



Neutral Citation Number: [2024] UKUT 0091 (LC)

Case No: LC-2023-584

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: CH1/43UH/MNR/2023/0115

5 April 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RENT DETERMINATION – Assured Shorthold Tenancy - First-tier Tribunal decision to restrict rent increase because of disputed condition of property – decision made on the papers – quantum of adjustments not explained – s.14, Housing Act 1988 – appeal allowed – rent redetermined – request for postponement refused

BETWEEN:

JOHN H W ANDERSON

Appellant

-and-

IGORS KOKINS & TATJANA KOKINA

Respondent

62 Swan Walk,
Shepperton,
Surrey TW17 8LY

Martin Rodger KC, Deputy Chamber President and Diane Martin MRICS FAAV

28 March 2024

The appellant represented himself
Mr Romans Fomins (lay representative) for the respondents

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The following cases are referred to in this decision:

Onyiliagha v You Move Lets Ltd [2023] UKUT 199 (LC)

Peabody Trust v Welstead [2024] UKUT 41 (LC)

1.

Background

1. The appellant landlord, Mr Anderson, appeals the decision of the First-tier Tribunal Property Chamber (“the FTT”) on a reference for the determination of a new market rent under sections 13 and 14 of the Housing Act 1988, for 62 Swan Walk, Shepperton. Neither party was legally represented at the hearing of the appeal but Mr Romans Fomins, who introduced himself as a friend of the respondents and who clearly has some familiarity with legal procedure, acted as representative for the respondent tenants, Mr Kokins and Ms Kokina. For simplicity we will refer to the parties as the landlord and the tenants.
2. Permission to appeal the FTT’s decision, which was issued with reasons on 6 June 2023, was granted by this Tribunal.

The facts

3. 62 Swan Walk is a two bedroom flat on the second (top) floor of a block of flats within a gated riverside development in Shepperton, built in the 1990s. The accommodation comprises a hall, living room with balcony, kitchen, main bedroom with ensuite bathroom, second bedroom and family bathroom. It has gas fired central heating and double glazed windows.
4. Screenshots and photographs submitted show that the block is set back from the river, from which it is separated by another block, so does not benefit from any significant riverside views. Flat 62 is on the west end of the block and appears to have a view westwards over the adjacent Walton Bridge. The development includes communal grounds and off-street parking.
5. The flat was refurbished ahead of the letting to the tenants on 9 January 2016, which included the provision of new carpets, curtains and white goods – in particular a washing machine, fridge-freezer, hob and extractor. The assured shorthold tenancy agreement contains the usual repairing obligations, clause 4.1.15 requiring the tenants to “Keep the property including all of the landlord’s machinery and equipment in good and tenantable condition, repair and decorative order (reasonable wear and tear, items for which the landlord is responsible to maintain, and damage for which the landlord has agreed to insure, excepted).” Clause 4.3.18 requires them to report any suspected faults with the appliances to the landlord. Clause 4.4.7 makes reference to an inventory, although if there was one it was not made available to us.
6. Clause 5.9. of the tenancy agreement incorporates section 11 of the Landlord and Tenant Act 1985, which, by section 11(1) requires the landlord:
 - “(a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),
 - (b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other

fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and

(c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.”

7. At section 11(1)(b) the statute draws a distinction between installations for the supply of water, gas and electricity (including basins, sinks, baths and sanitary conveniences) all of which are within the landlord’s obligation and must be kept in repair and proper working order, and other fixtures, fittings and appliances which make use of water, gas or electricity, such as cookers, washing machines and refrigerators, to which the landlord’s statutory obligation does not apply. The effect of that distinction in this case is that the landlord was under no obligation to keep the white goods in the kitchen in good and tenable condition and repair. But nor were the tenants, because the agreement also included a covenant by the landlord to insure his own fixtures and fittings which caused them to fall outside the tenants’ obligation under clause 4.1.15.
8. On 3 March 2023 the landlord served notice on the tenants under section 13(2) of the Housing Act 1988 proposing a new rent of £1,700 per month to take effect from 9 April 2023. The existing rent of £1,250 per month had remained unaltered since the letting commenced in 2016, although from 2021 onwards the landlord had made three previous unsuccessful attempts to serve notices proposing an increase. Only the third of these notices had been acknowledged by the tenants and been referred to the FTT. We were told that the parties had exchanged written statements and that the notice was considered on 6 February 2023 either at a case management hearing or at a mediation, but that the FTT had concluded that it had no jurisdiction to determine a rent because of some unexplained error relating to service.
9. On 6 April 2023 the tenants referred the fourth and final notice of increase to the FTT under section 13(4)(a) of the 1988 Act seeking a determination of the rent under section 14. Their application made use of the FTT’s standard form and, under the heading of “improvements”, they stated that they had had to replace the carpets because of a water leak from the windows and had also replaced the washing machine. They made reference to outstanding repairs to the extractor over the hob, which was not working, and the fridge from which liquid/condensation was leaking. The tenants also stated that the central heating did not work because of a problem with the remote control unit, which the landlord had refused to replace unless they paid their rent arrears, causing them to purchase an oil radiator and electric heater.
10. Before knowing the landlord’s response to the facts stated in the application the FTT directed that the matter would be determined on the papers without a hearing “...unless a party objects in writing to the Tribunal ...within 7 days of the date of these Directions.” The directions also stated that the FTT would not inspect the property but would seek to view it on the internet and, if it was considered necessary, carry out an external inspection.
11. The directions required the landlord to provide a statement of his case by 12 May, to which the tenants were to respond by 26 May. No provision was made for the landlord to respond to the tenants’ rent appeal statement and the only notice he would have of the

tenant's case would therefore be the material provided in the original application of 6 April.

12. The landlord's statement included some comparable evidence of asking rents in the locality. He stated that the flat had been refurbished with new appliances in 2016 and that the tenants had been the only occupants since then. In the section on disrepair he stated simply "No disrepair or defects – all appliances work!".
13. The tenants' response included notes running to 16 paragraphs which had not been included with the original application (although the landlord may have seen an earlier version of the same material in December 2022 in connection with a previous section 13 reference (see below). These stated that the outstanding repairs and replacements they had made were necessary because the refurbishment in 2016 had been done with cheap materials. The carpet was of cheap quality and had been damaged during the first week of the letting by water from a leaking window. It was six and a half years old and worn out, but the landlord refused to replace it so the tenants had spent £1,600 on a replacement carpet in June 2022. Receipts were provided for the new carpet and for a new washing machine, purchased in May 2022 for £379, and two heaters purchased in November and December 2022 for £418. Screenshots were provided of text exchanges between the parties in December 2022 concerning the need for a new remote control unit to operate the central heating system. The tenants also stated that the neighbouring Flat 63 had recently been let in good condition for £1,450 per month.
14. Neither party had requested an oral hearing of the reference and the FTT panel of three surveyor members determined the rent on the papers at £1,390 per month. A statement of reasons was provided with the decision notice of 6 June 2023 in which the FTT explained that the market rent for the property in letting condition was assessed at £1,600 per month. From what they had read the panel concluded that "...the Tenants were effectively being denied the use of the central heating system by the Landlord who has refused to repair or replace a control. None of the other statements made by the Tenants had been contradicted or countered by the Landlord." On that basis deductions were made from the base rent for lack of working central heating (£160), defective white goods (£10), tenants' replacement of damaged carpets (£30) and tenants' provision of a washing machine (£10). The FTT said that it had regard to the comparables provided and used its own judgement and knowledge of rental values in Shepperton. No explanation was given for the quantum of these adjustments.
15. On 10 July 2023 the landlord sought permission to appeal. Amongst the points he made was that he had assumed that a statement in which he addressed the tenants' complaints and which he had submitted to the FTT in December 2022 in connection with the previous unsuccessful notice of increase would have been available to the panel when it made its decision in the current case.
16. The December 2022 statement to which the landlord referred had provided a rebuttal of the tenants' complaints about the condition of the appliances and photographic evidence of the condition of the flat on letting. Since the current notice and reference followed so closely after the hearing on 6 February 2023, the landlord had assumed that all the previously submitted information would be considered by the panel along with his latest statement.

17. The application for permission to appeal was refused by the FTT but permission was eventually granted by this Tribunal on the following grounds:
 1. Procedural irregularity – The FTT made significant deductions from the starting rent of the property based on disputed allegations that the carpets, central heating control and other installations in the property were in a state of disrepair or had been replaced at the tenants’ expense. But it is not clear how the FTT was able to determine responsibility for the suggested problems without conducting a hearing.
 2. Sufficiency of reasons – The FTT did not explain how it arrived at its starting rent of £1,600 or how it was consistent with the evidence relied on by the applicant of a two bedroom flat in the same building at a rent of £1,750.
18. The tenants chose not to submit any response to the appeal, but Mr Kokins appeared at the hearing and was permitted to participate through his lay representative.
19. In granting permission to appeal the Tribunal stated that if the appeal was successful the matter would be remitted to the FTT for redetermination. Depending on the view we take of the first ground this may be unnecessary and with additional material provided by both parties during the hearing we may be able to make our own determination. This option was supported by the landlord but resisted by Mr Fomins on behalf of the tenants. We will return to it later.

Rent increases under assured periodic tenancies

19. Sections 13 and 14 of the Housing Act 1988 are concerned with increases in rent payable under assured periodic tenancies. Where the landlord under such a tenancy wishes to obtain an increase in rent it must serve on the tenant a notice in a prescribed form specifying the proposed new rent to take effect at the beginning of a specified period of the tenancy (section 13(1)-(2)). The proposed rent will take effect unless the parties agree an alternative figure or the tenant exercises the right conferred by section 13(4) to refer the notice to the appropriate tribunal (in England, the FTT).
20. By section 14(7), where a notice of increase has been referred to the FTT and it has determined a new rent, that rent will take effect from the date specified by the landlord in the notice unless the parties agree on a different date or it appears to the FTT that for the rent to take effect from that date “would cause undue hardship to the tenant”. In that event the FTT may direct commencement of the new rent from a later date, not later than the date of the determination.
21. As the Tribunal has recently pointed out in *Peabody Trust v Welstead* [2024] UKUT 41 (LC) a reference to the FTT of a landlord’s notice of increase given under section 13 is not an appeal by the tenant. That is important because it means that the tenant is under no obligation to present a case which demonstrates that the proposed increase is unjustified (as is usually required of a party who appeals against a decision which would otherwise be binding). All that the tenant is required to do is to refer the notice to the FTT. Nor, for that matter, is there an onus on the landlord to justify an increase. The amount of the increase is placed in the hands of the FTT which must reach its decision having regard to the material and submissions made by the parties.

22. When the FTT receives a referral of a notice under section 13, it is instructed by section 14(1) to determine the rent at which, on certain assumptions, it considers that the dwelling concerned might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy which is on the same terms and for the same periods as the tenancy to which the notice relates, and which would begin at the beginning of the new period specified in the notice.

Submissions by the parties

23. On the first ground of appeal the landlord explained that he had assumed the response he had provided to the tenants' complaints in the previous proceedings in December 2022 would be available to the FTT which decided the current case. He submitted that the deduction of £160 per month for the supposed lack of a working central heating system was disproportionate, and would amount to an allowance of £1,920 a year, a sum sufficient to replace the boiler and controller entirely. He disputed the suggestion that there was anything wrong with the central heating system itself, and said that any problem with the remote control was due to it not being kept clean. He submitted a recent email from the heating engineer who serviced the boiler in December 2022 in which she comments that Mrs Kokina showed her how the controller could be made to work by fiddling with the batteries. That email was not, of course, available to the FTT when it made its determination. He also stated that a new remote control unit was installed by the heating engineer in August 2023 at a cost of £232.51, paid for by the landlord. Mr Fomins confirmed that the controller had been replaced and did not dispute the suggested cost.
24. The landlord also challenged the deduction of £10 per month for supposedly defective white goods. The FTT had rerecorded That the tenants' case was that the fridge, hob and extractor fan did not work properly, but this was an error and the parties agreed that the hob does work (as Mr Fomins confirmed). The landlord explained that the hob extractor does work, but not as effectively as the tenants would like, which may be because the mesh filter has become blocked through lack of cleaning. As for the tenants' complaint that the fridge did not cool food properly and had been leaking, the landlord explained that there was no supply of water to the fridge and any liquid was caused by a failure to keep the drainage tube at the back of the appliance clean.
25. A second deduction of £10 per month was made to reflect the provision by the tenants of a washing machine. The landlord said that this was the second new washing machine required since the start of the letting in 2016, which suggested misuse by the tenants. The washing machine installed at the start of the letting was not new, but was replaced by him after two to three years as it may have been leaking. He also pointed out that the tenants had, and still have, rent arrears of £2,490 and explained that he was unwilling to incur new expenditure until those had been repaid.
26. The FTT made a further deduction of £30 per month for the value of 55 sq m of replacement carpet, paid for by the tenants in May 2022. The landlord explained that the original carpet was of the same quality as he had installed in his own home and confirms that he had paid for the original carpet to be cleaned before the tenants chose to replace it with their own. He referred to damage caused by the tenants at the start of the letting, when they tried to dry out a wet patch with an iron or a hairdryer, and suggested further damage had occurred from the metal feet of their furniture.

27. Immediately before the hearing the tenants submitted photographs of water damage to their new carpet which they explained was caused by water leaking underneath the French windows. This was not in evidence before the FTT and occurred in late 2023 so is not relevant to the rent determination as at 9 April 2023. On the second ground of appeal the landlord initially challenged the FTT's assessment of market rent, before deductions, at £1,600 and considers that the evidence he supplied with his rent appeal statement showed that £1,700 was more realistic. The FTT had wrongly assumed that a one bedroom flat to which he had referred was in the same block and available to rent at £1,250 per month, since that flat was in a different development altogether. They did not refer to his evidence of a two bedroom, two bathroom flat in an adjoining block, overlooking the river, available to rent at £1,750, which the landlord thought supported his proposed rent of £1,700 (although Mr Fomins plausibly suggested that the subject would be worth much less than a newly refurbished river view flat). The tenants had provided no evidence that the neighbouring Flat 63 had recently been let for £1,450. By the end of the hearing, to settle the matter at this level without remitting it to the FTT, the landlord was prepared to accept that the market rent of the flat in new letting condition was £1,600.

Determination

23. The landlord is not assisted in this appeal by his apparent belief that the FTT would have before it the material he had submitted in December 2022 in answer to the tenants' complaints raised in the previous proceedings. A new FTT reference number had been issued and he must have appreciated that these were different proceedings concerned with a different notice of increase. The FTT had made it clear in its directions that the only material it would take into account in determining the new rent would be the material which the parties supplied in their statements of case. He made no reference in his case to the previous proceedings and there was no reason for the FTT to arrange for the previous file to be made available to it. If the landlord made the mistake he relied on in his application for permission to appeal, it can only be because he failed to heed that warning. We therefore make our determination based on the evidence that was submitted by the parties in May 2023 and available to the FTT when it sat in June 2023.
24. The landlord was at fault for failing to provide a detailed response to the tenants' complaints raised in the application of 6 April 2023, but he did make clear in his own statement that he disputed the tenants' suggestion that appliances were not working. His position was as clear as it was concise: "No disrepair or defects – all appliances work!"
25. It would therefore have been obvious to the FTT that the facts about the condition of appliances were disputed. The FTT's directions did not make any provision for the landlord to respond to the tenant's statement in response, in which they took issue with the landlord's denial and provided full details of their complaints. Those were the details which the FTT said had not been "contradicted or countered by the Landlord", but the landlord was given no opportunity to do so and was specifically told that any material not included in the single statement he was permitted to file on 12 May would not be considered. For that reason it was not open to the FTT to rely on the fact that the tenants' detailed complaints were not countered in similar detail. It was unfair and irregular for it to do so and its decision on the disputed issues of fact cannot stand for that reason.

26. Additionally, it is not clear to us how the FTT could have made a determination on the disputed issues of fact without clarifying the facts either by further rounds of written material or by the conventional approach of determining the application at an oral hearing. The same point was made by the Tribunal (Judge Cooke) in *Onyiliagha v You Move Lets Ltd* [2023] UKUT 199 (LC) and it applies equally here.
27. By the end of the appeal hearing the first ground of appeal had largely fallen away. The landlord said that he would accept the FTT's finding that the market rent for the property in marketable condition was £1,600. That was a helpful concession but even without it we would have been satisfied that there was no error in the FTT's assessment of that figure. Once it is appreciated that there was no evidence of a comparable two bedroom flat in the same building, or any similar building without a river view, (a fact that was not clear from the landlord's statement) the FTT's determination of a base rent without specific reference to the properties relied on by the parties ceases to be an issue. Properly explained, as it was to us during the appeal and as it is assumed already to have been understood by the FTT with its local knowledge, nothing in the evidence of asking rents in the locality casts doubt on the FTT's determination that an open market letting would be achieved at a figure lower than £1,600.

Redetermination

28. Once satisfied, as we are, that there is no basis on which the starting point of the FTT's valuation, its figure of £1,600 a month, could be disturbed, there ceased to be any reason why we could not safely make a decision on the adjustments required to reflect tenants' improvements and the condition of the property on 9 April 2023. Mr Fomins asked that we should not make a decision of our own, but he gave no explanation for the tenants' preference for the matter to be remitted to the FTT. We were driven to the conclusion that the only reason was to achieve a further delay. We are not attracted to that course. The FTT would be in no better position than us, having heard both parties' submissions, to assess what deductions are appropriate for those matters than we are.
29. With the benefit of the material on which both parties have now relied, it is clear to us that the deductions made by the FTT were excessive. The question for us is what rent would be agreed by willing parties for this flat in its actual condition (subject to the disregard of tenants' improvements), bearing in mind that in the condition in which it would be expected to be offered to the open market it would have commanded a rent of £1,600.
30. It is obvious that the remote control for the central heating was defective, but there is no evidence that any other part of the system was defective. We are satisfied that willing parties would not agree a deduction of £160 per month, amounting to £1,920 per year, on account of this defect when it could be rectified by purchasing of a new remote control unit for less than £250. Although it must be assumed that the letting is taking place with a defective control, the parties must be taken to know that the problem could be solved at a modest cost (which it must be assumed would be incurred by the tenant and therefore justify some allowance against the open market rent).

31. A deduction of £30 per month for a new carpet is high. The tenants replaced the carpet and the curtains, but the FTT made no deduction for curtains, regarding them as a matter of personal preference. The need for the replacement of the carpet is unexplained and disputed but the replacement was a tenants' improvement which must be disregarded. The proper assumption is not that the flat is being let without carpets, so that the incoming tenant would bear the cost of replacement, but that it is equipped with a six year old carpet, which had been cleaned by the landlord within the last twelve months, but which would inevitably have been somewhat worn. We are satisfied that those circumstances justify an allowance against a rent achieved for a refurbished flat, but that allowance would be unrelated to the cost of replacement.
32. The deduction made by the FTT for defective white goods is not justified on the evidence. Responsibility for keeping the extractor fan and the fridge drain clear of obstruction falls on the tenant and it must be assumed that that responsibility has been complied with. There is no evidence that those appliances were defective for any other reason.
33. An allowance is required for the replacement of the washing machine at the tenant's expense. That is an improvement which must be disregarded and we can see no reason to depart from the FTT's assessment that an allowance of £10 per month is reasonable.
34. Taking these matters (the defective heating control, the worn carpet, and the need to replace the washing machine) in the round we consider that the negotiation for a new letting would result in an agreement for a deduction of £50 a month from the market rent of £1,600, and a rent payable of £1,550 with effect from 9 April 2023. We set aside the decision of the FTT and substitute a determination to that effect.
35. At the conclusion of the hearing Mr Fomins made representations on behalf of the tenants that, should the appeal be successful, the provisions of section 14(7) of the Housing Act 1988 should be applied so that any additional rent payable should not be back dated to 9 April 2023 because of undue hardship that would be caused to them. Undue hardship was not relied on before the FTT, or before this Tribunal and the tenants had previously declined to participate in the appeal. In support of the application Mr Fomins produced copies of a number of bank statements and an anecdotal selection of bills and demands, but these gave an incomplete picture of the tenants' financial affairs and are wholly insufficient to enable us to determine that they would experience undue hardship if their rent is increased for the first time in more than six years with effect from 9 April 2023.

Diane Martin MRICS FAAV

Martin Rodger KC,
Deputy Chamber President
5 April 2024

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.