



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/00CB/HSE/2018/0001**

Property : **9, Merton Place, Birkenhead, Wirral CH43
4XD**

Applicants : **Wirral Borough Council
(represented by Mr Bayatti, borough
solicitor)**

Respondent : **Scott Andrew Smyth**

**Type of
Application** : **Application for a rent repayment order by
Landlord (following conviction)
Sections 40-44 Housing and Planning Act
2016**

Tribunal Member : **Mr J R Rimmer
Mr J Rostron**

**Date of
Determination** : **17th May 2019**

Order : **The application for a Rent Repayment Order
is refused for the reasons set out herein**

A. Application

- 1 The Tribunal has received an application under Section 41 Housing and Planning Act 2016 (the Act) from the Applicant for a rent repayment order (RRO). The amount requested for the order is £3791.06. This is slightly above the amount claimed in the application, the difference being accounted for by reference to what was paid during, rather than attributable to, the relevant period.
- 2 The Tribunal has sent a copy of the application to the Respondent.
- 3 Directions were given by the Deputy Regional Valuer of the Tribunal for the further conduct of this matter.
- 4 Those directions have been complied with sufficiently for the Tribunal to be able to determine the application

B Background

- 5 The Applicant is the local housing authority which provided housing benefit to the occupier of 9, Merton Place, Birkenhead in a period preceding a conviction of the Respondent at Wirral Magistrates' Court on 28th February 2018.
- 6 The Respondent was convicted of two offences in his absence. The offence that is relevant to this application is that on or about 21st November 2017 he had control of or managed a house (9, Merton Place) which was required to be licensed under Part 3 Housing Act 2004 but was not so licensed.
- 7 By reason of that conviction, the Applicant is entitled to seek repayment of any housing benefit paid in respect of the property for a period of up to twelve months immediately preceding the date of the offence (i.e. from 22nd November 2016 onwards).
- 8 The Respondent is now the registered owner of the property.
- 9 The property is a house which falls within one of the 4 designated areas of the Borough of Wirral to which the selective licensing scheme of Part 3 Housing Act has been applied, hence the need for a licence and the ensuing conviction for not having one.
- 10 Having determined upon an intention to seek to recover the housing benefit that had been paid the Applicant served an appropriate notice upon the Respondent and in general terms, although with much disagreement upon precise matters, the recovery process appears to

have reached its present stage because neither party acted towards, or responded to, the other in the manner that they had anticipated and might have resulted differently

The Law

- 11 It is therefore useful to set out the law as it applies to the making of a RRO such as is contemplated within this application.

Section 40 of the Act

(1) confers power on the First-tier Tribunal to make a (RRO) where the landlord has committed an offence to which this Chapter applies

(2) A (RRO) is an order requiring the landlord under a tenancy of housing in England to

(a) Repay an amount of rent paid by a tenant

Subsection 3 then sets out a table of 7 offences to which the Tribunal's powers apply:

1 using violence to secure entry to residential premises

2 eviction of harassment of occupier

3 failure to comply with an improvement notice

4 failure to comply with a prohibition notice

5 and 6 offences in relation to houses required to be licenced

6 breach of banning orders in relation to the provision of housing

- 12 Section 41 of the H&PA 2016 provides

(1) A ... local housing authority may apply to the First-tier Tribunal for a (RRO) against person who has committed an offence to which this Chapter applies

(2)...

(3) A local housing authority may apply for an order only if-

(a) The offence relates to housing in the authority's area and

(b) The authority has complied with section 42.

(4) In deciding whether to apply for (an RRO) a local housing authority must have regard to any guidance given by the Secretary of State

- 13 Section 42 requires the local housing authority to serve a notice of intended proceedings that must

(a) Inform the landlord that it is proposing to seek a RRO and
Explain why

(b) State the amount it is seeking to recover

(c) Invite the landlord to make representations within a period of
not less than 28 days

And then consider any representations made

A notice of intended proceedings may not be given after the end of a

period of 12 months beginning with the date the landlord committed the offence.

14 Section 43 provides

- (1) The First-tier tribunal may make a (RRO) 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) And the amount of the order is determined by section 45 in the case of an application by the local housing authority

15 Section 45 provides that

- (1) Where the First-tier tribunal decides to make a (RRO) under Section 43
- (2) the amount that may be recovered depends upon a table provided in t
- (3) For the offences relating to unlicensed houses the amount of an order can be up to the amount of universal credit, or housing benefit, paid during a period not exceeding 12 months during which the landlord was committing the offence, but cannot exceed that amount
- (4) In determining the amount the tribunal must in particular take into account
 - (a) Th conduct of the landlord
 - (b) The financial circumstances of the landlord
 - (c) Whether the landlord has at any time been convicted of a (relevant) offence

16 It is important to note that the Act clearly acknowledges that committing an offence is not synonymous with being convicted of an offence in a court exercising a criminal jurisdiction, but is regarded requiring any decision as to such an offence being determined, where there is a need to do so, according to the criminal burden of proof.

Submissions and hearing

17 The Tribunal was provided by each of the parties setting out their respective positions in relation to the making of an order and which formed the basis of the enquiries made by the Tribunal during the course of the hearing.

18 It was clear that Scott Andrew Smyth was convicted in his absence of the relevant offence at Wirral Magistrates' Court on 28th February 2018. What was not initially clear to the Tribunal was whether the Scott Andrew appearing before it was the Same person. As proceedings progressed it became apparent to the Tribunal that he was and the Tribunal was further satisfied that he acknowledged this fact.

- 19 As the history of the ownership and occupation was recounted, both from the Applicant's perspective and that of the authority it became clearer as to how the current situation had arisen.
- 20 The tenancy agreement in relation to 9, Merton Place states the landlord as being Mrs Catherine Smyth, the mother of Scott Andrew Smyth. Prior to her death in September 2017 she unfortunately suffered from dementia and Mr Smyth acted for her in relation to management of 9, Merton Place. It would appear that the signature on the tenancy agreement is consistent with it being that of Catherine Smyth.
- 21 It seems to the Tribunal that the intention of the family to set up a form of trust that would keep the property from being used for the purpose of funding care for her subject to rent being available for that purpose. It appears to be the case that the somewhat convoluted method chosen by Mr Smyth to secure this aim would not have been successful.
- 22 Be that as it may, Catherine Smyth passed away on 21st September 2017 and the property devolved upon Mr Smyth as her executor. He became at that point the owner of 9, Merton Place in that capacity and title passed to him, according to Land Registry documentation, on 21st November 2017.
- 23 Against that background it was clear that the Magistrates' Court would be entitled to convict Mr Smyth as a person having control of or managing an unlicensed dwelling. There never was a relevant licence and as the property is now unlet it does not require one.
- 24 Less clear is his liability for a rent re-payment order. Sections 40-45 of the Act refer to an order being made against a landlord. That is not defined for the relevant part of the Act and the tribunal raised this with the Applicant. The conviction is in respect of management and control of the property. Mr Smyth appears not to have been the landlord, at least not until 22nd September, his mother was.
- 25 After having time to consider the matter, the Applicant conceded that it must now limit its claim to the two months from 22nd September to 21st November 2017. The Tribunal thinks that is correct. A landlord may not necessarily be a person having relevant management, or control, of the dwelling or vice-versa. The history of rent repayment orders does not assist the Applicant, earlier references prior to 2016 being to an "appropriate person" and the current provisions being within that part of the Act specifically referring to "Rogue landlords". The effect is to reduce the amount claimable from £3791.06 to £988.97.

- 26 The Applicant indicated a wish to pursue a claim for that amount, by reference to the continued lack of any licence for the relevant period whilst the Respondent was landlord, which merely continued his period of management and control on behalf his mother.
- 27 The Respondent averred that he was effectively an accidental landlord. There had been a letting to a close friend with the intention of securing some funding. He had inherited the property and was looking to sell it. He felt a moral obligation towards the tenant and did not seek to repossess the house immediately until he felt the tenant was dragging her feet about finding new accommodation. He accepted that he had not sought to engage with the local housing authority in seeking a licence, nor in seeking a temporary exemption from the requirements.
- 28 The Respondent suggested his approach was coloured by his other experiences with Wirral Borough Council and the approach adopted by the Social Services Department in relation to his mother's affairs. Some discussion took place to inform the Tribunal of the nature of information held by different Council departments and the data protection issues that arise with any sharing of that information.
- 29 The Respondent also indicated that his current financial situation was parlous, having lost his business and having no current income from benefits. He appears to be dependent upon savings and the realisation in due course of monies from the sale of 9, Merton Place.

Determination

- 30 It is clear that on 21st November 2017 the Respondent was managing or controlling an unlicensed dwelling when a licence was required. The Magistrates' Court was entitled to convict him. What is less clear is whether the wording of section 43(1) of the Act (see paragraph 14, above) would allow the Tribunal to come to a different conclusion. It appears the Tribunal must be satisfied beyond reasonable doubt that an offence has been committed "whether or not the landlord has been convicted".
- 31 On this occasion, as an exercise in caution, the Tribunal has taken that to envisage a tribunal reaching a conclusion of guilt in the absence of a conviction in a court exercising a criminal jurisdiction. And did not in any event see anything to suggest an offence had not been made out.
- 32 It was, however, concerned as to the chain of events that had put the Respondent in the position he now is. The pursuit of the larger initial amount by the Council turned upon an incorrect assumption of liability for the while of a twelve-month period. An opportunity to consider extenuating circumstances, relating to both the Respondent and Mrs

Smyth appears to have been missed on more than one occasion. One of those may have been the conviction of the Respondent in his absence, deals with the situation it finds before it, and in relation to his somewhat idiosyncratic dealings with the Applicant and the Tribunal he may not have provided himself with the best services. In addition, the Tribunal has what is probably a better picture of the Respondent's financial circumstances than has hitherto been available.

- 33 The Tribunal is not, in the case of an application by the local housing authority, forced to make a binary choice of all, or nothing, but has the ability to make an order in any amount up to the full amount of the benefit paid in the relevant period.
- 34 The Tribunal now views the situation that pertained in respect of 9, Merton Place with the benefit of some considerable hindsight. In addition to what has been noted above, it is clear accommodation was provided to the tenant, in respect of which there is no suggestion of any member of the Smyth family acting as a rogue landlord in any recognised sense of that term. It would appear there has been no personal gain to the Respondent in the relevant period, other than a conceivable enhancement of the estate, but that is not clear. They are not, and were not, apparently, professional landlords.
- 35 It might be reasonable to assume that had the tenant not lived at Merton Place, accommodation provided might have led to an equivalent entitlement to housing benefit. On that basis the council has not necessarily lost money on behalf of its taxpayers.
- 36 The Act clearly envisages a discretion on the part of the Tribunal as to the making of an order or not. It considers that on this occasion, against the background set out above, it is appropriate not to make any order.

J R RIMMER (CHAIRMAN)

Date: 27 June 2019

