Judge Siobhan McGrath,

First-tier Tribunal Property Chamber (Residential Property)

10 Alfred Place, London WC1E 7LR

01/3/2019

Dear Judge McGrath,

RE: Decisions under HaPA 2016 RRO cases: further legacy issues

You may remember that the error in the RRO1 form, that we corresponded about in January, resulted from a "legacy issue": i.e. it stemmed from the Housing Act 2004.

I am writing regarding decisions that have been made at the First-tier Tribunal Property Chamber (Residential Property) on cases brought by tenants under the Housing and Planning Act 2016 which we feel also erroneously rely on the wording of the Housing Act 2004, rather than the new legislation from 2016.

1. We have read nearly 20 decisions on Rent Repayment Order (RRO) cases brought under Housing and Planning Act (HaPA) 2016. The majority have been guided by Upper Tribunal (UT) judgments made in cases brought under the Housing Act (HA) 2004, due largely to the absence of any guidance from UT cases under HaPA 2016. Often such decisions are prefaced by attempts at justification due to the similarities between the two Acts, e.g. LON/00AG/HMK/2018/0020 at §18: there are many other similar justifications.

2. Whereas there are some similarities between the two pieces of legislation, there are some very important differences. And we feel that these are not fully accounted for in the decisions we have seen. Indeed the differences, both in purpose and wording of the Acts, are so important that they would justify a radical overhaul of the approach the Tribunal takes to assessing RRO case awards.

3. The HaPA 2016 changes who can make a RRO application, under what circumstances and for what range of offences. Importantly, it also **changes how the amount of any award is to be assessed** by the First-tier Tribunal Property Chamber (Residential Property) (RPT).

4. The reasoning behind the 2016 legislation has been made clear by the Government and is well known. Pepper v Hart (1992) requires regard to this where there is any ambiguity, however there has been little ambiguity in the language of the Government guidance.

5. 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:

> When extended rent repayment orders were introduced through the Housing and Planning Act 2016, Ministers made clear that they expected this power to be used robustly as a way of clamping down on rogue landlords. In the House of Commons, Brandon Lewis MP

and:

> a small number of rogue or criminal landlords knowingly rent out unsafe and substandard accommodation. We are determined to crack down on these landlords and disrupt their business model.

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

6. The most widely quoted UT guidance from HA 2004 cases is Parker v Waller (2012) where the landlord successfully appealed a decision by the FtT to award 100% of the rent to the applicant. Much of the deliberation in this decision centred on what the purpose of RROs might be (§20 to 26). However, for the HaPA 2016, the purpose of RROs has been made much clearer: RRO awards should punish criminal landlords and act as a severe deterrence, hence the inclusion of offences other licensing.

7. In assessing the amount of the award the above UT guidance relied heavily on the wording at s74 (5) of the HA 2004: that the amount should be "**reasonable in the circumstances**". This part of the legislation is replaced by the HaPA 2016 and this wording no longer occurs. No guidance based on this wording should, therefore, be used in assessing awards made for cases brought under HaPA 2016.

8. As a consequence, there is no need to assess "reasonable" deductions from a RRO award. At 13 (d) in the above decision, George Bartlett, QC (President) commented that the HA 2004 does not distinguish between rent that included other charges (such as utilities) and more 'purer' rental payments. In the HaPA 2016 there is also no such distinction. We would argue that the FtT has no statutory discretion to reduce an award, other than by any other stipulation in the HaPA 2016. Therefore, the FtT does not, as a matter of course, have to deliberate on landlords' expenses claims or calculate any rental 'profit' as a basis for an award. From the HaPA 2016, the basis award should always be 100% of the rent paid before any other considerations, under HaPA 2016, are weighed. This calculation of the basis for an award has often taken up many hours of heated discussion in hearings of RRO cases: all completely unnecessary and a waste of valuable Tribunal time.

9. A further argument for not 'adjusting' the rental payments is that all properties have standing charges on them (be it utility payments, council tax or mortgage payments) that would occur whether the property was occupied or not. It should also be noted that mortgage interest allowance is being phased out for the majority of landlords: if HMRC doesn't allow mortgage payments against rent, why should the FtT?

10. Our contention that 100% of the rent paid should be the basis of the award is also supported by the fact that the award calculation covered in the HaPA 2016 section "*Making of rent repayment order*" is now almost identical for tenants (s44) and Local Authorities (LAs) (s45). However, under HA 2004, awards for 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". As awards to LAs are based on 100% of the Housing Benefit/UC under HaPA 2016, awards for tenants should also be based on 100% of the periodical payments.

11. The other considerations concerning the amount of the award, under HaPA 2016 are s44 (4):

    -The conduct of the landlord and the tenant

    -The financial circumstances of the landlord

    -Whether the landlord has a conviction under chapter 4 of HaPA 2016

12. All of these were also factors to be assessed for a RRO award under HA 2004, so the guidance from the UT decisions is relevant here and we list points made by the UT regarding how these relate to the calculation of an award, except for the last (prior conviction), where the instructions are clear (100%):

13. Conduct: at §39 of Parker v Waller's decision, the judge makes the point that only behaviour which relates to the offence should be considered. To consider unrelated behaviour "would be to punish the landlord for matters that form no part of the offence." Similarly, for tenants, landlord evidence of poor tenant behaviour should only be considered when it relates to the offence. So, for example, late rental payments should not be a reason for reducing an award for a RRO brought on the grounds of a licensing offence. Indeed, for a licensing offence, it would be difficult to imagine tenant behaviour that could weigh in an award assessment as licensing is the sole responsibility of the landlord.By contrast, the point was also made here, that a professional landlord should be treated more harshly for a licensing offence that they should have been aware of. Likewise any delay or avoidance in dealing with the subject of the offence should increase an award

14. Financial circumstances: at §40 the point is made that any plea from a landlord for mitigation due to financial circumstances must be public and open to challenge by the tenants. In addition, we feel that any financial circumstances claimed by the landlord that are seriously considered by the FtT should be proved to the same level of evidence as that for the offence itself, i.e. beyond reasonable doubt. To do anything else would risk making a mockery of the legislation.

15. There is a further discretion allowed under HaPA 2016 at s46 (5) for "exceptional circumstances."

16. Another consideration, at §26 (v) in Parker v Waller, was whether there should be any adjustment for the benefit the tenant received by occupying the premises during the relevant period. The conclusion, which we would support, is that it cannot: "This is because it is of the essence of an occupier's RRO that the rent should be repaid in respect of a period of his occupation." As we understand it: you cannot make a RRO application without having been a tenant (other than LAs) so your award cannot be reduced by the fact that you have been one. However, there have been a couple of HaPA 2016 cases in which the decision seems, nevertheless, to consider the benefit of occupancy as reason for reducing the award, e.g. LON/OOAG/HMK/2018/0003 at §23 & §24

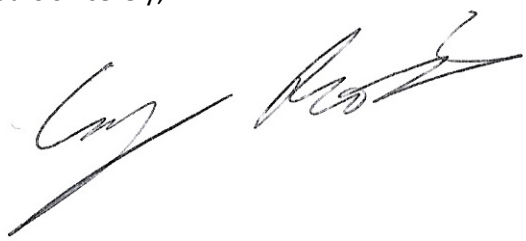
We would respectfully request that you raise these concerns with your colleagues. Moreover, these concerns relate also to decisions made in other Tribunal regions, e.g. Midlands and Eastern where we have seen similar patterns in decisions.

Given that we currently have an appeal request outstanding, LON/00AL/HMK/2018/0035, there is an opportunity here to include consideration of these matters and create clarity for the benefit of all concerned.

We look forward to your response.

With kind regards

Yours sincerely,



Guy Morris