



Neutral Citation Number: [2025] UKUT 175 (LC)

Case No: LC-2024-784

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

Ref: LON/00AG/HMG/2023/0004

Royal Courts of Justice, Strand,

6 June 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – rent paid before the start of the period when the offence was being committed – no order could be made

BETWEEN:

CARL PEARTON

Appellant

and-

BETTERTON DUPLEX LIMITED

Respondent

Ground Floor and Basement,
33 Betterton Street,
London, WC2H 9BQ

Upper Tribunal Judge Elizabeth Cooke
Determination by written representations

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The following cases were referred to in this decision:

Kowalek v Hossanein Ltd [2021] UKUT 143 (LC)

Introduction

1. This is an appeal from a decision by the First-tier Tribunal that it could not make a rent repayment order in favour of the appellant against his former landlord; the FTT gave permission to appeal. The appeal has been determined under the Tribunal's written representations procedure. The appellant has not been legally represented, and the former landlord has chosen not to take part in the appeal.

The factual background

2. The appellant was one of three tenants of the ground floor and basement of 33 Betterton Street, London WC2H who signed a tenancy agreement on 19 July 2022 and moved into the property on 22 July 2022. The tenancy agreement stated that the tenancy began on 22 July 2022. The rent was £8,000 per month, and the tenants paid six months' rent in advance on 20 July 2022; the agreement itself stated that this sum was payable on the date of signing the agreement. That was the only rent they ever paid; they moved out on 21 January 2023.
3. The three tenants, who were not related to each other, occupied their own rooms with shared facilities, and the property was therefore a house in multiple occupation as defined in the Housing Act 2004. The local housing authority had made an additional licensing designation which meant that an HMO with three or more occupiers in two or more separate households required a licence; and the house was not licensed. In February 2023 the tenants made an application to the FTT for a rent repayment order.
4. The FTT found that while the tenants were occupying the property the landlord was committing the offence of being a person managing or in control of an unlicensed HMO. I do not need to go into any more detail about that finding as there is no appeal from it. In principle therefore the FTT was prepared to make a rent repayment order; but it took the view that it could not make one because it could only order the repayment of rent that had been paid while the offence was being committed, on the authority of *Kowalek v Hossanein Ltd* [2021] UKUT 143 (LC). In order to explain that, we have to look in detail at the statutory provisions and then at the decision in *Kowalek*.

The statutory provisions

5. Section 20 of the Housing and Planning Act 2016 gives the FTT jurisdiction to make a rent repayment order where a landlord has committed one of the offences set out in a table, of which item 5 is the offence created by section 72(1) of the Housing Act 2004 of managing or being in control of an HMO which required a licence and was not licensed.
6. There are several provisions about timing in the sections that follow. Section 41(2) provides:

“(2) A tenant may apply for a rent repayment order only if —
(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
(b) the offence was committed in the period of 12 months ending with the day on which the application is made.”

7. Those conditions were met in this case. Section 43 makes provision about the amount the landlord can be ordered to repay, and it says this:

“(2) The amount must relate to rent paid during the period mentioned in the table.

<i>If the order is made on the ground that the landlord has committed</i>	<i>the amount must relate to rent paid by the tenant in respect of</i>
an offence mentioned in row 1 or 2 of the table in section 40(3)	the period of 12 months ending with the date of the offence
an offence mentioned in row 3, 4, 5, 6 or 7 of the table in section 40(3)	a period, not exceeding 12 months, during which the landlord was committing the offence

8. In the present case the period during which the landlord was committing the offence was from 22 July 2022 to 21 January 2023. On a straightforward reading of section 43(2) the amount that he could be ordered to repay had to relate to rent paid “during” that period and also to rent paid “in respect of” that period.
9. In *Kowalek v Hossanein Ltd* the Tribunal (the Deputy President, Mr Martin Rodger KC) had to decide whether it was possible to order a landlord to repay rent paid after the landlord had ceased to commit the relevant housing offence; the rent in question was paid late and discharged the tenant’s liability for rent falling due while the offence was being committed. He decided that that rent could not be the subject of a rent repayment order; the statute imposed two separate requirements that the rent be paid both “in respect of” the relevant period and “during” that period. One requirement was met – the arrears were paid in respect of the period of the offence – but the other was not, because the arrears were paid after the offence had ceased to be committed. That decision was upheld on appeal, at [2022] EWCA Civ 1041.

The FTT’s decision

10. The FTT took the view that the property was an HMO, and therefore the offence was being committed, from 22 July 2022 to 21 January 2023. That was because the relevant definition of an HMO under the “standard test” in section 254(2) of the Housing Act 2004 requires the property to be occupied; section 254(2) provides that a building or part of it meets the standard test if it:
- “(a) consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
 - (b) the living accommodation **is occupied** by persons who do not form a single household ...;
 - (c) the living accommodation **is occupied** by those persons as their only or main residence or they are to be treated as so occupying it;
 - (d) their **occupation** of the living accommodation constitutes the only use of that accommodation;

- (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' **occupation** of the living accommodation; and
- (f) two or more of the households **who occupy** the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities."

11. The emphasis is added; it can be seen from the repeated references to occupation that it is crucial to the definition.
12. Accordingly, the only payment of rent made by the tenants, whilst made "in respect of" the period when the offence was being committed, was not made during that period. The FTT took the view that it could therefore not order repayment of any rent, on the basis that the reasoning in *Kowalek* applied as much to payments made before the relevant period as to payments made afterwards.

The appeal

13. The appellant makes a number of points. First, he suggests that *Kowalek* was wrong. The Tribunal is bound by the Court of Appeal's decision in *Kowalek*, and in any event I see no reason to suppose that it was incorrect; it follows from a plain reading of the statute.
14. The appellant argues that the tenants were required to pay the rent in advance and that that has allowed the landlord to sidestep justice; the principle in *Kowalek* opens a loophole for landlords to which students are particularly vulnerable because they generally have to pay in advance. He suggests that the statute should be read in such a way as to adapt it so that lump sum payments made in advance can be repaid. I cannot accept that that is possible; the wording is clear, and to read it down or disregard it in order to widen the possibility of a rent repayment order would be an impermissible mis-reading of the statute. The appellant may be right that the wording creates a loophole; I note that the Renters' Rights Bill will, if enacted in its current form, make such advance payments impermissible.
15. The appellant points to the fact that the tenant in *Kowalek* paid three months' rent in advance. So he did, but there is no suggestion that the payment was made before the offence started to be committed; no assistance can be found for the appellant from the facts of *Kowalek* itself. He also suggests that since the payment was made in respect of the period commencing on 22 July 2022 it could only be "applied" on that date. By that I understand him to mean that the landlord was not entitled to the payment until 22 July. But that cannot be right; the tenancy agreement was completed and required a payment on the date when it was signed, and the landlord was entitled to that six months' rent even if the tenants chose never to go into occupation.

Conclusion

16. I can find no error in the FTT's decision; the rent paid by the appellant was not paid during the period in which the offence was committed as section 43(2) requires, and so could not be the subject of a rent repayment order. The appeal fails.

Upper Tribunal Judge Elizabeth Cooke
6 June 2025

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.