UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT PAYMENT – whether a rent repayment order may be made against a superior landlord – application to strike out claim for rent repayment order – ss. 40, 41 Housing and Planning Act 2016 – appeal dismissed

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

BETWEEN:

MARTIN JOSEPH RAKUSEN

Appellant

and

MIKKEL JEPSEN (1)
RONAN MURPHY (2) **Respondents**
STUART McARTHUR (3)

Re: Flat 9, Mandeville Court,
Finchley Road,
London NW3 6HB

Martin Rodger QC, Deputy Chamber President

27 October 2020

Hearing conducted by Skype

Tom Morris, instructed by Winckworth Sherwood LLP, for the appellant
Edward Fitzpatrick, instructed by Justice for Tenants for the respondents

The following case is referred to in this decision:

Goldsbrough v CA Property Management Limited [2019] UKUT 311 (LC)

London Corporation v Cusack-Smith [1955] AC 337

Pollway Nominees Ltd v Croydon LBC [1987] 1 AC 79

Urban Lettings (London) Ltd v LB Haringey [2015] UKUT 104 (LC)

Introduction

1. The issue in this appeal is whether a rent repayment order under Chapter 4 of Part 2, Housing and Planning Act 2016 can only be made against the immediate landlord of the tenant in whose favour the order is made.

2. The issue arises in an appeal against a decision of the First-tier Tribunal (Property Chamber) (FTT) issued on 18 December 2019 by which it dismissed an application by the appellant, Mr Rakusen, to strike out an application for a rent repayment order made by the respondents, Mr Jepsen, Mr Murphy and Mr McArthur in respect of rent paid by them during their occupation of rooms in a flat in Finchley. Mr Rakusen was not the respondents' immediate landlord, having let the whole of the flat to a company which then let individual rooms to the respondents.

3. In *Goldsbrough v CA Property Management Limited* [2019] UKUT 311 (LC) this Tribunal (Judge Cooke) determined that an application for a rent repayment order could be made against a superior landlord (in that case the freeholder) despite the applicants never having been in the relationship of landlord and tenant or licensor and licensee with that person. *Goldsbrough* was determined on the basis of written submissions made by a lay representative of the applicants and without any representation from the freeholder. The circumstances of this appeal are not materially different from those in *Goldsbrough* and the FTT rightly took the view that it was bound the Tribunal's decision. Nevertheless, having heard full argument and having concluded that an appeal would have a realistic prospect of success, the FTT granted permission to appeal to enable the issue to be considered again by the Tribunal with the benefit of submissions from both sides.

4. At the hearing of the appeal, which was conducted remotely, the appellant was represented by Tom Morris and the respondents by Edward Fitzpatrick. I am grateful to them both for their assistance.

The facts

5. The application out of which this appeal arises was an application to strike out the respondents' claim for a rent repayment order on the grounds that it had no reasonable prospect of success. The application was supported by a witness statement made of Mr Rakusen which the FTT accepted as describing the relevant factual background, although it made no findings of fact of its own. For the purpose of the appeal I will assume that the facts stated in Mr Rakusen's witness statement are correct.

6. The appeal concerns Flat 9 at Mandeville Court, Finchley Road, London, NW3. In 2006 the freeholder of the building granted a lease of the flat to Mr Rakusen for a term of 999 years. In 2013 he assigned the lease to himself and his partner Ms Sarah Field. For a time the couple lived in the flat as their home before moving elsewhere and deciding to let the flat.

7. On 31 May 2016 Mr Rakusen granted a tenancy of the whole of the flat to Kensington Property Investment Group Ltd ("KPIG"), a company to which he had been introduced by his letting agents, Hamptons. The tenancy was for a term of 36 months, less one day, at a rent of £2,643.33 a month. The agreement appears to be a standard form of short term residential tenancy under which Mr Rakusen is responsible for keeping the property in repair. One modification of more conventional terms is found in clause 7.5 which provides that "the Tenant shall have the right to sublet each unit individually or the whole as part of the day to day management of their business".

8. Later in 2016, and at different times, KPIG entered into separate written agreements with the three respondents, each of whom was granted the right to occupy one room in the flat. The documents were described as licence agreements and made provision for the payment of a licence fee. The aggregate sum paid by the three respondents was £2,297 per month.

9. The evidence does not show how many rooms the flat contains, nor how many other individuals were granted the right to live there with the respondents. There is material which suggests that by November 2018 there were four people living in the flat, and Mr Rakusen acknowledges in his witness statement that it appears to have been occupied by more than three people forming two or more households. On that basis, as he accepts, the flat was a house in multiple occupation ("HMO") and was required to be licensed under Part 2 of the Housing Act 2004 (the 2004 Act).

10. In November 2018 Hamptons informed Mr Rakusen that KPIG wished to apply to the local housing authority for an HMO licence. The evidence does not show if such an application was ever made but no licence was ever granted and Mr Rakusen did not renew KPIG's tenancy at the end of the fixed term in May 2019.

11. Mr Rakusen's evidence to the FTT was that he had become aware of the licence agreements entered into by KPIG only after the applications for rent repayment orders were made. He denied that he had committed an offence under section 72(1), 2004 Act, because he was not a person having control of the HMO or a person managing it. Alternatively, he relied on the defence provided by section 72(5)(a), 2004 Act, that he had a reasonable excuse for having control or management of an unlicensed HMO.

The proceedings

12. On 27 September 2019 the respondents applied to the FTT under section 41, 2016 Act for rent repayment orders totalling £26,140 against Mr Rakusen and Ms Field. The grounds for making the application were stated to be "control or management of an unlicensed HMO" and in support of that application the respondents provided copies of the agreements between themselves and KPIG.

13. In their response to the application Mr Rakusen and Ms Field invited the FTT to exercise its power under rule 9(3)(e) of the Property Chamber Rules to strike out the whole of the application on the grounds that there was no reasonable prospect of it succeeding. They asserted that a rent repayment order could only be made against the immediate landlord of the person who made the application. Mr Rakusen was not the immediate landlord of the

applicants, and Ms Field had never been party to any agreement in respect of the property with either KPIG or the applicants, so no order could be made against either of them.

14. The FTT directed that the application to strike out the claim should be determined as a preliminary issue and, at the applicant's request, at a hearing. On 18 December 2019 the FTT issued its decision. It struck out the application against Ms Field on the grounds that there was no reasonable prospect of it succeeding against her. It refused to strike out the application against Mr Rakusen, as it was bound by the decision of this Tribunal in *Goldsbrough.* The FTT nevertheless granted permission to appeal.

15. There has been no appeal against the FTT's decision in relation to the claim against Ms Field. The sole issue in the appeal is therefore whether, as the Tribunal found in *Goldsbourgh*, it is not a requirement of an application under section 41, 2016 Act that the landlord against whom the application is made is or has been the applicant's immediate landlord.

The relevant statutory provisions

16. Rent repayment orders were first provided for by section 73, 2004 Act, as a sanction if an HMO which was required to be licenced under Part 2 of the Act was not so licenced. The scope of the orders was significantly expanded by Chapter 4 of Part 2, Housing and Planning Act 2016 (the 2016 Act). Additional housing offences now trigger the right to apply for an order and the process has been simplified, notably by allowing an order to be made without the need for the landlord first to be convicted of the relevant offence.

17. The contrast on certain points of detail between the old and the new provisions is relevant to the proper construction of the 2016 Act, so I will begin by referring to the 2004 Act.

18. A rent repayment order under section 73, 2004 Act is an order requiring "the appropriate person" to pay sums paid during the period the offence of having control or managing an unlicensed HMO was committed (section 73(5)). The sum to be paid by the appropriate person is either an amount of housing benefit or universal credit in the case of a local housing authority, or periodical payments paid to the person having control of or managing the HMO in the case of an application made by the occupier.

19. The "appropriate person" is defined in section 73(10) and means in relation to any payment of universal credit, housing benefit or periodical payment payable in connection with occupation of a part of an HMO, "the person who at the time of the payment was entitled to receive on his own account periodical payments payable in connection with such occupation." Periodical payments are defined by reference to welfare regulations but they include rent or other payments in respect of a licence to occupy a dwelling.

20. Section 50, 2016 Act made amendments to the 2004 Act, the effect of which is that section 73 of the 2004 Act now applies only to HMOs in Wales, while the provisions of Chapter 4 of Part 2 to the 2016 Act apply in England. As section 13(1) explains, Part 2 of the 2016 Act "is about rogue landlords and property agents" and the extension of rent repayment

orders provided for by Chapter 4 is one of a battery of measures intended to discourage and penalise the activities of such landlords.

21. In England rent repayment orders are now provided for by sections 40 to 52 of the 2016 Act. So far as relevant section 40 provides as follows:

> "40 Introduction and key definitions
>
> (1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.
>
> (2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—
>
> (a) repay an amount of rent paid by a tenant, or
>
> (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy."

A list of seven offences to which Chapter 4 applies is provided in section 40(3). Two involve violence or harassment: using violence to secure entry contrary to section 6(1), Criminal Law Act 1977, and unlawful eviction or harassment of occupiers contrary to section 1(2), (3) or (3A), Protection from Eviction Act 1977. Four are offences under the 2004 Act: failure to comply with an improvement notice or a prohibition order, or being on control or management of an unlicensed HMO or house. The last offence is breach of a banning order contrary to section 21, 2016 Act.

22. Section 41 deals with applications for rent repayment orders. So far as is material it provides as follows:

> "41 Application for rent repayment order
>
> (1) A tenant or a local housing authority may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.
>
> (2) A tenant may apply for a rent repayment order only if —
>
> (a) the offence relates to housing that, at the time of the offence, was let to the tenant, and
>
> (b) the offence was committed in the period of 12 months ending with the day on which the application is made.
>
> (3)-(4) [Applications by local housing authorities]"

23. Section 43 deals with the making of rent repayment orders and provides by sub-section (1):

> "(1) The First-tier Tribunal may make a rent repayment order if satisfied, beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applies (whether or not the landlord has been convicted)."

24. Section 44 is concerned with the amount payable under a rent repayment order made in favour of a tenant. By section 44(2) that amount "must relate to rent paid during the period mentioned" in a table which then follows. The table provides for repayment of rent paid by the tenant in respect of a maximum period of 12 months.

The appeal

25. It is clear that under section 73(5), 2004 Act only the appropriate person i.e. the person entitled to receive, on his own account, the rent or other periodical payments paid in connection with the occupier's occupation of part of an HMO could be made the subject of a rent repayment order (section 73(10)). There would therefore have been no question of a successful claim against a superior landlord like Mr Rakusen. He was not entitled to receive rent in connection with the respondents' occupation of any of the rooms in the flat. His entitlement was to the rent of the whole flat, irrespective of the occupation of any part of it by an occupier.

26. On behalf of the appellant, Mr Morris submitted that this characteristic of rent repayment orders had not changed and that, although it has been repackaged, the law in England remains as it was before the 2016 Act and as it still is in Wales.

27. Mr Morris argued that the key to the appeal was found in section 40(2), 2016 Act. Although section 40(1) confers a power to make a rent repayment order "where a landlord has committed an offence", those words are simply introductory and it is section 40(2) which explains what a rent repayment order is. In the case of an order made on an application by a tenant it is an order requiring "the landlord under a tenancy of housing in England to (a) repay an amount of rent paid by a tenant". The meaning was clear. The Oxford English Dictionary defines the word "repay" as "to pay back (money)". Mr Morris suggested that as a matter of ordinary English, money can only be paid back where it was paid directly to the person making the repayment. It involves the return of a payment by the payee to the payor.

28. That this was the meaning of section 40(2)(a) was confirmed by the contrasting language of section 40(2)(b) which describes a rent repayment order made in favour of a local housing authority. It is an order requiring the landlord under a tenancy in England to "pay to a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy," Mr Morris suggested that the use of the verb "to pay", rather than "to repay", was appropriate because the sum in question would ordinarily have been paid by the local housing directly to the tenant and then paid as rent by that tenant to their landlord. In those circumstances, the landlord could not be ordered to "repay" any sum to the local housing authority, since the award of universal credit would not have been paid to the landlord directly by the local housing authority.

29. Giving "repay" its ordinary meaning, Mr Morris submitted, a rent repayment order could only be made against the person who received the rent paid by the occupier of the HMO. That person could only be the occupier's immediate landlord and could not be a superior landlord. If Parliament had intended a superior landlord to be the subject of an order in favour of an occupier who was not that landlord's immediate tenant, it would have defined a rent repayment order under subsection 40(2)(a) as an order requiring *a* landlord under a tenancy of housing to *pay* an amount in respect of rent paid by a tenant.

30. I do not find Mr Morris's restrictive reading of section 40(2) convincing. As a matter of language there is nothing incongruous in referring to a sum being "repaid" by a person who was not the original payee. The essence of a repayment is that it is a sum paid back to the person who originally made the payment. I do not regard it as indispensable that the person making the repayment should be the same person as received the original payment, or that only two parties should be involved, although both may often be the case.

31. Nor do I think the contrasting language of subsections 40(2)(a) and (b) is supportive of Mr Morris's argument. As Mr Fitzpatrick pointed out, universal credit is not paid by local housing authorities (unlike housing benefit, which was). I agree that it would not be apt to refer to a sum originally paid in respect of universal credit as being "repaid" to an authority, but that is because the authority was not the original payer (central government was), and not because the sum might first have been paid by the tenant from money provided by the authority.

32. As a matter of first impression I nevertheless agree with Mr Morris that the language of section 40(2)(a) is suggestive of a single direct relationship of landlord and tenant. Unqualified references to "the landlord", "a tenancy", and "a tenant" invite the assumption that the landlord and tenant referred to are parties to the same tenancy. But closer consideration is required of the language of sections 40 and 41 as a whole, and of the expansion of the rent repayment regime to a catalogue of additional offences, as well as of the contrast between the 2016 and 2004 Acts, before concluding whether that first impression is reliable.

33. I will begin with the language of section 40.

34. The purpose of subsection 40(1) is to prescribe the circumstances in which the FTT will have power to make a rent repayment order. It identifies one triggering event, namely, that "a landlord has committed an offence to which this Chapter applies." Those offences are listed in subsection 40(3) and I will return to them shortly.

35. There was debate about the use of the definite and indefinite articles in section 40. In subsection 40(1) the indefinite article is used in "where *a* landlord has committed an offence", but I do not regard that as particularly significant in defining the scope of rent repayment orders. To have said "where *the* landlord has committed an offence" would not have been correct as no particular landlord has yet been identified, nor has any tenancy been mentioned which could be used to identify a particular landlord.

36. Subsection 40(2) then defines a rent repayment order as an order requiring "the landlord under a tenancy of housing in England" to make a payment. The use of the definite article is appropriate because the landlord in question has already been identified: it is the landlord who has committed the offence mentioned in subsection 40(1) who may be required to make the payment. The use of the definite article is also necessary as it links the person against whom an order may be made to the offence.

37. The landlord in subsection 40(2) is the landlord under "a tenancy". Once again, the indefinite article is required because no particular tenancy has yet been identified.

38. The draftsman then had a choice in subsection 40(2)(a). A rent repayment order might have been described either as an order to repay an amount of money to "a tenant" or to "the tenant". Either would have been grammatically correct, but the choice is potentially significant because of the different meanings which the two words convey. Had the draftsman chosen to define a rent repayment order as "an order requiring the landlord under a tenancy in England to repay an amount of rent paid by the tenant" it would have been clear that the landlord and tenant in question are parties to the same tenancy, in an immediate relationship of landlord and tenant. But the draftsman did not make that choice. Instead, a rent repayment order is defined as "an order requiring the landlord under a tenancy in England to repay an amount of rent paid by a tenant."

39. The indefinite article used in subsection 40(2)(a), "a tenant", means that there is no necessity for an immediate relationship between the landlord under the tenancy and the tenant to whom an amount of rent is to be repaid. A further condition is introduced in section 41(2)(a): a tenant may only apply for an order against a person who has committed an offence if the offence relates to housing that, at the time of the offence, was let to the tenant. But, for the purpose of defining what a rent repayment order is, all that is said by subsection 40(2)(a) about the recipient of the payment is that they are a tenant; grammatically at least it is possible that the landlord who is to make the payment may not be the immediate landlord of the tenant who is to receive it.

40. That possibility must be considered in the light of subsection 40(2)(b). A rent repayment order under subsection 40(2)(b) is an order requiring "the landlord under a tenancy" to pay to a local housing authority an amount in respect of universal credit "paid (to any person) in respect of rent under the tenancy". I agree with Mr Morris that for this purpose there is a direct connection between the landlord and the rent in respect of which universal credit has been paid. The tenancy under which rent was payable and in respect of which an award of universal credit was made is also the tenancy under which the person who is subject to the order is the landlord. Mr Morris submitted that the two limbs of subsection 40(2) ought to be interpreted in such a way that the landlord in each case stands in the same relationship to the tenant, so that in both cases the landlord and tenant should be required to be in a direct relationship. While subsection 40(2)(b) clearly has that effect, rent repayment orders in favour of local housing authorities are different from those in favour of tenants in a number of respects, and they are dealt with separately in sections 44 and 45. While I agree that the consistency between subsections 40(2)(a) and (b) would be a pointer towards the construction for which Mr Morris argues, it is less clear that the same relationship must exist between the rent and the landlord under both limbs.

41. That brings me to subsection 40(3), which identifies the offences to which Chapter 4 applies. The commission of an offence to which Chapter 4 applies is the only condition for the making of a rent repayment order identified in section 40. In the absence of some restriction elsewhere in Chapter 4 the statement in subsection 40(1) that the FTT has power to make an order "where a landlord has committed an offence to which this Chapter applies" ought to be a useful pointer towards the scope of the power. It is therefore instructive to consider whether the offences listed in subsection 40(3) can be committed by someone who is not the immediate landlord of the occupier of housing in England.

42. Nine offences under four different statutes are identified in subsection 40(3).

43. The offence of using or threatening violence for the purpose of securing entry into any premises on which someone who is opposed to the entry is present, contrary to section 6(1), Criminal Law Act 1977, is capable of being committed by any person who acts without lawful authority. It is not necessary that the person using or threatening violence should have any interest in the premises, but the offence could certainly be committed by someone who does, including a superior landlord.

44. The same is true of the offence, contrary to section 1(2), Protection from Eviction Act 1977 (the 1977 Act), of unlawfully depriving or attempting to deprive a residential occupier of any premises of their occupation, which may be committed by any person.

45. Two other offences under the 1977 Act are included in subsection 40(3). The first, the offence of doing acts likely to interfere with the peace or comfort of a residential occupier contrary to subsection 1(3), may again be committed by any person. The second is more narrowly targeted. It is an offence, contrary to subsection 1(3A), 1977 Act, for the landlord of a residential occupier or an agent of the landlord to do acts likely to interfere with the peace or comfort of the occupier or members of their household, knowing that the conduct is likely to cause the occupier to give up occupation of the premises or refrain from exercising any right. Subsection 1(3C) explains that:

> "In subsection (3A) above "landlord", in relation to a residential occupier of any premises, means the person who, but for—
>
> (a) the residential occupier's right to remain in occupation of the premises, or
>
> (b) a restriction on the person's right to recover possession of the premises,
>
> would be entitled to occupation of the premises and any superior landlord under whom that person derives title."

In other words, for the purpose of subsection 1(3C), the meaning of "landlord" is clarified so as expressly to include not only the immediate landlord of the occupier but also a superior landlord.

46. The next four offences identified in subsection 40(3) are all offences under the 2004 Act. They are:

1. failing to comply with an improvement notice, contrary to section 30(1);
2. failing to comply with a prohibition order, contrary to section 32(1);
3. having control or management of an unlicensed HMO, contrary to section 72(1); and
4. having control or management of an unlicensed house, contrary to section 95(1).

47. An improvement notice is a notice served by a local housing authority requiring the person on whom it is served to take specified remedial action in respect of a hazard found to exist on residential premises (sections 11(2) and 12(2), 2004 Act). Section 18 and Schedule 1 make provision for the service of improvement notices.

48. Where the premises in question are licensed under Parts 2 or 3 of the 2004 Act, any improvement notice must be served by the local housing authority on the licence holder (para.1, Sch.1, 2004 Act). Where the premises are not licensed an improvement notice may be served, in the case of a dwelling, on the person having control of the dwelling, and in the case of an HMO, either on the person having control of the HMO or on the person managing it (para.2, Sch.1, 2004 Act).

49. A licence under Parts 2 or 3 of the 2004 Act may be held by a person who is not the immediate landlord of the occupier of residential premises. In the case of an HMO required to be licensed under Part 2, section 64 lays down no ownership condition for the grant of a licence. The local housing authority must be satisfied that the applicant is a fit and proper person to be the licence holder, and that, out of all the persons reasonably available to be the licence holder in respect of the house, they are the most appropriate person. In the case of a house required to be licensed under Part 3, section 88 is to the same effect. In both cases it is to be assumed that the person having control of the house is a more appropriate person to be the licence holder than a person not having control of it (ss.66(4) and 89(4)).

50. The expression "person having control" is defined in section 263(1), 2004 Act. It is relevant to the issue in this appeal in a number of different respects. It is used to identify the most appropriate person to hold a licence under Parts 2 or 3, 2004 Act. Where a licence has been granted the licence holder will be the person on whom an improvement notice will be served, and who may therefore commit the offence under section 30(1). It is also used to identify one of the two categories of persons who may commit the offences under section 72(1) and 95(1) of having control or management of an unlicensed HMO or house. The other is the "person managing", an expression defined in section 263(3).

51. So far as is material, section 263 says:

> "263 Meaning of "person having control" and "person managing" etc.
>
> (1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–

(a) receives (whether directly or through an agent or trustee) rents or other payments from–

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

52. Section 263(1) is divided into two limbs: if a house is let at a rack rent the person having control is the person who receives the rack-rent; if the house is not let at a rack rent (for example because the only letting is at a ground rent) the person having control is the person who would receive the rack-rent if the premises were subject to a letting at a rack rent. The formula used in the definition has a considerable history going back at least to 1847 (as Lord Bridge of Harwich explained in *Pollway Nominees Ltd v Croydon LBC* [1987] 1 AC 79, at 91C-92C). The purpose of the definition is to identify the person (or group of persons who collectively have the relevant interest) who may be made subject to a statutory obligation to undertake work or make a contribution to the cost of public works.

53. In *London Corporation v Cusack-Smith* [1955] AC 337, 357-358 Lord Reid considered a chain of leases and subleases where several were at a rack rent and was of the opinion that more than one person could be in receipt of a rack rent at one time. That case concerned a purchase notice under section 19(1), Town and Country Planning Act 1947, and turned on the second limb of the definition of "owner" (which adopted the same formula as "person having control") because the land in question was not let at a rack rent. Lord Reid said:

> "A, the freeholder, may let to B for a rent of £100 which is a rack-rent at the date of B's lease, and later B may sublet to C for a rent of £200 which is a rack-rent at the date of C's lease. It appears to me that then both A and B are entitled to receive a rack-rent of the land. … I am therefore of opinion that there can be more than one "owner" under the first limb of the definition, and that if the freeholder lets at a rack-rent he is and remains an "owner" no matter what his tenant may do.

Interestingly, Lord Reid did not regard the use of the definite or indefinite article as of much significance when considering whether more than one person could be an owner for the purpose of the statutory definition.

54. Where, as in this case, a house is let to a single tenant at its full value, who then sublets the house either as a whole or as individual rooms to different sub-tenants, again at full value, applying Lord Reid's approach both the superior landlord and the intermediate landlord will be in receipt of the rack rent of the premises and will satisfy the definition in section 263(1) of a person having control. In *Urban Lettings (London) Ltd v LB Haringey* [2015] UKUT 104 (LC), at [43], it was accepted that more than one landlord could be in receipt of rack rent at the same time. In that case a rent repayment order made against the immediate landlord of the occupational tenants although that landlord had only ever had a lease for a short term of only three years. The Tribunal confirmed that it was a person having control and was capable of committing the offence under section 72(1), 2004 Act. The Tribunal was not required to consider whether an order could have been made against the superior landlord but it seems clear that it would also have fulfilled the description of being the person having control.

55. The status of "person managing" is more restrictive. The key qualification is the receipt of rent from the persons who are in occupation (whether directly or through an agent or trustee). Where a superior landlord lets a house to an intermediate landlord who then sublets to tenants or licensees in occupation, ordinarily only the intermediate landlord receives rent from those tenants or licensees. The superior landlord will receive rent from the intermediate landlord, who is not an agent or trustee for the superior landlord, so the superior landlord will not be a "person managing" for the purpose of section 263(3).

56. A local housing authority may therefore serve an improvement notice on a superior landlord in receipt of a rack rent as the person having control of a dwelling or an HMO which is not required to be licensed. A superior landlord may also be a person having control of an unlicensed HMO or of a house which is required to be licensed under Part 3 but which is not so licensed.

57. The offence under section 32(1), 2004 Act, of failing to comply with a prohibition order may be committed by any person who, knowing that a prohibition order has been made, uses the premises in contravention of the order or permits the premises to be so used. A local housing authority which makes a prohibition order must serve copies of it on the persons identified in paragraph 1(2) of Schedule 2, 2004 Act. Those persons include the "owner" of the premises, an expression defined in section 262(7), 2004 Act as meaning the person entitled to dispose of the fee simple of the premises, whether in possession or in reversion (i.e. the owner of the freehold, even if the premises are subject to a lease). The expression also includes a person entitled to the rents and profits of the premises under a lease with an unexpired term of more than 3 years.

58. It follows that each of the offences under the 2004 Act identified in section 40, 2016 Act may be committed by a superior landlord.

59. These possibilities are not theoretical. There was evidence before the Tribunal that the policy of the London Borough of Camden is that licences will not be granted to landlords holding less than a five year term (that being the usual duration of a licence under Part 2 and 3, 2004 Act), and that Camden considers the most appropriate person to be a licence holder in such situations to be the superior landlord. Similarly, when deciding on whom to serve an improvement notice a local housing authority is likely to consider the practicality of the recipient being able to carry out the necessary remedial works. If, as in this case, an intermediate landlord has no significant repairing obligations and no right to carry out major repairs to the building, the local housing authority may well consider that the appropriate recipient of an improvement notice is the superior landlord.

60. The final offence identified in section 40(3) is the offence, contrary to section 21, 2016 Act, of breaching a banning order. A banning order may be made against a person convicted of a banning order offence, and bans that person from letting housing in England. Each of the offences identified in section 40(3), 2016 Act (except the final offence under the 2016 Act itself) is specified in the Schedule to the Housing and Planning Act 2016 (Banning Order Offences) 2018 as a banning order offence. Since, as we have seen, each of those offences may be committed by a superior landlord or other person who is not the immediate landlord of the tenant in occupation, it follows that a banning order may also be imposed on a superior landlord and that the offence of breaching a banning order may be committed by such a person.

61. Section 40(1) makes the commission of an offence to which Chapter 4 applies by "a landlord" the sole jurisdictional criterion for the making of a rent repayment order. In the case of one of the offences (section 1(3A), 1977 Act) superior landlords are specifically mentioned as persons by whom the offence may be committed. Mr Morris submitted that the omission to provide that "landlord" in section 40 includes superior landlord, as had been done in section 1(3C), 1977 Act, should be taken to be restrictive. That is certainly a possible inference but the opposite inference is also possible. The fact that the offence of doing acts likely to interfere with an occupier's peace or comfort is expressly defined in the 1977 Act so as to include superior landlords makes it unlikely that the draftsman of the 2016 Act overlooked the possibility that the offence may be committed by landlords with different interests in the premises. The offence under section 1(3A), 1977 Act, is one which only a landlord (or a landlord's agent) may commit and the absence of any exclusion from subsection 40(3) of superior landlords looks like a deliberate choice not to narrow the categories of offenders, and to make commission of the offence by a landlord at any point in a chain the only jurisdictional gateway to the making of a rent repayment order.

62. Far from narrowing the categories of persons against whom an application for an order may be made, section 41(1) allows a tenant or local housing authority to seek an order against "a person who has committed an offence". Commission of the offence is identified as the only relevant qualifying condition for potential respondents.

63. It is also instructive to consider that the draftsman of section 40 was departing from the approach taken by the draftsman of the 2004 Act when identifying those against whom the original rent repayment order could be made. As we have already seen, under section 73(5), 2004 Act a rent repayment order is an order requiring "the appropriate person" to

make a payment, and that person is defined by section 73(10) in relation to a periodical payment payable in connection with occupation of part of an HMO as the person entitled to receive the payment on his own account in connection with such occupation – in other words, the immediate landlord. It would have been easy enough for the draftsman of section 40 to have followed that model. Some modification would have been necessary to allow for the addition of offences unrelated to HMOs, but a direct connection between the tenant making the periodical payment and the landlord receiving it could have been maintained, for example by defining a rent repayment order in subsection 40(2)(a) as an order requiring the landlord under a tenancy in England to repay an amount of rent paid by "the tenant". In light of the original legislation the choice to define rent repayment orders instead by reference to rent paid by "a tenant" looks like a deliberate choice to widen their scope. The whole purpose of Chapter 4 is to expand the original jurisdiction from a single HMO offence to a much wider range of housing offences. I do not think there is anything improbable in Parliament having intended that the expansion should also expose an additional class of landlords who commit those new housing offences to the risk of a rent repayment order.

64. Finally, I bear in mind that the policy of the whole of Part 2 of the 2016 Act is clearly to deter the commission of housing offences and to discourage the activities of "rogue landlords" in the residential sector by the imposition of stringent penalties. Despite its irregular status, an unlicensed HMO may be a perfectly satisfactory place to live, and the main object of the provisions is deterrence rather than compensation. The scope of the additional jurisdictions conferred on the FTT is defined by reference to the commission of specific offences, with the only qualification identified being that the person committing the offence must be a landlord. I can think of no policy reason why the objective of deterring such offences should extend only to immediate landlords and not to superior landlords. If such a limitation had been intended it could have been made clear, as it was in section 73(1), 2004 Act. The facts of this case are not unusual and the phenomenon of intermediate landlords taking relatively short leases of houses with few repairing responsibilities with a view to subletting them to occupational tenants is sufficiently commonplace to have acquired the recognised label "rent-to-rent". The effectiveness of rent repayment orders would be considerably reduced if the "rogue landlords" whom the orders are intended to deter could protect themselves against the risk of rent repayment by letting to an intermediate while themselves retaining responsibility for licencing and for the condition of the accommodation.

65. The conclusion I have reached, therefore, is that the FTT does have jurisdiction to make a rent repayment order against any landlord who has committed an offence to which Chapter 4 applies, including a superior landlord. There is no additional requirement that the landlord be the immediate landlord of the tenant in whose favour the order is sought. That appears to me to be the natural meaning of the statute and is consistent with its legislative purpose. The only jurisdictional filter is that the landlord in question must have committed one of the relevant offences, and before an order may be made the FTT must be satisfied to the criminal standard of proof that that is the case. Although a narrower interpretation is possible it would involve reading the language as prescribing an additional condition which is not clearly stated, and which would detract from the simplicity and effectiveness of the statutory regime.

66. This conclusion is the same as was reached by Judge Cooke in *Goldsbrough.* In that case applications for rent repayment orders had been made by two tenants of individual rooms in a house against their immediate landlord, CAPM, and against its superior landlords, who were the freeholders of the property. The application was made against the freeholders on the grounds that they were persons in control of an unlicensed HMO. The application against CAPM was on the grounds that it had unlawfully evicted the applicants. The FTT took the view that only CAPM could be a respondent to an application for a rent repayment order as only it was the landlord of the tenants in occupation. The Tribunal disagreed and concluded that the freeholder were also landlords within the scope of Chapter 4. The matter was remitted to the FTT for it to determine whether the freeholders had committed the offence on which the application against them was based. I agree with the Tribunal's decision in *Goldsbrough* and I need mention only one point on which Mr Morris made submissions.

67. Mr Morris took issue with paragraph [35] of the Tribunal's decision which said this:

> "If the only possible respondent were the landlord who held the immediate reversion to the tenant, it would be possible for a freeholder to set up a situation where a rent repayment order could not be made, by first granting a lease of the property to a company that is not in control of, nor managing, the property and is ineligible for an HMO licence, and then having that company grant the residential tenancies."

68. I agree with Mr Morris that it is difficult to see how the company in the example given would not be a person in control of the HMO (as it would presumably be in receipt of a rack rent and would satisfy the description in section 263(1), 2004 Act). But it is not difficult to foresee that an immediate landlord with only a short-term interest and no repairing obligations may be ineligible for an HMO licence. If the superior landlord failed to obtain a licence, and so committed an offence under sections 72(1) or 95(1), 2004 Act, the consequence of the appellant's construction would be that no rent repayment order could be made against anyone. That is not necessarily fatal to the appellant's construction but illustrates how the rent repayment regime would be rendered less effective if he is right.

69. In any event, as Mr Fitzpatrick pointed out, if only the immediate landlord may be the subject of an order, the grant of a short-term tenancy to an insubstantial intermediary through which the premises would then be sublet would remain a route for avoidance of the enforcement of rent repayment orders. A company with no assets other than a short-term lease, which may be not much longer than that granted to the occupational sub-tenants, is not likely to be a promising target for enforcement of a substantial rent repayment order.

Disposal

70. There has been no investigation of the facts in this case and I stress that it has not been established that the appellant has committed any offence. The offence of having control or management of an unlicensed HMO is subject to the statutory defence of reasonable

excuse under section 72(5)(a), 2004 Act. The appellant filed evidence with the FTT in support of his reasonable excuse defence, but coupled it with an application to strike out the claim which he asked to be dealt with at a hearing. Procedurally it would have been much simpler if the FTT had heard the evidence at that hearing and dealt with the defence in its decision, but it did not do so and the application for a rent repayment order must now be referred back to the FTT to be determined.

Martin Rodger QC,

Deputy Chamber President

11 November 2020