

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2016] UKUT 0459 (LC)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – rent determination – fair rent – sufficiency of reasons for First-tier Tribunal’s decision on open market rent and adjustments for condition and improvements – s.70 Rent Act 1977 – appeal allowed

**IN THE MATTER OF AN APPEAL FROM A DECISION OF THE FIRST TIER
TRIBUNAL (PROPERTY CHAMBER)**

BETWEEN

MS JOSEPHINE SAINT

Appellant

and

MR MARK KIGHTLEY

Respondent

**Re: Flat 5,
7 Pelham Crescent,
The Park,
Nottingham
NG7 1AU**

Decision by written representations

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The following cases are referred to in this decision:

Flannery v Halifax Estate Agencies Limited [2000] 1 ALL ER 373 at 377J

The Trustees of the Israel Moss Children's Trust v Bandy [2015] UKUT 0276 (LC)

Irvine v Moran [1991] 1 EGLR 261

Sheffield City Council v Oliver [2008] LRX/146/2007 (LT)

DECISION

Introduction

1. This is an appeal by way of review against a decision of the First-tier Tribunal (Property Chamber) (“FTT”) dated 20 April 2016 (with written reasons given on 13 May 2016) determining the fair rent of Flat 5, 7 Pelham Crescent, The Park, Nottingham NG7 1AU (“the appeal property”) at £1,362 per quarter for the purposes of section 70 of the Rent Act 1977 (“the 1977 Act”). The appellant is Ms Josephine Saint who occupies the property under a tenancy agreement dated 14 August 1984.

2. The respondent landlord, Mr Mark Kightley, made an application for the registration of a fair rent on 24 November 2015 specifying a figure of £1,350 per quarter. The existing registered fair rent at that time was £885 per quarter with effect from 25 June 2014. The new application was made on the grounds that there had been a change of circumstances due to improvements, which the landlord stated to be “new central heating, property modifications and décor.”

3. The Rent Officer determined the fair rent at £941.50 per quarter with effect from 18 January 2016, of which £104 per quarter was said to be “attributable to services”. This represented the maximum fair rent as calculated in accordance with the Rent Acts (Maximum Fair Rents) Order 1999 (“the 1999 Order”). The Rent Officer remarked, for information only, that the uncapped rent was £1,300 per quarter.

4. The landlord objected to the rent determined by the Rent Officer and the matter was referred to the FTT. The FTT assessed the fair rent without an oral hearing after inviting written representations from the parties. The FTT inspected the appeal property on 20 April 2016 and gave notice of its decision on the same day. It determined the fair rent at £1,362 per quarter and did not specify any amount for services which it said was “not applicable”. The FTT said that the capping provisions of the 1999 Order “do not apply because [of] 15% exemption”, i.e. in accordance with Article 2(7) of the 1999 Order.

5. The appellant asked the FTT to give reasons for its decision which it did on 13 May 2016. The appellant’s subsequent application to the FTT for permission to appeal its decision was refused on 13 June 2016.

6. The appellant applied to the Tribunal for permission to appeal and the Deputy President granted permission on 20 July 2016 saying that it was arguable that the FTT had failed to give adequate reasons for (i) its assessment of the open market rent; (ii) its deduction for condition; (iii) its decision not to make any allowance for scarcity; (iv) its determination of the uncapped rent disregarding the landlord’s improvements; and (v) its allowance for tenant’s improvements.

7. The appeal proceeded by way of written representations with the agreement of the parties.

The FTT's reasons in support of the decision

8. The FTT noted that works had been undertaken to the appeal property after an inspection by Nottingham Environmental Health Community Protection Department in 2014 under the Housing Act 2004 identified several defects. The FTT said that wall mounted electric heaters had been fitted by the landlord in 2015 and that other improvements had been undertaken, including refitting the kitchen (which the tenant contributed to), some retiling of the bathroom, provision of a fire door to the kitchen, a new hot water cylinder and extractors to the kitchen and bathroom.

9. The FTT then considered the open market value of the appeal property as if it were "let today in the condition that is considered usual for such open market lettings." It did this by having regard to the tribunal's "own general knowledge of market rent levels in the area of Nottinghamshire." It concluded that the likely market rent would be £1,755 per quarter.

10. The FTT then adjusted this rent for what it described as "the differences between the condition considered usual for such a letting and the condition of the actual property as observed by the Tribunal (disregarding the effect of any disrepair or other defects attributable to [Ms Saint])". It deducted £333 per quarter to reflect these differences and made a further deduction of £60 per quarter to allow for Ms Saint's improvements.

11. Having made these deductions the FTT went on to consider whether the rent reflected any scarcity, i.e. whether it was necessary to make an adjustment for the assumption to be made under section 70(2) of the 1977 Act. It concluded that it was not appropriate to do so and therefore determined the fair rent at £1,362 per quarter. This rent was above the maximum allowed under the 1999 Order but the FTT said no cap applied because of the exemption contained in article 2(7) which provides that the maximum fair rent provisions do not apply if because of a change in the condition of the property or the common parts as a result of repairs or improvements (including the replacement of any fixture or fitting) carried out by the landlord, the determined rent exceeds by at least 15% the previous registered rent.

12. The FTT said that the current uncapped rent excluding the landlord's improvements was £1,200 per quarter. The figure including the landlord's works was £1,362 per quarter and so the difference of £162 per quarter was the increase in rent due to those works. As this was greater than 15% (£132.75) of the previously registered fair rent of £885 per quarter, the capping provisions did not apply and the rent to be registered was therefore £1,362 per quarter.

Discussion

13. The FTT owes a general duty to give clear reasons for its decision. As Henry LJ said in *Flannery v Halifax Estate Agencies Limited* [2000] 1 ALL ER 373 at 377J:

“... Fairness surely requires that the parties – especially the losing party – should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know ... whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case.

... the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.”

14. In *The Trustees of the Israel Moss Children’s Trust v Bandy* [2015] UKUT 0276 (LC) the Deputy President, Martin Rodger QC, said at [11] that when the FTT was requested by a party to give reasons for its decision when determining a fair rent:

“... the reasons need not be elaborate or lengthy but they must be intelligible and deal with the substantial points which have been raised. Having read the reasons the parties should be able to understand why the decision had been reached.”

Any such explanation will require some “working through” and the Deputy President said that what this will amount to in any individual case:

“... will depend on the nature of the issue and the evidence. Often the FTT will have been provided with little or no relevant evidence, but it is still required to explain how and why it reached its own determination. It must avoid the appearance of simply picking figures out of the air, but it should be able to achieve that without going into any greater detail than the subject matter requires.”

15. In this appeal the appellant finds herself facing a rent increase of 54% above the previous registered fair rent and 45% above the figure determined by the Rent Officer. The FTT’s determination (£1,362 per quarter) is also higher than the figure which the landlord wanted the Rent Officer to register (£1,350 per quarter). In these circumstances it is incumbent on the FTT to give a full and clear explanation of how it arrived at its determination of the rent.

16. The FTT’s determination of the open market value of the appeal property in a “usual” condition was £1,755 per quarter based upon what is described as its “own knowledge of market rent levels in the area of Nottinghamshire.” The FTT did not specify what it meant by usual condition, either in terms of repair, decorative condition or the type of amenities that were offered, e.g. central heating or double glazing. Nor did the FTT give any details of the knowledge upon which it relied or whether it took account of, and if so how, the four comparable flats in 7 Pelham Crescent referred to in the landlord’s written representations, or whether, and if so how, it took account of the Rent Officer’s comment that the uncapped rent was £1,300 per quarter. This does not appear to be a case, such as *The Trustees of the Israel Moss Children’s Trust*, where the FTT had been provided with “little or no relevant evidence” (or at least, if it considered the comparables put forward by the landlord, and the opinion of the rent officer, to be irrelevant, it was necessary to explain why).

17. I do not consider that the FTT’s bald reliance on its unspecified local knowledge is sufficient to enable the appellant to understand how the FTT reached its decision.

18. The FTT reduced the rent by £330 per quarter to reflect the difference between the “usual” condition of such a flat and the condition of the appeal property. In doing so it said it had disregarded the effect of any disrepair or other defects attributable to Ms Saint. It did not explain how this figure was obtained or what items of disrepair existed or were attributed to the appellant. I note that the FTT was only provided with a copy of one (unspecified) page of the tenancy agreement. I have had the benefit of seeing a complete copy of the 1984 agreement and from the FTT’s description of the one page it had seen it seems likely that this was the front page. The FTT was presumably unaware (at least from the wording of the document) of the parties’ repairing obligations. For instance the FTT noted the deteriorating condition of some original windows to the flat but it is not clear whether they attributed this disrepair to the landlord or the tenant. This was worthy of comment as it is the tenant’s responsibility to repair the windows under clause 2(c) of the tenancy agreement, although that obligation is qualified by the landlord’s statutory implied obligation under section 11 of the Landlord and Tenant Act 1985 to keep the structure and exterior of the dwelling in repair. The windows are part of the exterior of the flat so it was relevant for the FTT to explain what assumptions it had made about them (See *Irvine v Moran* [1991] 1 EGLR 261; *Sheffield City Council v Oliver* [2008] LRX/146/2007 (LT))

19. The FTT’s adjustment of £60 per quarter for tenant’s improvements is also unexplained either in terms of what those improvements were or how it had valued them. There was a clear dispute between the parties about what improvements had been done, why and at whose cost. The FTT should have explained how it had resolved this dispute and what assumptions it had made in deriving its figure of £60 per quarter. This is especially important given the FTT’s subsequent adjustment of £162 per quarter in respect of the exclusion of “the works completed”. That figure is the value of the change in the condition of the appeal property due to repairs or improvements (including the replacement of any fixture or fitting) carried out by the landlord. The FTT did not explain whether it has accepted the list of improvements said to have been undertaken by the landlord in his written representations or whether, and if so how, they took account of the appellant’s argument about, for instance, the poor efficiency of fittings installed by the landlord and the alleged need for the appellant to replace the landlord’s newly-installed hot water cylinder because of its inadequate capacity.

20. The FTT gave no reason why it was satisfied, without reference to any evidence, that it was “not appropriate to make any deduction for scarcity”. It explained that the question of scarcity required consideration of “whether the number of persons genuinely seeking to become tenants of similar properties in the wider area of Leicestershire on the same terms other than rent is substantially greater than the availability of such dwellings.” But it provided no evidence or analysis of that number other than a descriptive passage about the general view of landlords that such scarcity did not exist. It is possible that the FTT referred to Leicestershire instead of Nottinghamshire by mistake but, if not, it failed to explain why the “wider area of Leicestershire” was relevant.

Disposal

21. The FTT’s decision lacks sufficient detail to explain to the appellant how it arrived at its determination of the fair rent under the changed circumstances asserted by the landlord. I therefore allow the appeal and remit the matter to the same FTT to explain in greater detail how it arrived at its original decision on the matters set out above.

Dated: 31 October 2016

A J Trott FRICS
Upper Tribunal (Lands Chamber)