STATUTORY INTERPRETATION: RENT REPAYMENT ORDERS

IN the context of seemingly intractable poor conditions in private rental housing, what weight should the courts give to promoting public good when interpreting complex statutory provisions? This question is critical to this note's examination of the decision of the Court of Appeal in *Jepsen v Rakusen* [2021] EWCA Civ 1150, shortly to be heard on appeal in the Supreme Court. The case concerned the rent repayment order (RRO) – a novel, tenant-oriented remedy for breaches of housing law – and the question of who is potentially liable to repay rent under the provisions. The note examines *Jepsen* in three parts: first setting out the wider context, then critiquing the reasoning in the Court of Appeal, before considering ways forward for the RRO.

Introduced in the Housing Act 2004, the original aim was to ensure that local authorities could reclaim housing benefit from landlords who had committed a relevant criminal offence. However, during parliamentary debates, one M.P. asked why, if local authorities could recoup rent, tenants should not also be able to do so in similar circumstances? The logic appeared irrefutable, so tenants as well as local authorities were enabled to apply for an RRO to what is now the First Tier Tribunal, Property Division ("FTT"). Because the 2004 Act limited RROs to claims against landlords who had been convicted of a criminal offence, the provisions were little used. Then the Housing & Planning Act 2016 extended the scope of the remedy. In particular, the statute provided that a tenant could apply for an RRO where a landlord is found in the proceedings brought before the the FTT to have committed of an offence contained in section 40(3), removing the requirement for a conviction. A local authority can also apply, but only to recover that element of the rent paid by state benefits. Where there is no conviction the applicant must prove before the FTT that the offence was committed beyond reasonable doubt. These offences include illegally evicting or harassing occupiers, failing to comply with local authority orders to mitigate health and safety risks, or failing to license properties where required. If successful, the applicant can receive up to a year's rent which, at a time of spiralling rents, can be substantially higher than fines imposed for equivalent offences in the magistrates court. In effect, the RRO turns individual residents into prosecutors of poor standards in the private rented sector, providing a real incentive to bring proceedings, whilst also requiring them to meet the criminal standard of proof and negotiate their way through a procedurally and legally complex process.

The central legal issue for the Court of Appeal was whether an RRO can only be made against an immediate landlord, or whether a superior landlord might also be liable. Mr. Rakusen owned a flat in north London. In 2016 he granted a tenancy to Kensington Property

Investment Group Ltd. (KPIG), granting KPIG the right to sublet. KPIG purported to grant licences to Jepsen and others to live in the property. However, despite the property meeting the legislative definition of a House in Multiple Occupation no application was made to the local authority for the requisite licence. Based on this failure, the applicants sought an RRO, and the FTT and the Upper Tribunal ("UT") held that an RRO could be made against Mr. Rakusen, even though he was not the direct landlord of the applicants.

The Court of Appeal disagreed. Central to the reasoning of Arnold L.J. and Andrews L.J. (Baker L.J. agreed with both) were the statutory powers given to the local authority. The reasoning – and the problem with it – requires close examination of the legislation, and the provision in section 40(2) in particular. It provides that:

> A rent repayment order is an order requiring the landlord under a tenancy of housing in England to –
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> (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.

The argument accepted at the FTT and UT was that references to "a" tenancy and "a" tenant meant that superior landlords could be caught by the provision. However, in those decisions, it was accepted that references to "the" tenancy in part section 40(2)(b) applicant meant that a potential local authority applicant could only apply against an immediate landlord. For the Court of Appeal, this was crucial, and necessarily has a knock-on effect for the interpretation of section 40(2) and section 40(2)(a), because it is "a very strong indicator that for the purposes of construing the section as a whole, the "tenancy of housing" referred to in the opening lines is a direct tenancy" (Andrews L.J., para. 49).

The judgments suggest this point lacked elaboration in written submissions and was not explored until oral argument. Given the importance of the point to the Court of Appeal's reasoning, this is unfortunate. There are other approaches to this provision and it is to be hoped that this will be explored further in the Supreme Court.

For example, it can be argued that section 40(2)(b) does not limit local authorities to claim only against direct landlords. The use of "the tenancy" in this section relates to the liability to pay universal credit; a duty which arises on the state when an application for support is made in relation to a specific tenancy. It was therefore necessary for the provision to refer to that specific relationship. However, it does not necessarily follow that "a" tenancy earlier in the provision must also refer to that direct relationship. This is because the provision focused on local authority applications is not limited in scope to that relationship, as it makes clear that it does not

matter who the money is paid to. By expressly including the reference "to any person" the draftsman sought to overcome any efforts to create artificial barriers to the ability to reclaim public funds and denied the importance of privity of contract.

This makes sense in a context in which it was accepted that the legislation is clear that superior landlords can commit offences. Arguably, therefore, the provision is designed to go beyond the private relationship between those two, demonstrating the ability to reclaim the money from whomsoever has received it. There is a strong public interest in being able to reclaim state benefits from superior landlords. The interpretation given by the Court of Appeal, that "the" tenancy must refer to the tenancy between the UC claimant and their immediate landlord does not engage with this. The Court of Appeal's interpretation assumes that money is not passed on to a superior landlord (which ignores commercial reality), or if it is, it is washed clean and the superior landlord can take it without worrying about the source of those funds. This is troubling from a policy perspective, and not the necessary interpretation. The Supreme Court should not consider itself restricted by the Court of Appeal's interpretation of section 40(2) (b). The subsection does not need to be interpreted as a barrier to claims by tenants against superior landlords.

There are important policy reasons for supporting a more expansive approach to the RRO and enabling an order to be made against all landlords benefitting from the letting of the property, regardless of contractual arrangements. The charity *Safer Renting*, intervener in the Court of Appeal, provided important experiential evidence of poor conditions and poor practices in the private rented sector, particularly at the lower end of the sector where house sharing and what Judge Luba in *Sturgiss v Boddy* (2021) EW Misc 10 (C.C.) described as "housing churn" proliferate. The lack of alternatives makes this a lucrative business which can exploit the young, the vulnerable and the mobile. It is clear that "rent to rent" agreements can involve complex and opaque relationships between superior and immediate landlords and indeed landlords and managing agents. The person or company presented as the direct landlord may be without resources, set up solely to evade regulation. Individual tenants, whose claims are not mediated through state apparatus, have limited resources to forensically examine those relationships and to track receipt of profit. Nor is it the role of the FTT. The law needs to provide the simplest route to justice for tenants not only to redress the wrong they have suffered but importantly also because they are acting in lieu of the state to promote public good.

Of course, this must be consistent with fairness for landlords. The criminal standard of proof and the defence of "reasonable excuse" are significant protections. So is the requirement to take tenant behaviour into account when setting the level of the RRO; and it is not disproportionate

to expect a superior landlord to take steps to check the conditions at the property – checking subletting agreements and inspecting regularly – particularly when the landlord knows that the rent is higher than the rent for a property in single family occupancy. Finally, an expanded liability could still allow for contractual autonomy, as superior and direct landlords could still make post-order arrangements distributing liability.

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INSANITY AND COMMAND DELUSIONS

IS the defence of insanity available to a defendant who, owing to a disease of the mind leading to a defect of reason, believed that his actions were being externally controlled? In *Keal* [2022] EWCA Crim 341, [2022] 4 W.L.R. 41, the Court of Appeal answered, "No", holding that any other answer would require an inappropriate departure from the *M'Naghten* rules (1843) 8 E.R. 718. As will be seen below, the court's conservative view of its own powers is understandable. Yet there is little binding authority on the question arising in *Keal*. It was not addressed when the House of Lords endorsed *M'Naghten* in *Sullivan* [1984] A.C. 156. Moreover, even if a trip to the Supreme Court be required, there is much to be said for expanding the insanity defence to cover at least some cases of "command delusion".

Robert Keal attempted to kill his father, mother and grandmother with weapons including knives, scissors and a cricket bat, during a sustained attack at their shared home. There were moments during the attack when Keal apologised to his victims and stated that he was unable to stop himself. To his mother, at one point he said, "I'm sorry, this isn't me, it's the devil". Keal had a long history of severe mental illness and, on the day before the attack, had attempted suicide and been hospitalised. When found by authorities after the attack, he was in a disturbed state, in a country road wearing only his underpants.

At trial, the psychiatric experts agreed that Keal was seriously unwell and in a psychotic state at the time of the offence. He satisfied the first two requirements in *M'Naghten* that a defendant who claims insanity must prove that he was, at the time of the alleged offence, (1) suffering from a "disease of the mind", (2) leading to a "defect of reason". However, the experts also agreed that Keal understood the "nature and quality" of his actions, ruling out a defence under limb (3a) of the rules. In order to qualify