UPPER TRIBUNAL (LANDS CHAMBER)

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LC-2022-167
Written representations

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT REPAYMENT ORDER – the amount to be awarded – conduct of the parties – seriousness of the offence

APPEALS AGAINST DECISIONS OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

EDWARD ACHEAMPONG — **Appellant (LC-2022-11)**

-and-

PATRICIA SANCHEZ ROMAN (1)
CHRISTINA GARCIA CARRASCO (2)
LAURA GARCIA CARRASCO (3)
OLGA ORTEGA JURADO (4) — **Respondents (LC-2022-11)**

Re: 695 Lordship Lane, London, N22 5JY

AND BETWEEN

MOJHERAL CHOUDHURY — **Appellant (LC-2022-167)**

-and-

NICOLE RAZAK (1)
LISE PARIDAANS (2) — **Respondents (LC-2022-167)**

184 North End Road, London, W14 9NX

Judge Elizabeth Cooke
Determination on written representations

Decision Date: 5 September 2022

The following cases are referred to in this decision:

Hallett v Parker [2022] UKUT 165 (LC)
Parker v Waller [2012] UKUT 301 (LC)
Vadamalayan v Stewart and others [2020] UKUT 183 (LC)
Williams v Parmar [2021] UKUT 244 (LC)
Wilson v Arrow and others [2022] UKUT 27 (LC)

Introduction

1. This is the Tribunal's decision on two appeals from the First-tier Tribunal (Property Chamber) ("the FTT"). Each raises the same point, namely the approach to be taken by the FTT in deciding how much a landlord should pay by way of a rent repayment order. This is a point that has troubled both the FTT and this Tribunal, and has generated a steady stream of appeals in recent months. In the paragraphs that follow I re-state the approach that is to be taken since the Tribunal's decision in *Williams v Parmar* [2021] UKUT 244 (LC).

2. Neither of the landlords in the two appeals has had professional representation. Written representations were provided on behalf of the tenants in Mr Acheampong's appeal by Represent Law, and in Mr Choudhury's appeal by Justice for Tenants.

The legal background

The statutory provisions

3. Rent repayment orders were made by the FTT in these two cases because the landlords had committed licensing offences under the Housing Act 2004. Part 2 of the 2004 Act provides for houses in multiple occupation ("HMO"s) to be licensed by local housing authorities, and section 72 provides that it is an offence to manage or be in control of an HMO which is required to be licensed and is not. Part 3 of the 2004 Act creates a selective licensing scheme which local housing authorities may choose, in certain circumstances, to operate; section 95 provides that it is an offence to manage or be in control of a house which is required to be licensed under Part 3 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 the licensing offences just described to the eviction or harassment of the occupiers contrary to section 1 of the Protection from Eviction Act 1977.

5. Sections 44 and 46 are about the amount the landlord is to be ordered to pay if a rent repayment order is made in response to an application by a tenant (as in the present appeals); for a licensing offence the amount "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."

6. Section 44(4) goes on to say:

> "(4) In determining the amount the tribunal must, in particular, take into account—
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> (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."

7. Section 46 provides that in the case of some of the offences listed in section 40, if the landlord has been convicted of the offence the rent repayment order must be for the full amount of the rent in the relevant period, without regard to the conduct of the parties or to the landlord's financial circumstances; but the licensing offences under sections 72 and 95 of the 2004 Act are not among those listed in section 46.

Decisions of the Upper Tribunal

8. Rent repayment orders were first introduced in the 2004 Act. In *Parker v Waller* [2012] UKUT 301 (LC) the Tribunal held that in considering the amount to be repaid under a rent repayment order the FTT should deduct the landlord's expenditure, for example mortgage payments and sums spent on repairs to the property, so that the effect of the order was to take from the landlord the profit element of the rent. The relevant parts of the 2004 Act no longer apply in England, although they do in Wales.

9. In *Vadamalayan v Stewart and others* [2020] UKUT 183 (LC) the Tribunal had the opportunity to look at the same issue in the context of the provisions of the 2016 Act, which are now the relevant provisions for England and are in significantly different terms from those of the 2004 Act. The Tribunal held that under the 2016 statute the landlord's expenditure is not to be deducted; the order should be for the repayment of the rent regardless of what the landlord had spent on the property (because mortgage payments and maintenance are for the landlord's own benefit and enhance his own property). However, where the rent includes payments for utilities (which the tenant consumes and which do not benefit the landlord) it will usually be appropriate to deduct a sum representing that payment; a sum the tenant pays the landlord for utilities is not really rent.

10. Therefore *Parker v Waller* is no longer relevant to the calculation of rent repayment orders.

11. However, *Vadamalayan* did not provide a complete picture, partly because of the factual background to that appeal, and caused some confusion by saying that the "obvious starting point" is the amount of the rent payable for the period during which the offence was being committed. That gave the impression that a rent repayment order should normally be the full amount of the rent, without deduction for the landlord's expenditure, unless there was a reason to order a lower figure either because of the conduct of the parties (section 44(4)(a)) or because of the landlord's financial circumstances (section 44(4)(b)), even where the landlord had not been convicted of a housing offence (section 44(4)(c)).

12. An obvious problem with that approach is that in the absence of any positively good conduct by the landlord, of poor conduct by the tenant, or of financial difficulties of the landlord it would generate an order to repay the whole of the rent regardless of the seriousness of the offence. Thus the landlord who has simply failed to get a licence, out of ignorance, but has provided perfectly satisfactory accommodation to perfectly satisfactory tenants, will pay the same as the landlord of a dangerous property which would not have qualified for a licence even if the landlord had applied for one, and the same as a landlord who has harassed his tenants (contrary to section 1 of the Protection from Eviction Act 1977) or who has used violence to secure entry to the property (contrary to section 6(1) of the Criminal Law Act 1977).

13. That is not the law, and in *Williams v Parmar* [2021] UKUT 244 (LC) the Tribunal (the President, Fancourt J) explained why. Rent repayment orders may be made in response to a range of offences. To some of them section 46 applies and the whole of the rent must be repaid if the landlord has already been convicted. Therefore, necessarily, Parliament envisaged that in some cases the whole of the rent will not be ordered to be repaid (paragraph 23). At paragraph 24 the President said:

> "It therefore cannot be the case that the words "relate to rent paid during the period …" in s. 44(2) mean "equate to rent paid during the period …".
>
> 25. However, the amount of the RRO must always "relate to" the amount of the rent paid during the period in question. … Thus, the amount of the RRO may be a proportion of the rent paid, or the rent paid less certain sums, or a combination of both. **But the amount of the rent paid during the period is not a starting point in the sense that there is a presumption that that amount is the amount of the order in any given case, or even the amount of the order subject only to the factors specified in s.44(4).**
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> 26. … *Vadamalayan* … is not authority for the proposition that the maximum amount of rent is to be ordered under an RRO subject only to limited adjustment for the factors specified in s. 44(4)."

14. I have emboldened the words from paragraph 25 which indicate what the FTT must not do. The appeal in *Williams v* Parmar was from a case where the FTT had done just that. The President set aside the decision and substituted the Tribunal's decision that the landlord was to repay 80% of the rent for the relevant period, noting that the landlord was a first offender, with no relevant convictions, but that she was a professional landlord who must be taken to have known the licensing requirement for licensing an HMO. The property was not in fact eligible for a licence because one of the bedrooms was too small. At paragraph 53 of his decision the President said:

> "The factors identified above, which illustrate the kind of evaluative exercise that the tribunal needs to conduct when making an RRO in a case where the maximum amount provisions do not apply, indicate that this was a reasonably serious offence of its kind, though not the most serious case that could be imagined."

15. *Williams v Parmar* did not say in so many words that the maximum amount will be ordered only when the offence is the most serious of its kind that could be imagined; but it is an obvious inference both from the President's general observations and from the outcome of the appeal that an order in the maximum possible amount would be made only in the most serious cases or where some other compelling and unusual factor justified it. It is beyond question that the seriousness of the offence is a relevant factor – as one would expect from the express statutory provision that the conduct of the landlord is to be taken into consideration. If the tribunal takes as a starting point the proposition that the order will be for the maximum amount unless the section 44(4) factors indicate that a deduction can be made, the FTT will be unable to adjust for the seriousness of the offence (because the

commission of an offence is bad conduct and cannot justify a deduction). It will in effect have fettered its discretion. Instead the FTT must look at the conduct of the parties, good and bad, very bad and less bad, and arrive at an order for repayment of an appropriate proportion of the rent.

16. So in a case where the landlord of several properties had no HMO licence and whose eventual application for a licence was rejected on the basis of the fire hazards at the property, and who nevertheless failed to remedy those defects for over a year, the Tribunal ordered repayment of 90% of the rent (*Wilson v Arrow and others* [2022] UKUT 27 (LC)) ; in a case where the landlord was letting just one property through an agent, and might reasonably have expected the agent to warn him that a licence was required, and the condition of the property was satisfactory, the Tribunal ordered repayment of 25% of the rent (*Hallett v Parker* [2022] UKUT 165 (LC)).

17. There are no rules as to the amount to be repaid; there is no rate card. But it is safe to say that if the landlord is ordered to repay the whole of the rent (after deduction of any payment for utilities), without consideration of the seriousness of the offence, or in a case that is far from the most serious of its kind, it is likely that something has gone wrong and that the FTT has failed to take into consideration a relevant factor.

Practical points for decision making

18. It is easy to say what the FTT should not do: it should not take the whole rent (less any payments for utilities) and regard that as the starting point subject only to deductions made in light of the factors in section 44(4) of the 2016 Act.

19. What should it do instead?

20. The following approach will ensure consistency 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).

21. I would add that step (c) above is part of what is required under section 44(4)(a). It is an assessment of the conduct of the landlord specifically in the context of the offence itself; how badly has this landlord behaved in committing the offence? I have set it out as a separate step because it is the matter that has most frequently been overlooked.

The appeals

22. In the two cases now appealed the landlord has permission to appeal on the issue of the amount of the rent repayment order, and I am going to set out only those of the facts that are relevant to the single issue: did the FTT err in the exercise of its discretion as to the amount to be repaid by failing to consider the seriousness of the offence? In considering that question I bear in mind that the Tribunal will only interfere with a discretionary decision if it is clearly wrong because it is made as a result of an error of law or because it is irrational.

23. I have dealt with the appeals in the order I consider will be most helpful for future reference.

(1) Mr Choudhury's appeal, LC-2022-167

24. Mr Choudhury let a self-contained basement flat, in the London Borough of Hammersmith and Fulham, to two tenants from 14 July 2019. The property was in an area designated under a selective licensing scheme, and Mr Choudhury did not apply for a licence until August 2021. The tenants applied in November 2021 (having left the property in March 2021) for a rent repayment order for the period 13 February 2020 to 12 February 2021; the rent was £1,500 per month, and they sought repayment of the full rent for the 12 months, £18,000.

25. Mr Choudhury admitted the failure to licence, and there is no appeal from the FTT's finding that it was satisfied, to the criminal standard, that he had committed the offence under section 95(1) of the Housing Act 2004.

26. In considering the amount that Mr Choudhury should be ordered to repay, the FTT quoted extensively from *Parker v Waller, Vadamalayan,* and *Williams v Parmar,* and other Upper Tribunal decisions. It directed itself correctly that it should not deduct from the rent any sums representing the landlord's mortgage payments and so on. It noted that the rent included payment for gas, water and internet access, and so made a deduction of £100 per month to represent the provision of those services to the tenants. It then turned to the conduct of the parties, at its paragraph 34, and noted that the property was not in a satisfactory condition because of some damp and mould, that the deposit was not protected, that the landlord did not hold gas or fire safety certificates and that there were failings in fire safety equipment. Therefore, the FTT said, it was not appropriate to make any further deduction; the award was of the whole rent minus the utilities payments, in the sum of £16,800.

27. The landlord appeals, arguing that the sum awarded was too high for a number of reasons; he has permission to appeal on the basis that it was arguable that in setting the amount of its

order the FTT failed to consider the seriousness of the offence and did not take proper account of the decision in *William v Parmar*.

28. The tenants argue that the sum awarded was appropriate, in the light of the landlord's failings; they have made extensive representations about Mr Choudhury's conduct, but of course I can take into account only the facts found by the FTT. The tenants rely on observations by the Tribunal that an award of the full rent may be made. So it can, where appropriate; but that does not mean that any conduct that can be labelled "serious" can justify an order for repayment of the full amount of the rent. That would not be a rational position.

29. Turning to the FTT's reasoning: the seriousness of the offence was not mentioned in so many words, but that is not fatal. The FTT looked at the landlord's conduct and noted that it was poor. However, the FTT took the full rent as its starting point and regarded itself as able only to make deductions – which it could not make in the absence of good conduct by the landlord.

30. In other words, the FTT took the approach that the Tribunal in *Williams v Parmar* said should not be taken (see the emboldened words in the quotation in paragraph 13 above). It fettered its discretion in the way I described at paragraph 15 above.

31. I set aside the FTT's decision and I substitute the Tribunal's decision. The full payment needs to be adjusted to subtract any payment for utilities, and I take the FTT's figure of £100 per month to arrive at a rent of £1,400 per month, so that the maximum possible rent repayment order for the 12 months was £16,800. I consider the seriousness of the offence; obviously fire safety failings are a significant factor, and may have made the property ineligible for a licence. The failure to protect the deposit is a significant breach of duty to the tenants. But this was not the most serious offence of its kind. Absent any other factors I would order repayment of 75% of the rent.

32. As to the rest of the section 44(4) factors, there was nothing in the conduct of the landlord, or of the tenants to warrant any further adjustment; nor did Mr Choudhury produce any evidence of financial difficulties (he does not agree with that, but he does not have permission to appeal on that issue); and he has not been convicted of any housing offences.

33. Accordingly Mr Choudhury is ordered to repay 75% of £1,400 x 12 months, being £12,600.

(2) Mr Acheampong's appeal, LC-2022-11

34. Mr Acheampong holds a leasehold interest in 695 Lordship Lane, London N22, which is a flat in a purpose-built block. Four tenants of the flat, who occupied it for different periods but all left in April 2020, applied to the FTT for a rent repayment order on the basis that the flat was an HMO that was required to be licensed and was not licensed.

35. The FTT was satisfied, to the criminal standard, that Mr Acheampong had committed the offence during the period 11 October 2019 to 25 April 2020.

36. The FTT made findings of fact about a large body of evidence about the conduct of Mr Acheampong and of the tenants; it found that one of the tenants ("A4") had caused a serious disruption in what had otherwise been a harmonious landlord and tenant relationship and had sent a racially abusive message to Mr Acheampong. As to the other tenants the FTT found that there was no question about their conduct, and that until that disruption Mr Acheampong's conduct "appeared to the Tribunal to have previously been good." The FTT said that it had no evidence about Mr Acheampong's financial circumstances other than that he co-owned two properties with another person. The FTT said that on the basis of Mr Acheampong's good conduct it "made a 10% deduction from any award of an RRO."

37. The FTT then deducted £4 per person per week for utilities. It concluded:

> "The Tribunal keeps in mind that a RRO is meant to be a penalty against a landlord who does not follow the law. It is a serious offence which could lead to criminal proceedings. Taking these matters into account and the very poor conduct of A4 [the tenant in favour of whom no award was made], we consider that the maximum award permissible should be reduced by 10%. Accordingly, we find that an RRO should be made against [Mr Acheampong] in the sum of £9147.60. This reflects the net rent of £121 per week, for 28 weeks, for the period of 11/10/2019-25/4/2020."

38. That sum of £9,147.60 was to be divided equally between the three tenants (£3049.20 each) who are the respondents to this appeal, with nothing payable to the fourth applicant because of her poor conduct. The calculation is a little strange because one would have expected the FTT to set out first the maximum by reference to the rent paid by all four, but at any rate £121 x 3 x 28 x 90% is £9,147.60.

39. The grounds of appeal in this case are wider than those in Mr Choudhury's appeal. Mr Acheampong has permission to appeal on the ground that the FTT's decision was inconsistent with the Tribunal's decision in *Williams v Parmar*; that an inadequate deduction was made for the element of payment for utilities in the rent in light of the evidence; and that the FTT did not give proper consideration to the landlord's evidence of his financial circumstances.

40. I have had limited assistance from the parties' written representations, which for the most part seek to re-open the FTT's findings of fact about the parties' conduct on which they do not have permission to appeal. Mr Acheampong refers to his defence of reasonable excuse, which failed before the FTT, and on which he does not have permission to appeal.

41. Mr Acheampong refers, correctly, to *Williams v Parmar*. The respondents' representative says the decision in *Williams v Parmar* would have made no difference to the outcome. But the FTT in refusing permission to appeal said that had the decision in *Williams v Parmar* been issued before the FTT's decision then Mr Acheampong's criticism of the decision would have had merit, and it is surprising therefore that the FTT did not grant permission.

42. The FTT's reasoning, again, does what the Tribunal in *Williams v Parmar* said should not be done: it started with the maximum rent, and then made a deduction because Mr

Acheampong had been a good landlord. It treated the maximum amount as the default penalty and gave no attention to the seriousness of the offence.

43. In light of that I do not need to go on to consider the other grounds of appeal. The FTT's decision as to the amount of the rent repayment order is set aside. Its finding that Mr Acheampong committed the section 72 offence stands, as do its findings of fact about the conduct of the parties.

44. The Tribunal is not able to substitute its own decision in this case. In order to find the maximum payable I would need to know the value of the utilities paid for as part of the rent. There was contested evidence about that, and although the FTT made a deduction it is not apparent to me why it subtracted £4 per week for gas and electricity when the figures provided by Mr Acheampong (reproduced in the appeal bundle) indicated a greater sum. He also provided figures for internet and water, which the FTT did not mention; and I do not know to what extent the water charges were dependent upon the tenants' consumption and to what extent they would have been payable in respect of the property in any event.

45. I am not able to make findings of fact about that. Had I been able to do so, I would then have considered the seriousness of the offence in order to find a starting point, noting that Mr Acheampong seems to have failed to get a licence because he was unaware of the need to do so. There is no evidence of anything else to raise the seriousness of the offence. I would then consider the good conduct of the landlord and the absence of any misdemeanour by these three tenants. But I would also need to consider the landlord's financial circumstances, and again it is apparent from the material in the appeal bundle that he provided evidence of this which the FTT did not consider.

46. Accordingly the matter is remitted to the FTT for determination of the amount of the rent repayment order. The three respondents will have to ask the FTT for directions so that it can make the necessary findings of fact about utilities and the landlord's financial circumstances, after a short hearing if necessary, so that it can then determine the amount of the rent repayment order. I repeat that the findings of fact about the parties' conduct are undisturbed and that the parties should not seek to re-open them.

Summary

47. Both appeals succeed and in each case the FTT's decision is set aside. I have substituted the Tribunal's decision in Mr Choudhury's appeal, as set out in paragraph 33 above; Mr Acheampong's appeal is remitted to the FTT.

Judge Elizabeth Cooke

5 September 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.