UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER– section 44 of the Housing and Planning Act 2016 - starting point – basis of deductions

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

BETWEEN:

MR BABU RATHINAPANDI VADAMALAYAN

Appellant

and

ELIZABETH STEWART AND OTHERS

Respondents

Re: 236D Finchley Road,
London, NW3 6DJ

Judge Elizabeth Cooke
9 June 2020
By remote video platform

The following cases are referred to in this decision:

Fallon v Wilson [2014] UKUT 300 (LC)
Parker v Waller [2012] UKUT 301 (LC)

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("the FTT") about a rent repayment order. The appellant, Mr Vadamalayan, says that the amount he was ordered to pay was excessive in view of the money he had spent on the property.

2. I heard the appeal on 9 June 2020 using a remote video conferencing platform. Neither party was represented; the appellant presented his own case, and Ms Saskia Edwards spoke for the respondents. I am grateful to them both.

3. In the paragraphs that follow I set out the relevant law and the factual background, and then summarise the FTT's decision and discuss the appeal. The appellant says that further items should have been deducted before the amount of the rent repayment order was determined. In my judgment the FTT's decision was flawed not only because its calculations of the deductions could not be understood, but also because of the absence of reasoning to justify any deduction. I have allowed the appeal and substituted the Tribunal's decision which, in the light of the circumstances of this appeal, does not increase the amount payable by this appellant, but signals a change of approach to be adopted by the FTT for the future.

The law

4. Section 72(1) of the Housing Act 2004 ("the 2004 Act") provides:

> "A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1) and is not so licensed."

5. An "HMO" is a house in multiple occupation. I do not need to go into the rules about licensing because it is not in dispute in this appeal that the appellant committed the offence described in section 72(1) (to which I refer as the "HMO licence offence").

6. Section 40 of the Housing and Planning Act 2016 "the 2016 Act") states:

> "(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."

7. Among the relevant offences is the HMO licence offence.

8. Section 43 provides that the FTT may make a rent repayment order if it is satisfied beyond reasonable doubt that the offence has been committed, and that where the application is made by a tenant the amount is to be determined in accordance with section 44, which reads as follows:

> "(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: [The table provides, for the HMO licence offence, "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.

9. In *Parker v Waller* [2012] UKUT 301 (LC) the President (George Bartlett QC) had to consider the provisions of sections 73 and 74 of the 2004 Act, which gave the FTT jurisdiction to make rent repayment orders; but they have been repealed so far as England is concerned and now apply only in Wales.

10. Section 74(5) of the 2004 Act provided that a rent repayment order in favour of an occupier had to be "such amount as the tribunal considers reasonable in the circumstances". Where the order was made in favour of the local authority, by contrast, section 74(2) provided that the tribunal "may not require the payment of any amount which the tribunal is satisfied, by reason of exceptional circumstances, it would be unreasonable for that person to be required to pay." The President said at paragraph 24 that the contrast between those two provisions was "marked". With regard to orders made in favour of an occupier, therefore, he said at paragraph 26(iii):

> "There is no presumption that the RRO should be for the total amount received by the landlord during the relevant period unless there are good reasons why it should not be. The RPT must take an overall view of the circumstances in determining what amount would be reasonable."

11. But the statutory wording on which that paragraph is based is absent from the 2016 Act. There is no requirement that a payment in favour of the tenant should be reasonable. The

only difference between section 44, which is about orders made in favour of tenants, and section 45, which is about orders made in favour of local housing authorities, is that in the latter section there is reference to universal credit rather than to rent. Paragraph 26(iii) of *Parker v Waller* is not relevant to the provisions of the 2016 Act; nor is the decision in *Fallon v Wilson* [2014] UKUT 0300 (LC) insofar as it followed that paragraph.

12. That means that there is nothing to detract from the obvious starting point, which is the rent itself for the relevant period of up to twelve months. Indeed, there is no other available starting point, which is unsurprising; this is a rent repayment order so we start with the rent.

13. In *Parker v Waller* the President set aside the decision of the FTT and re-made it. In doing so he considered a number of sums that the landlord wanted to be deducted from the rent in calculating the payment. The President said at paragraph 42:

> "I consider that it would not be appropriate to impose upon [the landlord] an RRO amount that exceeded his profit in the relevant period."

14. It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament's intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord's profits was – as the President acknowledged at his paragraph 26 – not the only purpose of a rent repayment order even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord's profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord's profits. That principle should no longer be applied.

15. That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord has spent on the property during the relevant period. That expenditure will have repaired or enhanced the landlord's own property, and will have enabled him to charge a rent for it. Much of the expenditure will have been incurred in meeting the landlord's obligations under the lease. The tenants will typically be entitled to have the structure of the property kept in repair and to have the property kept free of damp and pests. Often the tenancy will include a fridge, a cooker and so on. There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order.

16. In cases where the landlord pays for utilities, as he did in *Parker v Waller,* there is a case for deduction, because electricity for example is provided to the tenant by third parties and consumed at a rate the tenant chooses; in paying for utilities the landlord is not maintaining or enhancing his own property. So it would be unfair for a tenant paying a rent that included utilities to get more by way of rent repayment than a tenant whose rent did not include utilities. But aside from that, the practice of deducting all the landlord's costs in calculating the amount of the rent repayment order should cease.

17. Section 249A of the 2016 Act enables the local housing authority to impose a financial penalty for a number of offences including the HMO licence offence, as an alternative to prosecution. A landlord may therefore suffer either a criminal or a civil penalty in addition to a rent repayment order. In *Parker v Waller* the landlord had been prosecuted and had had to pay a fine. The President said at paragraph 26(vi):

> "Since the landlord is liable to suffer two penalties – a fine and an RRO – it will be necessary to take this into account. An RPT should have regard to the total amount that the landlord would have to pay by way of a fine and under an RRO. There may be a tension between the imposition of a fine and the making of an RRO. The maximum fine is £20,000, and this shows the seriousness with which Parliament regards the offence. In the present case the magistrates imposed a fine of £525, which would suggest that they did not consider this particular offence to be other than minor. The RPT, however, is entitled to take a different view about the seriousness of operating the HMO without a licence."

18. The President deducted the fine from the rent in determining the amount of the rent repayment order; under the current statute, in the absence of the provision about reasonableness, it is difficult to see a reason for deducting either a fine or a financial penalty, given Parliament's obvious intention that the landlord should be liable both (1) to pay a fine or civil penalty, and (2) to make a repayment of rent.

19. The only basis for deduction is section 44 itself. and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence.

The factual background and the FTT's decision

20. The appellant is the leasehold owner of 236D Finchley Road, London NW3 6DJ ("the property". The respondents held an assured shorthold tenancy of the property from 9 September 2017. They moved out and surrendered the tenancy on 19 July 2019.

21. It is not in dispute that the property should have been licensed throughout the 23 months during which the respondents rented the property. The appellant applied for a licence on 23 February 2019. The respondents made an application to the FTT for a rent repayment order for the 12 month period from 1 February 2018. There was no dispute that that was the appropriate period, nor about the maximum payable which was £28,599.96, being the rent payable for those twelve months.

22. The FTT in considering the level of the penalty took the view that the conduct of the parties was not relevant its determination, although it was unimpressed by the appellant's explanation for his failure to get a licence. The FTT considered a schedule of what the appellant said he had spent on the property and should be deducted from the maximum

penalty. The FTT reminded itself of the Tribunal's decisions in *Fallon v Wilson* [2014] UKUT 0300 (LC) and in *Parker v Waller* [2012] UKUT 301 (LC).

23. After considering the appellant's schedule of deductions and the respondents' representations about the items on the schedule the FTT decided to deduct £5,313.89, leaving the maximum amount payable at £23,226.07 (there is an arithmetical error there; the FTT deducted £5,373.89). It then considered what would be a reasonable amount to pay, and deducted 25% of £23,226.07 because, it said, the appellant had fixed a number of problems at the property that were not caused by any fault on his part. It did not say what those were. The appellant was ordered to pay £17,420.

The appeal

24. The FTT refused permission to appeal. The Tribunal gave permission on one ground only, namely a challenge to the way that the FTT calculated the deductions. Permission was given to renew the application at the hearing on one further ground, namely that the FTT had not taken into account the financial penalty the appellant had paid to the local authority.

The schedule of deductions

25. The appellant sought permission to appeal on the basis that some of the items that the FTT should have been deducted were not deducted – either because the FTT said they should be, but then did not include the amounts in its total, or because the item was conceded by the respondents, or because the FTT said it had not seen receipts when the appellant said it had. On reading what the FTT said about the deductions and considering the amount it deducted I was not able to understand how the total deduction had been calculated, and therefore gave permission to appeal on this ground.

26. What the FTT said about the appellant's schedule of 28 items for deduction was this, at its paragraph 15:

> "The list of items the Respondent sought to take into account is extensive. However, it includes a number of items which predate the tenancy. These are represented by items 1 – 6 on the schedule. Item 7 is agreed as being deductible as is the new bath included in the expenses at item 8. There are no receipts/invoices for the other items said to have been spent. Item 9, the cost to unblock the toilet is agreed. It 10, the hob replacement is agreed but items 11 – 14 appear to be matters undertaken before the tenancy started. Items 15 to 18 would appear to be issues that should have either been dealt with through the freehold/landlord or, in the case of garden gate an expense which the applicants denied had been incurred. Items 19 and 20 are accepted expenses as is the landlord's insurance, supposedly for repairs, which should have been followed for some of the works if the landlord did not accept responsibility under the lease. There is also a claim for the insurance of the property in the sum of £762 for two years. We would allow one year at that amount. The applicants have accepted the management costs and agency fees in the total of £4,451.89. If we add the

insurance for the property that brings the total to £5,313.89. The other items of expenditure are in our finding non-recoverable."

27. I have reproduced the appellant's schedule below, alongside the FTT's comments. I have highlighted those items that the FTT appeared to be saying it would deduct.

		Claimed deduction	What the FTT said
1	New mattress for each room September 2017	£300	Pre-dates the tenancy
2	New boiler installed March 17	£1,798	Pre-dates the tenancy
3	New washer dryer	£185	Pre-dates the tenancy
4	Damp proofing and rendering October 2017	£9,187	Pre-dates the tenancy
5	Extractor fans	£1,260	Pre-dates the tenancy
6	New electric switch board November 2017	£120 and £1,689	Pre-dates the tenancy
7	New security lights	£250	**"agreed as being deductible…"**
8	Tiles, bath and shower	£527.50 and £3392 ??	**"… as is the new bath at item 8"**
9	Blocked toilet replacement	£277 and £60	**"agreed"**
10	New hob	£300	**"agreed"**
11	New fridge	£225	Pre-dates the tenancy
12	New tiled floor in kitchen	£1,800	Pre-dates the tenancy
13	New stair carpet September 2017	£134, £85, £200	Pre-dates the tenancy
14	New double glazed window and door	£3,085 and £1,866	Pre-dates the tenancy
15	Roof repairs December 2018	£2,800	Freeholder's responsibility
16	New plaster board in ceiling	£565 and £7,654	Freeholder's responsibility
17	Garden gate	£250	Freeholder's responsibility
18	Damp proofing	£3,085	Tenants say this was not incurred
19	Pestgone	£225 and £180	**"accepted expenses"**
20	Van Mildert Rent guard	£179.20 x 2	**"accepted expenses"**
21	Landlord insurance	£93.85 x 2	**" … as is the landlord's insurance"**
22	Building insurance	£762.50 x 2 [762.50 allowed]	**£762** allowed, for one year
23	Management cost	£6,863.98	See item 23 below
24	Estate agent fee	£5,834 [4,551,89]	"The applicants have accepted **management costs and agency fees in the total of £4,551.89"**
25	Inventory cost	£150	No comment
26	Gas safety certificate	£60 x 2	No comment
27	Home care cover	£35 x 24: £840	No comment

28	Hotel accommodation for tenant during maintenance work	£137	No comment

28. What the appellant says is that a number of items said to have been "agreed" or "allowed" by the FTT in its paragraph 15 were not in fact included in the total of deductions. And indeed it is not possible to understand the FTT's figure of £5,313.89, which appears to comprise an unexplained part of items 23 and 24, together with item 22 only (£4,551.89 + £762 = £5,313,89).

29. I have asked myself whether the FTT disallowed the other items even where they were agreed on the basis that no receipts were produced; the FTT says that apart from items 7 and 8 no receipts or invoices were produced. But that would leave unexplained the omission of items 7 and 8, and indeed the inclusion of one year's insurance at item 22 and part of items 23 and 24. Moreover, the appellant has produced for the Tribunal the bundle that he provided to the FTT and says that it shows that he did have receipts for most of the items claimed.

30. A further mystery is that the FTT did not say why items 11 to 17 were the responsibility of the freeholder. The FTT made no reference either to the appellant's lease or to the terms of the assured shorthold tenancy, and so I am not able to understand that determination.

31. More fundamentally, it will be apparent from my account of the law in paragraphs 9 to 19 above that although it has been the FTT's practice to make deductions in this way following *Parker v Waller* I take the view that that is not the correct approach under the current statutory provisions.

What the appellant says about the deductions

32. The appellant in his grounds of appeal and skeleton argument was particularly concerned at the failure to deduct the first six items, which he says were incurred during the tenancy; item 8, where the FTT said it would deduct the cost of the bath; item 13 which the appellant says the respondents accepted and where the FTT said incorrectly that the expenditure was incurred before the date of the tenancy. In some cases the appellant says that he did produce a receipt or an invoice, namely item 13 and item 18. As to the patio door at item 14, he says that he produced an estimate to the FTT and now has an invoice. Item 18 he says was not the responsibility of the freeholder, and the expense was incurred during the tenancy.

33. At the hearing the appellant went through each item on the list and referred me to items in the bundle that he produced for the FTT. He helpfully made clear that he was not appealing each item, but he went through everything to show that in each case there was an invoice, and in each case he argued that this was an expense of renting out the house and that it was a relevant expense even where it fell outside the period for which a rent repayment order was claimed. He accepted that some items fell outside the period of the tenancy but said that they demonstrated his expenditure on the property.

34. I asked the appellant about the basis on which he made these payments, and he agreed that he had obligations as a landlord, but argued that the rent was his only means to pay these expenses.

What the respondents say about the deductions

35. The respondents have produced a copy of their tenancy agreement. Clause 3.3 says that the landlord (that is, the appellant) has the following obligation:

> "To comply with the requirements of section 11 of the Landlord and Tenant Act 1985 which imposes obligations on the Landlord to repair the structure and exterior (including drains, gutters and external pipes) of the Premises; to keep in repair and proper working order the installations in the Premises for supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of water, gas or electricity); to keep in repair and proper working order the installations in the Premises for space heating and heating water. In determining the standard of repair required by the Landlord under this clause, regard shall be had to the age, character and prospective life of the Premises and the locality in which it is situated."

36. The respondents point out that where the FTT says that a payment was made outside the period of the tenancy, in some cases what was meant was that the payment was not made during the period of one year from 1 February 2018 with respect to which the payment is to be calculated. But some payments were made outside the period of the tenancy, for example the fridge and tiled floor at items 11 and 12, and the patio door at item 14 which was ordered before the commencement of the tenancy in September 2017.

37. The respondents therefore say that items 1 to 6, 11 to 18, 25 and 28 should not be deducted.

38. The respondents say that they did not agree that the cost of the bath should be deducted (item 8) and they point out that the invoice produced is for a different amount and a different address. The appellant in reply said that he now had a corrected invoice, and that the previous invoice had the wrong address because he had been a customer of this supplier from some years and they had his old address.

39. The respondent agree that the costs at items 7, 9, 10 and 19 were incurred during the relevant period, and half of items 20, 21, 22, 26 and 27. As to items 23 and 24 they say that the management costs incurred during the relevant period were £2,431 and the estate agency fees were £256.50, rather than the sum deducted by the FTT.

Conclusion about the deductions

40. I am grateful to the parties for setting out their thinking about the various items in the schedule. The FTT's refusal to deduct items 1 to 6 and 11 to 14 is explained by the fact

that none of those items fell within the period relevant to the rent repayment order; the fact that some or all of them were incurred during the tenancy is irrelevant. Aside from that, the parties have not been able to explain how the FTT made its calculation. The respondents concede that a number of items were agreed by them, although not all that the FTT said were agreed; it is not possible to understand why the FTT deducted some of the items that it said were agreed but not all of them and the figures for items 23 and 24 remain a mystery. On that basis the FTT's decision is irrational, because its reasoning cannot be understood and is inconsistent with the decision it made, and has to be set aside.

41. It will be apparent that in any event I take the view that the deduction of the landlord's expenditure was not in accordance with the law, for the reasons I set out in paragraphs 9 to 19, and I set the decision aside for that reason also.

The financial penalty

42. The appellant also wants permission to appeal on the grounds that the FTT failed to take into consideration the fact that he has paid £8,000 to the local housing authority by way of a financial penalty for the HMO licence offence. But he did not mention it to the FTT, so it is hard to see what else the FTT should have done. The appellant says that he did not realise it was relevant; and he would like the amount of the financial penalty to be deducted from the rent in calculating the rent repayment order.

43. I do not agree that the amount of the financial penalty should be deducted (see paragraph 18 above). So I do not think that the FTT would have had any reason to change its decision even if the financial penalty had been mentioned to it.

44. There is no prospect of a successful appeal on this ground and permission is refused, but in re-making the FTT's decision I shall be able to bear the financial penalty in mind.

Re-making the decision

45. The Tribunal can make any order that the FTT could have made. I take the view that I have sufficient information to re-make the decision rather than remitting it to the FTT.

46. All that the statute tells us is the period in respect of which the order is to be made (12 months), the maximum that can be ordered (in this case, the rent paid for those 12 months) and the matters set out in section 44(4) namely the conduct of the parties, the financial circumstances of the landlord, and whether he has been convicted of any offences to which this Chapter of the 2016 Act applies. There are no convictions, so only the first two matters are relevant.

47. I have to start, therefore, with the relevant period, which is not in dispute, and the maximum payable, which equally is not in dispute (being £28,599.96).

48. I then have to consider the conduct of the parties. At the hearing of the appeal the appellant again sought to exonerate himself from his failure to license the property, saying that he

believed he had to get works done before the licence application could be made. He said that he was not a professional landlord and had misunderstood the rules. The FTT was unimpressed with this, but nevertheless found that there was nothing in the conduct of the appellant or the respondents that needed to be taken into account. That finding was not appealed and so I adopt it. I see no substance at all in the appellant's attempts at the appeal hearing to denigrate the respondents' conduct.

49. Accordingly the only remaining matter to be considered is the landlord's financial circumstances.

50. Under this head the appellant seeks the deductions set out in his schedule, some further payments including mortgage payments, and the financial penalty.

51. The FTT followed *Parker v Waller* and aimed to limit the rent repayment order to an amount that would remove the landlord's profits; it therefore deducted costs that the landlord incurred in the course of the period for which an order was made must be deducted. It refused to deduct anything paid outside the period from 1 February 2018 to 31 January 2019 because such payments were funded by the rent received outside that period and are irrelevant to these proceedings.

52. However, as I said above, there is no longer any reason to limit the order to make it in effect a repayment of the landlord's profits for the relevant period.

53. The provisions of the 2016 Act are rather more hard-edged than those of the 2004 Act. There is no longer a requirement of reasonableness and therefore, I suggest, less scope for the balancing of factors that was envisaged in *Parker v Waller*. The landlord has to repay the rent, subject to considerations of conduct and his financial circumstances. There may be a case, as I said at paragraph 15 above, for deducting the cost of utilities if the landlord pays for them out of the rent (which was not the case here). But there is no justification for deducting other expenditure. The appellant incurred costs for his own benefit, in order to get a rental income from the property; most were incurred in performance of the appellant's own obligations as landlord. The respondents as tenants were entitled to the items set out in the appellant's schedule of expenditure (insofar as they do relate to the property; in the circumstances I do not have to resolve disputes of fact for example about item 8). The respondents are entitled to a rent repayment order. There is no reason to deduct what the appellant spent in meeting one obligation from what he has to pay to meet the other.

54. The appellant also wants to deduct what he had to pay by way of mortgage payments to the TSB and interest on another loan which has not been shown to relate to the property. The FTT refused to deduct the mortgage payments because the mortgage was taken out in 2016 whereas the property was purchased in 2014, so that the mortgage did not appear to have funded the purchase. The appellant says that the property was bought some years before that and that this was a re-mortgage. He did not produce evidence about that to the FTT and he could have done so. More importantly, what a landlord pays by way of mortgage repayments – whether capital or, as in this case, interest only – is an investment in the landlord's own property and it is difficult to see why the tenant should fund that

investment by way of a deduction from a rent repayment order. The other loan has not been shown to relate to the property and I regard it as irrelevant, as did the FTT.

55. I bear in mind that the appellant has paid a financial penalty of £8,000. There is no reason why it should be deducted from the rent repayment order. There is nothing in the amount ordered that indicates to me that an unusually severe or lenient view was taken by the local housing authority, and so I do not think that the financial penalty takes matters any further.

56. Were I making this decision on a blank sheet of paper, without any prior proceedings in the FTT, I doubt that I would deduct anything from the maximum, in the absence of better evidence about the appellant's financial circumstances aside from his income from the rent.

57. However, in this case there was no cross-appeal. The tenants had agreed that a number of items should be deducted, although there is some dispute as to what was agreed before the FTT. The FTT and the parties all proceeded on the basis that the deductions were appropriate and that may well be why the appellant did not produce better evidence of his financial circumstances. Had there been a re-hearing he would have had the opportunity to do so. As things stand, and in the absence of a cross-appeal, it would be unjust if the outcome of the appellant's successful appeal was that he had to pay a great deal more than he was ordered to pay by the FTT.

58. Accordingly I make a rent repayment order in the sum of £17,420, being the same sum that the FTT ordered. The appellant is to make that payment to the respondents, in the proportions ordered by the FTT, within 28 days of the date of this decision.

Judge Elizabeth Cooke

11 June 2020