**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2022] UKUT 277 (LC)**
**UTLC Case Number: LC-2022-297**

**Location: Royal Courts of Justice,**
**London, WC2A 2LL**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***HOUSING – RENT REPAYMENT ORDERS – house in multiple occupation – failure to obtain an HMO licence - the seriousness of the offence and the amount of rent to be repaid***

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

**BETWEEN:**
**MS JACQUELINE HANCHER**

**Appellant**

**-and-**

**LUKE DAVID (1)**
**GEORGINA MEARS (2)**
**MAXIMILLIAN CRAMER (3)**
**ALEXANDRA MOREL-FONTERAY (4)**

**Respondents**

**Re: 10D Omega Works,**
**167 Hermitage Road**
**Haringey,**
**London, N4 1LZ**

**Judge Elizabeth Cooke**
**Determination of written representations**

**Decision Date: 21 October 2022**

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The following cases are referred to in this decision:

*Acheampong v Roman and others* [2022] UKUT 239 (LC
*Williams v Parmar* [2021] UKUT 244 (LC)

## Introduction

1. This is an appeal from the decision of the First-tier Tribunal ("the FTT") to make a rent repayment order against the appellant, Ms Hancher. It is the latest in a series of appeals in which the Tribunal has endeavoured to resolve the difficulties encountered by the FTT in applying the reasoning of the Tribunal in *Williams v Parmar* [2021] UKUT 244 (LC).

2. The appeal has been determined under the Tribunal's written representations procedure. Ms Hancher has not been legally represented; the respondent tenants have been represented by Justice for Tenants.

## The legal background

3. There is no dispute as to the relevant law. Part 2 of the Housing Act 2004 requires houses in multiple occupation ("HMOs") specified in the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018 to be licensed by local housing authorities, and section 72(1) provides that it is an offence to manage or be in control of an HMO which is required to be licensed and is not.

4. Section 41 of the Housing and Planning Act 2016 enables tenants to apply for a rent repayment order where their landlord has committed any of the offences listed in section 40, during the 12 months ending on the day the application was made. Seven offences are listed, ranging from licensing offences to the eviction or harassment of the occupiers contrary to section 1 of the Protection from Eviction Act 1977.

5. Section 43 of the 2016 Act provides that the FTT may make a rent repayment order if it is satisfied beyond reasonable doubt that the relevant offence has been committed. Section 44 states that the amount ordered to be repaid "must relate to the rent" paid during the period, not exceeding 12 months, when the landlord was committing the offence, and section 44(4) provides:

> "(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."

6. Following the decision in *Williams v Parmar* [2021] UKUT 244 (LC) it is now well-established that the FTT in assessing the amount of a rent repayment order is not to take the full amount of the rent (less payments for utilities) as a starting point, subject only to deduction for good conduct on the part of the landlord, poor conduct by the tenants, or the landlord's financial circumstances. That approach fails to consider the seriousness of the offence, which is of course is a crucial element of the landlord's conduct. Accordingly in *Acheampong v Roman and others* [2022] UKUT 239 (LC) the Tribunal endeavoured to provide some practical guidance for the FTT. In paragraph 21 of *Acheampong* the Tribunal

said that the following approach to the assessment of the amount of rent to be repaid would be consistent with the authorities:

a. Ascertain the whole of the rent for the relevant period;

b. Subtract any element of that sum that represents payment for utilities that only benefited the tenant, for example gas, electricity and internet access. It is for the landlord to supply evidence of these, but if precise figures are not available an experienced tribunal will be able to make an informed estimate.

c. Consider how serious this offence was, both compared to other types of offence in respect of which a rent repayment order may be made (and whose relative seriousness can be seen from the relevant maximum sentences on conviction) and compared to other examples of the same type of offence. What proportion of the rent (after deduction as above) is a fair reflection of the seriousness of this offence? That figure is then the starting point (in the sense that that term is used in criminal sentencing); it is the default penalty in the absence of any other factors but it may be higher or lower in light of the final step:

d. Consider whether any deduction from, or addition to, that figure should be made in the light of the other factors set out in section 44(4).

7. With that in mind we can turn to the facts of the present case.

**The factual background**

8. Ms Hancher owns the freehold of 10 Omega Works, Haringey, London N4, one of a large number of Victorian warehouses on the Crusader Industrial Estate. It is divided into four "units". Ms Hancher has operated a fashion studio from unit 10A. Unit 10D is a self-contained flat on the first floor; she let rooms within the unit on assured shorthold tenancies between 2017 and 2020, and the application to the FTT for a rent repayment order was made by the four respondents, Mr David, Ms Mears, Mr Cramer and Ms Morel-Fonteray who each occupied rooms for different lengths of time and sought rent repayment orders in relation to different periods. It was not in dispute that all four lived at the unit.

9. The FTT gave a lengthy and careful judgment in which it had to decide some difficult issues relating to the nature of the property and its occupation. Ms Hancher's argument was that the use of the property was for "warehouse living", which she wanted to portray as mixed business and residential use so that an HMO licence was not required. The FTT found that unit 10D met the "standard test" for being an HMO in section 254 of the 2004 Act, because the tenants were using it only as living accommodation, as the terms of their tenancy agreement required.

10. The FTT found that at all material times unit 10D was an HMO which required a licence. Ms Hancher pleaded the defence of reasonable excuse, on the basis that she reasonably believed that the premises was not an HMO, but the FTT did not believe her evidence on

this and noted that she had been advised that the property was indeed an HMO. Accordingly the FTT was satisfied beyond reasonable doubt that Ms Hancher had committed the offence under section 72 of the 2004 Act of managing and being in control of the premises which required an HMO licence and did not have one, and that she had no reasonable excuse for not having one. In the case of each individual tenant the offence had been committed within the twelve months prior to the application made in July 2021.

11. The FTT reminded itself of the provisions of section 44(4) of the 2016 Act and of the recent Tribunal decisions including *Williams v Parmar.* Then (from its paragraph 107 onwards) it determined that there was no basis for any deduction in respect of utilities, and it refused (correctly) to make any deduction in respect of Ms Hancher's mortgage payments; as to Ms Hancher's financial circumstances, it noted that she owned three other properties, and was planning to sell unit 10D for £2 million. It noted that the accommodation in the unit had been "basic" but said that that was reflected in the rent; it noted that the stairs were unsuitable and that the tenants' representative had identified work that needed to be done to improve the means of escape (but did not say whether the property was in fact dangerous nor that it would have been refused an HMO licence). The FTT said that there was nothing in the conduct of the tenants that provided grounds for reducing the order save where there were arrears of rent.

12. It then went on at paragraph 110 to set out the amount of the rent repayment orders for each tenant:

    a. For Mr David, the full amount of the rent for the 11.5 month period, in the sum of £7,892.56;

    b. For Ms Mears, the full amount of the rent paid for the 9 month period, in the sum of £6,464.58;

    c. For Mr Cramer, who sought 12 months' rent in the sum of £8,775.00 , the FTT deducted arrears of £651 and made an order for repayment of £8,124;

    d. For Ms Morel-Fonteray, the full amount of the rent for the 12 month period, in the sum of £8,820.

13. Ms Hancher has permission to appeal on the basis that the FTT erred in law in not following the approach set out in *Williams v Parmar*, and that the FTT ignored evidence that the landlord paid utility bills for the tenants.

**The issues in the apeal**

14. The central issue in the appeal is the FTT's approach to the assessment of the amount of rent to be repaid. Despite the citation of the *Williams v Parmar,* the FTT treated the maximum possible order as the default order, from which only deductions have been made, which is precisely what *Williams v Parmar* said should not be done. The tenants say that the award is correct in light of the condition of the property, but that is to miss the point;

the FTT's reasoning started in the wrong place, and the FTT failed to give any consideration to the seriousness of the offence.

15. Accordingly the FTT's decision is set aside.

## The decision re-made

16. The Tribunal is able to substitute its own decision for the one set aside. In doing so I follow the approach set out at paragraph 21 of the *Acheampong* decision, quoted at paragraph 6 above.

17. The first step is to ascertain the whole of the rent for the relevant period I can adopt the FTT's calculation set out in paragraph 12 above, which I summarise again here:

    a. For Mr David, £7,892.56;

    b. For Ms Mears, £6,464.58;

    c. For Mr Cramer, £8,124;

    d. For Ms Morel-Fonteray, £8,820.

18. The next step is to deduct any payments made by the landlord for the tenants' benefit, in particular the utility bills. Ms Hancher says that the FTT ignored the evidence she provided of payment of the utility bills, namely that the tenancy agreements all stipulated that the landlord would pay the bills. She has asked that the Tribunal deduct a suitable sum from the rent to take this into account. Despite repeated requests by the Tribunal Ms Hancher has not produced a bundle for the appeal, which would have included a copy of the tenancy agreements. Moreover, the FTT's decision records her evidence that the terms of the tenancy agreements she granted "did not reflect the substance and the reality of the relationship" (paragraph 90 of the FTT decision). Ms Hancher has not provided any information about the amount she actually paid in respect of utilities, if any. Therefore the Tribunal is unable to make any adjustment for the payment of utilities.

19. Next the Tribunal has to consider the seriousness of the offence and the appropriate percentage of the rent to reflect that seriousness, in order to generate a starting point. The offence under section 72(1) of the Housing Act 2004 is not one of the more serious of the offences for which a rent repayment order can be made. And this is not one of the most serious examples of the section 72(1) offence; in particular, whilst some improvements were clearly needed at the property there is no evidence of fire hazards, for example, and no suggestion that the property would not have qualified for an HMO licence had one been sought. However, it is clear from the FTT's findings about credibility that the offence was committed deliberately; Ms Hancher chose not to apply for a licence even though she had been told by her architect that she needed one. I take the view that a repayment of 65% of the rent is appropriate to reflect the seriousness of the offence.

20. The final step is to consider whether any adjustments are to be made in light of the other factors set out in section 44(4) of the Housing Act 2004. There is no evidence that Ms Hancher has any relevant convictions. In granting permission to appeal the Tribunal said that there was no permission to appeal the FTT's findings about the conduct of the landlord and the tenants and the landlord's financial circumstances. The FTT took the view that none of these factors justified a reduction in the amount to be paid.

21. Accordingly the amounts to be repaid to the tenants are 65% of the sums determined by the FTT. Omitting the pence, they are as follows:

    a. For Mr David, £7,892 x 65% = £5,129

    b. For Ms Mears, £6,464 x 65% = £4,201

    c. For Mr Cramer, £8,124 x 65% = £5,280

    d. For Ms Morel-Fontenay, £8,820 x 65% = £5,733

22. The Tribunal's order will require those sums to be paid within 28 days of this decision.

Judge Elizabeth Cooke

21 October 2022

**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.