UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2022] UKUT 11 (LC)
UTLC Case Number: LC-2021-304

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – RENT PAYMENT – whether a rent repayment order may be made against a director of a company landlord – s.251, Housing Act 2004 – ss. 40, 41, Housing and Planning Act 2016 – appeal dismissed

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

BETWEEN:

KATARZYNA KASZOWSKA AND OTHERS

Appellants

-and-

DOMINIC WHITE

Respondent

Re: 49 Russell Hill Road,
Croydon

Martin Rodger QC,
Deputy Chamber President

13 January 2022

Royal Courts of Justice

George Penny, of Flat Justice, for the appellants

Laura Phillips, instructed by Greenwoods LLP, for the respondent

The following cases are referred to in this decision:

Rakusen v Jepson [2021] EWCA Civ 1150

Sutton v Norwich City Council [2020] UKUT 90 (LC); [2021] EWCA Civ 20

1. The short but important issue in this appeal is whether a rent repayment order under Chapter 4 of Part 2 of the Housing and Planning Act 2016 can be made against the director of a corporate landlord who has himself committed an offence to which Chapter 4 applies.

2. The First-tier Tribunal (Property Chamber) (the FTT) decided on 22 February 2021 that it did not have jurisdiction to make a rent repayment order against a company director who was not himself the landlord. It also decided that the respondent in this case, Mr Dominic White, had not committed a relevant housing offence.

3. The ten appellants were all licensees of a former children's home in Croydon, which they occupied under agreements with Camelot Guardian Management Ltd (Camelot). In 2016 Camelot had agreed to provide property guardianship services to the owner of the building, Croydon Council, under an agreement which the FTT found created a tenancy of the building. Subsequent agreements between Camelot and the individual appellants, under which they were each granted the right to occupy the whole building, were found to be licences.

4. It is not now disputed that while it was occupied by the appellants the building was an HMO (a house in multiple occupation) which required to be licensed under Part 2 of the Housing Act 2004 and that it was not so licensed. Camelot was nevertheless informed by Croydon, acting in its capacity as local housing authority, that no HMO licence was required.

5. On 6 November 2019 Camelot entered a creditor's voluntary liquidation. From 1 February 2019 until that date the respondent, Mr White, had been its managing director. In June 2020 the appellants issued an application under section 41 of the Housing and Planning Act 2016 seeking rent repayment orders against Mr White and another Camelot director (against whom the application was subsequently discontinued).

6. The basis of the application was that, contrary to the advice given to Camelot by Croydon, the building had indeed required to be licensed and that Camelot had committed the offence under section 72(1), 2004 Act of being in control of an unlicensed HMO. Camelot was already in liquidation by this time and the claim against the directors was put on the basis that Camelot's alleged offence had been committed with their consent or connivance. By section 251, 2004 Act, they too had therefore committed the same offence and were liable to be proceeded against and punished accordingly, including by the imposition of rent repayment orders.

7. The FTT dismissed the application on the grounds that it had no jurisdiction to make a rent repayment order against someone who was not a landlord. It agreed with the appellants that Camelot should have obtained an HMO licence and that the contrary advice it had received from Croydon was wrong. The FTT was nevertheless satisfied that Croydon's erroneous advice provided Camelot with a reasonable excuse for having been in control of an unlicensed HMO and that no offence had been committed either by Camelot or by Mr White.

8. The FTT granted permission to appeal because it recognised, rightly, that the issue of jurisdiction is a question of principle of general importance to the functioning of the rent

repayment order regime. It also considered that if it was wrong on the extent of its jurisdiction it would be appropriate for the issues concerning the reasonable excuse defence to be looked at again by this Tribunal.

9. At the hearing of the appeal the appellants were represented by Mr George Penny of the organisation Flat Justice. The respondent was represented by Ms Laura Phillips. I am grateful to them both for their assistance.

10. The Court of Appeal has recently considered the rent repayment order regime in detail in its decision in *Rakusen v Jepson* [2021] EWCA Civ 1150. As Arnold LJ pointed out, at [21], the provisions now found in sections 40 to 52 of the 2016 Act replaced, so far as England is concerned, earlier provisions relating to unlicensed HMOs contained in section 73 of the 2004 Act.

11. Section 40(1) and (2) provide:

> "**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."

12. A list of seven offences to which Chapter 4 applies is provided in section 40(3). Four are offences under the 2004 Act, including the offence under section 72(1) of being in control or management of an unlicensed HMO.

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

> "**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."

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

> "**Making of rent repayment orders**

(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)."

15. 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 which varies depending on the nature of the offence committed by the landlord.

16. Mr Penny's argument on behalf of the appellants depends on section 251(1), 2004 Act, which provides:

> **"Offences by bodies corporate**
>
> (1) Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of–
>
> (a) a director, manager, secretary or other similar officer of the body corporate, or
>
> (b) a person purporting to act in such a capacity,
>
> he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly."

17. Mr Penny drew attention to the fact that section 251(1) had been relied on by the Tribunal in *Sutton v Norwich City Council* [2020] UKUT 90 (LC) (upheld on appeal: [2021] EWCA Civ 20) as providing the basis on which a civil penalty under section 249A, 2004 Act could be imposed on a company director in respect of relevant housing offences committed, in the first instance, by the company. But, as Mr Penny acknowledged, section 249A, 2004 Act is drafted in different terms from those governing rent repayment orders in the 2016 Act. In particular, section 249A(1) allows a local housing authority to impose a financial penalty on "a person" if it is satisfied that "the person's conduct amounts to a relevant housing offence". There is no requirement, as there is in the 2016 Act, that the person must be a landlord.

18. The effect of section 251(1) is that a person who is found to have consented to or connived in the commission of an offence by a company of which they were a director, is themselves guilty of an offence and is "liable to be proceeded against and punished accordingly". The essence of Mr Penny's argument is that the liability to be proceeded against and punished for the offence means that the director should be exposed to all the same processes and penalties as could have been brought to bear on the company itself. He suggested that a two-stage approach should be adopted. First it should be determined whether an offence had been committed by a landlord which was a company; if so, it should be considered whether that offence had been committed with the consent or connivance of, or as a result of neglect by, a director. If both those conditions were satisfied then, he submitted, a rent repayment order could be made against the director as well as, or instead of, the company. It was immaterial that the director may not personally have received the rent which was to be repaid.

19. Mr Penny supported his argument by reference to the policy of the 2016 Act to crack down on rogue landlords.

20. I do not accept Mr Penny's submissions.

21. In *Rakusen* the Court of Appeal decided that a rent repayment order could only be made against the immediate landlord of the tenant who had made the application and who had paid the rent which was sought to be recovered. While the issue resolved in *Rakusen* does not arise here, the Court of Appeal's analysis of the operation of the Act is equally applicable. The power to make an order is defined and limited by section 40(2). As Andrews LJ explained at [45]: "that section not only defines what an RRO is, but identifies the person against whom such an order can be made".

22. The relevant housing offences listed in the table in section 40(3) may be committed by landlords, superior landlords, their agents, or, in the case of the offences of violence for securing entry and unlawful eviction or harassment, by persons who have no connection to the landlord. It was therefore necessary for Parliament to specify whether rent repayment orders were a remedy available against any person who has committed a relevant housing offence or only some. That choice is made in section 40(2).

23. The only person against whom section 40(2) permits a rent repayment order to be made is a landlord. Had it been intended to extend the scope of rent repayment orders to company directors Parliament would surely have said so in explicit terms.

24. The other parts of the statutory scheme confirm that an order may only be made against a landlord. Section 40(1) explains that Chapter 4 confers power to make a rent repayment order "where a landlord has committed an offence to which this Chapter applies" and section 40(3) explains that such an offence is one of those listed "that is committed by a landlord in relation to housing in England". Section 42(1) requires a local housing authority to "give the landlord a notice of intended proceedings" before making an order. The matter of which the First-tier Tribunal must be satisfied before it makes an order is that "a landlord has committed an offence" (section 43(1)).

25. It is true that section 41(1) enables a tenant or a local housing authority to apply to the FTT for a rent repayment order against "a person who has committed an offence to which this Chapter applies" but it is clear from the other provisions to which I have referred that this does not free the FTT from the limitations already imposed by section 40(2). The offences to which the Chapter applies are all offences committed by a landlord, and the person referred to in section 41(1) must therefore be a landlord.

26. The FTT also pointed out that the appellants were seeking to make Mr White liable to repay rent which he had never received. In *Rakusen* Arnold LJ considered at [27] that the more natural interpretation of "repay" in section 40(2)(a) was that it referred to the landlord repaying rent which it had received from the tenant, rather than a sum which the tenant had paid to someone else. I agree with the FTT that repayment by someone other than the landlord who received the rent is not contemplated.

27. Finally, the policy arguments with which Mr Penny supported his case on the construction of the statute are the same as those which failed to sway the Court of Appeal in *Rakusen.* It is true that, without the opportunity to proceed against the directors of an insolvent company which was their landlord, some tenants will fall outside the scope of rent repayment orders and the statutory policy of combatting the activities of rogue landlords may be less effective as a result. But, as Arnold LJ put it in *Rakusen* at [40]: "It nevertheless remains the case that Parliament has legislated to implement that policy only to the extent provided for by the language of section 40(2)".

28. In my judgment the FTT came to the right conclusion in this case. It had no jurisdiction to make a rent repayment order against Mr White and the appeal must be dismissed. It is therefore unnecessary to consider the other grounds of appeal against the FTT's finding that no offence had been committed.

Martin Rodger QC,
Deputy Chamber President

14 January 2022

Right of appeal

Any party to this case 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.