

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2019] UKUT 311 (LC)
Case No: RRO/7/2019**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

***HOUSING – HOUSE IN MULTIPLE OCCUPATION – RENT REPAYMENT ORDER –
MEANING OF “A LANDLORD” IN SECTION 40 OF THE HOUSING AND PLANNING
ACT 2016***

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

BETWEEN:

(1) KEITH GOLDSBROUGH

(2) ROBERT SWART

Appellants

- and -

(1) CA PROPERTY MANAGEMENT LTD

(2) MR TIMOTHY GARDNER

(3) MRS ALIKI GARDNER

Respondent

**Re: 24 Cowper Gardens,
London,
N14 4NR**

Elizabeth Cooke, Upper Tribunal Judge

Determination on written representations

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Introduction

1. This is an appeal from an interim decision made by the First-tier Tribunal (“the FTT”) as to who is the correct respondent to an application for a rent repayment order (“an RRO”) under section 43 of the Housing and Planning Act 2016 (“the 2016 Act”). The FTT’s decision was made in respect of two applications, one by the first appellant as tenant of Room 4, 24 Cowper Gardens, London N14 4NR and one by the second appellant as tenant of Room 3 at the same address.

2. In both matters the FTT determined that the first respondent to this appeal, CA Property Management Ltd (to which I shall refer as “CAPM”) was the correct respondent to the application for an RRO. The appellants disagree, and want the freeholders of 24 Cowper Gardens (“the property”) to be the respondent, in the first appellant’s case in addition to CAPM and in the second appellant’s case instead of CAPM. The freeholders are the second and third respondent, Timothy Barry Gardner and Aliko Gardner. The appeal has been determined under the Tribunal’s written representations procedure. The appellants have been represented by Flat Justice, and I am grateful for the helpful written submissions made on their behalf. The Respondents have chosen not to participate in the appeal.

The factual background

3. The property is, according to the appellants, a two bedroomed house that has been converted to a five bedroom house. The registered proprietors are Mr and Mrs Gardner, who bought it on 2 November 2017.

4. On 7 November 2017 Mr and Mrs Gardner let the house for a term of 5 years from 1 December 2017 to CAPM. In the written agreement Mr and Mrs Gardner as landlord covenanted to be responsible for insuring the property, to be liable for maintenance of the external and internal structure, gas, electrical systems and heating, to be responsible for the safety of the electricity and gas supplies to the property, and to pay the cost of obtaining a gas safety certificate, an NICEIC certificate and an energy performance certificate.

5. At paragraph 2 the agreement says (and I quote precisely):

“The premises asked to be used for subletting as residential accommodation. The subletting will create easy and shorthold tenancy as defined in section 20 of the Housing act 1988 or license in accordance with occupation by licensing residents.”

6. The rent is stated to be £1,400 per calendar month, payable in advance, after a rent-free period of a fortnight at the start of the lease “to get the property up to standard and rented” (paragraph 15). Rent is suspended if the property is uninhabitable (paragraph 14) but there are no other provisions for the suspension of rent.

7. CAPM granted to the first appellant, Mr Goldsbrough, an assured shorthold tenancy of room 4 for a term of one year from 8th December 2017. The rent was £550 per month.

8. CAPM granted to the second appellant, Mr Swart, an assured shorthold tenancy of room 3 for a term of one year from 5th December 2017, at a rent of £550 per month.

9. On 30 January 2019 Mr Goldsbrough applied to the FTT for an RRO, naming as respondents both CAPM (described as “Agent”) and Mr and Mrs Gardner (described as the landlord), giving as the grounds of the application both (1) occupation and control of an unlicensed house in multiple occupation (“HMO”) by Mr and Mrs Gardner and (2) harassment and illegal eviction on the part of CAPM. Mr Swart’s application was made on 8 February 2019 only against Mr and Mrs Gardner and was made on the ground of operating and controlling an unlicensed HMO. No decision has yet been made as to whether those offences have been committed; this appeal is only about the question who is the correct respondent to the application.

10. On receipt of the applications the FTT designated CAPM as the respondent to both applications. The appellants objected to that and a hearing was conducted to determine the correct respondent as a preliminary issue. The FTT gave its decision on 13 June 2019 that CAPM was the correct respondent, and that decision is the subject of this appeal.

The law

11. Because the offences said to have been committed took place wholly after 6 April 2019, the applications were made under the 2016 Act. Section 40 says this:

“(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. Section 41 goes on to say this:

“(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.”

13. Section 43 states:

“(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).”

14. Accordingly the 2016 Act enables the FTT to make a rent repayment order against “a landlord”, only if it is satisfied beyond reasonable doubt that that landlord has committed an offence to which the Chapter applies.

15. The offences of controlling or managing an unlicensed HMO (section 72(1) of the Housing Act 2004) and of harassing a tenant (section 1(3) of the Protection from Eviction Act 1977) are both listed in section 40 as offences to which Chapter 1 relates. I do not need to say anything else in relation to the harassment offence since it is not in dispute that CAPM is the correct respondent to the application for an RRO so far as that offence is concerned.

16. The appeal relates to the HMO licence offence under section 72(1) of the Housing Act 2004 (“the 2004 Act”):

“(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.”

17. Section 61(1) of course is the provision that requires HMOs to be licensed. Section 263 provides the following definitions of persons having control of, or managing, premises:

“(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 includes, where those rents or other payments are received through another person as agent or trustee, that other person.”

18. Section 73 enables the FTT to make an RRO in certain circumstances, but has effect now only in respect of HMOs in Wales, because the provisions of the 2016 Act, set out above, have effect in England. But some of the provisions of section 73 have been relied upon by the appellants and so I set them out:

“(4) ... amounts paid in respect of rent or other periodical ... may be recovered in accordance with subsection (5) and section 74 (in the case of an HMO in Wales) or in accordance with Chapter 4 of Part 2 of the Housing and Planning Act 2016 (in the case of an HMO in England).

(5) If—

(a) an application in respect of an HMO in Wales is made to the appropriate tribunal by the local housing authority or an occupier of a part of the HMO, and

(b) the tribunal is satisfied as to the matters mentioned in subsection (6) or (8),

the tribunal may make an order (a “rent repayment order”) requiring the appropriate person to pay to the applicant such amount in respect of the ... periodical payments paid as mentioned in subsection (8)(b), as is specified in the order ...

[Subsections (6) and (8) relate to the commission of an offence by the appropriate person].

19. In contrast to the 2016 Act, therefore, section 73(5) enables the FTT to make an RRO against an “appropriate person”, defined in section 74(10) as follows:

“(10) In this section-

“ the appropriate person ”, in relation to any payment of universal credit or housing benefit or periodical payment payable in connection with occupation of a part of an HMO, means 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.”

20. So the 2004 Act uses the terms “control” and “management” to determine who must obtain an HMO licence, but – in provisions that no longer apply in England – uses the defined term “appropriate person” to specify who can be subject to an RRO.

The arguments made by Flat Justice

21. Before the FTT, and in this appeal, Flat Justice argue that the correct respondent to an application for an RRO in response to the failure to obtain an HMO licence is not CAPM but the freeholders, Mr and Mrs Gardner. They argue that Mr and Mrs Gardner receive the rent for the property, passed on by CAPM, and that they would clearly be the “appropriate person” under

section 73 of the 2004 Act. The 2016 Act does not define the term “landlord”, and therefore one has to look back to the 2004 Act for a definition.

22. Flat Justice quote paragraph 3.8 of *Rent repayment orders under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities*, published by the Department for Communities and Local Government:

“Can a rent repayment order be applied for against a managing agent or ‘head tenant’ who has sublet a property and is carrying out all the usual landlord activities?”

No, a rent repayment order can only be applied for against the landlord of a property. A rent repayment order cannot be sought against a managing agent or ‘head tenant’ unless they are the landlord of the property, entitled to keep the rent.”

23. Flat Justice argues that CAPM is a managing agent. It passes rent on to the landlord, Mr and Mrs Gardner. They are the persons having control and management of the property, in accordance with the definitions in the 2004 Act, because they take a rack rent from CAPM, and because the terms of the agreement with CAPM make it clear that the freeholders retain responsibility for the boiler and other essential installations. Flat Justice has been in touch with the local housing authority, and understand that CAPM is not able to obtain an HMO licence because the terms of its lease do not give it sufficient control of the premises.

24. Further, Flat Justice argues that if CAPM is the only respondent, the freeholders will be able to evade responsibility for the building; that is not in line with the policy of the 2016 Act which is to crack down on rogue landlords. It refers for support to a decision of the FTT in LON/00AG/HMF/2018/0012 where the freeholder was designated as the respondent and not the managing agent.

25. Before the FTT CAPM argued that it was the appropriate respondent. It pays rent to the freeholders regardless of its own receipts, without any remission where room are not let; the rent it receives is not held on trust for the freeholders and CAPM is not the freeholders’ agent.

The FTT’s decision

26. The FTT observed that there is no provision in the 2016 Act importing definitions from the 2004 Act. Indeed, the triggers for an RRO are offences under other statutes as well as the 2004 act, so it would make no sense to import wording from the 2004 act in relation to RROs. The government guidance envisages an agency situation, and the FTT found that CAPM is not the agent for the freeholders. The decision in LON/00AG/HMF/2018/0012 was made in very different circumstances where the freeholder had entered into an agency agreement with a company that managed the property on its behalf.

27. The FTT concluded:

“the Agreement between CAPM and the Gardners appears to be a valid tenancy agreement and not an agency agreement, Therefore, I determine that CAPM to be the ‘landlord’ to the Applicants and as such would be the appropriate Respondent in these two cases.”

The decision on the appeal

28. It is worth repeating that the preliminary issue that is under appeal in these two matters is not whether CAPM or the freeholders have committed an offence under section 72(1) of the 2004 Act. The issue is whether either is the correct respondent to an application for an RRO; in the course of that application it will be for the appellants to prove that the offence under section 72(1) has been committed. The 2016 Act says that an RRO can be made against “a landlord” who has committed one of the listed offences.

29. I agree with the FTT that there can be no possible basis for importing into the 2016 Act the definition of the “appropriate person” from provisions in the 2004 Act that do not apply to England. An express provision would be required to bring that term into the 2016 Act. The different wording in the two statutory schemes is clearly deliberate.

30. I also agree with the FTT that CAPM is the landlord of the two appellants. It holds the reversion to their tenancies and it granted their tenancies.

31. I also agree that a managing agent that does not have a lease of the property cannot be a landlord. If that is what the government guidance, quoted at paragraph 23 above, is intended to say then it is correct. But if it is intended to say that an intermediate lessee, who is the landlord of the applicants but the sub-tenant of the freeholders (or indeed of another superior lessee) cannot be subject to an RRO than that would appear to be incorrect and misleading. It would be very helpful for that guidance to be clarified.

32. Where I part company with the FTT is in its restriction of liability to an RRO to “the landlord” of the occupier. That is not what the 2016 Act says. The only conditions that it sets for liability to an RRO are, first, that the person is “a landlord” and second that that person has committed one of the offences. Certainly the person must be a landlord of the property where the tenant lived; section 41(2)(a) requires that the offence relates to housing that, at the time of the offence, was let to the tenant. It does not say that the person must be the immediate landlord of the occupier; if that was what was meant, the statute would have said so.

33. The 2016 Act is in this respect rather simpler than the 2004 Act. Its choice of different wording from that employed in the 2004 Act is clearly deliberate and there is no need to import any definitions from elsewhere. The word “landlord” is straightforward, there is no need to assess who is the “appropriate person”, and therefore no need to determine, as between CAPM and the

freeholders, which landlord is entitled to receive the rent on their own account, as section 74(10) would require.

34. So in these cases, CAPM is a landlord, but so are Mr and Mrs Gardner. The appellants have chosen to make their applications, in respect of the HMO licensing offence, against the freeholders and not against CAPM. It will be for the appellants to prove to the FTT that Mr and Mrs Gardner have committed that offence, and it is at that stage that the definitions of “control” and “management” under the 2004 Act become relevant.

35. 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. That is what Flat Justice says has been done here; I make no finding on that.

36. Accordingly the decision of the FTT on this preliminary issue is set aside, and I substitute the Tribunal’s determination that the appropriate respondent in each case, in respect of the licensing offence, is Mr and Mrs Gardner. CAPM will remain the respondent to Mr Goldsbrough’s application in relation to harassment.

Upper Tribunal Judge Elizabeth Cooke

29 October 2019