FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/38UB/HMB/2019/0001**
Property	**:**	2 Trinity Close, Bicester, Oxfordshire OX26 4TN
Applicant	**:**	Peter Karanja Njogu
Representative	**:**	David North, Env. Health Officer (Cherwell District Council)
Respondent	**:**	Ali Murat Terzi [in person]
Type of Application	**:**	application by a tenant for a rent repayment order where there has been a conviction of the landlord [HPA 2016, ss.41 & 43]
Tribunal Members	**:**	G K Sinclair, S Redmond BSc MRICS & A K Kapur
Date and venue of Hearing	**:**	Monday 20th May 2019 at The Littlebury Hotel, Bicester
Date of this decision	**:**	24th May 2019

DECISION

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1. For the reasons which follow the tribunal determines that, in respect of this application by a tenant following conviction of the respondent landlord (on his own guilty plea) for an offence of unlawful eviction under the Protection from Eviction Act 1977, it will make a rent repayment order in the sum of £7 960.

Background

2. On 11th August 2017 the applicant and his partner, Ms Faith Mwangi, became tenant of residential premises known as 2 Trinity Close, Bicester OX26 4TN under an assured shorthold tenancy agreement for a term of six months at a rent of £995 per month. The rent was paid, as required, by standing order from the applicant's Barclays Bank account, with payments being made on the 12th or 13th of the month if the 11th fell at a weekend. After the fixed term the tenancy could continue from month to month but, due to various problems including an issue with heating over the winter months, the applicant gave notice by text of his intention to quit on 11th April 2018. Later, due to his insistence on the landlord repaying the deposit on their day of departure – to which he would not accede – Mr Njogu remained in occupation.

3. This greatly annoyed his landlord, Mr Terzi, who wrote to him on 12th April 2018 explaining the potential legal consequences of his failing to vacate. The letter, at pages [48–51] in the hearing bundle, informs him that he (Mr Terzi) had held a meeting with his solicitor regarding his case for a second time and the solicitor would be happy to take his case. However, on that same first page, he goes on to comment :

> As I tend to win almost all of the legal cases in the Court of Law due to the fact that since the start of this business in 2001 as landlord to date – I have always followed the legal path and not changed my behaviour for anything or indeed anyone. Everything must be by the book.
>
> Of course receiving the penalties imposed on by the judge and the hassle of Bailiffs not really achieving anything. Thus as of late (some years now) I have stopped this route but the rules are still the same and your case is becoming the perfect candidate for a legal wrangle.

4. Mr Terzi did not commence possession proceedings. Instead, on 16th April while Mr Njogu was at work, he moved all his tenant's possessions into the garden and covered them with plastic sheeting, changing the locks so that the applicant could not get back in again. He later moved electrical goods back inside so that they would not get damaged by moisture. It took the applicant some days to collect his belongings. He never recovered possession of the house.

5. On 8th January 2019, at Oxford Magistrates Court, the respondent pleaded guilty to the following offence, namely that on 16th April 2018, as owner of 2 Trinity Close, Bicester, Oxfordshire OX26 4TN he unlawfully deprived the residential occupier of 2 Trinity Close of his occupation of the premises, contrary to section 1(2) and (4) of the Prevention from Eviction Act 1977. He was fined £500 and ordered to pay a victim surcharge of £50 plus prosecution costs of £1 000.

6. The applicant had paid his rent of £995 per month regularly, save for two payments of £895 in December 2017 and January 2018. The first was deducted with the landlord's authority, as recompense for having to pay unusually large

heating bills due to a failure of the usual heating system. The second was deducted without permission but was later recouped by deduction from the applicant's rent deposit, which was otherwise returned in full. The total amount of rent paid by him from the start of the tenancy in August 2017 until his unlawful eviction in April 2018, as confirmed by his bank statements but not challenged by Mr Terzi – save as to timing – was therefore £7 960. All of this was paid personally by him, with no resort to universal credit or other state benefits.

7. This application was brought, with the assistance of the local authority, Cherwell District Council, on 30th January 2019.

Material statutory provisions

8. Although rent repayment orders were first introduced by the Housing Act 2004 their scope was increased considerably by Part 2, Chapter 4 of the Housing and Planning Act 2016. The material sections are sections 40–46, of which in this case only sections 40, 41, 43, 44 and 46 apply.

40 **Introduction and key definitions**

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or

(b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.

(3) A reference to "an offence to which this Chapter applies" is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

	Act	section	general description of offence
1	Criminal Law Act 1977	s.6(1)	violence for securing entry
2	Protection from Eviction Act 1977	s.1(2), (3) or (3A)	eviction or harassment of occupiers
3	Housing Act 2004	s.30(1)	failure to comply with improvement notice
4		s.32(1)	failure to comply with prohibition order etc
5		s.72(1)	control or management of unlicensed HMO
6		s.95(1)	control or management of unlicensed house
7	This Act	s.21	breach of banning order

(4) For the purposes of subsection (3), an offence under section 30(1) or 32(1) of the Housing Act 2004 is committed in relation to housing in England let by a landlord only if the improvement notice or prohibition order mentioned in that section was given in respect of a hazard on the premises let by the landlord (as opposed, for example, to common parts).

41 Application for rent repayment order

(1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(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.

(3) A local housing authority may apply for a rent repayment order only if—
- (a) the offence relates to housing in the authority's area, and
- (b) the authority has complied with section 42.

(4) In deciding whether to apply for a rent repayment order a local housing authority must have regard to any guidance given by the Secretary of State.

43 Making of rent repayment order

(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with—
- (a) section 44 (where the application is made by a tenant);
- (b) section 45 (where the application is made by a local housing authority);
- (c) section 46 (in certain cases where the landlord has been convicted etc).

44 Amount of order: tenants

(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.

46 **Amount of order following conviction**

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2) Condition 1 is that the order—

(a) is made against a landlord who has been convicted of the offence, or

(b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.

(3) Condition 2 is that the order is made—

(a) in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the table in section 40(3), or

(b) in favour of a local housing authority.

(4) For the purposes of subsection (2)(b) there is "no prospect of appeal", in relation to a penalty, when the period for appealing the penalty has expired and any appeal has been finally determined or withdrawn.

(5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable to require the landlord to pay.

The hearing

9. As the hearing bundle contained nothing from the respondent to indicate his compliance with the tribunal's direction that he serve upon the applicant and file with the tribunal office a statement of case setting out his response to the application his presence at the hearing caused some surprise. He explained that he had sent a letter to the tribunal – but he had not also sent it to the applicant. Copies of this letter were produced. In it he claimed to have paid already for "this guilt (an alleged crime if you will – under mitigating circumstances!)" and that Mr Njogu was having a laugh at his expense. The tribunal explained to him that due to the nature of his offence the scope of its enquiry was very limited.

10. It was put to him that, while the tribunal had a discretion whether to make an

order, if it decided to do so then it must award the maximum amount unless he were able to draw the tribunal's attention to exceptional circumstances enabling it to refuse to award any amount that it might regard as unreasonable. Through Mr Cracknell, another tenant who had come to support him, Mr Terzi submitted that exceptional circumstances could be that due to Mr Njogu's refusal to abide by his own notice of intention to quit the new tenant was unable to move in, but had to leave his former premises.

11. The day after the hearing Mr Terzi emailed to the tribunal a further submission on this issue. Unless parties are permitted or instructed by the tribunal to make written closing submissions after the hearing date (most usually if the evidence has taken up all the allotted hearing time) then the case will be determined on the basis of what was adduced at the hearing only. For the sake of completeness, however, this decision records that Mr Terzi submitted that :

> The elusive exceptional circumstance for the Judges to make their decision is, in my opinion, this: if all of my tenants were to demand the returning of their deposit in cash on the night of the end of their own-served Notice to Quit, as per the compliance of the Assured Shorthold Tenancy regulations, why is there a need for the landlord to register the deposit with the Deposit Protection Scheme within 30 days of the beginning of the tenancy?

He also urged the tribunal to check whether Mr Njogu had made similar claims against his previous landlords

12. Neither of these points appear to the tribunal to assist the respondent on this issue, so the applicant has not been invited to comment.

Discussion and findings

13. In considering whether to make a rent repayment order the first matter on which the tribunal must be satisfied beyond reasonable doubt is that the landlord has committed an offence. As Mr Terzi was charged with and pleaded guilty to the relevant offence under the Prevention from Eviction Act 1977 that box is ticked.

14. As explained to the parties during the hearing, the material part of the Act goes into some considerable detail when explaining the approach to be adopted when deciding on the quantum, or amount, of the award to be made, but on two issues the Act offers no guidance whatsoever. An analysis of other published decisions on rent repayment orders under the 2016 Act do not assist either. These issues are :
    a. As section 40 confers power on the tribunal to make a rent repayment order and section 43 states that the tribunal "may" make an order, on what basis is it to exercise its discretion on that initial step?
    b. What may the tribunal regard as "exceptional circumstances" sufficient to enable it to award less than the Act says that it "must"?

15. *a. Exercise of a power* — According to *Stroud's Judicial Dictionary* (9th ed) :

> Though dicta of eminent judges may be cited to the contrary, it seems a plain conclusion that "may", "it shall be lawful", "it shall and may be lawful", "empowered", "shall hereby have power", "shall think proper", and such like phrases, give, in their ordinary meaning, an enabling and

discretionary power. "They are potential and never (in themselves) significant of any obligation" (per Lord Selborne, *Julius v Oxford (Bishop)*, 49 LJQB 585; 5 App Cas 235). "They confer a faculty or power, and they do not of themselves do more than confer a faculty or power"; and therefore, where the point in question is not covered by authority, "it lies upon those who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which according to the principles I have mentioned creates this obligation" (per Cairns C, 49 LJQB 578 at 579; 5 App Cas 223). On that case Cotton LJ, observed: " 'May' never can mean 'must', so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word 'may', it becomes his duty to exercise that power" (*Re Baker, Nichols v Baker*, 44 Ch D 262).

Julius v Oxford (Bishop) (above), may be regarded as the leading case on the principles therein referred to by Lord Cairns for construing as obligatory, phrases which in their ordinary meaning are merely enabling. His Lordship in that case gathers those principles into the following proposition—
(a) "Where a power is deposited with a public officer for the purpose of being used for the benefit of persons (1) who are specifically pointed out, and (2) with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised" (49 LJQB 580; 5 App Cas 214).
(b) And the following supplemental proposition may be gathered from the judgment of Lord Blackburn in the same case—
Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right: and if the object of the power is to enable the donee to effectuate a legal right, then it is the duty of the donee of the power to exercise the power when those who have the right call upon him to do so.

16. Under s.9(1)(e) of the General Rate Act 1967 (c.9) the rating authority "may refund" any amount which has been paid by a person who was not liable to make that payment. The use of the word "may" gives the authority some discretion in determining whether to make a repayment, but it was held that it does not relieve them of the duty to take into consideration the object of s.9, which was to remedy any injustice.[1]

17. The Upper Tribunal (Lands Chamber) has in three cases considered the exercise of discretion under the former rent repayment order regime under the Housing Act 2004. The first is the case of *Parker v Waller*[2], the second – soon after - was *Fallon v Wilson*[3], and most recently Judge Siobhan McGrath, FTT Property

[1] *R v Tower Hamlets LBC, Ex p Chetnik Developments* [1988] 2 WLR 654

[2] [2012] UKUT 301 (LC)

[3] [2014] UKUT 0300 (LC), a decision by Judge Edward Cousins

Chamber President, considered briefly in *London Borough of Newham v Harris*[4] whether the word "may" introduced a discretion to make a rent repayment order or whether the tribunal was compelled to do so if the conditions were met. She held that the tribunal did retain a discretion, but without discussing the criteria for its application.

18. In *Parker v Waller* the President, George Bartlett QC, observed that the purpose of "occupier RROs", as he described them, remained obscure after considering the provisions of sections 73 and 74, and considered it appropriate to seek assistance in resolving the ambiguity in section 74(5) by applying the rule in *Pepper v Hart*.[5] At paragraph [25] of his decision he quoted the Minister, Lord Bassam of Brighton, as saying that occupiers would be permitted :

> ...to make an application to the RPT for a rent repayment order where an order had already been granted to the local housing authority in respect of the same property, or where the landlord had been convicted of the offence. Such rent will be recoverable as an ordinary civil debt. The sanction proposed will help prevent a landlord from profiting from renting properties illegally, including cases where that would be at the expense of the public purse through housing benefit. It will also provide a civil sanction through the residential property tribunal for cases where potentially slow and resource-intensive action through the courts is impractical or not considered appropriate.

19. The President continued, at [26] :

> It can be concluded from this statement that the occupier RRO provisions have a number of purposes – to enable a penalty in the form of a civil sanction to be imposed in addition to the fine payable for the criminal offence of operating an unlicensed HMO; to help prevent a landlord from profiting from renting properties illegally; and to resolve the problems arising from the withholding of rent by tenants (sc on the basis of illegality).

20. In *London Borough of Newham v Harris* Judge McGrath stated, at [27] (and the references are to provisions in the 2004 Act) :

> I find that the Tribunal does have a discretion whether or not to make a rent repayment order even when the conditions in section 96(6) or (8) are met. In my view section 96(5) is very clear: if "a tribunal is satisfied as to the matters mentioned in subsection (6) or (8) it may make an order." Had the draftsman intended that there should be no discretion for the Tribunal to make an order or not they would have used the word "must" or "shall." If the conditions in subsections (6) or (8) were not met then the Tribunal could not make an order and would not have a discretion to do so. To that extent the word "may" is permissive. If the conditions in subsections (6) or (8) are fulfilled and the Tribunal decides to make an order then it is necessary to consider section 97 of the Act. However in my view section 96(5) clearly means that the Tribunal should first decide whether or not to make an order before proceeding to decide the amount of the order. The word "may" therefore both confers jurisdiction and gives

[4] [2017] UKUT 264 (LC)

[5] [1993] AC 593

a discretion.

21. At [30] she went on :

> The task for the Tribunal therefore is as follows: firstly to decide whether the conditions in section 96(6) or (8) have been fulfilled; secondly to decide in the circumstances whether or not to make an order and finally if an order is made, then to determine the amount of the order having regard to the requirements of section 97. I should add that it will be a very rare case where a Tribunal does exercise its discretion not to make an order.

22. While the rule in *Pepper v Hart* should be applied only rarely (and the former President of the Supreme Court, Lord Neuberger, has been heard regretting its very existence) a more common means of seeking to understand the purpose of a statutory provision is to consider the explanatory notes published to accompany the Bill and, in its final form, the Act. The note to section 40 reads as follows :

> Chapter 4 empowers the First-tier Tribunal to make rent repayment orders to deter rogue landlords who have committed an offence to which the Chapter applies. This section lists the offences concerned...

23. It is also worth noting that Part 2 of the Act is entitled "Rogue landlords and property agents in England."

24. The tribunal applies the principle in *Julius v Oxford (Bishop)*[6] that enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right : and if the object of the power is to enable the donee to effectuate a legal right, then it is the duty of the donee of the power to exercise the power when those who have the right call upon him to do so.

25. The purpose of this Part of the 2016 Act is akin to that referred to in connection with the 2004 Act by the then President, George Bartlett QC, in *Parker v Waller*. Part of it is to deter bad landlords, and part to relieve tenants of the need to commence civil proceedings for damages in the County Court. When Mr Terzi wrote that he had paid he had in fact only suffered the criminal part of the penalty – of which the tenant saw no benefit whatever. The rent repayment order provides the second element, and in a case where the landlord has committed an offence under the Protection from Eviction Act 1977 the nature of that award is tightly constrained.

26. *b. "exceptional circumstances"* — Lord Bingham of Cornhill CJ in *R v Kelly*[7], when construing a reference to "exceptional circumstances", stated :

> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

[6] More recently applied in connection with the General Rate Act in *R v Tower Hamlets LBC, Ex p Chetnik Developments*

[7] [1999] 2 All ER 13, at 20

27. The tribunal does not consider that the matters raised by the respondent landlord – at the hearing or one day later, by email – amount to exceptional circumstances justifying a reduction under section 46(5) in the amount that must otherwise be awarded. If the tribunal is directed by section 46(1) expressly to disregard the conduct of the landlord and tenant then how can the same be taken into account as an exceptional circumstance? (Further, and for the avoidance of doubt, if the conduct of landlord and tenant must be disregarded when considering the **quantum** of an award how can it possibly be taken into account when taking the initial step of deciding **whether** to make an award at all?)

28. The tribunal is satisfied beyond reasonable doubt that the landlord committed an offence of unlawful eviction under the 1977 Act, and it determines that :
    a. It will make a rent repayment order in favour of the applicant tenant
    b. The rent paid by the tenant during the period of 12 months ending with the date of the offence was £7 960
    c. There is no relevant payment of universal credit to take into account
    d. No exceptional circumstances exist, and
    e. The sum awarded must therefore be the maximum payable under section 44, namely the rent paid by the tenant during the period of 12 months ending with the date of the offence, or £7 960.

Dated 24th May 2019

Graham Sinclair

Graham Sinclair
First-tier Tribunal Judge