Supreme Court unanimously decides that RROs cannot be made against a superior landlord (Rakusen v Jepsen)

On 1 March 2023, the Supreme Court handed down its judgment in Rakusen v Jepsen [2023] UKSC 9. In a unanimous decision delivered by Lord Briggs and Lord Burrows in a joint judgment, the court held that the Court of Appeal had been correct in its interpretation that a Rent Repayment Order (RRO) could only be made against the immediate landlord of a tenancy that generates the relevant rent.

This analysis was first published on Lexis®PSL on 1 March 2023 and can be found here (subscription required).

Background

This appeal is about RROs. These are orders that can be made against landlords that have committed certain housing-related offences. They require a landlord to repay an amount of rent paid by a tenant (or pay to a local housing authority an amount of universal credit paid in respect of rent). The question which arises is whether they can only be made against a tenant's immediate landlord, or whether they can be made against a landlord higher up in a chain of tenancies (eg the landlord of the tenant's immediate landlord), referred to as a 'superior landlord'.

The Respondent, Mr Rakusen, is the leaseholder of a flat in London. In May 2016 he granted a short residential tenancy of the flat to a company called Kensington Property Investment Group Ltd ('KPIG'). KPIG subsequently entered into separate agreements with each of the three Appellants by which they were each granted a right to occupy one room in the flat in exchange for a fee. As a result of this arrangement the flat was required to be licenced as a 'house in multiple occupation' or 'HMO' under the Housing Act 2004 (HA 2004). However, no such licence was ever obtained.

In 2019 the Appellants applied for RROs against Mr Rakusen on the basis that he was said to have committed an offence of being in control or management of an unlicenced HMO contrary to section 72 of the HA 2004. Mr Rakusen denied that he committed such an offence. He also applied to strike out the Appellants' claims arguing that a RRO could only be made in favour of the Appellants against their immediate landlord (ie KPIG).

The First-tier Tribunal (FTT) refused to strike out the Appellants' claims against Mr Rakusen and the Upper Tribunal (UT) dismissed Mr Rakusen's appeal. They held that it was possible to make a RRO against a superior landlord. However, the Court of Appeal reversed this decision. The Appellants appealed to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses the appeal. It holds that a RRO cannot be made against a superior landlord. Lord Briggs and Lord Burrows give a joint judgment with which the other members of the panel agree.

Reasons for the Judgment

The central statutory provision in question is section 40(2) of the Housing and Planning Act 2016 (HPA 2016). A straightforward interpretation of the words in HPA 2016, s 40(2) is that a RRO cannot be made against a superior landlord and can only be made against the immediate landlord of the tenancy that generates the relevant rent [30].

This is because RROs can be made against 'the landlord under a tenancy of housing in England' (HPA 2016, s 40(2)), who can be required to 'repay an amount of rent paid by a tenant' (HPA 2016, s 40(2)(a)). The 'rent paid by a tenant' plainly refers to the rent paid under the 'tenancy of housing' referred to previously. It would therefore be unnatural to interpret 'landlord under a tenancy' as referring to any landlord other than the landlord of the tenancy which generates the rent of which repayment is sought [24]-[28].

The words 'repay … rent paid by a tenant' also support this interpretation. They naturally refer to a landlord repaying rent that it has received directly from the tenant. It would strain the language to say that a superior landlord is 'repaying' rent to a tenant from whom it had never received any rent [31].

The Court considered that, on balance, wider contextual factors and an examination of the purpose of the provision supported or, at least, were consistent with this straightforward interpretation [59].

First, when RROs were originally introduced by HA 2004 they could only be made against the immediate landlord. There is no indication, including in pre-legislative material, that a purpose was to change this when the legislative scheme was revised in 2016 [36];[55].

Second, although some of the offences which form the basis of a RRO can be committed by superior landlords, some can also be committed by people who are not landlords at all (eg property agents). There is no suggestion that RROs could be made against these other non-landlord offenders. It seems that the purpose was to restrict RROs to those who directly benefit from the payment of rent, ie immediate landlords [38].

Third, there are a range of other sanctions available to combat rogue landlords. These include fines, civil penalties and banning orders. Ultimately it is a matter for Parliament to decide whether these are sufficient [40]-[43].

Fourth, allowing a RRO to be made against a superior landlord could create complexity as to how much was payable by whom and to whom where there is a chain involving numerous tenancies [44]-[46].

Fifth, the straightforward interpretation was supported by reading HPA 2016, s 40(2)(a) together with HPA 2016, s 44(3) [49]. Support was also found in the fact that certain offences under the Protection from Eviction Act 1977 expressly extended the definition of landlord to include 'any superior landlord', but this was not done in the provisions relating to RROs [50].

Sixth, taken as a whole, the pre-legislative materials are consistent with the straightforward interpretation that RROs are not available against a superior landlord [51]-[56].

Finally, the straightforward interpretation was supported by the principle that where there is any doubt as to whether a statutory provision imposes a penalty on someone it should be resolved in favour of not imposing the penalty [57]-[58].

The conclusion reached by the court was that the additional relevant interpretative factors on balance support or, at least, were consistent with the straightforward interpretation of the words of HPA 2016, s 40(2) [59].

A RRO cannot therefore be made against a superior landlord [60].

Comments

Timothy Baldwin, Barrister at Garden Court Chambers (counsel for the tenants)

This is a decision on an issue of wide public interest concerning enforcement of tenant rights against 'rogue' landlords. The issue was when certain specified criminal offences were proven on an application to a tribunal, whether superior landlords are liable, in addition to other sanctions, to the sanction under HA 2004, as amended by HPA 2016, of a RRO. The Supreme Court, on dismissing the appeal, upheld the decision of the Court of Appeal and provided a definitive construction of the relevant statute, HPA 2016, s 40(2). The approach of the Supreme Court identified that specialist expert tribunals charged with making RROs erred in their interpretation of this statute. For example, in this case the FTT refused to strike out the application, holding that the Respondent was 'a' landlord of the flat, albeit not 'the' landlord of the Appellants. The Respondent appealed but the Deputy President in the UT dismissed the Respondent's appeal, holding that that a RRO can be made against a superior landlord of an applicant. The UT judge granted permission to appeal and the Court of Appeal allowed the Respondent's appeal, holding that a RRO could not be made against a superior landlord, which the Supreme Court upheld.

Although the Supreme Court dismissed the appeal, in paragraph 43 of the decision, the court identified that if it was the intent of Parliament to capture superior landlords under RROs in addition to other sanctions it was for Parliament to legislate on this issue and not rely on a 'distorted' interpretation of the statute. This observation may focus the minds of those now lobbying for such change under the Renters Reform Bill. However, they should also take heed of the observations of the court at paragraphs 44 – 47 of the decision of the practical complexity of RROs operating against superior landlords when lobbying for such reform.

Giles Peaker, Partner at Anthony Gold Solicitors (Solicitors for the Interveners)

While the Supreme Court judgment clarifies that RROs can only be sought against a tenant's immediate landlord, the court acknowledges that this makes them less effective against rogue landlords, in particular where there is a 'rent to rent' landlord, a company or individual who has taken a tenancy from the property owner and sub-let to occupiers. This growing sector often sees poor behaviour from the rent-to-rent landlord, including failing to obtain a licence, and illegal evictions and harassment. As Safer Renting's intervention set out, such arrangements are used to obscure criminal activity and liability. When faced with a RRO application, 'rent-to-rent' set ups often disappear, or go into liquidation, avoiding payment of an RRO and leaving the superior landlord to deal with the sub tenants. The Supreme Court notes this but finds that this is a matter for Parliament to address in legislation.

Sam Madge-Wyld, Barrister at Tanfield Chambers

The Supreme Court has dismissed the tenant's appeal. This means that tenants or licensees of unlicensed premises can only seek a RRO from their direct landlord and cannot bring a claim against the superior landlord (who is the person who owns the premises). The Supreme Court held that this arose from a straightforward interpretation of the statute, and it would be artificial to impose an obligation on a superior landlord who did not receive any of the rent paid by the tenants. The tenants and the intervener had argued that the alternative construction should be preferred as otherwise it meant that tenants of landlords who sub-let premises under a 'rent-to-rent' model, and therefore had few if any assets, were left unprotected by the legislation (given a RRO made against a person or company with no assets was impossible to enforce). This method of letting premises is particularly common in the HMO sector. The Supreme Court nonetheless disagreed. This was not what Parliament intended, there were other measures within the legislation that protected against rogue landlords, and it was for Parliament to decide whether they were sufficient. That said, there are many other problems with 'rent-to-rent' which makes the other methods of enforcement difficult (for example prosecuting companies that wind themselves up or nominee directors that simply disappear) and this decision is likely to provide further incentive to owners of HMOs to let their premises to third parties or to special purpose vehicles with no assets to sub-let. It will therefore be interesting to see if Parliament intervenes to amend the legislation to close this loophole and whether it also considers the wider policy implications of companies with no assets letting residential premises to tenants.

Source: Rakusen v Jepsen and others [2023] UKSC 9

Case details:

- Court: Supreme Court
- Judges: Lord Lloyd-Jones, Lord Briggs, Lord Kitchin, Lord Burrows, Lord Richards
- Date of judgment: 1 March 2023

Tim Baldwin is ranked in Chambers UK for Social Housing and is identified as a leading junior in the Legal 500 for Social Housing, Court of Protection and Community Care, and Civil Liberties and Human Rights. He is known for his fierce commitment to representing vulnerable, marginalised and disadvantaged clients. He has appeared in a number of reported cases in the Court of Appeal, High Court, Upper Tribunal, as well as significant inquests.

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