Rent Repayment Orders for the Unaware Superior HMO Landlord?

1. This article will consider the liability of superior landlords of HMOs which arise as a result of unlawful subletting in the light of recent case law.
2. Landlords often rent out their property to a small number of occupiers, or a family, on the basis that due to the number of occupiers, or that the occupiers consist of only one household, the property will not be classified as a house in multiple occupation (‘HMO’) and/or will not require a HMO licence.
3. Many landlords deliberately do this as they do not want their property to become one which is classified as a HMO and/or one which requires a licence. The regulations which govern licensable HMOs are extensive and often for many landlords very off-putting.
4. There are various type of schemes which require HMOs to be licenced. The first being the mandatory licensing scheme. Generally, this applies to any property which falls within the definition of a HMO (see s.254 Housing Act 2004) that is occupied by five or more people forming more than one household.
5. There are then the additional and selective licensing schemes under which a licence can be required under the individual terms of the scheme. Some councils have schemes which involve compulsory licencing for all residential properties within a certain area (even if there is only a single occupier).
6. Landlords should check with their local council as to whether there are any additional or selective schemes in place that govern their properties which may be more onerous than the mandatory licencing scheme.
7. Many landlords who deliberately let their properties to a small number of occupiers, or a single household, to avoid the requirement to obtain a HMO licence, are now finding themselves in situations where their direct tenants have been subletting to other occupiers and in some instances even converting living rooms and other rooms into additional bedrooms to increase the number of occupiers.
8. The effect of this is often that due to the increased number of occupiers, the property will fall within the definition of a licensable HMO. The consequence to the unaware superior landlord can often be devastating.
9. First, a failure to have a licence is a criminal offence and subject to an unlimited fine.
10. Second, HMOs are subject to various management regulations (contained within the Management of Houses in Multiple Occupation (England) Regulations 2006) to ensure the health, safety, and wellbeing of the occupiers. There are stringent standards and if the property does not meet such, any breach is a criminal offence subject to an unlimited fine (for each separate breach of each standard).
11. Landlords can often find themselves subject to criminal prosecution for matters which they did not know existed. As the courts regularly reiterate, ignorance is no excuse.
12. Further, since 6 April 2017, the Housing and Planning Act 2016 (‘HPA 2016’) introduced financial penalties as an alternative to criminal prosecution. A local council may impose a financial penalty of up to £30,000.00 on a landlord for each offence.
13. It is common for properties which were not intended to be HMOs to be subject of multiple charges for breaches of the management regulations. These soon add up. Ten breaches, which is not uncommon, can amount to civil penalties in the sum of £300,000.00.
14. By way of examples, the management regulations require that the manager of the property must:
15. ensure that his name, address and any telephone contact number are made available to each household in the HMO; and such details are clearly displayed in a prominent position in the HMO.
16. ensure that each unit of living accommodation within the HMO and any furniture supplied with it are in clean condition at the beginning of a person’s occupation of it.
17. ensure, in relation to each part of the HMO that is used as living accommodation, that: the internal structure is maintained in good repair; any fixtures, fittings or appliances within the part are maintained in good repair and in clean working order; and every window and other means of ventilation are kept in good repair.
18. Then comes the occupier’s ability to apply for a rent repayment order (‘RRO’), which can entitle them to re-claim up to 12 months of their rent. The question is, who can they reclaim their rent from?
19. RROs are now made pursuant to sections 40-49 HPA 2016. Landlords who have found their properties being sublet without their knowledge or consent often believe that a RRO should not be made against them as they were not letting the property to the number of occupiers that would require a HMO licence, or in any event, they were not in receipt of the rent from those occupiers.
20. The matter was considered *in Goldsbrough & Another v CA Property Management Ltd & Others (Housing – House in Multiple Occupation)* [2019] UKUT 311 (LC). The Upper Tribunal held that applications for RROs do not have to be against the immediate landlord alone, but can be against either the immediate landlord or the superior landlord (i.e. the unaware superior landlord).
21. It is often the case that when these situations unfold, the immediate landlord, i.e. the tenants who are subletting, disappear and it is easier for the occupiers to seek an RRO against the unaware superior landlord, as they own the property and there are fewer problems in tracing them and ensuring that they can satisfy any judgment that is made.
22. The matter came back before the Upper Tribunal in *Rakusen v Jepsen (Housing – Rent Payment – Whether A Rent Repayment Order May Be Made Against A Superior Landlord)* (2020) UKUT 298 (LC). The Upper Tribunal confirmed the decision in *Goldsbrough*.
23. Both cases considered it material that the draftsman of section 40 HPA 2016 departed from the approach taken by the draftsman of the Housing Act 2004 Act when identifying those against whom a RRO could be made.
24. In essence, under the previous legislative scheme for RROs, section 73(5) Housing Act 2004, a RRO is an order requiring “the appropriate person” to make a payment, and that person is defined by section 73(10) in relation to a periodical payment payable in connection with occupation of part of an HMO as the person entitled to receive the payment on his own account in connection with such occupation. In other words, the immediate landlord.
25. The current legislative scheme, under s.40 HPA 2016, in effect widens the scope to reference to rent paid by “a tenant”, which the Upper Tribunal have now held twice to include a superior landlord.
26. That said, there may be light at the end of the tunnel for the unaware superior landlord.
27. Permission to appeal to the Court of Appeal has been granted in *Rakusen* and the hearing of the appeal will commence on 21 or 22 July 2021.
28. It will be open to the Court of Appeal to disagree with the Upper Tribunal and hold that RROs cannot be brought against superior landlords; however, it would seem that landlords will have a significant hurdle to overcome in persuading the Court of Appeal to make such a decision.
29. In the meantime, landlords are best advised to continue to do everything in their power to ensure that their properties do not become licensable HMOs if they do not intend for such.
30. In doing so landlords should regularly inspect their properties, and keep detailed records as to such, paying close attention during such inspections to any signs of increased occupation.
31. Dale Timson specialises in landlord and tenant matters including those relating to HMOs and RROs. He regularly represents both landlords and tenants in these types of cases and can be contacted through his clerk, Greg Piner, by emailing gregpiner@5pumpcourt.com.

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