Rent Repayment Orders and *Rakusen v Jepsen*

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Overview

- Rent repayment orders
- Facts and history of the case
- Supreme Court decision
- Implications

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Rent Repayment Orders

- Introduced by Housing Act 2004
- Revised and expanded in England by Housing and Planning Act 2016 (HA 2004 still applies in Wales)
- Can be made by tenant or local housing authority on application to First-tier Tribunal (Property Chamber) (LVT in Wales)
- Enforceable as a debt

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Rent Repayment Orders

- HPA 2016, s.40:

- “(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.”

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Trigger offences

- Originally limited to two
- HA 2004, s.72(1) (control or management of unlicensed HMO)
- HA 2004, s.95(1) (control or management of unlicensed house)
- But more added by HPA 2016 …

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Trigger offences

- Breach of Criminal Law Act 1977, s.6(1) (violence for securing entry)
- Protection from Eviction Act 1977, s.1(2), (3), or (3A) (eviction or harassment of occupiers)
- HA 2004, s.30(1) (failure to comply with improvement notice)
- HA 2004, s.32(1) (failure to comply with prohibition order)
- HPA 2016, s.21 (breach of banning order)

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Making an application

- Timing important
  - Application can only be made if the offence was committed in 12-month period ending with the day application made: s.41(2)(b)
- Need to identify correct landlord
  - But is this only the immediate landlord or any landlord?
  - Might be possible to amend application later but not later than 12 months after the offence: *Gurusinghe v Drumlin Ltd* [2021] UKUT 268 (LC)
- Use form RRO1 (https://www.gov.uk/government/publications/form-rro1-application-by-tenant-or-local-housing-authority-for-a-rent-repayment-order-housing-and-planning-act-2016)

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Making an order

- FTT(PC) may make an order if satisfied that landlord has committed an offence: s.43(1)
  - "beyond reasonable doubt"
  - Does not mean that the offence must be proved beyond any doubt at all: *Opara v Olasemo* [2020] UKUT 96 (LC)
  - Does not require a conviction to prove this

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Amount of rent to be repaid

- Three different approaches
- Application by tenant: s.44
- Application by LHA: s.45
- Application by either where there has been a conviction: s.46

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Identifying the maximum amount (s.44)

- Amount “must relate to rent paid during … the period of 12 months ending with the date of the offence”

- Amount “must not exceed … the rent paid in respect of that period” (less any relevant award of Universal Credit paid in respect of rent under the tenancy during that period)

- Rent paid includes “an amount that a tenant does not pay as rent but which is offset against rent”: s.52(2)

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Amount of rent repayment order

- Twelve months is maximum even with multiple offences: *Ficcara v James* [2021] UKUT 38 (LC); [2021] HLR 30

- Cannot be required to “repay” more rent than was actually paid: *Ficcara*

- Rent must have been paid in the relevant period and relate to that period: *Kowalek v Hassanein Ltd* [2022] EWCA Civ 1041; [2022] HLR 42 (see also *Awad v Hooley* [2021] UKUT 55 (LC))

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Amount of rent repayment order

- The amount of an order is not to be limited to the landlord's profit obtained from the unlawful activity: *Vadamalayan v Stewart* [2020] UKUT 183 (LC); [2020] HLR 38

- No presumption that the amount of rent paid is to be the amount of the order: *Williams v Parmar* [2021] UKUT 244 (LC); [2022] HLR 8

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Amount of rent repayment order

- Must take into account (s.44(4)):
  - the conduct of the landlord and the tenant
  - the financial circumstances of the landlord
  - whether the landlord has at any time been convicted of an offence to which HPA 2016, Pt 2, ch.4 applies
  - Conduct of tenant includes any rent arrears: *Kowalek v Hassanein Ltd*

- Cost of utilities consumed by tenant but paid by landlord can be deducted: *Vadamalayan v Stewart*

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Where landlord has been convicted (s.46)

- Needs to have been either a conviction or a financial penalty that has not been appealed: s.46(2)

- Amount of order is to be maximum that could be made under s.44 (disregarding s.44(4))

- If there are exceptional circumstances that would make it unreasonable for the landlord to pay, FTT can reduce the amount: s.46(5)

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Local authority applications

- Timing treated differently
  - Must give notice of intended proceedings no later than 12 months after date of offence: s.42(1), (5)
  - NIP must allow at least 28 days for landlord to make representations: s.42(2)(c)
  - LA must consider any representations received during notice period: s.42(3)
  - LA must also wait until notice period has concluded before making application: s42(4)

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Local authority applications

- Can only apply if offence relates to housing in the authority's area: s.41(3)(a)

- Must have regard to guidance given by Secretary of State: s.41(4)
  - DCLG, *Rent repayment orders under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (2017)

- Duty to consider applying if aware that there has been a conviction: s.48

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Local authority applications

- Amount determined under s.45 by reference to Universal Credit paid
  - References to UC include Housing Benefit: s.51

- Section 46 applies similarly where there has been a conviction

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Who is the correct landlord for an RRO?

- Under HA 2004, can only be the immediate landlord (due to definition of “appropriate person”)

- That definition was not carried over to HPA 2016, so could an RRO be made against any landlord in a chain?

- *Rakusen v Jepsen* [2023] UKSC 9

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Facts

- Long lease of Flat 9, Mandeville Court, Finchley Road granted to Mr Rakusen in 2006

- Mr Rakusen assign lease to himself and Ms Field in 2013

- 31 May 2016: Mr Rakusen (but not Ms Field) grants tenancy for 36 months less a day to Kensington Property Investment Group Ltd (introduced to them by his letting agent, Hamptons)

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Facts

- Throughout 2016, KPIG grant licences to Mr Jepsen, Mr Murphy, and Mr McArthur (and probably at least one other)

- Hamptons told Mr Rakusen in November 2018 that KPIG wanted to apply for HMO licence (not clear if application ever made; no licence granted)

- KPIG's tenancy was not renewed when it expired in 2019

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Application for RRO

- In September 2019, Mr Jepsen, Mr Murphy, and Mr McArthur apply for an RRO against Mr Rakusen and Ms Field
- Respondents apply to strike out
- FTT strikes out application against Ms Field as she had never been party to any agreement with KPIG or the applicants
- Refuses to strike out against Mr Rakusen

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The appeals

- Mr Rakusen appealed to the Upper Tribunal (Lands Chamber); appeal dismissed by Deputy President, Martin Rodger QC [2020] UKUT 298 (LC); [2021] HLR 18

- Further appealed to Court of Appeal; appeal allowed by Baker, Arnold, and Andrews LJJ [2021] EWCA Civ 1150; [2022] 1 WLR 324

- Applicants appeal to the Supreme Court

- National Residential Landlords Association & Safer Renting given permission to intervene

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The Supreme Court decision

- Judgment of Lord Briggs and Lord Burrows (Lords Lloyd-Jones, Kitchin, and Richards agree)

- Straightforward interpretation of legislation: RROs can only be made against immediate landlord of the tenancy that generates the relevant rent
  - Because s.40(2) sets out that a “rent” RRO is an order “requiring the landlord under a tenancy of housing in England to … repay an amount of rent paid by a tenant”; “rent paid by a tenant” plainly refers to rent paid under the “tenancy of housing in England” already referred to

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The Supreme Court decision

  - Similar logic applies to “universal credit” RRO: an order “requiring the landlord under a tenancy of housing in England to … 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”; that also plainly refers to rent paid under the “tenancy of housing in England” already referred to

- No indication in the pre-legislative material that it was intended to change the HA 2004 position that RROs could only be made against immediate landlords

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The Supreme Court decision

- While some trigger offences can be committed by superior landlords, some can also be committed by persons who are not a landlord at all; no suggestion that RROs could be made against them; intention was to restrict RROs to those directly benefitting from the payment of rent (*i.e.* immediate landlords)

- Range of other sanctions available (fines, civil penalties, and banning orders); it was for Parliament to decide whether these were sufficient

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The Supreme Court decision

- If RROs could be made against superior landlords, this would generate complexity in calculating how much was payable by whom and to whom

- If s.40(2)(a) is read with s.44(3), it makes clear that the "tenancy" is the one under which rent is paid to the landlord
  - "A rent repayment order is an order requiring the landlord under a tenancy of housing in England to ... repay an amount of rent paid by a tenant ... [the amount of which] must not exceed (a) the rent paid in respect of that period, less (b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period."

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The Supreme Court decision

- It would have been a simple matter for Parliament to include a definition catching superior landlords, such as in Protection from Eviction Act 1977

- Pre-legislative materials were consistent with the straightforward interpretation

- If there was any doubt, the principle (or presumption) against doubtful penalisation would come into play

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Implications

- Does not mean that landlords can simply create “workaround” intermediate tenancies
  - Could still be subject to criminal or other civil sanctions
  - May be construed as a sham
  - Possibility of liability for wrongful trading

- Landlord argued that not only did there need to be a direct relationship between the tenant and the landlord but that the tenancy generating the relevant rent must be the “bottom” tenancy (*i.e.* the occupational tenancy); Supreme Court left this undecided

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Implications

- Renters Reform Bill
  - Could reverse the Supreme Court decision
  - Alternative (better?) option: allow orders to be made against directors/officers of intermediate landlord companies on a joint and several basis

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