Hilary Term
[2023] UKSC 9
On appeal from: [2021] EWCA Civ 1150

JUDGMENT

Rakusen (Respondent) *v* Jepsen and others (Appellants)

before

Lord Lloyd-Jones
Lord Briggs
Lord Kitchin
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
1 March 2023

Heard on 26 January 2023

Appellants
Edward Fitzpatrick
Timothy Baldwin
(Instructed by Hammersmith & Fulham Law Centre)

Respondent
Tom Morris
(Instructed by Winckworth Sherwood LLP (London))

Intervener - National Residential Landlords Association
Robert Brown
Rosamund Baker
(Instructed by JMW Solicitors LLP (London))

Intervener – Safer Renting CIC
Justin Bates
Charles Bishop
(Instructed by Anthony Gold Solicitors LLP (London Bridge))

LORD BRIGGS AND LORD BURROWS (with whom Lord Lloyd-Jones, Lord Kitchin and Lord Richards agree):

1. Introduction

1. This appeal is about Rent Repayment Orders ("RROs"). They are an important sanction against rogue landlords who commit certain types of offence in relation to the private rented sector of the housing market. Along with other sanctions, the aim of RROs is to encourage landlords to comply with the law and to drive them out of the market if they do not. They were originally introduced in relation to the non-licensing of houses in multiple occupation (or subject to a selective licencing scheme) by the Housing Act 2004 ("the 2004 Act") but are now governed in England (but not Wales) by Chapter 4 of Part 2 of the Housing and Planning Act 2016 ("the 2016 Act") under which they enjoy a greatly extended scope.

2. The jurisdiction to make RROs is conferred on the First-tier Tribunal ("the FtT"). In bare outline, where the relevant conditions are satisfied, the FtT may by an RRO require a landlord to repay an amount of rent paid by a tenant, or to pay a local housing authority an amount in respect of universal credit awarded in respect of rent, where the landlord has committed one or more of a list of housing-related offences.

3. The question to be decided in this case is whether, unlike its predecessor, the 2016 Act enables the FtT to make an RRO not merely against the immediate landlord of the tenant, who paid the rent or who was awarded universal credit in respect of the rent, but also against a superior landlord. The FtT decided that it could make an RRO against a superior landlord of the property let to the applicant tenants, and the Upper Tribunal ("UT") agreed. But the Court of Appeal reached the opposite conclusion. The tenants now appeal to the Supreme Court.

4. Although counsel ranged far and wide through the 2016 Act, the 2004 Act, and the pre-legislative materials, it is our view that the answer to the question posed turns on a short point of statutory interpretation that yields a short answer. That answer comprises a straightforward interpretation of the words in section 40(2) of the 2016 Act: see paras 24 – 33 below. The same answer is on balance supported by, or at least is consistent with, a range of additional factors that go to the wider context and purpose of section 40(2): see paras 34 – 59 below.

5. The next three sections (paras 6 – 23) summarise the factual background and the proceedings below and set out the relevant provisions of the 2016 Act.

2. The factual background

6. The respondent on this appeal is Martin Rakusen, who can be referred to as a superior landlord of property licensed out to the appellants, Mikkel Jepsen, Ronan Murphy and Stuart McArthur. They can be referred to as the tenants (a term which, for all relevant purposes under the 2016 Act, includes licensees). The appeal arises out of an application to strike out the appellants' claim for an RRO on the ground that it has no reasonable prospect of success. The central assumed facts are as follows.

7. The relevant property is Flat 9, Mandeville Court, Finchley Road, London. In 2006 the freeholder of the building granted a lease of the flat to Mr Rakusen for a term of 999 years. In 2013 Mr Rakusen assigned the lease to himself and his partner Ms Sarah Field. For a time, the couple lived in the flat as their home before moving elsewhere and deciding to let the flat. On 31 May 2016 Mr Rakusen granted a tenancy of the flat to Kensington Property Investment Group Ltd ("KPIG"), a company to which he had been introduced by his letting agents, Hamptons. The tenancy was for a term of 36 months, less one day, at a rent of £2,643.33 a month. The agreement was a standard form of short-term residential tenancy under which Mr Rakusen was responsible as landlord for keeping the property in repair. One modification of more conventional terms is found in clause 7.5 which provided that "the Tenant [ie KPIG] shall have the right to sublet each unit individually or the whole as part of the day to day management of their business".

8. Later in 2016, and at different times, KPIG entered into separate written agreements with the appellants, each of whom was granted the right to occupy one room in the flat. The documents were described as licence agreements and made provision for the payment of a licence fee. The aggregate sum paid by the appellants was £2,297 per month. Presumably (and there is some evidence to support this) KPIG was not making a loss on the flat because at least one other person was granted the right to live there. It is not in dispute that the flat was a house in multiple occupation ("HMO") and was required to be licensed under Part 2 of the Housing Act 2004.

9. In November 2018 Hamptons informed Mr Rakusen that KPIG wished to apply to the local housing authority for an HMO licence. The evidence does not show if such an application was ever made, but no licence was ever granted. Mr Rakusen did not renew KPIG's tenancy at the end of the fixed term in May 2019.

3. The proceedings below

10. On 27 September 2019 the appellants applied to the FtT under section 41 of the 2016 Act for RROs totalling £26,140 against Mr Rakusen and Ms Field. The grounds for making the application were stated to be "control or management of an unlicensed HMO". In their response to the application, Mr Rakusen and Ms Field invited the FtT to strike out the application on the ground that there was no reasonable prospect of its succeeding because an RRO could only be made against the immediate landlord of the person who made the application. Ms Field also relied upon the fact that she had never been party to any agreement in respect of the property with either KPIG or the appellants.

11. Although not relevant to the strike-out application, Mr Rakusen says that he only became aware of the licence agreements entered into by KPIG after the applications for RROs were made; and he denies that he committed an offence under section 72(1) of the 2004 Act because he was not a person having control of the HMO or a person managing it. In the alternative, he relies on the defence provided by section 72(5)(a) of the 2004 Act that he had a reasonable excuse for having control or management of an unlicensed HMO.

12. The FtT (LON/00AG/HMJ/2019/0065) struck out the application against Ms Field on the ground that there was no reasonable prospect of its succeeding against her. It refused to strike out the application against Mr Rakusen because it was bound by the earlier decision of the UT in *Goldsbrough v CA Property Management Ltd* [2019] UKUT 311 (LC), [2020] HLR 18 in which Judge Elizabeth Cooke had decided that an RRO could be made against a superior landlord as well as the immediate landlord.

13. The UT ([2020] UKUT 0298 (LC)) dismissed Mr Rakusen's appeal. In his judgment, Martin Rodger QC, the Deputy Chamber President, considered that "as a matter of first impression" (see para 32) the language of section 40(2)(a) suggested the need for a direct relationship of landlord and tenant so that RROs in favour of the tenants could not be made against the superior landlord (Mr Rakusen). But he went on to hold that those first impressions were unreliable when one looked in more detail at all the relevant provisions and factors. He appeared to have been particularly influenced by the fact that a superior landlord could commit one of the offences in relation to which RROs can be made; and that, if RROs could only be made against the immediate landlord, the grant of a short-term tenancy to an insubstantial intermediary who then sub-lets (as on the facts of this case) provides a route for avoidance of RROs.

14. The Court of Appeal (Arnold, Andrews and Baker LJJ) [2021] EWCA Civ 1150, [2022] 1 WLR 324 allowed Mr Rakusen's appeal. In essence, they considered that Martin Rodger QC's first impressions of the meaning of section 40(2) of the 2016 Act had been correct and were consistent with an analysis of all the relevant provisions and the purpose of the 2016 Act.

4. The central relevant provisions of the 2016 Act

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

> "**40. 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."

16. A table of seven offences, or sets of offences, committed by a landlord to which Chapter 4 applies is provided in section 40(3). Two involve violence or harassment: using violence to secure entry contrary to section 6(1) of Criminal Law Act 1977, and unlawful eviction or harassment of occupiers contrary to section 1(2), (3) or (3A) of the Protection from Eviction Act 1977. Four are offences under the 2004 Act: failure to comply with an improvement notice (section 30(1)) or a prohibition order (section 32(1)) or being in control or management of an unlicensed HMO (section 72(1)) or unlicensed house (section 95(1)). The last offence is breach of a banning order contrary to section 21 of the 2016 Act.

17. Section 41 deals with applications for RROs. So far as material, it provides as follows:

"**41. 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.

(2) A tenant may apply for a rent repayment order only if —

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

(b) the offence was committed in the period of 12 months ending with the day on which the application is made."

18. Section 43 provides:

"**43. Making of rent repayment order**

(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).

(2) A rent repayment order under this section may be made only on an application under section 41.

(3) The amount of a rent repayment order under this section is to be determined in accordance with—

(a) section 44 (where the application is made by a tenant);

(b) section 45 (where the application is made by a local housing authority);

(c) section 46 (in certain cases where the landlord has been convicted etc)."

19. By section 44(2) the amount payable under an RRO made in favour of a tenant "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. By section 44(3), the amount which the landlord may be required to repay in respect of a period 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." Section 45 contains analogous provisions in respect of an RRO in favour of a local housing authority but it should be noted that by section 45(3) the amount that the landlord may be required to repay in respect of a period must not exceed "the amount of universal credit that the landlord received (directly or indirectly) in respect of rent under the tenancy for that period."

20. Section 46 provides, so far as relevant:

"**46. Amount of order following conviction**

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 and both of the following conditions are met, the amount is to be the maximum that the tribunal has power to order in accordance with section 44 or 45 (but disregarding subsection (4) of those sections).

(2) Condition 1 is that the order—

(a) is made against a landlord who has been convicted of the offence, or

(b) is made against a landlord who has received a financial penalty in respect of the offence and is made at a time when there is no prospect of appeal against that penalty.

(3) Condition 2 is that the order is made—

(a) in favour of a tenant on the ground that the landlord has committed an offence mentioned in row 1, 2, 3, 4 or 7 of the

> table in section 40(3), or (b) in favour of a local housing authority. …
>
> (5) Nothing in this section requires the payment of any amount that, by reason of exceptional circumstances, the tribunal considers it would be unreasonable to require the landlord to pay."

21. Section 48 imposes a duty on a local housing authority, which becomes aware that a person has been convicted of an offence to which Chapter 4 applies in relation to housing in its area, to consider applying for an RRO. Section 49 empowers local housing authorities to help tenants to apply for RROs.

22. Section 52(1) provides that "'rent repayment order' has the meaning given by section 40". Under section 56, "tenancy" is defined to include a licence.

23. The provisions set out above replaced, so far as England is concerned, earlier provisions relating to unlicensed HMOs contained in section 73 of the 2004 Act (which still apply in Wales). It is common ground that, by virtue of section 73(10) of the 2004 Act (see para 35 below), those provisions only permitted the making of RROs against immediate landlords.

5. A straightforward interpretation of the words in section 40(2) of the 2016 Act

24. The opening words of section 40(2) (see para 15 above) identify as a person against whom an RRO can be made "the landlord under a tenancy of housing in England". A tenancy of housing consists of the grant by one person (or persons) to another person (or persons) of the right to occupy residential accommodation for a period (usually, and in the 2016 Act, called a term) in return for the payment of rent. At common law a tenancy is a grant of exclusive possession but the 2016 Act defines "tenancy" as including a licence: see para 22 above. The grantor under such a tenancy is called the landlord and the grantee is called the tenant. Thus in relation to a particular tenancy, the grantor is the landlord under that tenancy.

25. The landlord under a particular tenancy of housing will either be the freehold owner of the housing, or a tenant of it under a superior tenancy, which may include a number of housing units. Although there can be a more complex chain of sub-tenancies, this judgment will use the following simple hypothetical example. X, the freeholder, grants a tenancy of a building containing 10 flats to Y ("the head-tenancy").

Y grants a tenancy of flat 1 to Z ("the sub-tenancy"). Y is the landlord under the sub-tenancy to Z. X is the superior landlord in respect of the sub-tenancy to Z but X is not the landlord under that sub-tenancy. X is the landlord under the head tenancy with Y.

26. As sub-subsections (a) and (b) of section 40(2) make clear, RROs are of two types, one for repayment of an amount of rent paid by a tenant and the other for payment to a local housing authority of an amount in respect of universal credit. They will be called, for convenience rather than elegance, a rent RRO and a universal credit RRO respectively. Thus the description of a rent RRO is that it is an order "requiring the landlord under a tenancy of housing in England to… repay an amount of rent paid by a tenant". To what rent does "rent paid by a tenant" refer? Plainly, in our view, those words refer to rent paid by a tenant under the "tenancy of housing in England" referred to earlier in the same sentence. That is the sub-tenancy in the hypothetical example, if the tenant seeking repayment is (as in this case) the occupier Z. It will necessarily have been paid to the landlord under that tenancy, to Y in the example, so that an order for "repayment" naturally requires that landlord to pay back what he, she or it (henceforth "it") has received to the tenant who paid it.

27. The description of a universal credit RRO is that it is 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". Again, to what rent and to what tenancy do those final words refer? Plainly, in our view, they refer to the rent payable under the tenancy referred to at the beginning of the sentence, namely the tenancy of housing in England under which the respondent to the order is the landlord. That is, in the example set out above, the sub-tenancy, under which Y is the landlord and Z is the tenant. Here the obligation is to "pay" rather than "repay" for the reasons that we set out at para 31 below.

28. This straightforward interpretation links the landlord with the tenancy that generates the relevant rent. It renders it artificial and unnatural to construe the opening words of section 40(2) as referring to any landlord other than the landlord under the tenancy which generates the relevant rent, that is the rent to be repaid under section 40(2)(a) and the rent in respect of which the universal credit is paid under section 40(2)(b). It excludes a superior landlord because it is not the "landlord under" the tenancy which generates the rent.

29. Mr Fitzpatrick for the appellants sought to meet this difficulty in two alternative ways. First, he submitted that "landlord under a tenancy" was apt to include not merely the immediate landlord but any superior landlord in relation to the tenancy which generates the relevant rent. Secondly, he submitted that it was wrong to equate

the tenancy under which the respondent was the landlord with the tenancy which generates the relevant rent. For the reasons already given, the first submission denies the ordinary and generally understood meaning of "landlord under a tenancy". The second submission flies in the face of the straightforward interpretation of the definitions of the two types of RRO when each is, as above, set out from end to end.

30. In our view, that straightforward exercise in interpretation of the words in section 40(2) indicates that the appeal should be dismissed; and that an RRO cannot be made against a superior landlord, that is, a landlord higher up the chain of tenancies than the immediate landlord under the tenancy which generates the relevant rent.

31. Although perhaps not definitive in themselves, the use of the words "repay … rent paid by a tenant" in section 40(2)(a) supports that straightforward interpretation. Those words naturally refer to the landlord repaying the rent paid to the landlord by the tenant or, put another way, repaying the rent received directly from the tenant. Repayment of rent paid most naturally refers to a direct relationship of landlord and tenant. It is forced language to say that a superior landlord would be repaying rent to a tenant from whom it had never received any rent. In our example, Z has paid rent to Y not X and it is Y, not X, that may be required to "repay" that rent to Z. The different word "pay" in section 40(2)(b) does not cast doubt on the focus being on the rent payable under the direct relationship between the tenant and the landlord. Rather, the word "pay" rather than "repay" is used because the universal credit may have been paid to the tenant rather than to the landlord and, in any event, universal credit is paid by central government not by the local housing authority, which is the beneficiary of a universal credit RRO. It would therefore have been inappropriate to have used the word "repay" in respect of a universal credit RRO.

32. Mr Fitzpatrick submitted that nothing rests on the word "repay" and that the words "repay" and "pay" are interchangeable as shown, he argued, by the fact that in section 45(3) the word "repay" (rather than "pay") is used when dealing with the amount of a universal credit RRO. Under that subsection, "The amount that the landlord may be required to repay in respect of a period must not exceed the amount of universal credit that the landlord received (directly or indirectly) in respect of rent under the tenancy for that period." We accept that in that context (of a universal credit RRO) it may have been more consistent to use the word "pay" rather than "repay" although the linkage in this subsection to the amount received by the landlord may explain why "repay" was used. But in any event, in our view, section 45(3) does not undermine the relevance of the sharp juxtaposition of "repay" and "pay" within the same subsection (section 40(2)).

33. In his oral submissions, Mr Morris for the respondent put forward a more restrictive version of the need for a direct relationship between the tenant and the landlord under section 40(2). According to this submission, there is not only the need for a direct relationship between the tenant and the landlord but the tenancy generating the relevant rent for an RRO must be the bottom tenancy, that is the tenancy under which a tenant is occupying the property, as it was on the facts of this case. Put another way, Mr Morris submitted that there were no circumstances in which a tenant (in our hypothetical example, Y), who has itself sub-let the property to the occupying tenant (Z), could obtain an RRO against its (Y's) immediate landlord (X). We prefer not to decide whether this submission is correct in a case where nothing turns on it and where we are conscious that we have not had full submissions on all possible fact situations.

6. Additional relevant interpretative factors on balance support or, at least, are consistent with, the straightforward interpretation of the words in section 40(2)

34. Statutory interpretation is concerned to identify the meaning of words used by Parliament in the light of their context and the purpose of the provision: *Uber BV v Aslam* [2021] UKSC 5; [2021] ICR 657, para 70; *Rittson-Thomas v Oxfordshire County Council* [2021] UKSC 13; [2022] AC 129, para 33; *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343, paras 28-29. The straightforward interpretation of section 40(2) that we have put forward in paras 24-33 above has taken the natural meaning of the words in section 40(2) in their immediate context. But we must go on to a wider consideration of context and purpose – and hence to an examination of additional relevant interpretative factors – in order to see whether this supports or contradicts the straightforward interpretation set out above.

(1) The previous law under the Housing Act 2004

35. It is common ground that under the Housing Act 2004, which introduced RROs for the offence of controlling or managing an unlicensed HMO (or an unlicensed house subject to the selective licensing scheme in Part 3 of the 2004 Act), the only landlord against whom an RRO could be made was the immediate landlord. This was because of the definition of "appropriate person" against whom an RRO could be made. Under section 73(10) of the 2004 Act, as first enacted, the "appropriate person" was defined in the following way:

> *'"the appropriate person*', in relation to any payment of 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."

This definition of "appropriate person" remained unchanged, subject to an amendment to include universal credit alongside housing benefit, until the enactment of the 2016 Act which extended the scheme of RROs in England while leaving the 2004 Act, with some amendments, to apply in Wales.

36. The reforms made in respect of RROs in England by the 2016 Act included that the offences for which RROs can be ordered were extended, that RROs can now be applied for by tenants directly, and that there is no need for a prior conviction of the landlord (provided the FtT is satisfied, beyond reasonable doubt, that the landlord has committed the offence). But there is nothing to suggest (including in the pre-legislative materials as we explain in paras 51 – 56 below) that those changes carried with them a major change in the reach of an RRO by extending the type of persons against whom such orders can be made. True it is that the use of the language and definition of an "appropriate person" was not carried through to the 2016 Act. Instead, by reason of section 40(2), an RRO may be made against "the landlord under a tenancy of housing in England", an expression which includes a licensor by reason of the definition of "tenancy" in section 56. But that is perfectly explicable as a neater drafting technique. If one of the reforms was to alter the reach of an RRO, so that a superior landlord (X) could be ordered to (re)pay rent to a sub-tenant (Z), one might have expected some reference to that in the pre-legislative materials.

(2) The purpose of, or policy behind, rent repayment orders

37. Part 2 of the 2016 Act is headed "rogue landlords and property agents in England". Chapter 4 within that Part deals with RROs. It is not in dispute that a purpose of RROs is to provide an effective sanction against rogue landlords which may in turn encourage them to comply with the law or to leave the private renting market. At first sight, it was a strong submission of Mr Fitzpatrick that because, plainly, a superior landlord may commit any of the relevant offences and, in some situations, a superior landlord may be the only person committing the relevant offence, it would undermine or, at least detract from, the purpose of, or policy behind, RROs if they were not available against such rogue landlords. The provisions should therefore be read, so it was submitted, with that legislative purpose at the forefront of one's attention. On that submission, as there is nothing that expressly restricts RROs to immediate landlords, superior landlords should be included within the references to landlord and tenant.

38. Although at first sight having force, we reject that submission. That is because, in our view, the words of section 40(2) plainly do not extend to superior landlords but, in any event, Mr Fitzpatrick's analysis of the purpose or policy proves too much. Most of the relevant offences can also be committed by persons who are not landlords, in particular property agents. In many situations, they too may be regarded as indirectly benefiting from the payment of rent (eg through commission payments). Yet there is no suggestion that RROs can be made against property agents. RROs can only be made against landlords. The obvious policy reason for that is that landlords are those who directly benefit from the payment of the rent, or from the associated universal credit. For the implementation of that policy it is entirely rational to confine RROs to those to whom rent is directly paid, and those who benefit from the associated universal credit. In both cases that means the immediate landlord.

39. It should also be borne in mind, in considering the purpose or policy, that an RRO is only one sanction available to those seeking to attack rogue landlords. As is considered next, there are numerous other sanctions in play.

(3) The avoidance of RROs and the importance of other sanctions

40. A major concern voiced by Mr Fitzpatrick, relying in particular for the details of this on the submissions of the interveners, Safer Renting, is that confining RROs to the immediate landlord provides an easy way for rogue landlords to escape an RRO. As on the assumed facts of this case, all that the rogue landlord needs to do is to set up a rent-to-rent scheme whereby it renders itself the superior landlord by letting to a company with few assets which then sub-lets to the applicant tenant. As on the facts of this case, an RRO against the immediate landlord would need to be brought against the company. That company – the immediate landlord - may not have committed any offence so that if the RRO were only available against the immediate landlord, this would detract from the efficacy of an RRO. And even assuming that the immediate landlord has committed a relevant offence, it may have insufficient assets to satisfy the RRO. It is clear from the judgment of the UT at paras 68-69 (and see also the judgment in *Goldsbrough v CA Property Management Ltd* [2019] UKUT 311) that this represents a major concern.

41. We fully recognise the difficulty. However, as Mr Morris submitted, relying on the written submissions of the other interveners, National Residential Landlords Association, the RRO must be seen against the range of sanctions available against rogue landlords. First, there is the criminal law itself under which the superior landlord can be found guilty and fined. Secondly, by reason of section 249A of the 2004 Act, a local housing authority can impose a financial penalty (ie a civil penalty) (of up to £30,000) if satisfied, to the criminal standard, that one of the relevant housing

offences has been committed in respect of premises in England. Thirdly, Chapter 2 of Part 4 of the 2016 Act allows a banning order to be made against a landlord or property agent who has been convicted of a banning order offence. Fourthly, Chapter 3 of Part 4 of the 2016 Act requires a database of rogue landlords and property agents to be established. Finally, in the event that a rogue landlord were to set up a straw company as a shield against liability to an RRO, the directors of the company may risk liability for wrongful trading under section 214 of the Insolvency Act 1986.

42. As the National Residential Landlords Association put it in their written submissions in a footnote to para 13, "It might be thought that [the] prospect of a property owner entering into such an arrangement solely to evade a potential RRO, while simultaneously leaving themselves open to prosecution for criminal offences, is a little far-fetched."

43. Having said all that, we accept that the interpretation we take renders RROs less effective than they perhaps could be if they were to be made available against superior landlords. But in our view that development would undermine the clear definition of an RRO, as set out in section 40(2) of the 2016 Act, and would therefore require new legislation. In other words, if this is thought to be a problem any reform would be a matter for Parliament and cannot be achieved through a distorted interpretation of the relevant provisions in the 2016 Act.

(4) The practical complexity of RROs against superior landlords

44. On the facts of this case, if a rent RRO were available against a superior landlord, this would not in itself produce any practical difficulty. Similarly in our hypothetical example, let it be assumed that under the head-tenancy the rent payable by Y to X was £700 and under the sub-tenancy the rent payable by Z to Y was £500. There would be no difficulty in working out that the maximum amount of an RRO against X would be £500 which was the rent paid by the applicant tenant, Z: see section 44(3)(a). But what if the rent under the head-tenancy was less than the rent under the sub-tenancy? The cap imposed by section 44(3)(a) (contrast section 45(3): see para 19 above) would then be more than the gross receipts of the superior landlord. While the FtT would have a discretion to take this into account under section 44(4), it would have no such discretion where there had been a conviction of the superior landlord: see section 46(1).

45. Further, if an RRO may cover a claim against a superior landlord, there is no rational way of stopping RROs against superior landlords under long horizontal or vertical chains of sub-tenancies. As regards horizontal chains, imagine that in the

hypothetical example, there is a head tenancy of 10 flats and sub-tenancies of each of the 10 flats instead of just one. And imagine that each of the sub-tenants seeks an RRO. Could they all recover from the superior landlord (X) the rent they have paid to Y even though the aggregate might greatly exceed the rent that X has been paid by Y? And what if universal credit were paid to some of those tenants but not others? How would that affect the calculation?

46. Even more problematic would be the long vertical chain. Let us assume that, instead of there being one sub-tenancy of flat 1, there are in fact 5 tenancies of flat 1, between the freeholder and the occupier. And let us also assume that universal credit is paid at different times to different occupiers of flat 1. How would one work out the amount of the RRO that the local housing authority or any particular tenant would be entitled to? At the very least, it would produce great complexity. One might add to this that each of the sub-tenants above the occupying tenant in the chain would themselves potentially become liable to an RRO in so far as they themselves commit any relevant criminal offence. Section 45(3) provides that the amount that the landlord may be required to pay under a universal credit RRO in respect of a period must not exceed the amount of universal credit that the landlord received (directly or indirectly) in respect of rent under the tenancy for that period. If landlord includes superior landlord, how is the universal credit element to be traced up the chain to any number of superior landlords?

47. One can contrast all that potential complexity with the simplicity of an RRO (of either type) operating only against the immediate landlord under the tenancy which generated the relevant rent.

(5) Other relevant provisions

48. In addition to our focus on section 40(2), there are other provisions that support the straightforward interpretation we have set out above. Mr Morris referred us to two persuasive examples of this.

49. First, section 40(2)(a) can be run together with section 44(3). If one does so, that makes clear that section 40(2)(a) is referring to "the tenancy" under which the rent is paid to the landlord. That is, "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."

50. Secondly, section 1(2), (3) and (3A) of the Protection from Eviction Act 1977 refers to offences, concerned with eviction and harassment of occupiers, which fall within the list of offences in section 40(3) of the 2016 Act. Section 1(3A) is an offence that can only be committed by the landlord of a residential occupier or an agent of the landlord. But it is significant that the word "landlord", for the purposes of section 1(3A), is defined to include "any superior landlord". There is no equivalent provision in relation to the meaning of landlord in the context of defining an RRO. It would have been a simple matter to include such a definition and the omission to do so may be regarded as carrying with it the inference that an extended meaning of "landlord" is not applicable in relation to an RRO.

(6) The pre-legislative materials

51. Where there is doubt as to the correct interpretation of a statutory provision, assistance may be derived from relevant consultation papers, reports, and explanatory notes: *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343, paras 30-32; *R v Luckhurst* [2022] UKSC 23, [2022] 1 WLR 3818, para 23.

52. The consultation paper that led to the relevant provisions in the 2016 Act was published in August 2015 by the Department for Communities and Local Government and was entitled *Tackling rogue landlords and improving the private rental sector: A technical discussion paper*. The paper explained that the Government was considering "extending [RROs] to cover other scenarios" (p 12) which could include where a landlord had been convicted of illegal eviction and where a landlord had been convicted of failing to comply with a statutory notice, such as an improvement notice or a prohibition order, issued by a local authority under the 2004 Act. Significantly, the consultation paper did not at any point suggest that the Government was considering extending the class of persons against whom an RRO could be made to include superior landlords.

53. The same can be said of the Government's paper on the responses to the consultation paper published in November 2015 as *Tackling rogue landlords and improving the private rental sector: Government's Response*. Indeed, the Government's position was that tenants could make an application for an RRO "where they have paid rent to the landlord" (p 14).

54. The Explanatory Notes to the Bill as introduced in the House of Commons on 13 October 2015 are again consistent with the "immediate landlord only" interpretation:

> "Chapter 4 empowers the First-tier Tribunal to make rent repayment orders to deter rogue landlords who have committed an offence to which the Chapter applies, or rented housing in breach of the new banning order made under Chapter 2. This clause lists the offences concerned: breaches of improvement orders and prohibition notices and of licensing requirements under the Housing Act 2004, violent entry under the Criminal Law Act 1977, and unlawful eviction under the Protection from Eviction Act 1977. In respect of breach of licensing requirements, the Chapter consolidates existing provisions, with certain modifications. The Chapter newly extends the power to the other cases. This clause states that an order requires a landlord to repay rent paid by a tenant, or to repay to a local housing authority housing benefit or universal credit which had been paid in respect of rent."

55. Had a purpose of the Bill been to change the established feature of an RRO so as to enable it to be made against a superior as well as an immediate landlord (the latter being the position under the 2004 Act: see paras 35-36 above) one might have expected there to have been some mention of that in the explanatory notes.

56. Taken as a whole the pre-legislative material is, at the very least, consistent with the straightforward interpretation set out above.

(7) The principle against doubtful penalisation

57. Mr Morris submitted that the words of the 2016 Act were clear and unambiguous in not permitting RROs against a superior landlord. But as very much a fall-back submission, he relied on the principle (often referred to as the presumption) against doubtful penalisation. That means, in this context, if there were any doubt as to whether the provision imposed a penalty against a superior landlord, that doubt should be resolved against the statute imposing the penalty. The principle is set out in *Bennion, Bailey and Norbury on Statutory Interpretation* 8th ed, (2020) at section 26.4 as follows:

> "It is a principle of legal policy that a person should not be penalised except under clear law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account."

58. While Mr Fitzpatrick denied that the principle against doubtful penalisation had any relevance in this case because, on his submission, the meaning of the statute was clear in permitting an RRO against a superior landlord, he did not dispute Mr Morris' submission that an RRO is a relevant penalty for the purposes of the principle. And it has been held that the principle against doubtful penalisation extends to the imposition of civil liability linked to a crime (see *Ess Production Ltd (in administration) v Sully* [2005] EWCA Civ 554, [2005] 2 BCLC 547, para 78). In our view, although unnecessary to rely on it, the principle against doubtful penalisation is a further factor supporting the straightforward interpretation set out above.

(8) Conclusion on the additional relevant interpretative factors

59. The additional relevant interpretative factors that we have examined on balance support or, at least, are consistent with what we have referred to as the straightforward interpretation of the words in section 40(2).

7. Overall conclusion

60. Although not always true in the law, in this case the simple answer to the question posed is also the correct answer. An RRO cannot be made against a superior landlord. The appeal is therefore dismissed.

61. We should say, finally, that we are very grateful for the excellent submissions, written and oral, by counsel on both sides who were appearing pro bono.