



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

Case Reference : **MAN/00CB/HSE/2019/0001+2+3**

Property : **1, 3 and 5, King Street, Wallasey CH44 8AT**

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

Respondent : **James O’Loughlin
(represented by Michael Ward, solicitor)**

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

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

Date of Determination : **20th December 2019**

Date of Decision : **15th January 2020**

DECISION

Order : The application for a Rent Repayment Order is granted 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 £11,317.62. This is slightly different from the amount claimed in the application, the difference being accounted for by reference to a re-calculation of the amounts of benefit paid for the relevant 12-month 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 occupiers of three properties at 1-5 King Street Wallasey in a period preceding a conviction of the Respondent at Wirral Magistrates' Court on 11th July 2018.
- 6 The Respondent was convicted of three offences of being concerned in the management of a property not being properly licenced, one offence in respect of each property. The offences that are relevant to this application are that on or about 5th February 2018 he had control of or managed houses required to be licensed under Part 3 Housing Act 2004 but were not so licensed, contrary to Section 95(1) and (4) Housing Act 2004.
- 7 By reason of those convictions, the Applicant is entitled to seek repayment of any housing benefit paid in respect of the relevant properties for a period of up to twelve months immediately preceding the date of the offence (i.e. from 6th February 2017 onwards).
- 8 The Respondent was at the time of the offences the registered owner of the properties which have now been sold to a Registered Social landlord.
- 9 The properties in question are bungalows situated within one of the 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 They were constructed on a vacant plot at the edge of the area in question after the designation had taken place.
- 11 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.
- 12 The Tribunal had the benefit of substantial statements of the respective cases of the parties, supported by bundles of relevant documents which they have taken into account, supported by the submissions made on behalf of the parties at the hearing at the SSCS Tribunal Centre, Dale Street, Liverpool on 9th December 2019.

The Law

- 13 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

- 14 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

15 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.

16 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

17 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 table set out in this subsection and must relate to a relevant benefit paid during the period mentioned in the table
- (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) The 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

18 Section 46 provides:

- (1) Where the First-tier tribunal decides to make a RRO 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...
- (3) Condition 2 is that the order is made...
 - (b) In favour of a local housing authority
- (4) ...
- (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.

Submissions and hearing

- 19 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.
- 20 It was clear that Mr O'Loughlin was convicted of relevant offences at Wirral Magistrates' Court on 11th July 2018 and he was ordered to pay a fine, costs and victim surcharge. There is no doubt that at the relevant time, and during the 12 months preceding it, he was exercising management and control of the three properties.
- 21 The Tribunal accepts all that was said by him, and on his behalf about the situation that arose in relation to 1-5 King Street that:
 - That the plot is on the very Southern boundary of the designated area.
 - There were no relevant buildings at the time on the plot at the time of the designation.

- He commenced building of three bungalows after the designation.
- There appears to be no complaint whatsoever as to the quality and standard of the accommodation provided.
- By reason of construction of the properties after the designation of the area, the addresses of 1, 3 and 5 King Street do not appear on the original list of addresses falling within the area.
- Notwithstanding there is some disagreement as to when the address list was updated there was potential for some confusion with respect to the list after it was undated if a search was made for these addresses.
- The correspondence from the Applicant in relation to a failure to licence is not comprehensive in its explanation of the possible consequences of that failure. (As an example; the letter dated 20th October 2017 to Mr and Mrs O'Loughlin).
- At the time the prosecution was taking place he was already in negotiations with a Registered Social Landlord for the sale of the properties and there would then be no need for any licence as such organisations were exempt from the process.

22 The Applicant takes issue with relevance of some of those factors in relation to the failure of the Respondent to obtain appropriate licences:

- The map clearly shows the relevant plot as being within the relevant area. As did the eventual updated address list.
- Notwithstanding that the addresses did not appear the Applicant made contact on several occasions and by various means to give the Respondent the opportunity to apply for a licence and no such application was forthcoming.
- Although it concedes that the correspondence in question does not refer specifically to the Council being able to seek recovery of rent paid by way of benefit, its explanation of outcomes in general is sufficient to encourage action to avoid possible consequences by seeking a licence.
- It was not made aware until a later stage that the negotiation for the sale of the property were taking place, or reaching a satisfactory conclusion.

23 Of particular concern to the Respondent is the fear that he was singled out as the object of an application for a RRO by reason of the manner in which he expressed his disapproval, immediately after his conviction, of the approach to licensing and prosecution. On that basis the decision to seek the order was

unreasonable. The Applicant denied that this had any relevance to the decision to seek a RRO and assisted the Tribunal at the hearing by collating, as best it could, the information available as to the relationship between licensing, prosecution and applications for RROs within the Borough. It accepted that at the time decisions were made in Mr O'Loughlin's case written guidelines on such matters had not been finalised and in the process of meeting to consider an application for an order one of the objects of the Respondent's expression of discontent was present.

- 24 If the Tribunal was not with the Applicant in relation to that view as to reasonableness the Respondent accepted that there the Tribunal had a binary choice between making an order, and not making one, in respect of the full amount of the benefit paid within the 12-month period . There was not the scope, available in relation to applications being made by a tenant, to consider a range for the amount to be repaid, from a token amount right up to the full amount of rent paid.
- 25 There were, in the Respondent's view, exceptional circumstances in the way in which the offences had come about that enable the Tribunal to apply Section 46(5) and find it unreasonable for the Respondent to pay any sum in repayment. Alternatively, the circumstances were such that within the general discretion as to whether or not make an order the circumstances were such that no order needed to be made
- 26 The Applicant, for its part, did not accept that the circumstances were such as to make them exceptional and that general discretion of the Tribunal should in the circumstances pertaining suggested that an order should be made. It followed that within the parameters of Section 46 it should necessarily be for the full amount of the benefit paid.

Determination

- 27 The Tribunal does have some sympathy with the Respondent's position in relation to him being clearly mistaken, initially, as to whether or not the properties fell within a designated area. It is far from convinced however that this carries much, if any weight, as time passed between the need for a licence being brought to the Respondent's attention and the eventual decision to prosecute as a result of the failure to apply. It is also clear that had the Respondent engaged more constructively with the Applicant and brought to its attention the prospective sale of the properties a separate and different application for an exemption from the licensing requirements could have been made.
- 28 In any event the parties are where they are as a result of a prosecution taking place and a conviction obtained; that was done whilst apparently recognising there was no complaint about the standard of the properties.

- 29 The Tribunal does not think that the subsequent decision to apply for a RRO is so unreasonable that a local housing authority acting reasonably would not make such a decision. Such evidence as there is suggests that the Applicant has acted similarly in the past. The Applicant had pursued the prosecution up to the point of conviction and sentence before the Respondent expressed his views inappropriately. It then pursued the RRO from that point and there is nothing in what the Tribunal heard to suggest there was anything other than a decision predicated upon the fact that a prosecution had now been obtained.
- 30 It is not persuaded otherwise by the fact of the attendance of a particular person at the meeting to decide upon the making of the application. Nor is it satisfied that the failure, in the relevant correspondence, to set out in full all the possible consequences of failure to apply for a licence is fatal to the Applicant's case. The Tribunal is satisfied that the consequences of failure are sufficiently identified to the Respondent by the contents as they are set out.
- 31 The Tribunal does however accept that it should consider all the circumstances of the case and the matters surrounding the failure to seek a licence in determining in which way it should exercise its discretion whether or not to make an order and whether there are such exceptional circumstances that suggest that making an order would be unreasonable.
- 32 The Tribunal, in considering the legislation in Sections 40-46 of the Act, takes the view that at this point it looks first at its general discretion as to the making of an order. It is of the view that the predominant factors are the unwillingness of the Respondent to engage with the Applicant in a constructive manner that would have prevented the situation reaching the point of prosecution and the subsequent RRO application. The interview that took place with the Respondent at the Applicant's offices, and of which a transcript is provided, is instructive in setting out the Applicant as being a landlord of a number of properties, being aware of legislative requirements and being aware that the Council was satisfied that the properties required licensing. The Tribunal is satisfied that it made that point on a number of occasions prior to taking enforcement action.
- 33 In those circumstances the Tribunal is of the view that the balance swings in favour of the Applicant in the exercise of its discretion as to making an order.
- 34 The Tribunal appreciates that the mischief at which the relevant statutory provisions are aimed, poor housing conditions, are not directly applicable to the Respondent's properties, but it is of the opinion that such legislation will always be a relatively blunt instrument. To the Tribunal's mind it has been applied as selectively as possible within Wirral in determining appropriate areas for designation and all the consequences of that designation necessarily follow.

- 35 Are there then such exceptional circumstances that the Tribunal should consider it unreasonable for the Respondent to pay any amount under the order? No guidance is offered to the Tribunal to assist with that determination. The Tribunal is satisfied that Section 46(5) is sufficiently widely drawn that it relates to all the circumstances, whether they relate to the offending behaviour, the financial circumstances of the Respondent, or the amount itself that would otherwise be payable.
- 36 The Tribunal is satisfied that there is nothing so unusual, or so out of the ordinary, or so other than normal, in the circumstances relating to any of those factors outlined to lead it to the conclusion that there are exceptional circumstances sufficient to consider the making of any payment by the Respondent unreasonable.
- 37 The Tribunal therefore finds in favour of the Applicant and makes an order in the full amount of the benefit paid in respect of rent for the 12- month period prior to the date of offence in respect of which a relevant conviction was obtained, 5th February 2018.

Tribunal Judge
J R RIMMER
15th January 2020