licensing scheme. Secondly, that licensing in general and the Council's scheme in particular were

"not well known". Thirdly, that the Council had tried to correspond with him at his old address. Fourthly, that he had later changed his address shown in the property register at HM Land Registry when he became aware in January 2020 that it was out of date. Fifthly, that his tenants did not pass on to him post which arrived for him at the Flat. Sixthly, that when he became aware that the owner of No.9A had been granted a licence after carrying out some works, he had carried out the same works in the Flat. Seventhly, when he was informed that the Council's officer wanted to speak to him, he had telephoned and emailed her but she did not reply. Finally, he assumed the Council would be satisfied with what he had done, and he believed that the licensing requirements only applied to No.9A because it was used for Airbnb lettings.

14. Although the FTT accepted that Mr Newell was unaware of the selective licensing scheme, it said that "he ought not to have been". It was incumbent on landlords to familiarise themselves with the legal requirements to which they were subject, and Mr Newell had failed to do so. His efforts to keep up to date consisted solely of "a few online searches" and he had not taken professional advice or considered joining a relevant national organisation, which might have provided him with relevant information. Even when he learned of the Council's attempts to contact him his own efforts at communication were minimal. He had not provided his tenants with instructions on what to do with post addressed to him, and he did not attend the property to pick it up. In short, the matters he relied on, "do not remotely constitute a reasonable excuse for his failure to get the property licensed".

15. Mr Newell's first ground of appeal was that the FTT had not given proper consideration to his defence of reasonable excuse. He made a number of points in support of this submission, but his overarching complaint was that the FTT had failed to ask itself the third of the questions suggested in *Marigold v Wells*, namely whether his lack of awareness of the need for a licence was objectively reasonable for him in his circumstances. Instead, he submitted that it had identified a level of knowledge and standard of management which it considered to be reasonable and then expected all landlords to achieve it. Its assertion that all landlords are expected to familiarise themselves with the legal requirements to which they are subject effectively denied the possibility that it might be reasonable for a particular landlord not to have been aware of every relevant law and regulation, however obscure. That mindset, he suggested, was also apparent from the FTT's statement that although it accepted that he was unaware of the Council's selective licensing scheme, 'he ought not to have been'.

16. I do not accept the general thrust of Mr Newell's submissions. It is clear from its decision that the FTT had his particular circumstances well in mind, and had regard to them.

17. The FTT quoted in full that part of the Tribunal's guidance which Mr Newell says it failed to apply. It is therefore understandable that Mr Newell has found it impossible to identify any contrary statement of principle clearly encapsulating the error he accuses the FTT of having made. Instead, he has had to pick out individual comments or turns of phrase and suggest that they disclose a flaw in the FTT's reasoning. But an appellate tribunal is concerned with the substance of the decision under appeal, read as a whole, and not with individual phrases or even whole passages looked at in isolation. That is particularly true where, as in the case of a defence of reasonable excuse, the FTT's task was to make a complex assessment taking into account both the standard of a reasonable landlord or

property manager and the particular characteristics of the individual who has not achieved them.

18. The FTT was clearly right to have in mind the standard of management which is reasonably to be expected of landlords or property managers generally. It is not enough for a landlord to show that they made an honest mistake in failing to obtain a licence. To be reasonable, an excuse must be objectively reasonable, and the standards which landlords are generally expected to achieve are an important measure of what is objectively reasonable in a particular case. That does not mean that there can never be a reasonable excuse for a failure to achieve the standard of performance which landlords can usually be expected to meet; the circumstances of a particular case, including the circumstances, knowledge and understanding of the particular landlord who has failed to take the required action, may adjust what is objectively reasonable for that person in that case and provide just such an excuse. That is reflected in the question suggested in *Marigold v Wells* (adapted for this context): was what the landlord did (or omitted to do or believed) objectively reasonable for this landlord in those circumstances? I do not accept, therefore, that the FTT misdirected itself when it said that it was "incumbent on landlords" to familiarise themselves with relevant legal requirements.

19. Nor do I accept that the FTT ignored Mr Newell's own circumstances, to the extent that it was made aware of them. It referred to the fact that he was a solicitor, and that he rented out only one property and had done so since 2006. It referred to his minimalist management style, and to the fact that he was not a member of any national landlords' organisation. All of these circumstances help explain why he did not become aware of the Council's introduction of selective licensing in 2016 or its renewal of the scheme in 2021.

20. The FTT recorded the factors relied on by Mr Newell as providing him with a reasonable excuse and he did not suggest that anything he had relied on was missing from that list. Having identified those factors it was then for the FTT to make its own assessment. In the absence of some error of principle, and I can see none, it is not for this Tribunal to substitute a different assessment of its own.

21. But I would go further than simply to refuse to interfere with the FTT's assessment by making it clear that I agree with it.

22. The various factors which Mr Newell relied on can broadly be divided into those which explain why he did not act differently, and those which complain that others should have acted differently. In the first category is the basic fact that he was unaware of the selective licensing scheme, which he said was not well known. Whether the scheme was well known in Tower Hamlets was not something about which there was evidence; nor would the awareness of the population as a whole be relevant, rather than the awareness of landlords, about which, again, there was no evidence. It was not suggested that the Council had failed to advertise the scheme as it is required to do before it commences. The FTT was entitled to be critical of Mr Newell for his indifference to sources of information which would have kept him better informed. It is unfortunate that the only active steps which he took to seek information, when he tried to contact the Council, appear to have coincided with the first Covid-19 lockdown, but that was four years after the licensing scheme was introduced. He also seems to have been surprisingly quick to

make assumptions about why No.9A might have required a licence while his flat did not. As the FTT said, there was no proper basis for those assumptions.

23. In the second category Mr Newell has drawn up a list of people whom he implies were also responsible to some extent for his failure to obtain a licence. The FTT dismissed the suggestion that his tenants were in any way at fault in not passing on information which may have arrived at the Flat addressed to him. They had no instructions to forward correspondence and the evidence of all three, including Ms Betts who was the most likely to take responsibility for communicating with Mr Newell, was that they had not been aware of any such correspondence. The implication that the Council ought to have given wider publicity to the scheme founders for lack of evidence, and the suggestion that individual officers should have responded to his limited attempts to contact them in early 2020 is equally unpromising. A local housing authority is not under an obligation to notify individual landlords of a licensing scheme and nothing had passed between Mr Newell and the Council which relieved him of the responsibility of keeping himself informed. The FTT was entitled to regard his belated enquiries as too little and too late.

24. As a solicitor (albeit not one specialising in housing law) Mr Newell was better equipped than many landlords to keep himself informed of his responsibilities and of the relevant regulatory environment. He did not do so and the FTT was entitled to find that he had no reasonable excuse for having managed the Flat without the required licence for almost six years. I therefore dismiss the first ground of his appeal.

The quantum of the rent repayment order

25. Mr Newell's second ground of appeal was that the FTT had erred in law in calculating the amount of the rent repayment order. He developed a number of points in support of that general proposition.

26. First, Mr Newell argued that in each case the FTT had based its assessment on the total amount of the rent paid in a different period from those identified by the respondents in their application. The foundation of Mr Newell's argument was the decision of this Tribunal in *Kowalek v Hassanien Ltd* [2021] UKUT 143 (LC) (which was affirmed by the Court of Appeal: [2022] EWCA Civ 1041). In *Kowalek*, at [29], I said that the effect of section 44(2) of the 2004 Act was to limit the amount of rent which may be the subject of a rent repayment order in two respects. The first was that the amount must relate to rent paid during the period mentioned in the table of offences in section 44(2), 2016 Act. In the case of managing an unlicensed house contrary to section 95(1), 2004 Act, that period is one, not exceeding 12 months, during which the landlord was committing the offence. The second limitation is that the amount must relate to rent paid by the tenant in respect of that period. While the first limitation focusses on the date the payment was made, the second is concerned with the period in respect of which it was made.

27. Mr Newell pointed out that in each case the respondent had specified a particular period in respect of which their claim was made. The application form stated that Mr Okrojek's tenancy started in 2018 and he "paid a monthly rent of £600 and would like to claim RRO from 23/08/21 to 29/07/2022 which is £7,200". It then stated that Mr Abbott had paid £600 a month from March 2019 "and would like to claim RRO from 18/07/2021 to

18/06/2022 which is £7,200". In each case the period identified was less than 12 months and, Mr Newell argued, the FTT had erred in law by awarding a sum equal to twelve months' rent.

28. I am satisfied that there is no substance in this point and that it is no more than a technical complaint about the way in which the application was expressed. The FTT took as its starting point the rent paid during a 12 month period when Mr Newell was managing the Flat without a licence and was therefore committing an offence. Although, at paragraph 3 of its decision, it identified the periods in respect of which the respondents sought orders, it did not suggest that the sum on which it based its own calculation was the amount paid during or in respect of that period; instead it said only, at paragraph 30, that "the whole of the amount paid by the applicants for their occupation of the property over a period of 12 months was £7,200 each". Since the FTT was satisfied that both respondents had paid their rent in full, it was not necessary for it to be specific about the period on which it was focussing. Nor was there any reason for it to limit its calculation to the period identified in the application. Whatever their advisor's reason for specifying different starting and ending dates for each respondent, it is not a condition of section 44 that a tenant specify any period in their application, so specifying a period shorter than 12 months did not create any jurisdictional obstacle to an award based on payments for a full year. Nor was their any procedural unfairness in basing an award on a full 12 months rent, because the application made it clear that each respondent was seeking repayment of £7,200, and each satisfied the FTT that they had paid that amount in a period of 12 months.

29. There might be more substance in this ground of appeal if there had been rent arrears. It would then have been necessary for the FTT to examine a particular period of 12 months and to consider how much had been paid during that period. Indeed, Mr Newell's second point was that the FTT had been wrong to accept the evidence of the respondents, and particularly that of Mr Okrojek, that they were fully up to date with rent payments.

30. The main evidence of payments relied on by the respondents comprised bank statements, but for some months these were unavailable or did not show payments. Each gave oral evidence that they had paid rent every month and Mr Okrojek explained that some of his payments had come from a bank account in Poland for which he did not have statements. The FTT accepted that evidence. It also recorded that Mr Newell had informed it that he had not gone through his own records to determine what had or had not been paid; his position was that he did not assert that rent was unpaid, but simply put the respondents to proof that they had paid all that they said they had. Mr Newell took issue with the FTT's description of the stance he had taken, but as it is dealt with specifically in the decision I accept it. It had no evidence from Mr Newell of his own bank statements showing what he had received, but it was aware that he had parted on good terms with the respondents and had repaid their deposits in full, neither of which is consistent with their rent having been in arrears. The FTT was entitled to conclude on the evidence that both respondents had paid rent throughout the period of their occupation.

31. While dealing with suggested rent arrears it is convenient to deal with another of the points relied on by Mr Newell, which was that after the departure of the third tenant, the two respondents became responsible for paying her share of the rent for the whole Flat and were consequently in arrears by £6,000 by the time they vacated. Rent arrears were said by Mr Newell to be an issue of conduct which the FTT ought to have taken into account

when determining the quantum of its awards. In principle that is no doubt correct, as the Tribunal has said on several occasions (see *Awad v Hooley* [2021] UKUT 55 (LC) at [36], and *Kowalek*, at [38]). But the FTT found that the respondents had never been tenants of the whole Flat and had never agreed to accept responsibility for the aggregate rent; each was tenant of his own room for which he had each agreed to pay £600 a month. The FTT was entitled to make those findings on the evidence and there were no grounds for it to take the alleged arrears into account.

32. Mr Newell's next point was a more substantial one concerning the FTT's assessment of the seriousness of the offence in this case. In paragraph 34 of its decision the FTT said this:

> "The Tribunal considers that the fact that the Respondent had control of and managed a property for such a long time without making any efforts to apprise himself of his obligations, let alone to apply for a license, puts this at the serious end of the spectrum for the offence under section 95(1) of the 2004 Act."

In this passage the FTT considered the relative seriousness of Mr Newell's offence when compared to other offences of managing an unlicensed house contrary to section 95(1). It did not consider the relative seriousness of licensing offences as a category when compared to other categories of housing offences in respect of which a rent repayment order may be made. Mr Newell submitted that this approach was wrong in principle because it was contrary to guidance given by this Tribunal, and that it caused the FTT to order repayments at 80% of the maximum permissible, which was inconsistent with other similar cases and higher than was justified.

33. In determining the amount to be repaid under a rent repayment order the FTT is required by section 44(4) of the 2016 Act to take into account, in particular, (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 Chapter 4 applies. Where the landlord has been convicted of one of five different housing offences or has been the subject of a financial penalty other than on conviction (i.e. under section 249A, 2004 Act) the FTT is required by section 46(1) to order repayment of the maximum amount permitted by section 44. Parliament appears to have taken the view that (in the absence of exceptional circumstances) the fact that one of these five offences has already resulted in a conviction or a civil financial penalty justifies the additional imposition of the maximum possible rent repayment order. But section 46(3)(a), 2016 Act excludes licensing offences from the five housing offences for which this maximum penalty is mandated.

34. Since its decision in *Ficcara v James* [2021] UKUT 38 (LC) the Tribunal has emphasised the seriousness of the offence which has been committed as a significant factor to be taken into account when determining how much of the rent paid by a tenant should be ordered to be repaid. At paragraph [32] of that decision, I said this about the factors identified in section 44(4), 2016 Act, as those which the FTT must in particular take into account:

> "First amongst those relevant factors is the conduct of the landlord, which must include the conduct which amounts to the relevant housing offence or

> offences. One would naturally expect that the more serious the offence, the greater the penalty."

Later in the same decision, at paragraph [50], I drew attention to the relevance of section 46(1) in setting the framework within which the FTT is required to exercise its discretion. Section 46(1) provides that where the landlord has already 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. The exclusion of licensing offences, including the offence of managing an unlicensed Part 3 house contrary to section 95(1), 2004 Act, may be taken to indicate the relative seriousness which Parliament attributes to the different housing offences for which a rent repayment order may be made.

35. In *Williams v Parmar* [2021] UKUT 244 (LC) Mr Justice Fancourt, Chamber President, reiterated, at paragraph [41], that "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."

36. In *Hallett v Parker* [2022] UKUT 165 (LC) I referred to statements made in Parliament about the purpose of the rogue landlord provisions in Part 2 of the 2016 Act and said this, at paragraph [25]:

> "This explanation of the purpose of Part 2, with its battery of measures again "rogue landlords", suggests that the power to make rent repayment orders should be exercised with the objective of deterring those who exploit their tenants by renting out substandard, overcrowded or dangerous accommodation. The differential treatment of licensing offences and more serious offences in section 46, and the greater flexibility given to tribunals when ordering rent repayment in the former category, are likely to be a reflection of that objective."

37. In *Acheampong v Roman* [2022] UKUT 239 (LC) at paragraph 15, the Tribunal (Judge Cooke) concluded in the light of these decisions that "an order in the maximum possible amount would be made only in the most serious cases or where some other compelling and unusual factor justified it". With that calibration in mind, the Judge then suggested at paragraph 20(c) that having determined the upper limit of what might be ordered to be repaid, decision makers should adopt the following approach when assessing the seriousness of an offence:

> "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."

38. *Acheampong* was the first occasion on which the Tribunal had referred specifically to the need to consider the seriousness of the offence relative to "other types of offence in respect of which a rent repayment order may be made" and not just to "other examples of the same

type of offence", which is the exercise Mr Newell complains was not undertaken by the FTT in this case. The Tribunal has nevertheless commented on a number of occasions (and particularly in *Hallet v Parker* at paragraph [30]) that, in a list of housing offences which includes the use of violence to secure entry, unlawful eviction, and failure to comply with an improvement notice, a prohibition order or a banning order, licensing offences are relatively of lesser seriousness. It did so again in *Daff v Gyalui* [2023] UKUT 134 (LC) where, at paragraphs [48]-[49], I tried to rank the housing offences by references to their general seriousness, as follows:

> "48. The seven offences in respect of which a rent repayment order may be made are identified in section 40(3), 2016 Act. Two are offences of violence or intimidation (the use of violence for securing entry contrary to section 6(1), Criminal Law Act 1977, and eviction or harassment of occupiers contrary to section 1, Protection for Eviction Act 1977). Those offences are plainly the most serious of those listed in section 40(3) and in the Magistrates Court they punishable by a fine and a term of imprisonment of up to six months (up to two years in the Crown Court). The offence of breaching a banning order contrary to section 21, 2016 Act, is also particularly serious and is punishable by a term of imprisonment of up to 51 weeks or a fine or both. These three offences are at the upper end of the range of seriousness covered by section 40(3).
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> 49. The remaining four offences all involve breaches of provisions of the 2004 Act (failure to comply with an improvement notice or a prohibition order, and control or management of an unlicensed HMO or Part 3 house) and are generally of a less serious type. That can be seen by the penalties prescribed for those offences which in each case involve a fine rather than a custodial sentence. Although generally these are lesser offences, there will of course be more or less serious examples within each category. The circumstances relating to a failure to comply with an improvement notice, for example, may vary significantly. So too may be circumstances pertaining to a licensing offence."

39. I therefore consider that Mr Newell's criticism of the FTT's approach to the seriousness of the offence in this case is justified. In assessing the offence as one "at the serious end of the spectrum for the offence under section 95(1)" the FTT was looking at only part of the picture. In quantifying the rent to be repaid it ought also to have considered the relative seriousness of the section 95(1) licensing offence and other housing offences. Had it done so it would have been entitled to regard this as a serious example of one of the less serious offences in respect of which a rent repayment order can be made, but there is no indication in the decision that it approached the assessment on that basis. In that respect it erred in law.

40. Mr Newell made a wider and more troubling criticism of the FTT's approach to the assessment of the amount to be repaid. He pointed out that in its decision the FTT panel had made it clear that it disagreed with the guidance provided by this Tribunal in *Acheampong.* In particular it appeared to take issue with the principle that an order for the repayment of the maximum amount of rent possible should only be made in the most serious cases (a proposition derived from *Williams v Parmar* and stated explicitly in *Hallet v Parker*). The FTT said that it found it "difficult to follow [the Tribunal's] reasoning" and drew a distinction between a fine (which will have a maximum level which will be

reserved for the most serious cases) and an order for rent repayment which is pegged to the amount of the rent payable and will never exceed that rent, irrespective of the seriousness of the offence. The panel referred to one of their own decisions in which they had said that, in a case where the rent payable was low, and the quantum of the order therefore also low, "the maximum amount of the RRO is in no way commensurate with the seriousness of the landlord's behaviour". The FTT concluded that: "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".

41. Mr Newell submitted that, read as a whole, the FTT's decision demonstrated that it would have liked to make an award at a higher level but was constrained from doing so by the decisions of this Tribunal. That, I agree, is a fair reading of the decision. Mr Newell suggested that the FTT had allowed its preference for a higher award to infect its judgment concerning the seriousness of his offence and led it to impose a higher penalty than was justified.

42. Mr Newell was aware of other decisions by the same FTT panel which feature the same criticisms of the decisions of this Tribunal, cut and pasted from a common original text. Sometimes the panel's criticism extends to aspects of the Tribunal's guidance which are irrelevant to the case before it, as it did in this case when the FTT said that it "again finds it difficult to understand [the Tribunal's] reasoning" on the deduction of utility costs, before adding that the rent it was considering was not inclusive of utilities costs so there were none to be deducted. Mr Newell therefore had no confidence that the guidance given by this Tribunal was applied in his case.

43. A tribunal required to weigh up competing considerations before arriving at a relatively complex judgment is well advised to avoid prefacing their decision with an explanation of their dissatisfaction with the legal principles which bind them. A tribunal's view of what the law ought to be, where it differs from the view of the law which they are required to apply, is irrelevant. By repeatedly explaining their disagreement with the guidance given by this Tribunal the FTT panel risks undermining the confidence of tribunal users in the standard of justice they have received. The panel risks creating the impression in the mind of the unsuccessful party, as it has done in Mr Newell's mind, that different criteria have been applied to their case than to the cases of others whose disputes have been determined by different panels.

44. I am satisfied both that the FTT erred in principle in its approach to the seriousness of Mr Newell's offence, and that its error was amplified by its irrelevant criticisms of the decisions which bound it. Those errors are sufficiently serious to undermine the FTT's decision and to require that it be set aside. I therefore allow the appeal and set aside the decision.

Redetermination

45. The question then arises whether the respondents' application for a rent repayment order should be remitted to the FTT or redetermined by this Tribunal. Given the grounds on which the appeal has succeeded, and particularly the suspicion that has been created in Mr Newell's mind that relevant guidance was not applied in his case, if the matter was

remitted to the FTT it would be necessary for it to be reheard by a differently constituted panel. That would involve the parties in additional delay and expense and would involve allocating further judicial resources to a case which has already had been considered at two hearings. The difficulty with a determination by this Tribunal is that both parties relied on allegations of misconduct by the other which the FTT listed but did not make findings on. It would not be possible for me to determine whether those allegations had been made out and ought to be taken into account without conducting a further hearing, to which the same objections can be made.

46. The better course, in my judgment, is for a determination to be made by this Tribunal on the basis of the findings made by the FTT or which are not disputed, and disregarding allegations in relation to which it made no findings. Its omission to make proper findings on disputed issues of fact indicates either that the FTT was not satisfied that the allegations had been proven or that it was satisfied that they were either trivial or irrelevant. In either case they can safely be ignored when redetermining the amount of the rent repayment orders.

47. Before considering the quantum of the orders I remind myself of orders the Tribunal has made in other similar cases. It is an important part of this Tribunal's function to promote consistent decision making. It is relevant therefore to consider those cases involving licensing offences in which the level of rent repayment has been determined by the Tribunal. Each case is different and in each case the decision maker must exercise their own discretion, but the pattern of decisions in other cases is a necessary point of reference and a relevant factor to which regard should be had.

48. In *Williams v Parmar* the unlicensed property was an HMO rather than a smaller house, it was managed by a professional landlord and it was found to be in such poor condition that a licence would not have been granted for its occupation without improvements being carried out. The Tribunal ordered repayment of 80% of the rent (net of the cost of utilities paid for by the landlord), which was increased to 90% in the case of one tenant who had been particularly affected by the condition of the property.

49. In *Aytan v Moore* [2022] UKUT 27 (LC) landlords with a substantial property portfolio failed to licence an HMO for a prolonged period and were ordered to repay 85% of the rent received, while in *Wilson v Arrow* (determined at the same time and under the same reference number) repayment of 90% of the rent received was ordered against a landlord on a smaller scale but whose unlicensed HMO had lacked important fire safety features including proper fire doors and alarms and who had failed to remedy those deficiencies for a year after becoming aware of them.

50. In *Simpson House 3 Ltd v Osserman* [2022] UKUT 164 (LC), a substantial property investment company let an HMO in good condition but failed to obtain the necessary licence. It responded to requests by the tenants for repairs to be undertaken, and their participation in a residents' association, by serving notice to quit and by making baseless threats to forfeit the tenants' deposits if they did not move out. The Tribunal ordered the landlord to repay around 80% of the total rent received.

51. In *Hallett* a private individual had let his former family home while he was working abroad. In his absence it was relet by an agent in circumstances which required that it be licensed as an HMO, but the agent did not advise the landlord of that fact and no licence was obtained by the landlord for seven months. The property was in fairly good condition and a licence was granted without the need for improvements as soon as the landlord became aware that it was necessary. In those circumstances the Tribunal ordered repayment of 25% of the rent received.

52. In *Choudhury v Razak* (one of the cases heard together with *Acheampong* and bearing the same reference) a flat subject to selective licensing but unlicensed was not in a satisfactory condition, there were failings in fire safety equipment, the tenants' deposit was not protected, and the landlord did not hold gas or fire safety certificates. The Tribunal ordered repayment of 75% of the net rent.

53. In *Dowd v Martins* [2022] UKUT 249 (LC) a landlord who owned four flats in a building failed to licence one which was an HMO. The Tribunal concluded that the offence was significantly more serious than in *Hallett*, which had been relied on as a comparator, and ordered repayment of 45% of the rent.

54. In *Hancher v David* [2022] UKUT 277 (LC) the landlord of a number of warehouse units, one of which was let as an HMO, failed to obtain a licence, despite being advised of the need to do so by her architect. That caused the Tribunal to treat the offence as deliberate and, taken with the need for some improvements which might have been required in order to obtain a licence, that justified an award of 65% of the rent.

55. In *Daff* the owner of a flat in which she had lived became ill and returned to her home country where she remained seriously unwell. In her absence she let the flat through a letting agency which did not advise her that it was in an area of selective licensing. The property was in good condition, and I accepted that the landlord's offence was "very much towards the bottom of the range of seriousness" (paragraph [54]). The appropriate rent repayment was also influenced by the landlord's precarious financial position and the fact that her poor health had contributed to her lack of attentiveness. She was ordered to repay £2,000 which was less than 10% of the total rent she had received from two tenants.

56. In *Irvine v Metcalfe* [2023] UKUT 283 (LC) landlords who owned a number of large properties deliberately avoided obtaining an HMO licence for one of them, despite knowing that it was required. At paragraph [72] I reminded myself that "A failure to licence an HMO is always a serious matter, although generally of lesser significance than the other housing offences listed in section 40(3), 2016 Act". On the other hand, "Where there is little or no evidence that licensing would have been conditional on changes being made to the condition of the property the particular failure may be regarded as lower in the scale of seriousness". Taking into account the nature of the offence, the condition of the property and the fact that the offence had been committed deliberately by experienced landlords I determined that 75% of the net received by the landlords should be repaid.

57. This brief review of recent decisions of this Tribunal in appeals involving licensing offences illustrates that the level of rent repayment orders varies widely depending on the circumstances of the case. Awards of up to 85% or 90% of the rent paid (net of services)

are not unknown but are not the norm. Factors which have tended to result in higher penalties include that the offence was committed deliberately, or by a commercial landlord or an individual with a larger property portfolio, or where tenants have been exposed to poor or dangerous conditions which have been prolonged by the failure to licence. Factors tending to justify lower penalties include inadvertence on the part of a smaller landlord, property in good condition such that a licence would have been granted without additional work being required, and mitigating factors which go some way to explaining the offence, without excusing it, such as the failure of a letting agent to warn of the need for a licence, or personal incapacity due to poor health.

58. Mr Abbott and Mr Okrojek asked the FTT to take account of a number of matters of conduct on the part of Mr Newell which they said justified a higher penalty in their favour. These included a hotly disputed allegation that fire alarms were not fitted until relatively recently, the presence of mice in the Flat and occasionally rats in the common parts of the building (which were not in Mr Newell's control), problems with the hot water boiler, and a suggestion that a fuse box was not of an appropriate specification. In the absence of findings of fact by the FTT I am only prepared to consider two of these complaints (because they are clear from the documents), namely, that the respondents were not provided with a written tenancy agreement and that their deposits were not protected. As to the first of these, although it is good practice for a landlord to supply a written tenancy agreement there is no general obligation to do so, and no suggestion that the respondents ever asked for one. As to the second, an email exchange before Mr Okrojek moved in explained that the practice in the house was that each incoming tenant would reimburse their outgoing predecessor for the deposit which they had paid, rather than handing a deposit over to Mr Newell. Mr Okrojek was made aware of that convention before he moved in and does not appear to have objected, nor did he or Mr Abbott have any difficulty in setting off their deposits against their last month's rent. Those arrangements were characteristic of the informal way in which the parties conducted their landlord and tenant relationship, and I am not prepared to regard Mr Newell's failure to protect the deposit of his tenants as sufficiently serious to make a difference to the appropriate rent repayment.

59. For his part Mr Newell relied on the fact that he had "kept a respectful distance" and had been fair and reasonable as a landlord, providing a decent home for his tenants at a rent which was far below the market rent. He had been on good terms with all his tenants (one of whom had lived in the flat for eight years) and had provided references for both respondents when they left. The FTT was unimpressed by these points, saying that they were "a minimum requirement, not something which should be rewarded". That remark seems to me to miss the point. The scheme of rent repayment orders is a draconian statutory intervention in property rights under which severe penalties are justified by the need to deter "rogue landlords". In *Hallett v Parker*, at paragraph [24], I drew attention to what had been said to Parliament by the relevant Minster to be the objects of the scheme:

> "Most private landlords provide a decent service to their tenants, but we know that they are a small number of landlords and letting agents who do not manage their lettings or properties properly, sometimes exploiting their tenants – and the public purse, through housing benefit – by renting out sub-standard, overcrowded and dangerous accommodation. These landlords and letting agents often do not respond to legitimate complaints by tenants. These are the rogues that this Part applies to.…"

Having regard to the objects of the scheme the fact that a landlord has behaved in a respectful and considerate way towards their tenants is capable of mitigating the penalty to be imposed on them if, as in this case, they inadvertently commit a licensing offence.

60. Mr Newell also relied on examples of bad behaviour by the respondents but, as with the misconduct alleged against him, the details of these allegations were generally disputed and, in most instances, having heard the evidence, the FTT was disinclined or unable to decide whose version of events was correct. It dismissed those allegations on which it was able to reach any conclusion.

61. The Tribunal has said in the past that it is not possible to be prescriptive about the sort of conduct which might potentially be relevant under section 44(4), 2016 Act (see *Kowalek*, at paragraph [38]). But that should not be taken as an invitation to landlords and tenants to identify every possible example of less than perfect behaviour to add to the tribunal scales in the hope of increasing or reducing the penalty. When Parliament enacted Part 2 of the 2016 Act it cannot have intended tribunals to conduct an audit of the occasional defaults and inconsequential lapses which are typical of most landlord and tenant relationships. The purpose of rent repayment orders is to punish and deter criminal behaviour. They are a blunt instrument, not susceptible to fine tuning to take account of relatively trivial matters. Yet, increasingly, the evidence in rent repayment cases (especially those prepared with professional or semi-professional assistance) has come to focus disproportionately on allegations of misconduct. Tribunals should not feel that they are required to treat every such allegation with equal seriousness, or to make findings of fact on them all. The focus should be on conduct with serious or potentially serious consequences, in keeping with the objectives of the legislation. Conduct which, even if proven, would not be sufficiently serious to move the dial one way or the other, can be dealt with summarily and disposed of in a sentence or two.

62. I therefore approach the level of penalty in this case without giving weight to the allegations of poor conduct on either side. Nor has Mr Newell provided evidence of his financial circumstances. On that basis, bearing in mind that the offence was committed by the landlord of a single property and was the result of inadvertence, or lack of attention, rather than being deliberate, and that the accommodation provided was generally of a good standard which attracted long term residents and which the respondents were disappointed to leave, the appropriate order is for the repayment of 60% of the rent received. Had the offence been committed for a much shorter period the penalty I would have imposed would have been equal to 50% of the rent, but the effective operation of selective licensing schemes depends on landlords keeping themselves properly informed and a prolonged failure to obtain a licence therefore merits a higher penalty.

63. For these reasons I allow the appeal, set aside the FTT's decision, and substitute an order that Mr Newell pay Mr Abbott and Mr Okrojek £4,320 each. Those sums are payable within 21 days and, in default of payment, are recoverable as if payable under an order of the county court.

Martin Rodger KC,

Deputy Chamber President

19 June 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.