



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

Case Reference : **BIR/00FY/HST/2024/0001**

Subject Property : **5 Sophie Road
Nottingham
NG7 6AA**

Applicant : **Tarjinder Khamba**

Respondent : **Nottingham City Council
(Ref: JCS/Flare/175624)**

Type of Application : **Application under section 86(7) of the
Housing Act 2004 to appeal against the
refusal of the Respondent to serve a
second temporary exemption notice in
respect of the subject property**

Tribunal Member : **Valuer Chair Peter Wilson BSc (Hons)
LLB MRICS MCIEH CEnvH**

Date of Decision : **12 June 2024**

DECISION

Decision

1. The Tribunal reverses the decision of the Respondent and directs that the Respondent serve a temporary exemption notice of three months duration immediately upon expiry of the period for appeal of this decision.

Background and the Statutory Framework

2. The Applicant is the freehold owner of the subject property. The property is located within an area designated as being subject to selective licensing under part 3 of the Housing Act 2004 by Nottingham City Council with effect from the 1 December 2023. The area had previously been designated as subject to selective licensing on the 1 August 2018. Section 84(1) and (2) of the Housing Act 2004 provide that a designation should last for a maximum of five years. It then ceases to have effect and so the original designation in this case ceased to have effect on the 31 July 2023. There was accordingly an interval of 4 months between the first designation ceasing to have effect and the second designation coming into effect.
3. Selective licensing makes available to local housing authorities a mechanism to give them powers to deal with a range of housing related concerns. Any person having control or managing a relevant property within the designated area must hold a licence. For a licence to be granted a local housing authority must be satisfied that a licence holder(s) is a fit and proper person, that properties are properly managed and that properties meet a specified standard. Failure to license a relevant property within a designated area is an offence under section 95 unless there is a temporary exemption notice in force (or a management order in force). The penalties for being a person having control or managing an unlicensed house are prosecution with possible Level 5 fine or financial penalty of up to £30,000 as well as possible rent repayment orders.
4. The legislation recognises that there may be circumstances where it would be appropriate to suspend the requirement to license for a limited period. The most common reason is that a sale of the property is in hand. Section 86 makes provision for a person to notify a 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. The local housing authority may then, if they think fit, serve on the that person a temporary exemption notice which then means the house does not have to be licensed whilst the temporary exemption notice is in force.
5. Section 86(a) and (b) provide that a temporary exemption notice is in force for a period of 3 months from the date on which it is served. If the authority receives a further notification seeking a second temporary exemption notice, if they consider there are exceptional circumstances that justify the service of a second such notice, they may serve a such notice provided that it takes effect from the end of the first period of 3 months applying to the first notice. No further such notice may be served by virtue of section 86(5).

6. If a local housing authority decide not to serve a temporary exemption notice, section 86(6) provides that they must serve a notice without delay informing the person concerned of the decision, the reasons for it and the date it was made, the right to appeal and the appeal period. Section 86(8) states that such an appeal is to be by way of rehearing, but may be determined having regard to the matters of which the local housing authority were unaware. Section 86(9) states the tribunal may confirm or reverse the decision and further states that if the tribunal reverses the decision it must direct the authority to issue a temporary exemption notice with effect from such date as the tribunal directs.
7. The Applicant made a section 86 notification in respect of the first and second floors of the subject property whilst the first designation was still in force. This was approved by the Respondent and served on the 30 May 2023. It expired 3 months later on the 30 August 2023. The Applicant made a second notification dated the 8 December 2023 but did not serve this until the 3 January 2024. On the 8 January 2024 the Respondent decided not to serve a second temporary exemption notice and served a notice on the Applicant to this effect. The Applicant submitted an appeal dated the 5 February 2024 against this decision and the appeal was received by the Tribunal on that date.

Submissions by the Parties

8. The Schedule of Reasons given with the Notice of Decision served by the Respondent on the 8 January 2024 gives the following reasons for its decision:
 - (i) The first TEN expired on 30 August 2023 and under Section 86 (5) (b) of the Act it is specified that an extension must run from the expiration of the first TEN for a maximum period of 3 months. This would mean that if a second TEN was served this would expire on 30 November 2023. However the application to extend was received on 3 January 2024. Therefore, on the date of determination there has been in excess of 6 months that a second TEN would grant.
 - (ii) An extension can only be granted in exceptional circumstances and the application does not provide sufficient detail to deem an extension necessary.
 - (iii) Furthermore, a sufficient time has lapsed for the Applicant to take steps to ensure that the Property will not require a licence
 - (iv) In conclusion, as the Authority is not satisfied that the steps proposed by the Applicant are sufficient to remove the Property from the requirement to be licensed within 3 months, the Authority does not consider it fit to serve a temporary exemption notice for this property in response to the Applicant's notification.

9. In his application to appeal of the 5 February 2024, the Applicant gave the following grounds of appeal:
 - (i) The focal contention is the interpretation of Section 86(5)(b) of the Act, whereby the Applicant asserts that the Act does not stipulate consecutive extensions.
 - (ii) The Respondent's insistence on exception circumstances for an extension is not substantiated by the Act, which only required the sufficiency of proposed steps to secure the Property's compliance within the 3-month period.
 - (iii) The Respondents determination also emphasises a lapse of time, suggesting that sufficient time has lapsed for the Applicant to address licencing requirements. The Respondent fails to acknowledge the complexities involved and further disregards the genuine efforts made by the Applicant within the statutory framework.
10. On the 19 February 2024, the Tribunal issued a Notice giving a provisional view that the Applicant had failed to refute the first ground advanced by the Respondent. The Tribunal further observed that the Applicant had not applied for a second temporary exemption notice more than four months after the first notice had expired. The tribunal was therefore minded to strike out the Applicant's application pursuant to rule 9(3)(e) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 on the ground that the Tribunal considered there is no reasonable prospect of the Applicant's case succeeding. In such cases, the tribunal is required to give the parties the opportunity to make written representations in relation to the proposed striking out and the parties were given until the 15 March 2024 to do this.
11. The Respondent made representations on the 14 March 2024. The Respondent agreed with the provisional view of the Tribunal that the application should be struck out and emphasised its view that section 86(5)(b) meant the temporary exemption notice must run from the expiry of the first temporary exemption notice. Further, in the circumstances here the first temporary exemption notice was granted on the 30 May 2023 and expired on the 30 August 2023. "If, a second TEN was granted this would have expired on 30 November 2023. However, an application to extend the TEN was not received until 3 January 2024. Therefore, a second TEN could not be granted in accordance with the Act."
12. The Applicant made representations on the 15 March 2024. His representations acknowledged the concerns of the Tribunal in respect of the timing of the application for the second temporary exemption notice; the Applicant said this was because he had been "diligently exploring all available avenues to comply with the statutory requirements and address the issues raised by the Respondent".

13. He referred specifically to the fact that the first selective licensing had come to an end on the 1 August 2023 and “there was no guarantee the Secretary of State would approve the second round of the scheme”. He said that the scheme did not start again until the 1 December 2023 and stated he applied on the 3 January 2024 as soon as he was aware that the scheme was back in operation. He further stated that exceptional circumstances warranted the submission of a second temporary exemption notice in the absence of a scheme and “these exceptional circumstances relate to the Respondent being delayed the right to legally operate such a scheme”.
14. The Applicant argued that striking out would be disproportionate and unjust and urged the Tribunal to exercise discretion, in particular taking into account the overall objectives of the legislation which include prompting compliance with whilst recognising genuine efforts by property owners to adhere to regulatory requirements. He asked the Tribunal to refrain from striking out the application and instead to give the Applicant an opportunity to present its case and additional evidence regarding the exceptional circumstances.
15. The Tribunal invited the Respondent to provide comments on the submissions of the Applicant on the 22 April 2024 and the Respondent did so on the 25 April 2024. Essentially the comments again reinforced the contention of the Respondent that the requirements of the Act are clear in that it may grant a temporary exemption for 3 months if they are satisfied that steps are being taken to take the property out of licensing. A further notice may be served if the Authority consider that exceptional circumstances would justify the service of a second temporary exemption notice. The second period would run from the expiry of the first notice.
16. The Respondent acknowledged there was a “gap in the scheme” and argued that, if the tribunal were persuaded to grant a second temporary exemption notice from the start of the second licensing scheme, then this should start from the 1 December 2023 (start of the second scheme) and accordingly expire on the 1 March 2024. However, the position of the Respondent was that the legislation does not allow for this extended period and also does make any reference to different schemes.
17. The Respondent further pointed out that the Applicant had made reference to the second scheme starting in in January when it started on the 1 December 2024 and it may be assumed the Applicant knew of this because his application was dated in December even though he did not submit it until January. Furthermore the start of the second was well publicised by the Respondent using a variety of means – online, newspapers and display in Council buildings. The Respondent contends that landlords were given plenty of warning.
18. A specific point raised by the Respondent was the issue of the notice of possession proceedings provided by the Applicant. The possession hearing is

due to be heard on the 14 June. The Respondent points out that the Applicant served section 21 notices on the occupants on the 31 May 2023, the day after the temporary exemption notice was served. This meant the restriction on the service of such notices where a property subject to licensing was not licensed was not applicable. The Respondent states there was no reference to this in the second application for a temporary exemption notice and there was very little information included which could permit the Respondent to be satisfied there were exceptional circumstances justifying the service of a second temporary exemption notice.

Discussion

19. The primary contention of the Respondent is that the requirements of section 86(4) and (5) mean that a local housing authority may only approve any application for a second temporary exemption notice where the second temporary exemption notice would run from the day after the expiry of the first such notice. The maximum period for exemption is six months and the six months must run in one continuous period.
20. The secondary contention of the Respondent is that the Applicant failed to demonstrate exceptional circumstances which would justify the service of a second temporary exemption notice.
21. To deal with the issue of the exceptional circumstances first, assuming that this requirement applies in this case, the Tribunal agrees that the Applicant has failed to do this. He makes a vague statement about “diligently exploring all available avenues to comply with the statutory requirements” but gives no detail as what he has actually done.” A very common reason for seeking a temporary exemption notice in a selective licensing area is that the owner is seeking to sell the property and it is assumed that this is the case here given that the Applicant states that a possession hearing is pending but the Applicant gives no information whatsoever (other than a copy of the possession hearing notice) as what steps he has taken and is continuing to take to ensure that the property is no longer required to be licensed.
22. There is a significant delay between him completing an application for a second temporary exemption notice and him actually submitting it. He refers to there being no guarantee the Secretary of State would approve the scheme but information on the website of the Respondent shows the decision to approve was in fact made on the 26 July 2023 and the Respondent states that this information was in the public domain with effect from the 1 August 2023 and was publicised using a variety of means. It is reasonable to suppose that any property owner who had previously had benefited from a temporary exemption notice and was aware that a second selective licensing scheme was pending would in any event make their own enquiries whether online or directly of the Respondent. The

tribunal does understand why the Respondent declined to serve a second temporary exemption notice.

23. However, there is the question of the operation of section 86(4) and (5) and the continuous six month period. On the face of it, the meaning of the two subsections is clear and unambiguous if the second application is made whilst the selective licensing designation in force when the first temporary exemption notice was served remains in force when the second application is made. However, section 84(2) of the Act provides that a designation has a finite life of 5 years and then ceases to have effect. There is no provision for the life of the designation to be extended; a local housing authority has to make another designation and has again to follow strict consultation procedures (with approval by the Secretary of State necessary in some cases).
24. The Act is silent on the operation of section 86(4) and (5) where a second scheme comes into force. If a second designation did take effect immediately upon expiry of the first (so in effect the operation of selective licensing continued in a seamless manner for a ten year period) then if, for example, a first temporary exemption notice expired in the weeks after the expiry of the first scheme and therefore in the first few weeks of the new scheme it would be logical for the provisions of section 86(4) and (5) to apply. A second application could only be considered if the second temporary exemption notice came into effect the day after the expiry of the first notice (and there were exceptional circumstances). The 6 month period has to be continuous but in such circumstances the operation of selective licensing is continuous and so therefore is the obligation to license.
25. However, what if there is a clear gap between the end of a first selective licensing designation and the start of a new scheme? As discussed at paragraph 23, a second scheme is not an extension of the first; it is a new entity. Section 84(2) makes it clear that at the end of five years, a designation “ceases to have effect” and so there is no obligation to license during the interim period. The Act does not appear to have taken this into account with the temporary exemption provisions and there do not appear to be any previous cases on this issue. Local housing authorities publicising a second designation will refer to a “new scheme” as indeed does the Respondent.
26. Logically the provisions of section 86(4) and (5) should be reset if there is a gap between the end of the first scheme and the start of the new – if the period for two temporary exemption notices has to be continuous then it is rational to suppose that the period in which licensing is required should also be continuous. If a temporary exemption notice expired after the end of the first scheme but before the start of the second scheme whilst a person might make an application in anticipation of the second licensing scheme it is difficult to see how a temporary exemption notice could be served at that time as there is nothing to be given exemption from; there is no scheme in force and accordingly no requirement to license any property.

27. In this case, as the Respondent observes in its Schedule of Reasons, even if it was possible to serve a second temporary exemption notice taking effect immediately upon expiry of first such notice (and in the view of the Tribunal that is not possible) any such notice have expired on the 30 November 2023. The proposal by the Respondent that the Tribunal, if minded to direct the service of a second temporary exemption notice, should set the starting date for this from the 1 December 2023 start date of the second scheme with the notice expiring on the 1 March 2024, is patently wrong. The service of a notice both taking effect and expiring in the past would be irrational.
28. Assuming that a clear gap between a first licensing scheme and a second such scheme does reset the provisions of section 86(4) and (5), then if a second application for a temporary exemption notice is made after the resumption of the requirement to license as a consequence of the second scheme coming into effect, then logically it would not be necessary for the applicant to demonstrate exceptional circumstances under section 86(5)(b) only that his intention to take particular steps with a view to securing that the house is not longer required to be licensed under section 86(1). In the view of the Tribunal, the very limited information given in the submissions by the Applicant would not necessarily meet either criterion.
29. Having regard to paragraphs 23 – 28, in the view of the Tribunal, where there has been a clear gap between the end of one selective licensing designation and the start of a second designation, a local housing authority cannot rely on the 6 month continuous period for successive temporary exemption notices as the basis for deciding not to serve a second temporary exemption notice. Furthermore, where a second application is made after the start of a second licensing scheme separated by a clear break from the start of the first, then the Applicant has to demonstrate particular steps to take the property out of licensing, not exceptional circumstances. Accordingly the Tribunal reluctantly reverses the decision of the Respondent not to serve a second temporary exemption notice. Having reached that decision, by virtue of section 86(9) the Tribunal then has no alternative but to direct the Respondent to issue a temporary exemption notice with effect from such date as the Tribunal directs.

Decision

30. The Tribunal reverses the decision of the Respondent and directs that the Respondent serve a temporary exemption notice of three months duration immediately upon expiry of the period for appeal of this decision if no appeal is made or, if an appeal is made, when the appeal is finally determined.

Appeal

31. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal an aggrieved party must apply in writing to the First-tier Tribunal for permission to appeal within 28 days of the

date specified below stating the grounds on which that party intends to rely in the appeal.

12 June 2024

Peter Wilson
Valuer Chair