



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

Case Reference : **CHI/00MR/HMV/2019/0004**

Property : **235 Francis Avenue, Southsea PO4
0AJ**

Applicant : **Mr Gillian Fairhall**

Representative :

Respondent : **Portsmouth City Council**

Representative :

Type of Application : **Appeal against a condition to a
HMO Licence**

Tribunal Members : **Judge Tildesley OBE**

**Date and venue of
Hearing** : **Determination on the Papers
Inspection 29 May 2019**

Date of Decision : **2 July 2019**

DECISION

Decision of the Tribunal

- 1) The Tribunal reverses the Council's decision by deleting the special condition to the HMO licence for 235 Francis Avenue Southsea PO4 0AJ relating to the provision of an additional toilet.
- 2) The Tribunal is minded to Order the Council to reimburse the Tribunal application fee of £100 to the Applicant. The Tribunal invites written representations from the Council on the question of reimbursement which must be sent to the Tribunal and the Applicant within 14 days. If no representations are received the Tribunal will make the Order without further notice.

The Application

1. The Applicant appeals against the decision of Portsmouth City Council (the Council) to impose a special condition on the HMO Licence for 235 Francis Avenue Southsea PO4 0AJ.
2. The special condition is:

“The licence holder will carry out the following works with the times set out below, to the satisfaction of the Council:
Provide a separate WC accessed from a common landing or passage and containing a wash hand basin and a WC with its own water supply and connected to the main drainage system so as to conform to current building regulations”.
3. The Applicant objects to the Council's decision to require an additional WC because she considers that the present arrangement of two bathrooms with WCs have worked well in the past and are adequate to meet the needs of an HMO for occupation by six persons.
4. The Council's reason for imposing the condition was that the number of required washing and personal hygiene facilities is prescribed by legislation, The Licensing and Management of HMOs and Other Houses(Miscellaneous Provisions) (England) Regulations 2006, (the 2006 Regulations). The Council said that it had no discretion to allow a further reduction on a minimum number of washing/personal hygiene facilities than the ones specified in the legislation.
5. The Tribunal directed a determination on the papers. The Tribunal, however, inspected the property in the presence of the parties on 29 May 2019.
6. The property is a two storey terrace house built in late 19th/early 20th centuries of traditional brick construction with front single bay structure and forecourt. The ground floor consists of three bedrooms

and a communal kitchen and lounge area. The first floor consists of three further bedrooms, a bathroom with WC, and a shower room with WC. There are separate wash-hand basins in three of the bedrooms.

7. The area of the shower room is approximately 3.23m². The room is fully tiled with an enclosed shower cabinet, WC, wash hand basin, heated towel rail and an extractor fan.
8. The area of the bathroom is approximately 4.10m². The room is fully tiled with a full size bath and an electric shower over it with a glass screen. The room also contains a wash hand basin, WC, heated towel rail and an extractor fan.

Consideration

9. Under Paragraph 31(1) part 3 of schedule 5 of the 2004 Act the Applicant has the right to appeal to the Tribunal against the Council's refusal to grant the licence or against the Council's decision to grant the licence. An appeal against a grant may relate to the terms of the licence. Technically this is an appeal under paragraph 31(1)(b) against a condition of the licence requiring an extra toilet.
10. Paragraph 34(1) provides that the appeal is by way of a re-hearing and may be determined by the Tribunal having regard to matters of which the Council is unaware. The Tribunal may confirm, quash or vary the condition. The function of the Tribunal on appeal is not restricted to a review of the Respondent's decision. The Tribunal's jurisdiction involves a rehearing of the matter and making up its own mind about what it would do.
11. The Tribunal starts with the legislation. Under section 64(2) of the 2004 Act the local authority if satisfied of the matters mentioned in subsection (3) may grant a HMO licence to the Applicant. The relevant matter for this Application is subsection 3(a):

“(a) That the house is reasonably suitable for occupation by not more than the maximum number of households or persons mentioned in subsection (4) or that it can be made so suitable by the imposition of conditions under section 67.”
12. In this case the Council decided that the property was reasonably suitable for occupation by six persons provided that a condition was imposed for the creation of additional WC. The power to impose such a condition is found in sub-sections 67(2)(c) and 67(2)(e) of the 2004 Act.
13. Sub-section 67(2)(c) enables the Council to impose conditions requiring facilities to be made available in the house for the purpose of meeting standards prescribed under section 65. Sub-section 67(2)(e)

permits the Council to impose conditions requiring works to be carried out to provide those facilities.

14. Section 65 sets out the tests as to suitability for multiple occupation. Under section 65(1) an HMO is not reasonably suitable for occupation if the local authority considers that the house fails to meet the prescribed standards for occupation by the number of persons specified.
15. The prescribed standards for deciding suitability for occupation are found in Schedule 3 to the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006/373. The standards relate to heating, washing facilities, kitchens, fire precautionary facilities and kitchens.
16. The Council in its statement of case cited the original wording of Schedule 3 paragraph 2 of SI 2006/373 dealing with Washing Facilities:

“2(1) Where all or some of the units of living accommodation in an HMO do not contain bathing and toilet facilities for the exclusive use of each individual household—

(a) where there are four or fewer occupiers sharing those facilities there must be at least one bathroom with a fixed bath or shower and a toilet (which may be situated in the bathroom);

(b) where there are five or more occupiers sharing those facilities there must be—

(i) one separate toilet with wash hand basin with appropriate splash back for every five sharing occupiers; and

(ii) at least one bathroom (which may contain a toilet) with a fixed bath or shower for every five sharing occupiers.

(2) Where there are five or more occupiers of an HMO, every unit of living accommodation must contain a wash hand basin with appropriate splash back. (except any unit in which a sink has been supplied as mentioned in paragraph 4(1)).

(3) All baths, showers and wash hand basins in an HMO must be equipped with taps providing an adequate supply of cold and constant hot water.

(4) All bathrooms in an HMO must be suitably and adequately heated and ventilated.

(5) All bathrooms and toilets in an HMO must be of an adequate size and layout.

(6) All baths, toilets and wash hand basins in an HMO must be fit for the purpose.

(7) All bathrooms and toilets in an HMO must be suitably located in or in relation to the living accommodation in the HMO”.

17. The Council highlighted the words of sub- paragraphs 2(1)(b)(i) and(ii) describing them as prescribed standards from which the Council could not depart.
18. The original wording of schedule 3 paragraph 2 of SI 2006/373 was replaced by Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007/1903 reg.12(8)(a) on 1 October 1, 2007. The reason for the change was that LACORS the representative body for Local Authorities considered the original wording overly prescriptive and not supported by landlords or local authorities. The key change was the replacement of specified numbers of toilets, bathrooms and wash-hand basins with “an adequate number of ...” . The legislation in force now is as follows:
- “2(1) Where all or some of the units of living accommodation in an HMO do not contain bathing and toilet facilities for the exclusive use of each individual household—
- (a) there must be an adequate number of bathrooms, toilets and wash-hand basins suitable for personal washing) for the number of persons sharing those facilities; and
- (b) where reasonably practicable there must be a wash hand basin with appropriate splash back in each unit other than a unit in which a sink has been provided as mentioned in paragraph 4(1), having regard to the age and character of the HMO, the size and layout of each flat and its existing provision for wash-hand basins, toilets and bathrooms.
- (3) All baths, showers and wash hand basins in an HMO must be equipped with taps providing an adequate supply of cold and constant hot water.
- (4) All bathrooms in an HMO must be suitably and adequately heated and ventilated.
- (5) All bathrooms and toilets in an HMO must be of an adequate size and layout.
- (6) All baths, toilets and wash hand basins in an HMO must be fit for the purpose.
- (7) All bathrooms and toilets in an HMO must be suitably located in or in relation to the living accommodation in the HMO”.
19. The Tribunal raised this discrepancy with the Council Officers attending the inspection. The Officers stated that the Council had proceeded on the basis that the legislation was not prescriptive about the number of bathrooms and toilets in the property. The Tribunal, however, notes that this view is not reflected in the Council’s statement of case, and in the email of Jelena Taylor dated 18 February 2019 (Exhibit 5 to the Application). The Tribunal is left with the distinct impression that the Council’s misunderstanding of the legislation influenced its decision.
20. The Tribunal accepts that the Council is entitled to have its own standards for the type and number of facilities in HMOs which can be

higher than minimum standards. The Council is also entitled to impose conditions to facilitate the meeting of local standards.

21. The Tribunal observes that the Council in its 2018 Standards document for HMOs adopted the wording of the original paragraph 2(1)(b) of Schedule 3. Thus the 2018 Standards require two bath/shower rooms and two separate WCs with wash hand basins (one WC can be contained within one bathroom) for houses occupied by 6-10 people.
22. It is important for the Tribunal to identify the legal justification for the condition of the extra toilet. The Tribunal is satisfied that the condition of the extra toilet has been imposed to meet the local 2018 Standards and not Standards prescribed by the legislation. This means that the wording of section 65(2) is engaged rather than the wording of section 65(1). The significance of this distinction is that the Tribunal has a discretion to decide whether the house is reasonably suitable for occupation by six persons even though the house does not meet the local 2018 Standards.
23. The Tribunal's approach to section 65(2) is best summed up by the Upper Tribunal decision in *Clark v Manchester City Council* [2015] UKUT 0129 (LC) at [53]:

“In every case the views of the local housing authority will be relevant and merit respect, but once the tribunal has carried out its own inspection and considered all of the characteristics of the Property, including the size and layout of individual rooms and any compensating amenities, it will be in a position to make its own assessment of the suitability of the house for the proposed number of occupiers”.

24. The Tribunal finds that the bath/shower rooms were relatively large with good lay outs. They were well-equipped with each room having either a bath or a shower, a WC, wash-hand basin, heated towel rail and an extractor fan. The Tribunal is satisfied that all baths, showers and wash hand basins were fit for purpose and equipped with taps providing an adequate supply of cold and constant hot water. The Tribunal observes that the 2018 local Standards were met in respect of the number of personal hygiene facilities for six persons: two bath/shower rooms and two toilets with wash hand basins. The sole area where the property fell down was that one WC was not located outside the bath/shower rooms.
25. The Tribunal notes that the requirement for five persons in the 2018 local Standards is one bathroom and one separate WC with wash hand basin. The WC could be contained within a second bedroom. The HMO licence for this property was for six persons, one person more which suggests that there should be a margin of tolerance between the different sets of requirements for five persons and six to ten persons.

The Tribunal considers that the provision of wash hand basins in three rooms would reduce the usage of the bath/shower rooms.

26. The Tribunal finds that the Council advanced no substantive reason why it considered the present arrangements in the property for personal hygiene facilities unsuitable for six persons. As explained above the Council's case was that it was a legislative requirement for a separate WC.

Decision

27. In view of the above findings the Tribunal is satisfied that the current arrangements in respect of bath/shower rooms, toilets and wash hand basins in the property were adequate for six persons.
28. The Tribunal reverses the Council's decision by deleting the special condition to the HMO licence for 235 Francis Avenue Southsea PO4 0AJ relating to the provision of an additional toilet.
29. The Tribunal is minded to Order the Council to reimburse the Tribunal application fee of £100 to the Applicant. The Tribunal invites written representations from the Council on the question of reimbursement which must be sent to the Tribunal and the Applicant within 14 days. If no representations are received the Tribunal will make the Order without further notice.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of relevant legislation

Part 2 of the Housing Act 2004

Licensing of Houses in Multiple Occupation

64 Grant or refusal of licence

(1) Where an application in respect of an HMO is made to the local housing authority under section 63, the authority must either—

- (a) grant a licence in accordance with subsection (2), or
- (b) refuse to grant a licence.

(2) If the authority are satisfied as to the matters mentioned in subsection (3), they may grant a licence either—

- (a) to the applicant, or
- (b) to some other person, if both he and the applicant agree.

(3) The matters are—

- (a) that the house is reasonably suitable for occupation by not more than the maximum number of households or persons mentioned in subsection (4) or that it can be made so suitable by the imposition of conditions under section 67;
- (b) that the proposed licence holder—
 - (i) is a fit and proper person to be the licence holder, and
 - (ii) is, out of all the persons reasonably available to be the licence holder in respect of the house, the most appropriate person to be the licence holder;
- (c) that the proposed manager of the house is either—
 - (i) the person having control of the house, or
 - (ii) a person who is an agent or employee of the person having control of the house;
- (d) that the proposed manager of the house is a fit and proper person to be the manager of the house; and
- (e) that the proposed management arrangements for the house are otherwise satisfactory.

(4) The maximum number of households or persons referred to in subsection (3)(a) is—

- (a) the maximum number specified in the application, or
- (b) some other maximum number decided by the authority.

(5) Sections 65 and 66 apply for the purposes of this section.

65 Tests as to suitability for multiple occupation

(1) The local housing authority cannot be satisfied for the purposes of section 64(3)(a) that the house is reasonably suitable for occupation by a particular maximum number of households or persons if they consider that it fails to meet prescribed standards for occupation by that number of households or persons.

(2) But the authority may decide that the house is not reasonably suitable for occupation by a particular maximum number of households or persons even if it does meet prescribed standards for occupation by that number of households or persons.

(3) In this section “prescribed standards” means standards prescribed by regulations made by the appropriate national authority.

(4) The standards that may be so prescribed include—

(a) standards as to the number, type and quality of—

(i) bathrooms, toilets, washbasins and showers,

(ii) areas for food storage, preparation and cooking, and

(iii) laundry facilities,

which should be available in particular circumstances; and which should be available in particular circumstances; and

(b) standards as to the number, type and quality of other facilities or equipment which should be available in particular circumstances.

67 Licence conditions

(1) A licence may include such conditions as the local housing authority consider appropriate for regulating all or any of the following—

(a) the management, use and occupation of the house concerned, and

(b) its condition and contents.

(2) Those conditions may, in particular, include (so far as appropriate in the circumstances)—

(a) conditions imposing restrictions or prohibitions on the use or occupation of particular parts of the house by persons occupying it;

(b) conditions requiring the taking of reasonable and practicable steps to prevent or reduce anti-social behaviour by persons occupying or visiting the house;

(c) conditions requiring facilities and equipment to be made available in the house for the purpose of meeting standards prescribed under section 65;

(d) conditions requiring such facilities and equipment to be kept in repair and proper working order;

(e) conditions requiring, in the case of any works needed in order for any such facilities or equipment to be made available or to meet any such standards, that the works are carried out within such period or periods as may be specified in, or determined under, the licence;

(f) conditions requiring the licence holder or the manager of the house to attend training courses in relation to any applicable code of practice approved under section 233.

(3) A licence must include the conditions required by Schedule 4.

(4) As regards the relationship between the authority’s power to impose conditions under this section and functions exercisable by them under or for the purposes of Part 1 (“Part 1 functions”)—

(a) the authority must proceed on the basis that, in general, they should seek to identify, remove or reduce category 1 or category 2 hazards in the house by the exercise of Part 1 functions and not by means of licence conditions;

(b) this does not, however, prevent the authority from imposing licence conditions relating to the installation or maintenance of facilities or equipment within subsection (2)(c) above, even if the same result could be achieved by the exercise of Part 1 functions;

(c) the fact that licence conditions are imposed for a particular purpose that could be achieved by the exercise of Part 1 functions does not affect the way in which Part 1 functions can be subsequently exercised by the authority.

(5) A licence may not include conditions imposing restrictions or obligations on a particular person other than the licence holder unless that person has consented to the imposition of the restrictions or obligations.

(6) A licence may not include conditions requiring (or intended to secure) any alteration in the terms of any tenancy or licence under which any person occupies the house.

71 Procedural requirements and appeals against licence decisions

Schedule 5 (which deals with procedural requirements relating to the grant, refusal, variation or revocation of licences and with appeals against licence decisions) has effect for the purposes of this Part.

Schedule 5 of Housing Act 2004 SCHEDULE 5 Sections 71 and 94

31 Right to appeal against decision or refusal to vary or revoke licence

(1) The licence holder or any relevant person may appeal to the appropriate Tribunal against a decision by the local housing authority—

- (a) to refuse to grant a licence, or
- (b) to grant a licence.

(2) An appeal under sub-paragraph 91) may, in particular relate to any terms of the licence

34 Powers of tribunal hearing appeal

(1) This paragraph applies to appeals to a tribunal under paragraph 31 or 32.

(2) An appeal—

- (a) is to be by way of a re-hearing, but
- (b) may be determined having regard to matters of which the authority were unaware.

(3) The tribunal may confirm, reverse or vary the decision of the local housing authority.

(4) On an appeal under paragraph 31 the tribunal may direct the authority to grant a licence to the applicant for the licence on such terms as the tribunal may direct.