

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2020] UKUT 289 (LC)
UTLC Case Number: RRO/10/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER
TRIBUNAL (PROPERTY CHAMBER)

HOUSING – RENT REPAYMENT ORDER – amount awarded – whether any reason to award less than the full rent – conduct of the parties – financial circumstances of the landlord

BETWEEN:

MR CHUNG PUI CHAN

Appellant

and

**MR HARMINDER SINGH BILKHU
MRS KAWALJIT BILKHU**

Respondents

**Re: 267 St Georges Road,
Coventry,
CV1 2DG**

**Judge Elizabeth Cooke
19 October 2020
By Skype for Business**

Ms Francesca Nicholls of Flat Justice for the appellant

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The following cases are referred to in this decision:

Parker v Waller [2012] UKUT 301 (LC)

Vadamalayan v Stewart [2020] UKUT 183 (LC)

Introduction

1. This is Mr Chan’s appeal from the decision of the First-tier Tribunal (“the FTT”) to make a rent repayment order in his favour against his landlord, the second respondent, Mrs Kawaljit Bilkhu. Mr Chan appeals on the basis that the amount awarded was too low.
2. The appeal was heard by remote video platform on 19 October 2020. Ms Francesca Nicholls of Flat Justice represented Mr Chan, and Mr Bilkhu spoke for himself and for Mrs Bilkhu.
3. Because the law has changed since the FTT made its decision, the appeal must succeed and I can set out the Tribunal’s decision relatively briefly.

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. At the date of the signing of the appellant’s tenancy agreement a licensable HMO was one comprising 3 or more storeys, occupied by five or more persons in two or more households (the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006); from 1 October 2018 the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 provided that an HMO is licensable if it is occupied by five or more persons living in two or more households, and without a requirement for the house to have 3 or more storeys).

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 at that date gave the FTT jurisdiction to make rent repayment orders and provided that the sum to be paid must be reasonable; he held that the amount of the rent ordered to be repaid should be such as to strip the landlord of his or her profit, and that therefore amounts paid by the landlord for example in making mortgage payments or in meeting obligations to the tenants might be deducted in order to arrive at a reasonable amount.
10. Sections 73 and 74 of the 2004 Act have been repealed so far as England is concerned and now apply only in Wales; in England they have been replaced by the provisions I have just set out, which no longer prescribe that the amount ordered to be repaid should be reasonable. Despite that, the FTT has continued to make rent repayment orders on the basis devised in *Parker v Waller*, in the absence of more recent authority.
11. However, in *Vadamalayan v Stewart* [2020] UKUT 0183 (LC) the Tribunal was able to consider the new provisions. The Tribunal held that even if the approach in *Parker v Waller* had been appropriate under the old law, it was no longer to be followed when ordering a rent repayment order under the provisions of the 2016 Act. In particular, the starting point for a rent repayment order should be the whole of the rent for the relevant period, and the amount ordered should not generally be restricted to the landlord’s profit. The FTT’s practice of routinely deducting amounts that the landlord is paying in order to preserve his own property, such as mortgage payments, or that the landlord is obliged to make in any event under the terms of the lease, is no longer appropriate.

12. That said, the statutory provisions do not limit the matters that the FTT may take into consideration; its attention is directed in particular to the matters listed in section 43(4), set out above.

The factual background

13. There is no appeal or cross-appeal on the facts found by the FTT.
14. The FTT found that the appellant had an assured shorthold tenancy of 267 St George's Road, Coventry from 1 July 2018 for 12 months, and lived there with four others in four households. The FTT found that although the landlord stated on the tenancy agreement was Mr Bilkhu, the first respondent, the registered proprietor of the property was Mrs Bilkhu, the second respondent, and that therefore she was the landlord. It found that throughout the 12 months of the tenancy the property was an HMO which required to be licensed and was not licensed, and that therefore the second respondent committed the offence in section 72(1) of the 2004 Act throughout the year in which the appellant was a tenant.
15. The FTT found that the appellant paid £4,482.50 in rent during the 12 months he stayed at the property.

The order made by the FTT and the appeal

16. The FTT gave consideration to the matters set out in section 43(4). It noted that the landlord had not been convicted of an offence under section 72(1). As to the landlord's financial circumstances, the FTT looked at these in the light of the decision in *Parker v Waller*, which required it to consider the extent of the landlord's profit. It recorded the landlord's evidence that she made mortgage payments of £873 per month, but noted that no documentation had been provided to demonstrate this. It found that the two respondents between them owned approximately 10 properties, two of which were licensed HMOs.
17. In considering the conduct of the landlord the FTT noted that she had no criminal convictions under the housing legislation; it recorded the tenant's evidence that she had failed to respond to some minor disrepair issues. It took the view that she is a professional landlord, but that the failure to obtain a licence in this case was an oversight because the local housing authority had not itself imposed any penalties upon her.
18. The FTT made an order in the sum of £1,494.17 which it said represented on third of the rental profit.

The appeal

19. The appellant appeals on the basis that the order made was inappropriate in light of the authority of *Vadamalayan v Stewart*. That is manifestly correct.

20. The order made by the FTT would have been troubling even absent that authority. It is not possible to understand the basis of the FTT's calculation (the order made was for repayment of one third of the rent, and does not seem to be calculated by reference to the landlord's profit); and it is not known why the FTT thought that the landlord should retain two-thirds of her profit, on the FTT's own account of how the rationale for the sum ordered, in view of the fact that the second was found to be a professional landlord.
21. However, in any event the order made was determined on a basis that had been customary under the 2004 Act on the authority of *Parker v Waller*, but is unsustainable under the 2016 Act. The respondents, being unrepresented, did not put forward any legal argument to challenge that conclusion, but it is difficult to see how that recent authority could have been challenged. The Tribunal sets aside the FTT's order and substitutes its own.
22. The Tribunal therefore must consider in particular the matters set out in section 43(4) of the 2016 Act. Mr Bilkhu addressed me first about the findings of fact made by the FTT; he maintains that there were four occupants, not five. But the respondents have not appealed the findings of fact made by the FTT and it is not open to them to raise new arguments about findings of fact. Mr Bilkhu also sought to argue that there had only been two occupants in the property at certain points in the year, but accepted that he had not suggested that that was the case before the FTT and therefore could not raise it now.
23. Mr Bilkhu then addressed me about the landlord's financial circumstances. He confirmed that the respondents own nine properties, in addition to their home, which they let out. They have of course suffered financial difficulties in the course of 2020; students went home in March, rent has not been paid, they have had to give discounts to all their tenants and their properties are not fully occupied. The mortgagees of the properties have not been similarly accommodating to them. He stressed that they are conscientious landlords who put in a great deal of time and work in looking after their tenants, often going out to fix faults that turn out not to have been a real problem. They have paid the amount awarded by the FTT to Mr Chan.
24. Mr Bilkhu did not suggest that the respondents had suffered any hardship in the course of the year of Mr Chan's tenancy and I am not persuaded that events that have happened later can have a great deal of impact on a financial order made in relation to a period when they were letting out properties and receiving rent without any special circumstances affecting their income stream. The respondents are landlords with what Mr Bilkhu described as a "portfolio" of properties; the repayment of the rent claimed by this appellant is not, in the face of property ownership on that scale and in light of the profit likely to have been made from that portfolio, going to cause particular hardship.
25. Turning to the conduct of the landlord, there is a dispute as to whether there was a failure to respond to requests for repairs and maintenance, and I make this decision without regard to any allegations about that. However, I do take into consideration that a landlord with a portfolio of properties is to be expected to keep abreast of their professional and legal responsibilities. I do not regard inadvertence as a mitigation in such a case.

26. However, Mr Bilkhu drew my attention to the fact that until 1 October, and therefore for one quarter of the tenancy, the house was not a licensable HMO. It is on two storeys (Ms Nicholls did not challenge that). Only when the regulations changed on 1 October did it become licensable.
27. Ms Nicholls could offer no explanation as to why the whole of the rent for the year was claimed on appeal, in the light of that fact.
28. There would therefore appear to have been a mistake of law on the part of the FTT, which noted the change in the regulations but did not consider its application in this case. It may be that the points was not drawn to its attention.
29. I therefore determine that the rent to be repaid is three-quarters of the rent for the year, which amounts to £3,361.87. Subtracting the sum already paid in accordance with the FTT's order, the respondents are ordered to pay the balance in the sum of £1867.70. The amount is to be paid within 28 days.

Judge Elizabeth Cooke

20 October 2020