

First-tier Tribunal,



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5-7 Hill Street,

Birmingham,

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| Case: | BIR/00CQ/HMF/2019/0001 |
| A v R: | Chung Pui Chan v Bilkhu & Bilkhu |
| Property: | 267 St George’s Road, Coventry, CV1 2DG |
| Subject: | Appeal request |

Date: 04/05/2020

Dear Sir/Madam,

We are instructed by Mr Chung Pui Chan in the above matter. We write to request:

1. That the Tribunal review its Decision of 17/4/2020;

Alternatively,

1. Grant permission to appeal the judgment to the Upper Tribunal (Lands Chamber) (UT)

The grounds for this request are as follows:

1. The Applicant (A) applied for a total rent to be repaid of £4,482.50. This amount was agreed by the Tribunal as correct in §42 of the Tribunal’s Decision. However, the Tribunal made an award of only £1,494.17, “equating to approximately a third of the rental profit.” There was no clear justification for such a reduction in the award.
2. **Parker v Waller**: The Tribunal, in its Decision, makes reference to Parker v Waller and Others [2012] UKUT 301 (LC): §47. However, Parker v Waller relates to Rent Repayment Orders (RROs) under The Housing Act 2004 (HA) not to The Housing and Planning Act 2016 (HaPA). Although there are some aspects of Parker that are logically valid under HaPA, where this authority relies specifically on the wording of the underlying legislation (HA), then it is unsafe to depend on its conclusions under the new Act. This is most clearly the case in relation to the deduction of landlord expenses and the assumption that a RRO should principally reflect the profit made by the landlord.

Parker discusses at some length the purposes of the RRO and concludes that these are several but principally that it should prevent landlords from making a profit from letting an unlicensed property: §26 of Parker. This conclusion is drawn largely from consideration of the parliamentary debate which led to the RRO amendment of the HA 2004 bill. In the Parker ruling, the President, George Bartlett QC quotes from the Third Reading of the Bill in the House of Lords; and HL Hansard 3 Nov 04 vol 666 col 329 which records the Government spokesman, Lord Bassam of Brighton:

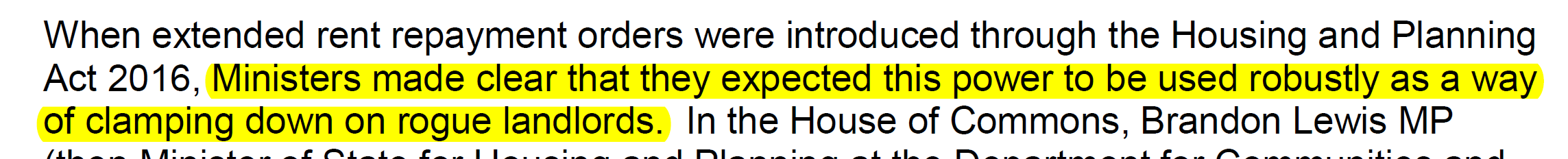
*“The sanction proposed will help prevent a landlord from profiting from renting properties illegally”*.

This conclusion is supported by the wording of the HA at s74(5), stating that a RRO award should be “*reasonable in the circumstances*”.

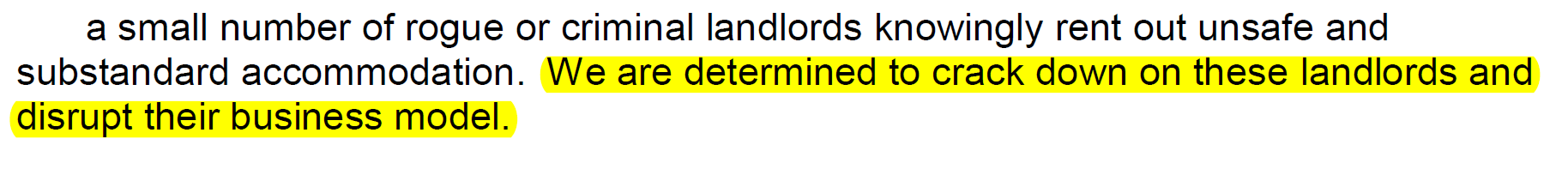
At §42 of Parker, therefore, the President concludes: *“I consider that it would not be appropriate to impose upon him an RRO amount that exceeded his profit in the relevant period.”*

This approach has continued under HaPA without much reflection on the very different circumstances and wording of the new Act. The HaPA is, however, substantially different to the HA in these principle ways:

* It allows for RROs to be made for a range of offences other than licensing, so that the intention is no longer so much to recover rent paid under an illegal contract as to punish the landlord. The rent paid then becomes a method for calculating the fine that the RRO has evolved into.
* The intention of the HaPA was much more to clamp down on “rogue” or criminal landlords:

The Foreword of “Rent repayment orders under the Housing and Planning Act 2016- Guidance for Local Housing Authorities” (2017 ISBN: 978-1-4098-5038-0) makes the reasoning amply clear: 

And:



The First-tier Tribunal will have regard to this guidance (1.3 p.8 of the guidance).

* The HA made a clear distinction between the methods of calculating a RRO when it related to private tenants recovering rent as opposed to local government’s recovery of Housing Benefit (HB). Under the HA, awards for Local Authorities (LAs) were calculated on the basis of 100% of the Housing Benefit paid: S74(2): “[the Tribunal] *must make a rent repayment order…equal to the total amount of housing benefit paid*”, whereas tenant awards were allowed to be “*reasonable in the circumstances*”. It should be noted that HB at that time normally covered the full rent.

Under HaPA, the award calculation is now almost identical for tenants (s44) and Local Authorities (LAs) (s45).

If one assumes, as seems reasonable, that the Government did not intend to reduce the amount recovered by LAs then one must conclude that the RRO calculation for tenants is “levelled-up” to the same method as that for LAs. The wording is essentially identical. In other words, there should be an assumption under the HaPA RRO award calculation that 100% of the rent be ordered to be repaid for tenant Applicants, unless there are extenuating circumstances, as per s46(5) HaPA. There does not need to be a consideration of the profit of the landlord: RROs under HaPA are much more about punishing them.

Despite these clear differences in the legislation, Parker continues to guide nearly every judgment made for RROs under HaPA 2016. There is a desperate need for clarification of the way in which awards should be calculated under the new Act.

1. **Unsubstantiated Expenses**: Alternatively, should the Parker v Waller rationale be maintained, then expenses should not be allowed which have not been clearly evidenced. In this case, the Respondent (R) bundle contained no details of the expenses claimed. It is not clear from the Decision document whether the Tribunal took into account the mortgage expenses claimed at the hearing in arriving at its award. The mortgage is mentioned at §48 where it is also stated that the Tribunal could not ascertain whether the mortgage payments related to any capital repayments.
   1. A RRO Applicant (A) needs to prove their case to “criminal level” of evidence or “beyond reasonable doubt”. It would be unjust, having so proved the case, to have the award reduced by unsubstantiated expense claims by the R. Even if these should be produced at the hearing, it would not be fair to make allowances for these when the A has had no chance to analyse them properly.
   2. Flat Justice has often been confronted with just such scenarios: sometimes the Tribunal is recessed for 15 minutes to allow analysis as a gesture. Whereas we have experience in dealing with these situations, many Applicants, mostly Litigants in Person, do not. We would argue for clear guidance from this appeal that specifies that expenses should only be considered that are already clearly evidenced in the bundle, well in advance of the hearing so that such ambushes can be avoided.
2. **Mortgage Expenses**: As only a third of the rent was awarded, it would seem likely the Tribunal accounted for the claimed mortgage expenses. We submit that mortgage payments should not have been accounted for at all in the quantum calculation for the following reasons:
   1. Mortgage payments represent fixed costs that occur irrespective of tenancy arrangements and should therefore not be a valid landlord expense consideration in Rent Repayment Order (RRO) cases. Moreover, such payments relate to the capital investment aspect of a property: it is often overlooked by Tribunals that rent represents only one part of an income stream from a property. Often the lion’s share of a property’s return is generated by the increase in value of the investment. There have already been a number of cases at the FtT that have disallowed mortgage expenses, the clearest yet being the recent case of [Hamdane v ORL Holdings Ltd](https://assets.publishing.service.gov.uk/media/5d399b01e5274a400ce4c1fc/Leighton_Rd_-_final_decision__25.7.19_.pdf). heard by Judge Latham 19/7/2019 at the FtT in London. In his Decision of 25th July 2019, Judge Latham makes the following remarks regarding such deductions (our emphasis in yellow):

“*34. There are two issues for this Tribunal to determine:*

*(i) As a matter of general practice, should we take into account mortgage interest in determining the profit made by the landlord?*

*(ii) If so, should we take it into account in this case?*

*35. We note that the Act provides that the maximum amount that a landlord may be required to repay is the rent paid during the relevant period, less any state benefits. We are required to take into account “the financial circumstances of the landlord”. The suggestion that it would not be appropriate to impose a RRO that exceeds the landlord’s profit in the relevant period, is rather guidance provided by the UT. The UT gives such guidance as part of its role to promote consistent practice by First-tier Tribunals (see Carnwath LJ in Earl of Cadogan v Sportelli [2007] EWCA Civ 1042; [2008] 1 WLR 2142).*

*36. As we indicated to the parties, we are an expert tribunal. In our experience, Buy to Let landlords acquire properties for two reasons: (i) capital appreciation and (ii) income from letting the property. The primary return is through the capital appreciation. Properties in Camden have increased in value by some four-fold since 1990.*

*37. The extent to which a landlord decides to fund the purchase of a Buy to Let property will depend upon the individual circumstances of the landlord. The amount of any loan interest does not relate to the cost of letting the property. The primary purpose in taking out a mortgage is to fund an investment which will yield a capital profit.*

*38. We therefore conclude that as a general matter of practice, it would not be appropriate to make a deduction for mortgage interest. We highlight three factors:*

*(i) A person who acquired a property with the benefit or*[of] *a mortgage would be required to make the relevant interest payments regardless or*[of] *whether or not the property is let.*

*(ii) Should the size of a RRO depend upon whether a landlord has taken out a loan of £1m, £0.5m or owns 100% of the equity? We suggest that it should not.*

*(iii) It would be invidious for a tribunal to seek to apportion the mortgage interest paid between to the capital and income elements of a landlord’s investment. We are satisfied that mortgage interest rather relates to the acquisition of a capital appreciating asset.*

*39. We accept that there may be a case where it would be appropriate to have regard to a mortgage liability. Section 44(4)(b) requires a tribunal to have regard to the “financial circumstances” of the landlord. Where a landlord raises an issue on impecuniosity, it would be appropriate for the tribunal to consider any mortgage liability in assessing their personal financial circumstances. This would normally arise in the case of an individual. No such argument of impecuniosity arises in the current case.*”

We hold that the above conclusion, that mortgage interest should not normally be deducted from a RRO award under HaPA 2016, is perfectly logical and should apply to all RRO cases.

* 1. Further support for this position can be gained from the current tax situation for buy-to-let landlords regarding mortgage interest costs. The Government has legislated that interest relating to mortgage costs will eventually not be allowed at all as a direct deduction when accounting for tax on rental income.
     1. Since April 2017, tax relief on mortgage interest has been gradually phased out. By April 2020, landlords will not be able to deduct any of their mortgage expenses from rental income to reduce their tax bill. Instead, they will receive a tax-credit, based on 20% of their mortgage interest payments. The new system has been phased in over several years. In 2019-20, a landlord could deduct only one quarter of their interest costs from their rental income, while three quarters of the mortgage interest payments received the tax credit. As of April 2020, all mortgage interest will only receive the tax credit.[[1]](#endnote-1)
     2. It would clearly be iniquitous for one branch of the Government to curtail deduction of mortgage interest costs for law-abiding landlords, while another branch of Government, through HMCTS, allows the same costs to be fully deducted in calculating awards made against criminal landlords.

1. Alternatively, should Parker be applied and mortgage costs considered a viable expense, the mortgage costs should not be allowed for in this case as the mortgage relates to a charge taken out on the property over eight months after the property purchase. The title of the property, attached here, shows that the R bought the property on 26th May 2016 for £120,000. The charges register shows a charge recorded 1st February 2017 to the benefit of The Mortgage Works (UK) PLC. It would seem that the property was first bought with the R’s own funds but was then later mortgaged.
   1. If the Tribunal had wished to apply Parker correctly and they had wanted to allow for mortgage costs they should have first determined whether the mortgage was used for the purchase of the property or whether the loan was a capital raising exercise. Parker specifically disallows the mortgage costs where these relate to a later mortgage not used in the actual purchase. At §42 of Parker:

“*However, it appears that, although Mr Parker bought the house in 1996, the costs of the mortgage relate to a mortgage that was taken out relatively recently, as he says that he is in negative equity. I am not satisfied, therefore, that the mortgage costs should be brought into the reckoning*.”

1. As mentioned above, it is not clear whether the Tribunal allowed for mortgage expenses as a deduction. The fact that only a third of the rent paid is allowed as an award would indicate that they did. However, if the Tribunal’s position was that the mortgage costs were not considered, then it is difficult to understand why so a low level of award was made:  
   1. There were no aspects of the A’s conduct which impacted the award (§58)
   2. The Tribunal accepted that the landlord had not carried out repairs in a timely manner (§55)
   3. The Tribunal held the R to be a professional landlord with multiple properties. Following Parker at §26:

“*A landlord who is engaged professionally in letting is likely to be more harshly dealt with than the non-professional*.”  
  
Yet here the landlord seems to have been treated very leniently. In the Parker case an award of 75% of the landlord’s profit was made.

* 1. The Tribunal considered, at §57, that the fact that the Council had not imposed penalties was a mitigating factor. We submit that this should not have been a consideration as the vast majority of offending landlords are not prosecuted or fined by LAs. In an investigation by [The Guardian](https://www.theguardian.com/society/2018/nov/29/rogue-landlords-most-local-authorities-in-england-fail-to-issue-fines) newspaper in 2018, it was found that 90% of councils failed to issue any fines against landlords in the previous year. It is precisely because LAs failed to use their powers under HA 2004 that HaPA 2016 gave powers to tenants to make RROs directly themselves, without the need to wait for a prior prosecution from the Council.

That the Council did not prosecute in this case either cannot, we argue, add any significant weight to the R’s case that the failure to license was simply an “oversight”.

# We would respectfully request that the Tribunal remake its Decision and award 100% of the rent paid to the Applicant. Alternatively, we request permission to appeal the matter to the Upper Tribunal (Lands Chamber).

With kind regards



Yours faithfully,

NG Morris

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1. source: https://www.which.co.uk/money/tax/income-tax/tax-on-property-and-rental-income/buy-to-let-mortgage-tax-relief-changes-explained-atnsv0j6j782 - Which? [↑](#endnote-ref-1)