

WHERE NOW SUMAL?

THE IMPLICATIONS OF BRENT LONDON BOROUGH COUNCIL v SANJAY SHAH & OTHERS

and

THE AVAILABILITY OF CONFISCATION PURSUANT TO THE PROCEEDS OF CRIME ACT 2002 IN RELATION TO VARIOUS CRIMINAL OFFENCES UNDER THE HOUSING ACT 2004

Introduction

1. This article is based on the Skeleton Argument which Edmund Robb from Prospect Law (the barrister acting for Brent London Borough Council) based his submissions on before Stephen Rubin QC sitting as a Recorder at Harrow Crown Court on 25-31 January 2018.
2. The case is important because Brent Council sought to distinguish various different offences under the Housing Act 2004 (the “2004 Act”) relating to the unlawful running of a House in Multiple Occupation (HMO) (namely breaches of conditions attached to a Selective License under s.95(2) of the 2004 Act, and failure to comply with Regulations passed for the proper management of HMO’s under s.234(3) of the 2004 Act), with the failure to obtain a license e.g. under s.95(1) of the 2004 Act.
3. In particular, the Defendants relied upon the well-known case of *Sumal & Sons (Properties) Limited v. London Borough of Newham* [2012] EWCA Crim 1840, to argue that there was no “causal link” between the criminal conduct and the benefit received: in Sumal it had been found that the criminal offence was a failure under s.95(1) of the 2004 Act to obtain a license – it was not a criminal offence to charge tenants rent, and indeed the tenancy agreements remained enforceable between the landlord and the tenants despite the failure of the landlord to secure the necessary license.
4. In essence, the Council’s argument in the Brent v Shah case was that on the facts of the case, a strong causal link did exist between the criminal conduct and the various

financial benefits then received. Sumal could and should be distinguished and confiscation under POCA 2002 was available.

5. The Crown Court has found, as a matter of principle, in the Council's favour: this is not, in other words, a Sumal case.
6. A further preliminary issues hearing has now been set for July 2018 to decide other threshold issues relating to POCA 2002.

The Factual Background

7. The Defendants were prosecuted by Council for various offences connected with the operation of a house licensed for occupation only by a single family at 1 Napier Road, London, HA0 4UA ("the Property").
8. On 23rd May 2017, following trial before District Judge Jabbitt between 24th to 28th April 2017, the Defendants were convicted of various offences for breaches of provisions of Parts 2 and 3 of the HA 2004 and The Management of Houses in Multiple Occupation (England) Regulations 2006 ("the 2006 Regulations") made under that Act, in relation to the Property.
9. The District Judge made an order pursuant to section 70(1) of the Proceeds of Crime Act 2002 ("POCA") referring the case to the Crown Court for confiscation proceedings to be considered.
10. DJ Jabbitt found that the Property was in multiple occupation on 21 July 2016, without a licence and in breach of the 2006 Regulations [paragraph 194] and this involved nine breaches of the Selective Licence granted in respect of the Property [paragraph 238].
11. The Property became "grossly overcrowded" [229] and contained so many tenants that they were unable all to use the kitchen facilities [229]. As an indication of how much rent was being made, the example of 25 occupants was given, but the Judge made clear that there was evidence that many more than 25 occupants may have lived at the Property at any given time [230].

12. The First and Second Defendants were paid some £180,000 in the years between 2011-2016 [paragraph 222], and based upon at least 25 occupants, monthly rent of at least £6,000 was generated [230]. £2,900 was paid monthly to the joint account of the First and Second Defendants, but, although there were some expenses, the rent was paid in cash, so at least £3,000 of income per month had not been accounted for [230] and, apart from the Third Defendant, the only possible recipient was his “boss”, the Fourth Defendant [234]. Significantly, the judge found that:

Plainly someone is making a lot of money from exploiting the tenants and providing them with appalling living conditions that are grossly overcrowded and unsafe [230]

And that the Fourth Defendant was

Primarily responsible for the conditions. [234]

13. One point requires clarification which perhaps was not clear from the judgment of the learned District Judge: the licence granted to the First Defendant was pursuant to the Selective Licensing scheme and only allowed a single household (that is to say one family), with up to 7 members, to occupy the house. This Selective License was not a House in Multiple Occupation (“HMO”) licence; a property that has one household living in it is not an HMO (s.254 HA 2004). An HMO is accommodation that is occupied by people who do not form a single household.

14. The Council contended that the Property was being used to house a population of some 35-40 unrelated occupants at any given time. The property was not only overcrowded to an extent that could never have been permitted under any licensing regime, but the Property had a Selective Licence, not an HMO licence, and, so, was being used for a purpose inconsistent with that for which it was licensed.

The Convictions

15. Convictions were obtained against the Defendants as follows:

- a. 1 offence (for each defendant) of failing to secure an HMO license for the Property as required by s.61 HA 2004, contrary to s.72(1). J. Valand pleaded guilty to the offence. The Court found the other three defendants guilty of the offence.
- b. Separate offences (for each of the defendants) relating to aspects of the management of the Property under s. 234(3) of HA 2004 Act the 2006 Regulations. J. Valand pleaded guilty to these offences. The Court found the other three defendants guilty of these offences.
- c. 9 separate offences for the First Defendant of failing to comply with various conditions attached to the Selective License, contrary to s.95(2) of HA 2004. The Court found the First Defendant guilty of these offences and the Fourth Defendant was found guilty of aiding and abetting one breach under s.95(2).

16. The Council sought confiscation in relation to the s.234(3) against all four Defendants, and against the First and Fourth Defendants in relation to the s.95(2) offences.

POCA 2002

17. When a Defendant has been convicted before, or committed to, the Crown Court and the Prosecutor initiates confiscation proceedings under s.6 of the Proceeds of Crime Act 2002 ("POCA"), the Court must then proceed to address questions about whether the Defendant has a criminal lifestyle, or if not, then whether the Defendant has benefitted from the crime.

18. Where a Prosecutor initiates confiscation proceedings, the Court must address certain questions. S.6(4) POCA lays out the approach the Court must follow:

- a. The Court must decide whether the Defendant has a criminal lifestyle (s.6(4)(a)).
- b. If it so decides, then it must decide whether he has benefitted from his general criminal conduct (s.6(4)(b)).

- c. If it decides he does not have a criminal lifestyle then it must decide whether he had benefitted from his particular criminal conduct (s.6(4)(c)).

19. These questions, to be decided upon the balance of probabilities, will conclude to what extent a Defendant can be said to have benefitted, and thus, if he has any available assets, how much he will be ordered to pay.

20. Of the three alternative tests to establish criminal lifestyle, that most clearly applicable in the present case is where the offence is one committed over a period of at least 6 months, and the Defendant has obtained a benefit from the conduct of at least £5000. (s.75(2)(c) and (4)).

21. In this connection, we note that the learned District Judge found that the First and Second Defendants accepted that they had been paid £180,000 in rent over the five years, 2011-2016 [222], and that the Fourth Defendant received large sums of money from at least June 2014 to July 2016 [234].

22. Criminal conduct and benefit is defined by POCA as follows:

76. Conduct and benefit

- (1) *Criminal conduct is conduct which—*
 - (a) *constitutes an offence in England and Wales, or*
 - (b) *would constitute an offence if it occurred in England and Wales.*

....

- (4) *A person benefits from conduct if he obtains property as a result of or in connection with the conduct.*

23. The potential benefit in the present case is:

- (a) The income derived from the excessive occupation of the Property in contravention of the Selective Licence conditions in breach of s.95(2) of HA 2004 (and for that matter in breach of the 2006 Management Regulations contrary to s.234(3) of HA 2004); and,

- (b) The pecuniary advantage obtained by failure to execute works and undertake administration necessary to comply with the 2006 regulations, in contravention of s.234(3) HA 2004.

Preliminary Issue

24. Counsel for the Fourth Defendant urged that, on the facts of this case, a confiscation pursuant to POCA is not available. This submission was based upon the decision of the Court of Appeal in *Sumal & Sons (Properties) Limited v. London Borough of Newham* [2012] EWCA Crim 1840.

25. The Council seeks to argue that, on the facts of the case, *Sumal* has no application and that confiscation is available in this case.

The principles determined by *Sumal*

26. In *Sumal*, the Court of Appeal held that, in relation to an HA 2004 s.95(1) offence (renting a house without the necessary licence), confiscation was not available.

27. The reasoning of the Court in reaching this view, may be summarised as follows:

- (a) The benefit enjoyed by the Defendant was rent. The rent was received pursuant to a tenancy. This tenancy was lawful for two reasons:
- i. The Defendant had a right to grant tenancies, and nothing in the HA 2004 prohibited the Defendant from doing so, notwithstanding that he had committed the offence of renting the property without a licence [paragraph 38];
 - ii. Further, the HA 2004 expressly provides that such tenancies are valid and enforceable (in Part 3, pursuant to s96(3)). That was inconsistent with the notion that the landlord was unlawfully obtaining rent [paragraphs 36 & 37].

If the rent proceeded from a lawful source, i.e. the tenancy, it could not be the result of the breach of s.95(1). It could not be the benefit of the criminal conduct.

(b) Further, in relation to the offence committed, a rent repayment order was available in respect of the same offending. If confiscation were also available, that would be double jeopardy or double recovery [paragraph 41].

28. The Council submitted before Stephen Rubin QC sitting as a recorder at Harrow Crown Court that *Sumal* is readily distinguishable from the present case, and that, had the Court of Appeal been faced with the facts of the present case, it would have reached a different conclusion.

29. The Fourth Defendant also sought to rely upon the case of *R v. Siaulyis* [2013] EWCA Civ 2083, in which the Court of Appeal applied the principle in *Sumal & Sons* to a HA 2014 s.72(1) offence. This is the provision under Part 2 of HA 2004 Act, dealing with HMOs, that mirrors the provision in Part 3, s.95(1), which concerned the court in *Sumal*, so, from the Council's perspective, it added nothing to that case.

Rent Repayment Orders

30. The Council argued that this issue could be easily disposed of. Rent repayment orders are provided for by s.96(4) HA 2004. Rent repayment orders are available only in relation to specific offences, these do not include s.95(2) or s.234(3) HA 2004. The *Housing and Planning Act 2016* ("HPA 2016"), came into force on 6 April 2017, and provides that the tribunal may only make a rent repayment order in respect of an offence listed in s.40(3). The only HA04 offences so listed are:

Section 30(1) Failure to comply with an improvement notice.

Section 32(1) Failure to comply with a prohibition order.

Section 72(1) Control or management of an unlicensed HMO.

Section 95(1) Control or management of an unlicensed house.

31. Further, no rent repayment order could be obtained in respect of the Fourth Defendant in any event. A rent repayment order can only be made against an “appropriate person” (s.96(5)). The “appropriate person” is defined (s.96(10)) as, “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”. Thus, the person so-entitled is the landlord, a point made explicit in s. 40(2) HPA 2016, which provides that “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 ...”.

32. In the present case, were a rent repayment order available, the “appropriate persons” would be the First and Second Defendants as the two registered freehold owners of the Property. The Fourth Defendant was not the landlord, but was found to be a person managing the property, for the purposes of HA04.

Approach to Confiscation

33. *Sumal* concerned a different offence and a distinct set of facts from those in the present case. The Council submitted in the Preliminary Issues hearing at Harrow Crown Court that rather than take *Sumal* as a starting point and assume that it applies to the present facts, as the Defendants sought to do, a better point of departure is the cautionary view of the Court of Appeal in *R. v. Palmer* [2016] EWCA Crim 1049, a case which considered the availability of confiscation in relation to an offence of engaging in licensable conduct otherwise than in accordance with a licence.

34. In *Palmer* the Court cautioned that “it will not necessarily be helpful to look at other statutes and other factual circumstances in order to answer, by analogy, the question that arises in any particular case” (per Simon LJ at [19]).

35. The following authorities illustrate how the court draws the vital distinction between income that derives from lawful activity and that which results from criminal conduct.

36. In *R. v. McDowell*, *R. v. Singh* [2015] EWCA Crim 173, the Court of Appeal held that there was “a narrow but critical distinction” between an offence of prohibited activity admitted by the offender, or proved against him, as in *R. v. Del Basso* [2010] EWCA Crim

1119, and an offence of failure to obtain a licence to carry out an otherwise lawful activity, as in *Sumal*.

37. In *Del Basso* the Court of Appeal upheld a confiscation order against two offenders who had failed to comply with an enforcement notice issued under the provisions of the 1990 Town and Country Planning Act by operating a park and ride facility in breach of planning permission. *Del Basso* was followed in *Hussain v. Brent* [2014] EWCA Crim 2344.

38. In *Palmer*, the respondent was convicted in the Magistrates' Court of an offence of engaging in licensable conduct otherwise than in accordance with a licence, contrary to the Private Security Industry Act 2001 (PSIA 2001) s.3(1) and (6). Section 3 of the PSIA 2001 provided that "it shall be an offence for a person to engage in licensable conduct except under and in accordance with a licence". The court at first instance held that the respondent's trading activity was not "criminal conduct" from which "benefit" accrued. The Crown appealed.

39. The Court of Appeal considered that the relevant question was whether PSIA 2001 s.3(1) created an offence that prohibited, and made criminal, the activity proved against the respondent (as in *Del Basso*), or an offence that comprised the failure to obtain a licence to carry out an activity which was otherwise lawful (as in *Sumal*). This was described in *McDowell and Singh* (at [34]) as the "narrow but critical distinction".

Whether the benefit results from criminal conduct

40. The Council's case in *Brent v Shah* was that, in relation to the rent received from the Property, in terms of both factual and legal causation, the benefit results from criminal conduct rather than from lawful contracts.

41. In *Sumal*, the offence was the breach of HA 2004, Part 3, s.95(1); a person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part but is not so licensed.

42. In *Sumal*, the benefit enjoyed by the defendant was rent and the ultimate source of the benefit was a lease. The lease was lawfully granted and nothing in HA 2004 had

prohibited the granting of the lease or its continuance. Rather, as an offence under HA 2004 Part 3, to which s.96(3) applied, HA 2004 expressly provided that the lease was valid and enforceable, and the tenancy could scarcely be unlawful in those circumstances.

43. Further, the tenancy was granted before the HA 2004 offences came into force [*Hussain v. Brent* [2014] EWCA Crim 2344, paragraph 16]. The wrong-doing had been the failure to obtain a licence after changes in the law had made that necessary, but the Court accepted that, had the defendant sought a licence, one could have been obtained [paragraph 26]. The failure to obtain a licence did not negate the lawfulness of the tenancy, which was the source of the benefit. The criminal conduct (failure to obtain a licence) was not the cause of the benefit (the rent), but, rather, was incidental to it [paragraph 39]. In substance the Court of Appeal looked at the matter in terms of causation; was the cause of the benefit the criminal conduct, or was the cause of the benefit the existence of a lawful contract?

44. In the *Brent v Shah* case the facts were rather different. A licence was obtained under the Selective Licence scheme. The pertinent Part 3 offence in relation to which confiscation is sought is s.95(2), which provides:

- (2) *A person commits an offence if—*
 - (a) *he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and*
 - (b) *he fails to comply with any condition of the licence.*

45. The Selective Licence was for one household (a single family) of no more than 7 persons. It was breached by the grant of tenancies or licences to between 35 and 40 persons at any given time. There could be no question that a licence would have been obtainable in respect of the level of actual occupation in this case.

46. Applying the “narrow but critical distinction” described in *McDowell and Singh*:

- (a) To rent a house and not have a licence required by law gives rise to the offence of not having a licence, but does not prohibit the renting of the house. The

result is that the rent derives from a lawful contract, not from the criminal conduct of not having the licence (*Sumal*); **but**,

- (b) To rent a house in breach of the terms of a licence that imposes limitations on permitted occupancy, gives rise to the offence of failure to comply with a condition of that licence (*R v. Palmer*).

47. Were it not for s.96(3), which provides that nothing in Part 3 renders tenancies or licences invalid or unenforceable, this would be the end of the matter; the tenancies or licences that were granted in contravention of the Selective Licence conditions would be unlawful, there would be no lawful basis upon which to grant them as they fall outside the use of the Property permitted by the Selective Licence.

48. In enacting s.96(3), Parliament no doubt had in mind the protection of tenants and licensees who find themselves occupying premises that are not compliant with the statutory provisions and regulations by which they are regulated. It cannot have been the intention of Parliament to thus create a shield for unscrupulous landlords who pack properties with excessive numbers of occupants for profit, exposing those occupants to health and safety and fire risks and grossly substandard living conditions. This must be especially so in relation to offences or defendants in respect of which rent repayment orders are not available.

49. The Council's case in *Brent v Shah* was that it does not matter that the tenancies and licences granted must be regarded as lawful in relation to a Part 3 offence. This is for two linked, but not interdependent, reasons:

- (a) *Sumal* did not deal with a situation in which the grant of tenancies was inconsistent with restrictions placed upon how the property might lawfully be used. There is a distinction, not considered in that case, between tenancies that are, in themselves, lawful, and permitting the occupation of a property inconsistent with its lawful use; and,
- (b) The benefit results ultimately and necessarily from criminal conduct, and is not incidental to it, as was the case in *Sumal*. Only by the breach of the

licence conditions – the offence concerned - is it possible to derive income from the grant of the multiple tenancies.

Unlawful use of the Property

50. It is possible to draw a distinction between tenancies that are lawful, on the one hand, and the unlawful use of the Property on the other:

- (a) In planning prosecution cases, the use of the land contrary to its permitted use is criminal conduct for the purposes of POCA, once an Enforcement Notice has been issued and is breached. The land is used for an unlawful purpose in these circumstances, so the income from the unlawful use is the benefit of criminal conduct (e.g. *Del Basso*).
- (b) In contrast, in the present case there was a licence in place that had the immediate effect of prohibiting any increase in the number of occupants of the Property unless the Council was consulted. No enforcement notice is required in order to create the prohibition.
- (c) By introducing additional occupants, the prohibitive condition was breached and it may be said that the use of the land was unlawful as a result.

51. At first glance this does not sit comfortably with the view of the Court of Appeal in *Sumal*. Given that s.96(3) provides that the tenancies granted are valid and enforceable [paragraph 36]. The Court [paragraph 37] considered it

extraordinary to attribute to Parliament an intention that a landlord of an unlicensed house may lawfully seek to recover in civil proceedings rent due under the tenancy whilst at the same time making it a criminal offence actually to receive such rent so recovered. That is not a tenable proposition.

52. It is not suggested, however, that receiving the rent is a criminal offence. It is not even the granting of tenancies *per se* that is the offence. The offence relates to the level of occupancy, and that represents unlawful use of the Property notwithstanding the grant of lawful tenancies.

53. Section 96(3) is designed to preserve the validity and enforceability of a tenancy by the parties *inter se* in “circumstances involving illegality” that might otherwise defeat the contract. It is not designed to make the use of the Property lawful where it is otherwise unlawful. It is unlawful, for example, where a property is used for multiple occupation in breach of a planning enforcement notice, or, as in the present case, where licence conditions prescribing the lawful use of the Property are breached. This offence does not affect the validity and enforceability of any tenancy agreements between those party to them, but it does not follow that occupation in breach of the licence conditions was a lawful use of the Property so occupied.

Benefit results from the criminal conduct

54. In *Brent v Shah*, the benefit, nevertheless, resulted from criminal conduct: In order to grant the tenancy in *Sumal*, the landlord did not have to break the law. In order to do so in the present case, the Defendants *did* have to break the law and, so, the benefit derives from that criminal conduct.

55. The principle underlying *Sumal* and subsequent cases is one of causation. There has to be a causal connection between the offence and the benefit [*Sumal*, paragraph 39]. From what cause did the benefit proceed? In *Sumal* it proceeded from a lawful tenancy.

56. In contrast, the present case involves overcrowding by tenants who did not form a single household of up to 7 persons as specified in the Selective Licence. This was not a situation that the Court of Appeal had to consider in *Sumal*. It was not possible for the Defendants to charge rent to 35-40 people simultaneously in compliance with the conditions of the licence (or indeed in compliance with the 2006 Management Regulations), therefore it was not possible to do so without committing an offence; only by committing this offence was it possible to grant these tenancies and gain the rent; the benefit flows directly from the criminal conduct in a way that it did not in *Sumal*, where the criminal conduct was incidental to the benefit.

57. In *Brent v Shah*, it was immaterial whether the tenancies are to be regarded as lawful or not; they could only be granted as a result of criminal conduct, therefore the benefit

those tenancies conferred upon the landlord was the benefit of that criminal conduct. The offence was permitting the Property to be occupied in a way inconsistent with the licence conditions (or the 2006 Management Regulations), not the granting of tenancies *per se*. Inserting a lawful contract between criminal conduct, where that criminal conduct is the necessary pre-condition to the creation of that contract, and the fruits of that criminal conduct, did not the Council argued, somehow “wash” the benefit clean of the stain of the underlying criminality from which it is derived. The Defendants’ benefit ultimately derived from their criminal conduct.

Other benefits

58. There was a further benefit to the Defendants from the s.234 offence. This offence is found in Part 7 HA 2014 and, so, is unaffected by s.96(3). Further, it was not an offence in respect of which a rent repayment order may have been sought

59. The section is as follows:

234 Management regulations in respect of HMOs

- (1) *The appropriate national authority may by regulations make provision for the purpose of ensuring that, in respect of every house in multiple occupation of a description specified in the regulations—*
 - (a) *there are in place satisfactory management arrangements; and*
 - (b) *satisfactory standards of management are observed.*
- (2) *The regulations may, in particular—*
 - (a) *impose duties on the person managing a house in respect of the repair, maintenance, cleanliness and good order of the house and facilities and equipment in it;*
 - (b) *impose duties on persons occupying a house for the purpose of ensuring that the person*
- (3) *A person commits an offence if he fails to comply with a regulation under this section.*

60. The offence resulted from a failure by the defendants to adhere to the regulations governing houses that are in multiple occupation. Compliance with the 2006 Regulations involved works to be done to the Property and its proper administration. The Council argued that by failing to comply with the 2006 Regulations, the Defendants have

benefited to the extent of the costs of the administration and of the works – to meet fire safety measures and other health and safety statutory requirements - that they have failed to undertake. They have, in other words, achieved significant “pecuniary advantage”.

Conclusion

61. The Council argued that the principles established in *Sumal* did not apply to the present case, which should be distinguished.

62. On the facts of the present case, the offences pursuant to s.95(2) and s.234(3) renders the use of the Property unlawful and means that the rent received from the occupants was the result of excessive occupation in breach of the Selective Licence conditions and the 2006 Management Regulations, so the benefit results from the criminal conduct.

63. The s.234(3) offence also gives rise to a pecuniary advantage that derives from evading compliance with the 2006 Regulations and the consequent expense, so, again, the benefit derives from the criminal conduct.

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