<u>Neutral Citation Number: [2022] EWCA Civ 1041</u>

<u>Case No: CA-2021-000035</u>

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
Martin Rodger QC, Deputy Chamber President
[2021] UKUT 143 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2022

Before:

LORD JUSTICE NEWEY
LORD JUSTICE COULSON
and
LORD JUSTICE WARBY

- -

Between:

(1) MAREK KOWALEK **(2) KAHORI KOWALEK**	**Applicants/ Appellants**
- and -	
HASSANEIN LIMITED	**Respondent**

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- -

Justin Bates and Brooke Lyne (instructed by **Mishcon de Reya LLP**) for the **Appellants**
Mathew McDermott and Robert Winspear (instructed by **Benchmark Solicitors LLP**) for the **Respondent**

Hearing date: 5 July 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on 25 July 2022.

Lord Justice Newey:

1. What is at issue on this appeal is whether a rent repayment order made against the respondent, Hassanein Limited ("the Company"), under the Housing and Planning Act 2016 ("the 2016 Act") was for too small a sum. The appeal raises issues as to how the amount of a rent repayment order should be determined.

Facts

2. On 26 February 2019, the Company granted the appellants, Mr and Mrs Kowalek, an assured shorthold tenancy of Flat 13, 130 Kilburn Park Road, London NW6 for a term of 24 months at a monthly rent of £3,553.33. Mr and Mrs Kowalek paid three months' rent in advance and also provided a deposit of £4,920, which was to be held under a tenancy deposit scheme.

3. Flat 13 is in an area which had since June of the previous year been designated as subject to selective licensing under section 80 of the Housing Act 2004 ("the 2004 Act"). As a result, the Company had to obtain a licence if the flat was to be let, but it did not do so. The Company's case before the First-tier Tribunal (Property Chamber) ("the FTT") was that it had been unaware of the licensing requirement, and evidence which the Company's director gave to that effect does not appear to have been challenged.

4. For reasons which have not been explained, Mr and Mrs Kowalek stopped paying rent regularly in August 2019. In the next nine months, they made three payments totalling £2,500, but substantial arrears nonetheless accumulated. As a result, the Company gave notice of its intention to seek possession and, in December 2019, issued possession proceedings.

5. The Company's claim came before the County Court on 28 January 2020. By then, however, Mr and Mrs Kowalek had applied to the FTT for a rent repayment order. The application, which was issued on 10 January 2020 and served on the Company on 25 January 2020, initially sought repayment of £23,819.98, but Mr and Mrs Kowalek subsequently increased the amount claimed by £2,000 to take account of a payment of that sum which they made to the Company on 28 January, i.e. the day of the first hearing in the County Court.

6. On the previous day, 27 January 2020, the Company had applied to the local housing authority for a licence, which was granted on 23 March. While section 95(1) of the 2004 Act stipulates that a person commits an offence "if he is a person having control of or managing a house which is required to be licensed under this Part … but is not so licensed", section 95(3) states that it is a defence that "at the material time … an application for a licence had been duly made in respect of the house under section 87, and that … application was still effective". The Company thus ceased to commit any offence under section 95 on 27 January 2020.

7. Mr and Mrs Kowalek vacated Flat 13 on 24 March 2020 without having paid any more rent. On 8 October 2021, the County Court proceedings which the Company had brought were resolved by an order in which District Judge Griffiths ordered the deposit of £4,920 which Mr and Mrs Kowalek had provided to be "forfeit in its entirety and payable to the [Company] as a contribution towards damage at the

Property [i.e. Flat 13]" and further ordered Mr and Mrs Kowalek to pay the Company £23,926.64 for rent arrears in respect of Flat 13. On the same day, however, District Judge Griffiths gave judgment in favour of Mr and Mrs Kowalek for £4,920 as a result of the Company "failing to protect" the tenancy deposit for Flat 13 and directed that that sum be offset against the amount due to the Company under the other order.

8. Mr and Mrs Kowalek's application for a rent repayment order had been the subject of a hearing before the FTT some 13 months earlier, on 4 September 2020, and the FTT (Judge Professor Robert Abbey and Mr Chris Gowman, Professional Member) gave its decision on 9 September. The FTT concluded that there should be a rent repayment order in Mr and Mrs Kowalek's favour in the sum of £11,909.99. The FTT had expressed the view in paragraph 13 that the £2,000 payment made on 28 January "was outwith the scope of the rent repayment order", leaving (the FTT said in paragraph 16) "the net maximum sum that might form the amount of a rent repayment order in the sum of £23,819.98". The FTT thought it appropriate to reduce that figure by half, explaining as follows:

> "20. In the light of the above when considering financial circumstances, the Tribunal should not consider profit, mortgage payments or reasonableness. So, the Tribunal did not take account of any of these points when coming to the amount of the rent repayment order. However, following the point regarding the utilities the Tribunal thought that some allowance should be made with regard to the payment of service charges.
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> 21. The Tribunal then turned to the matter of the conduct of the parties. The landlord should have licensed this property but didn't. This is a significant factor even though the company director said he relied upon his agents in all matters relating to the letting of the property and did so as he was not a professional landlord. However, it still remains the case that this property should have been licensed and ignorance of the law does not assist the [Company], it remains liable.
>
> 22. However, the position is different with regard to the conduct of the tenant. Substantial rent arrears have been allowed to accrue. The payment of rent is the paramount duty of a tenant and in this case the applicant is in clear breach of that duty. There are also unsettled allegations of damage to the property on the applicants vacating the premises.
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> 23. Consequently, while the Tribunal started at the 100% level of the rent it thought that reductions were appropriate proportionate and indeed necessary to take account of the factors in the Act. Therefore, the Tribunal decided particularly in the light of the rent arrears and the absence of a licence that there should be a reduction of 50% from the maximum figure of £23819.98 giving a final figure of £11909.99. This figure represents the Tribunal's overall view of the circumstances that determined the amount of the rent repayment order."

9. Mr and Mrs Kowalek appealed to the Upper Tribunal (Lands Chamber) ("the UT"), but without success. Mr Martin Rodger QC, the Deputy Chamber President, dismissed the appeal in a decision dated 18 June 2021. As matters had developed, the Deputy President had to address two issues:

   i) Whether money paid after a landlord has ceased committing a relevant housing offence to discharge the tenant's liability for rent falling due while the offence was being committed, should be part of the sum which a rent repayment order may require a landlord to repay; and

   ii) Whether the existence of rent arrears amounts to relevant "conduct" which may be taken into consideration in determining the amount of a rent repayment order.

10. The Deputy President answered the former question in the negative and the latter in the affirmative. In other words, he concluded, first, that money paid when a landlord is no longer committing a relevant offence cannot be taken into account even if the payment relates to rent which became due when an offence was being committed (so that, as the Deputy President said in paragraph 30 of his decision, the £2,000 payment of 28 January 2020 "was properly disregarded by the FTT") and, secondly, that failure to pay rent is "conduct" which can be taken into account (and, here, the Deputy President could "not see any basis on which [the FTT's decision to limit the amount of the rent repayment order to half of the total rent paid] could be regarded as irrational or outside the FTT's discretion": see paragraph 39).

11. Mr and Mrs Kowalek now challenge the UT's decision in this Court.

The statutory framework

12. Rent repayment orders were first introduced by section 73 of the 2004 Act. They could originally be made only where there had been a breach of the licensing regime in respect of houses in multiple occupation (or "HMOs"). The explanatory notes for section 73 said:

    > "The section provides … that a landlord who receives rent while operating an unlicensed property could be liable to a penalty equivalent to any rent received during the period of the offence, up to a maximum of 12 months. The RPT [i.e. Residential Property Tribunal] has the power to make a 'rent repayment order', imposing this penalty where it determines that an offence has been committed under section 72(1)."

13. The 2016 Act extended the circumstances in which a rent repayment order can be made in England. Rent repayment orders are the subject of chapter 4 of part 2 of the 2016 Act. Part 2 is headed "Rogue landlords and property agents in England", and chapter 4, which comprises sections 40 to 52, enables the FTT to make a rent repayment order where a landlord has committed any of the offences described in the table set out in section 40(3). The offences identified are using violence for securing entry contrary to section 6(1) of the Criminal Law Act 1977 (row 1 in the table); eviction or harassment of occupiers contrary to section 1(2), (3) or (3A) of the Protection from Eviction Act 1977 (row 2 in the table); failure to comply with an

improvement notice contrary to section 30(1) of the 2004 Act (row 3 in the table); failure to comply with a prohibition order etc contrary to section 32(1) of the 2004 Act (row 4 in the table); control or management of an unlicensed HMO contrary to section 72(1) of the 2004 Act (row 5 in the table); control or management of an unlicensed house contrary to section 95(1) of the 2004 Act (row 6 in the table); and breach of a banning order contrary to section 21 of the 2016 Act (row 7 in the table). To make an order, the FTT must be satisfied beyond reasonable doubt that the landlord has committed a relevant offence: see section 43(1).

14. Section 40(2) of the 2016 Act explains that a rent repayment order is an order requiring a landlord "to … repay an amount of rent paid by a tenant" or "to … pay a local housing authority an amount in respect of a relevant award of universal credit paid … in respect of rent under the tenancy". A rent repayment order may be sought by either a tenant or a local housing authority. So far as applications by tenants are concerned, section 41(2) provides:

> "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."

15. Section 43(2) of the 2016 Act states that, where an application for a rent repayment order is made by a tenant, the amount is to be determined in accordance with section 44. Section 44 reads:

> "(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.

If the order is made on the ground that the landlord has committed	***the amount must relate to rent paid by the tenant in respect of***
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

> (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."

16. Section 52(2) of the 2016 Act explains that, for the purposes of chapter 4 of part 2, "an amount that a tenant does not pay as rent but which is offset against rent is to be treated as having been paid as rent".

The issues

17. The issues raised by the grounds of appeal and a respondent's notice served by the Company are essentially these:

    i) Can a payment made at a time when a landlord is no longer committing an offence be taken into account when assessing the amount of a rent repayment order if it related to rent which fell due when the offence was still being committed?

    ii) Is the £2,000 payment which Mr and Mrs Kowalek made on 28 January 2020 to be attributed to rent for a period when the Company was committing an offence under section 95 of the 2004 Act?

    iii) Was the FTT entitled to take the rent arrears into account as "conduct" of Mr and Mrs Kowalek for the purposes of section 44(4) of the 2004 Act?

Issue (i): Rent paid when the landlord is no longer committing an offence

18. Section 44(2) of the 2004 Act states that the amount of a rent repayment order "must relate to rent paid during the period mentioned in the table". The table then identifies alternative periods, depending on which offence has been committed, with the heading "the amount must relate to rent paid by the tenant in respect of".

19. The effect, in the Deputy President's view, was to "[limit] the amount of rent which may be the subject of a rent repayment order in two quite different respects". He explained in paragraph 29 of his decision:

> "The first limitation focusses on when the payment was made: 'the amount must relate to rent paid during the period mentioned in the table'. The second limitation is provided by the requirement in the table heading that 'the amount must

> relate to rent paid by the tenant in respect of' the appropriate period. This focusses on the period in respect of which the payment was made - what the payment was for, not when it was made. Both conditions must be satisfied before a sum paid as rent can be the subject of a rent repayment order."

In paragraph 32, the Deputy President observed:

> "Properly understood, there is no contradiction between the different parts of section 44(2), and no need to give priority to one over the other. The consequences which [counsel for Mr and Mrs Kowalek] suggested were undesirable are in fact quite consistent with the policy of the Act to deter the commission of housing offences and to encourage compliance by landlords with their licensing and other obligations. It is no surprise that a landlord is not at risk of having to repay rent paid by the tenant at a time when the landlord was not committing any offence"

20. Mr Justin Bates, who appeared for Mr and Mrs Kowalek with Ms Brooke Lyne, argued that the Deputy President's analysis was erroneous. The opening words of section 44(2) of the 2016 Act, Mr Bates said, cross-refer to the table which follows, and the relevant period is simply that given in the table for the offence in question. The result in the case of, say, an infringement of section 95 of the 2004 Act (i.e. an offence mentioned in row 6 of the table in section 40(3) of the 2016 Act) is that the amount of a rent repayment order "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". There is, Mr Bates contended, no need for the rent to have been *paid* at a time when the offence was being committed.

21. Mr Bates submitted that this interpretation of section 44(2) of the 2016 Act chimes with section 44(3) (which stipulates that the amount that the landlord may be required to repay "must not exceed … the rent paid *in respect of* that period" less any relevant award of universal credit) and is also supported by section 52(2). Section 52(2) provides for "an amount that a tenant does not pay as rent but which is offset against rent … to be treated as having been paid as rent", and Mr Bates pointed out that such offsetting would commonly take place only after a tenancy had come to an end (for example, where a deposit is set off against rent arrears or such arrears are set against an award of damages for disrepair). If, Mr Bates argued, it were the case that, to be taken into account under section 44(2), any offsetting had to occur during the period specified as applicable in the table, section 52(2) would be deprived of any meaningful operation in most cases. Mr Bates suggested, too, that the Deputy President's approach could have absurd consequences. Suppose, he said, that a tenant paid 12 months' rent in advance and that the licence in respect of the property were revoked a month later. On the basis of the Deputy President's construction of section 44, it would not be possible to make any rent repayment order against the landlord even though he had been committing an offence for 11 of the 12 months in respect of which rent had been paid.

22. As, however, was stressed by Mr Mathew McDermott, who appeared for the Company with Mr Robert Winspear, the approach espoused by Mr Bates attributes no significance to section 44(2)'s reference to rent "paid during the period mentioned in

the table". What matters, according to Mr Bates, is just whether rent was paid "in respect of" the relevant period. Were that the case, it seems to me that the opening words of section 44(2) might have been expected to reflect those in the table and so to be, "The amount must relate to rent paid in respect of the period mentioned in the table". The draftsman has not, however, adopted such a course but rather chosen to speak of rent "paid during" the period mentioned in the table. That, in my view, provides strong support for the Deputy President's conclusions.

23. It appears to me, moreover, that the Deputy President's interpretation of section 44 is in keeping with the policy underlying the legislation. 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. The 2016 Act serves that objective as construed by the Deputy President. It conveys the message, "a landlord who commits one of the offences listed in section 40(3) is liable to forfeit every penny he receives for a 12-month period". Further, a landlord is encouraged to put matters right since he will know that, once he does so, there will be no danger of his being ordered to repay future rental payments.

24. On top of that, the construction of section 44 for which Mr Bates contends could have unattractive consequences. A rent repayment order could potentially relate exclusively to payments of rent made after the landlord's offending had stopped and, perhaps, when the tenancy had been at an end for some time. In fact, a former tenant who had paid no rent for many months might specifically appropriate a payment to a liability which had accrued during the period of the landlord's offending on the basis that he could discharge his indebtedness but yet recover the money through a rent repayment order.

25. It is true that, as Mr Bates said, the Deputy President's interpretation limits the circumstances in which section 52(2) of the 2016 Act can matter, but I do not see that as of any great significance. Section 52(2) is not, after all, rendered superfluous. Nor does section 44(3) seem to me to be of any real help to Mr Bates. It caps the amount of a rent repayment order in favour of a tenant at the rent paid in respect of the material period less any relevant award of universal credit. There is no inconsistency between that restriction and a requirement that, to be taken into account, rent must also have been paid in the period in question.

26. In all the circumstances, I agree with the Deputy President that the maximum amount of a rent repayment order must be determined without regard to rent which, while it

might have discharged indebtedness which arose during the period specified in section 44(2), was not paid in that period.

Issue (ii): Allocation of the £2,000 payment

27. By a respondent's notice, the Company contended that, even if, contrary to its case on Issue (i), regard could be had to rent paid outside a section 44(2) period, there was no, or no adequate, evidence that the £2,000 payment of 28 January 2020 was apportioned to debt from the period when it was in breach of section 95 of the 2004 Act. Mr McDermott never explained what debt the £2,000 *should* be taken to have discharged, but, given my conclusions on Issue (i), this point does not matter and I do not therefore need to consider it further.

Issue (iii): The significance of the rent arrears

28. It can be seen from its decision that the FTT thought it appropriate to set the amount of the rent repayment order it made at 50% of the possible maximum in large part because of the rent arrears which had accrued. The FTT observed in paragraph 22 of its decision that "[t]he payment of rent is the paramount duty of a tenant and in this case the applicant is in clear breach of that duty".

29. In his oral submissions, Mr Bates did not go so far as to suggest that a tenant's failure to pay rent is incapable of being an aspect of "the conduct of … the tenant" which it is proper to take into account when determining the amount of a rent repayment order under section 44(4) of the 2016 Act. He was right not to do so. Section 44(4) refers to "the conduct of … the tenant" in general terms, and there is no warrant for understanding it to mean "the conduct of … the tenant *other than failure to pay rent*".

30. It is relevant to cite in this connection the decision of the Court of Appeal in *Regalgrand Ltd v Dickerson & Wade* [1996] 29 HLR 620 ("*Regalgrand*") and that of Upper Tribunal Judge Elizabeth Cooke, sitting in the UT, in *Awad v Hooley* [2021] UKUT 0055 (LC) ("*Awad*"). *Regalgrand* concerned section 27 of the Housing Act 1988, which empowered the Court to reduce the damages which would otherwise be payable where a landlord had unlawfully deprived a tenant of occupation if it appeared to the Court that, "prior to the event which gave rise to the liability, the conduct of the former residential occupier or any person living with him in the premises concerned was such that it was reasonable to mitigate the damages for which the landlord in default would otherwise be liable". A judge having concluded that an award of damages should be reduced because of rent arrears, it was submitted to the Court of Appeal that "a failure to pay rent was not 'conduct' of the former residential occupier": see 625. The contention was rejected. Aldous J, with whom Ward LJ agreed, said at 625:

> "That submission is untenable. The word 'conduct' should be given its ordinary meaning. Although there may be no exact synonym, its use in this subsection is equivalent to 'behaviour'. A standing by can amount to conduct just as much as a positive step. To take a pertinent fact in this case, a failure to pay rent is part of the conduct of a tenant. It may or may not enable the tenant to be evicted."

The Court was also unpersuaded by an argument that, "by mitigating the Housing Act damages because of non-payment of rent and ordering the appellants to pay the unpaid rent, the judge was punishing the tenants twice or, put the other way round, was giving the respondents double recovery". Aldous J said at 626-627:

> "That submission, in my view, disregards the difference between Housing Act damages and an order for payment of rent due. The latter is an order for an amount due by contract. The former is statutory damages assessed on a particular basis so as to deter landlords from evicting tenants unlawfully. Those damages may be reduced under section 27(7) because of the conduct of the tenant. The Act is not concerned with the other claims. The sole question is whether the conduct of the tenant was such that damages should be reduced and, if so, by what appropriate amount. The test to trigger mitigation is conduct such that it is reasonable to mitigate. The amount of reduction is that amount that the judge, acting judicially, considers appropriate."

31. *Awad* involved an appeal by a tenant against the amount of a rent repayment order which the FTT had made in her favour. The FTT had attached significance to, among other things, "considerable rent arrears". Rejecting a submission that they should not have been taken into account, Judge Cooke said in paragraph 36:

> "The circumstances of the present case are a good example of why conduct within the landlord and tenant relationship is relevant; it would offend any sense of justice for a tenant to be in persistent arrears of rent over an extended period and then to choose the one period where she did make some regular payments – albeit never actually clearing the arrears – and be awarded a repayment of all or most of what she paid in that period. That default, together with the respondent's kindness and the respondent's financial circumstances, led the FTT to make a 75% reduction in the maximum amount payable, and I see no reason to characterise any of those considerations as irrelevant or the decision as falling outside the range of reasonable orders that the FTT could have made."

32. However, Mr Bates pointed out that the FTT has no jurisdiction to determine claims for rent and that, in the present case, the County Court proceedings in which Mr and Mrs Kowalek were ultimately ordered to pay rent arrears were not concluded until long after the rent repayment order had been made. Mr Bates submitted that it could not be right for the FTT to reduce the amount of a rent repayment order on the basis that there were arrears of rent if there was an issue as to that which had not yet been decided.

33. In the present case, though, the order made against Mr and Mrs Kowalek by District Judge Griffiths on 8 October 2021 confirms that, as the FTT had understood to be the position when it made the rent repayment order, there were substantial rent arrears. Moreover, it is not apparent that, when the application for a rent repayment order was before the FTT, there was any dispute between the parties as to what rent had been

paid and what was outstanding, and Mr and Mrs Kowalek's failure to pay rent was unexplained. In the circumstances, the FTT was, in my view, plainly entitled to have regard to the arrears when considering what the rent repayment order should be. There was no need for the FTT to await the outcome of the County Court proceedings.

34. In another case, it might be appropriate for the application for a rent repayment order to be heard only after a claim for rent in the County Court had been determined or, alternatively, for the proceedings in the FTT and the County Court to be heard together. (An FTT judge is also a judge of the County Court by virtue of section 5(2) of the County Courts Act 1984.) I would suggest that it is likely to make sense to adopt such a course where there is a dispute as to the existence or extent of rent arrears which is the subject of pending County Court proceedings and which could be thought material to the size of a rent repayment order.

Conclusion

35. I would dismiss the appeal.

36. I should like, finally, to express my thanks to Mr Bates, Ms Lyne and Mishcon de Reya, their instructing solicitors, for acting in this matter pro bono. I have found the assistance we received from them, as well as from the Company's legal team, most helpful.

Lord Justice Coulson:

37. I agree.

Lord Justice Warby:

38. I also agree.