FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UD/HMT/2020/0001
Property	**:**	11 Fairlight Road, Hastings, East Sussex, TN35 5ED
Applicant	**:**	Mr Roy Trevor Smith
Representative	**:**	Not represented
Respondents	**:**	Hastings Borough Council
Representative	**:**	Not represented
Type of Application	**:**	Appeal in respect of a refusal to grant a temporary exemption from Selective Licensing
Tribunal Members	**:**	Judge N P Jutton
Date of Decision	**:**	18 June 2020

DECISION

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1 **Introduction**

2 The Applicant, Mr Roy Trevor Smith, is the owner together with his wife, Marion Kathleen Smith, of a 4-bedroom detached residential cottage known as 11 Fairlight Road, Hastings, East Sussex, TN35 5ED (the Property). The Applicant appeals to the Tribunal in respect of the Decision of the Respondent, Hastings Borough Council, dated 10 December 2019 refusing to grant a Temporary Exemption Notice in respect of the Property pursuant to section 86 of the Housing Act 2004 (the Act).

3 There is before the Tribunal a bundle of documents running to 134 pages which contains the Applicant's Application Form and supporting documents, Directions made by the Tribunal, Witness Statements made on behalf of the Respondent, the Respondent's Statement of Case, and a letter from the Applicant in reply thereto. References in this Decision to page numbers are references to page numbers in that bundle.

4 There is also before the Tribunal an application from the Respondent dated 9 June 2020 for an Order for reasonable costs for preparing the said bundle.

5 **Background**

6 The Applicant and his wife were registered as proprietors of the Property in October 2015. The Property is described as a 4-bedroom cottage, partly 2 storey and partly 1 storey. In October 2015, a Selective Licensing Scheme for private rented homes in 7 wards in the Borough of Hastings came into effect. That designation was made pursuant to section 80 of the Act. The wards include the ward of Ore in which the Property is situated. The effect was that if the Property was occupied either under a single tenancy or licence (not being an exempt tenancy or licence under sub-sections 3 or 4 of section 79 of the Act), then the Applicant was required to obtain a Licence from the Respondent pursuant to section 85 of the Act.

7 In or about August 2018, Mr Dominic Daniel Hultier moved into the Property. The Applicant says that Mr Hultier does not have a Tenancy Agreement. He does not pay rent. The Applicant's understanding is that if Mr Hultier does not have a Tenancy Agreement he is not obliged to make an application for a Licence.

8 On 20 November 2019, the Respondent wrote to the Applicant a warning letter requiring the Applicant to apply for a Selective Licence within 14 days (page 93). On 25 November 2019, it would appear at the request of the Applicant that the Respondent forwarded to the Applicant by email a Temporary Exemption Application Form (page 95). The Respondent sent a further warning letter to the Applicant on 5 December 2019 (page 99). The Applicant submitted an Application to the Respondent for a Temporary Exemption from the licensing requirements pursuant to

section 86 of the Act on 2 December 2019. That Application was refused by the Respondent on 10 December 2019 (pages 111-114). The Decision was made on 10 December 2019 albeit dated 13 December 2019 and the letter sending the Decision to the Applicant is dated 13 December 2019 (page 109). The reasons for refusing the Application were stated to be as follows (page 111):

1. *The applicant was aware of the scheme as he has a licence from another property.*

2. *The property should have been licensed from at least August 2018.*

3. *The property does not have a landlord gas safety certificate or an EICR so there may be hazards in the Property.*

4. *Although the applicant claims that the* tenant does not pay rent, the tenant pays council tax and bills.

9 The Applicant's appeal to this Tribunal is dated 7 February 2020. Directions were made by the Tribunal on 12 March 2020. An initial issue was raised by the Respondent as to whether or not the appeal had been made in time. Section 86(7) of the Act provides that an appeal to the Tribunal should be made within the period of 28 days beginning with the date upon which the decision not to grant a Temporary Exemption Notice is made. On 10 March 2020, the Tribunal notified the Respondent that a procedural Judge had allowed the appeal to proceed and the Respondent confirms in its Statement of Case (paragraph 35(i) at page 127) that it accepts the Tribunal's decision to allow the appeal to proceed.

10 On 13 March 2020, the Applicant submitted an Application for Planning Permission to the Respondent for alterations and extensions to the Property to create an additional dwelling house (pages 65-72).

11 The Directions made by the Tribunal on 12 March 2020 provided that the Application would be determined on the papers without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected in writing to the Tribunal within 28 days of the date of receipt of those Directions. The Tribunal has received no objection and accordingly proceeds to determine the Application on the papers without a hearing.

12 **The Law**

13 Part 3 of the Housing Act 2004 (the Act) provides for a scheme whereby a Local Housing Authority may designate an area to be subject to Selective Licensing. A house is required to be licensed for those purposes by the Local Authority if it is within such an area and the whole of it is occupied under a single tenancy or licence that is not an exempt tenancy or licence under sub-sections 3 or 4 of section 79 of the Act.

14 Section 86 of the Act allows the house owner/landlord to apply to the Local Housing Authority for a Temporary Exemption Notice. As the

name suggests, a Temporary Exemption Notice provides that the house is temporarily not required to be licensed under Part 3 of the Act. Section 86 provides as follows:

"86(1) This section applies where a person having control of or managing a Part 3 house which is required to be licensed under this Part (see section 85(1)) but is not so licensed, notifies the local housing authority of his intention to take particular steps with a view to securing that the house is no longer required to be licensed.

(2) The authority may, if they think fit, serve on that person a notice under this section ('a temporary exemption notice') in respect of the house.

(3) If a temporary exemption notice is served under this section, the house is (in accordance with section 85(1)) not required to be licensed under this Part during the period for which the notice is in force.

(4) A temporary exemption notice under this section is in force –

(a) for a period of 3 months beginning with the date on which it is served, or

(b) (in the case of a notice served by virtue of sub-section 5) for the period of 3 months after the date when the first notice eases to be in force.

(5) If the authority –

(a) receives a further notification under sub-section (1), and

(b) considers that there are exemptional circumstances that justify the serving of a second temporary exemption notice in respect of the house that would take effect from the end of the period of 3 months applying to the first notice,

the authority may serve a second such notice on the person having control of or managing the house (but no further notice may be served by virtue of this subsection).

(6) If the authority decided not to serve a temporary exemption notice in response to a notification under su-section (1), they must without delay serve on the person concerned a notice informing him of –

(a) the decision,

(b) the reasons for it and the date on which it was made,

(c) the right to appeal against the decision under subsection (7), and

(d) the period within which an appeal may be made under that subsection.

(7) The person concerned may appeal to the appropriate tribunal against the decision within the period of 28 days beginning with the date specified under subsection (6) as the date on which it was made.

(8) Such 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.

(9) The tribunal –

(a) may confirm or reverse the decision of the authority, and

(b) if it reverses the decision, must direct the authority to issue a temporary exemption notice with effect from such date as the tribunal directs".

15 **The Applicant's Case**

16 The Applicant's case is set out in his Application (pages 1-8) a letter to the Respondent dated 13 January 2020 (pages 9-10) and in a letter in the form of a reply to the Respondent's Statement of Case to the Respondent dated 24 April 2020 (page 129).

17 The Applicant says he is an experienced landlord having let some 15/16 different properties over some 30 years. He makes the point that one of his current properties at 21 Brackendale, Hastings, is in the same ward as the Property and in respect of which he holds a Selective Licence. His understanding is that the Selecting Licensing Scheme applies to residential property which are subject to tenancy agreements (which he describes as rental agreements) signed by the landlord and tenant. That is why he says when he allowed Mr Hultier to move into the Property in or about August 2018, that Mr Hultier did not sign a Tenancy Agreement and has not been charged rent.

18 The reason is, the Applicant says, that he purchased the Property with a view to pursuing the possibility of constructing a second dwelling within the plot. The existing building is part 2 storey and part 1 storey. With the help of an Architect, he arrived at a preferred option in June 2019 to convert the Property into 2 semi-detached properties. His concern was that if he were to adhere to the Selective Licensing requirements, that he could spend many thousands of pounds on works to the Property, which work would then have to be undone when he proceeded with the conversion works. That because once the conversion works started, all the services at the Property would have to re-configured.

19 In the interim, the Applicant did not want to leave the Property empty so he arranged for Mr Hultier to move in to give the Property protection from *"vandals, squatters and the elements"*. He did not seek to grant Mr Hultier a tenancy or a licence. Although he did not charge Mr Hultier rent, Mr Hultier was responsible for paying Council Tax and utility bills. It is the Applicant's case therefore that Mr Hultier does not occupy the Property under a single tenancy or licence as is required by section 79(2)(b) of the Act, so that the provisions of Part 3 of the Act and accordingly the requirement for a licence do not apply to the Property.

20 Further, the Applicant says that the ward of Ore may be removed from the Selective Licensing Scheme in 2020 and thus there would be no need for properties in the ward from that time to be licensed. That accordingly for the Applicant to go to the expense of carrying out

extensive works to the Property in order to obtain a licence, would be as he puts it *"futile"*.

21 The Applicant has submitted his Planning Application. He says once he knows the outcome of that Application, he can plan for all necessary works to enable a licence to be granted. He makes the point that in the current Covid-19 lockdown environment, it might be difficult to employ the necessary tradesmen to carry out the works. Indeed, it is likely that he would not be able to complete the works that would be required by the Respondent prior to the ward of Ore being removed from the Selective Licensing Scheme in October 2020.

22 **The Respondent's Case**

23 The Applicant says that for the purposes of section 79(2)(b) that Mr Hultier does occupy the Property pursuant to a single tenancy or licence. That the Applicant receives consideration in return for Mr Hultier's occupation as Mr Hultier keeps the Property warm, secure and pays the bills. That a tenancy does not need to be in writing. That payment of rent is not necessarily a requirement of a tenancy. The Respondent refers to the judgment of Lord Justice Fox in **Ashburn Anstalt v Arnold** (1988) 2 ALL ER 147. That as such, the Property is not exempt from being licensed.

24 The Respondent makes reference to the Applicant's Planning Application dated 18 March 2020. The Respondent says that had that Planning Application been made at the time the Applicant applied for a Temporary Exemption Notice in December 2019, the Application would still have been refused as the Property should have been licensed since at least August 2018. Further, an Application to carry out alterations to a building is not evidence that the property is no longer to be subject to a tenancy or licence nor that if Planning Permission were granted, the tenant/licencee would no longer remain in occupation. However, the Respondent says, had the Planning Permission for alterations been granted at the time that the Application for a Temporary Exemption Notice was made, then the Application may have been granted because the 3 month period granted would have allowed time for the Applicant to evict Mr Hultier from the Property. That would be evidence, the Respondent says, for the purposes of section 86(1) of an intention on the Applicant's part *"to take particular steps with a view to securing that the house no longer requires to be licensed"*.

25 However, the Planning Application had not been granted in December 2019. Indeed, it had not even been submitted. It was not submitted until March 2020. That even if the Temporary Exemption Notice had been granted in December 2019 for a period of 3 months, it would have expired by the time the Applicant submitted his Planning Application.

26 As to the fact that the current Selective Licensing Scheme for the Ore ward ends in October 2020, the Respondent says that is irrelevant. That the Application by the Applicant relates solely to the Respondent's decision to refuse a Temporary Exemption Notice and not to the

Licensing Scheme itself. Further, in any event, the Respondent is seeking to consult on the question of whether or not a new Scheme should commence after October 2020.

27 The Applicant has failed to show, the Respondent says, that he has for the purposes of section 86(1) of the Act, taken particular steps to ensure that the Property would no longer be required to be licensed. As such, the Respondent invites the Tribunal to confirm its decision not to issue a Temporary Exemption Notice.

28 **The Tribunal's Decision**

29 The first issue is whether or not the Property is required to be licensed for the purposes of Part 3 of the Act. There is no dispute that it falls within an area, a ward, in the Respondent's district which is subject to Selective Licensing. The Applicant is familiar with that. He owns another property in the same ward in respect of which he holds a Selective Licence. He says however that the Property is not occupied under a single tenancy or licence. That accordingly the Property is not required to be licensed for the purposes of Part 3 of the Act. The Respondent does not agree. The Respondent says that the occupier Mr Hultier does have a form of tenancy. That there is consideration for the tenancy as Mr Hultier keeps it warm, secure and pays the utility bills. That it is not necessary for there to be payment of rent or for the arrangement to be in writing for there to be a tenancy.

30 A tenancy or a licence of a residential property does not need to be in writing. As to whether or not payment of rent is required, with reference to the Asburn Anstalt decision above the Respondent says that reservation of rent is not in itself necessary for the creation of a tenancy. Whether or not nonetheless Mr Hultier has a tenancy is a matter of determining whether or not the Applicant granted him a legal right of exclusive possession for either a period of time or on a periodic basis. He may well have the benefit of a tenancy. There is insufficient evidence before the Tribunal to determine that conclusively. However, even if he does not enjoy a tenancy, then in the view of the Tribunal he does occupy under the terms of a licence. The consideration may arguably be as the Respondent contends, keeping the Property warm and secure and paying utility bills (albeit arguably those are solely for Mr Hultier's benefit during his occupation). Alternatively, if such matters were not sufficient to amount to a form of consideration, Mr Hultier would still enjoy a licence of the Property by reason of the provisions of section 262(9) of the Act which provide:

"262(9) In this Act 'licence', in the context of a licence to occupy premises –

(a) includes a licence which is not granted for a consideration, but

(b) excludes a licence granted as a temporary expedient to a person who entered the premises as a trespasser (whether or

not, before the grant of a licence, another licence to occupy those or other premises had been granted to him);

and related expressions are to be construed accordingly".

31 As such, the Tribunal is satisfied that even if the Applicant is correct and Mr Hultier does not enjoy a tenancy, he does enjoy a form of licence and as such it follows that the Tribunal is satisfied that the Property is a house to which Part 3 of the Act applies, and accordingly is required to be licensed for the purpose of Section 85 of the Act.

32 Having determined that the Property is a house to which Part 3 of the Act applies, should the Respondent grant a Temporary Exemption Notice for the purposes of section 86 of the Act?

33 Section 86(1) of the Act (which is set out in full above) makes it clear that the section applies (for the purposes of an application for a Temporary Exemption Notice) only where the person having control of or managing the house *"notifies the Local Housing Authority <u>of his intention to take particular steps with a view to securing that the house is no longer required to be licensed</u>"* (emphasis added).

34 It is therefore incumbent upon an applicant for a Temporary Exemption Notice to demonstrate what steps that he or she is intending to take or is taking to remove the house from the requirement to be licenced for the purposes of Part 3 of the Act. An example arguably would be, as is indicated by the Respondent at paragraph 35(c) of its Statement of Case (page 126), if the house owner could satisfy the Local Housing Authority that he or she is taking steps to evict the tenant or licensee from the property. That because, as the Respondent suggests, that would demonstrate that the house owner is taking steps *"with a view to securing that the house is no longer required to be licensed"*

35 The Tribunal is not satisfied that the Applicant has got over the hurdle that section 86(1) puts in front of him. He has made an Application for Planning Permission to develop the Property to convert it into 2 separate units. That is not evidence as such of an intention to secure that the Property would no longer be required to be licensed. It is not evidence that the Property will no longer be subject to a tenancy or a licence. If Planning Permission is granted, the Applicant may still wish to let the Property. Further, it is noteworthy that the Applicant did not submit his Planning Application until 3 March 2020, over 3 months after the date of his Application for a Temporary Exemption Notice.

36 The Applicant says that the Selective Licensing Scheme for the ward of Ore ends in October 2020. It would therefore in effect be futile to require him to obtain a licence and to carry out various works which if the ward were removed from the Scheme would not be necessary. The Respondent says that although the current Scheme ends in October 2020, it is consulting about a new Scheme. That the point however the Respondent says is not relevant. That because the Application relates

solely to the Respondent's decision to refuse a Temporary Exemption Notice from the requirement to be licensed.

37 The Tribunal agrees with the Respondent. It is not known whether or not the Selective Licensing Scheme for the ward of Ore will be renewed after October. This appeal, which is dealt with by way of a re-hearing, relates solely to the question of whether or not the Respondent should grant a Temporary Exemption Notice pursuant to section 86 of the Act. Whilst the Property is required to be licensed (as the Tribunal has found) the fact that the Property may or may not remain in an area which is subject to a Selective Licensing Scheme after October 2020 does not assist the Tribunal.

38 Having considered the submissions of the parties carefully, the Tribunal confirms the Respondent's decision not to grant a Temporary Exemption Notice pursuant to section 86 of the Act.

39 **Application for Costs**

40 The Respondent has submitted an Application dated 9 June 2020 for costs pursuant to rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. In particular, the Respondent seeks an Order that the Applicant do pay the Respondent's costs for the preparation of the bundle of documents before the Tribunal. There is a Schedule of Costs attached to the Application. The Respondent seeks a total of £236.

41 On 24 May 2020, the Tribunal made further Directions in relation to the hearing bundle. By its Directions made on 12 March 2020, the Tribunal had directed the Applicant to provide a hearing bundle. In the event, the Respondent says, the bundle provided by the Applicant did not include the Respondent's Case or Witness Statements. It did include additional documents that had not been seen by the Respondent. The Respondent said that it would not be possible for the Tribunal to make a fair determination because of the 'errors' with the bundle. The Tribunal was satisfied, as stated in its Directions of 24 May 2020, that the Applicant had not complied with the Directions of 12 March 2020 in relation to the preparation of a bundle.

42 Paragraph 7 of the Directions of 24 May 2020 provided:

"The Tribunal proposes that the Respondent should provide an electronic copy of the bundle in accordance with the directions to the Tribunal and the Applicant, with the option of recovering reasonable costs of preparing the bundle from the Applicant".

43 Paragraph 8 of the same Directions went on to state:

"The parties have until 1 June 2020 to make representations on the proposal to the Tribunal. If no representations are made, the Respondent shall supply electronic copies of the bundle to the Applicant

and the Tribunal. If representations are made, the Tribunal will either confirm or vary the proposal".

44 In the event no representations were made to the Tribunal and on 3 June 2020 the Tribunal added an addendum to its Directions directing the Respondent to provide an electronic copy of the bundle to the Tribunal with a copy to the Applicant. The addendum further provided that if the Respondent wished to pursue an application for recovering its reasonable costs for preparing the bundle, it must make a formal application on the prescribed form by 16 June 2020.

45 Rule 13 of the 2013 Rules provides as follows:

> *(1) The Tribunal may make an Order in respect of costs only –*
> *a) Under section 29(4) of the 2007 Act (Wasted Costs) and the costs incurred in applying for such costs;*
> *b) If a person has acted unreasonably in bringing, defending or conducting proceedings in –*
> *.....*
> *(2) A residential property case.*

46 Guidance was given by the Upper Tribunal (Lands Chamber) in **Willow Court Management Company (1985) & Others v Mrs Ratna Alexander & Others** (2016) UKUT OT90 (LC) as to how the Tribunal should in practice exercise the application of Rule 13.

47 The Upper Tribunal identified a 3-stage process. The first stage was for the Tribunal to determine whether or not a person had acted unreasonably. The second stage was for the Tribunal to consider in light of unreasonable conduct that it found whether or not it ought to make an Order for costs. The third stage in the event the Tribunal decided to make an Order was what the terms of the Order should be.

48 In Willow Court Management the Upper Tribunal addressed the question of whether behaviour was to be considered unreasonable as follows:

> *"An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in Tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in Ridehalgh at 232E, despite the slightly different context. 'Unreasonable' conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough if the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party had conducted themselves in the manner complained of? Or, Sir Thomas Bingham's 'acid test': is there a reasonable explanation for the conduct complained of?".*

49 The Upper Tribunal went on to make it clear that the Tribunal should not be over-zealous in detecting unreasonable conduct after the event.

50 The Respondent complains that the Applicant was directed to prepare the bundle of documents for the hearing. It directed that the bundle should contain various documents including both parties' Statements of Case. That the Applicant failed to produce a bundle in accordance with those Directions. The bundle produced by the Applicant (a copy of which is not before the Tribunal) did not include the Respondent's Statement of Case and Witness Statements. It did include additional documents not previously seen by the Respondent. As the Tribunal made clear in the Directions dated 24 May 2020, it was satisfied that the Applicant had not complied with the Directions made in respect of the preparation of the bundle.

51 It is not known why the Applicant failed to comply with the Directions as regards the preparation of the bundle. It is not known whether the omissions he made from the bundle that he prepared were deliberate or that he simply misunderstood what the requirements were. It is not uncommon in the experience of the Tribunal for unrepresented parties to be selective in their preparation of bundles. In the view of the Tribunal, the failure of the Applicant to comply with the Directions as regards preparation of the bundle was arguably unreasonable. The Tribunal expects its Directions to be complied with. However, on balance the Tribunal is not satisfied that the Applicant's conduct was vexatious or designed to harass the Respondent. It was not conduct that was so unreasonable as to justify penalising the Applicant in costs.

52 In all the circumstances, the Tribunal declines to make an Order for costs as requested by the Respondent in its application of 9 June 2020.

53 **Summary of Tribunal's Decision**

1. The Tribunal confirms the Respondent's decision of 10 December 2019 (albeit dated 13 December 2019) not to serve a Temporary Exemption Notice pursuant to section 86 of the Housing Act 2004.

2. The Tribunal declines the Respondent's application for costs pursuant to rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 dated 9 June 2020.

Dated this 18th day of June 2020

Judge N Jutton

Appeals

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.