FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CQ/HML/2020/0017**
HMCTS (Paper, Video, Audio)	**:**	**A: CVP**
Property	**:**	**3 Scarborough Way, Coventry, CV4 8DE**
Applicant	**:**	**Mr Phil Horton**
Respondent	**:**	**Coventry City Council**
Type of Application	**:**	**An application under Schedule 5 to the Housing Act 2004 to appeal against conditions attached to a licence for a House in Multiple Occupation**
Tribunal Members	**:**	**Judge M K Gandham** **Mr R Chumley-Roberts MCIEH, JP** **Mr A McMurdo MCIEH**
Date of Hearing	**:**	**8th March 2021**
Date of Decision	**:**	**6th April 2021**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote hearing which had been consented to by the parties. The form of remote hearing was originally to be by way of video conferencing; however, due to technical difficulties on the day, the Tribunal determined that it should proceed by way of an audio hearing via the Cloud Video Platform (A:CVP). A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing/on paper. The documents referred to were contained within the parties' bundles, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and to enable this case to be heard remotely during the COVID-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal, the Tribunal directed that the hearing be held in private. The Tribunal had directed that the proceedings were to be conducted remotely; it was not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who were not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction was necessary to secure the proper administration of justice.

Decision

1. The Tribunal determines that Mr Phil Horton should be issued with a five-year HMO licence, commencing on 12th November 2018, for the property known as 3 Scarborough Way, Coventry, CV4 8DE. The licence should permit no more than 5 households and 5 residents for occupation and be subject only to those mandatory conditions detailed in Schedule 4 to the Housing Act 2004 which relate to houses requiring licences under Part 2 of the Act. The Tribunal, therefore, directs Coventry City Council to issue such a licence to Mr Horton.

Reasons for Decision

Introduction

2. On 26th October 2020, the First-tier Tribunal (Property Chamber) received an application from Mr Phil Horton ('the Applicant') for an appeal under paragraphs 31 and 32 of Schedule 5 to the Housing Act 2004 ('the Act'). The appeal related to a decision made by Coventry City Council ('the Respondent') to grant a licence to him for a house in multiple occupation (HMO) for the property known as 3 Scarborough Way, Coventry, CV4 8DE ('the Property').

3. The licence was dated 1st October 2020 ('the Licence') and was granted for a period of five years from 12th November 2018 to 11th November 2023, subject to certain conditions imposed by the Respondent. The Applicant clarified that he had appealed under both paragraphs 31 and 32 of Schedule 5 to the Act, as he was unsure whether the conditions imposed by the Respondent on 1st October 2020 constituted conditions on the grant of a new licence or whether they constituted a variation of his licence.

4. His appeal related to two of these conditions – firstly, the proviso in condition 17 of the First Schedule relating to the size of the first floor front bedroom ('Bedroom Five') and, secondly, the discretionary condition in Schedule 2 relating to the provision of a separate toilet.

5. The proviso in Condition 17 of the First Schedule stated as follows:

> "*The 1st floor front right bedroom number five (5) is currently undersized and must not be used by an occupant as sleeping accommodation by one person aged over 10 years unless suitable alterations are carried out to ensure the floor area of that bedroom is not less than 6.51 square metres.*
>
> *COMPLETION: This must be complied with from the date of this licence or, if the room is occupied on the day the licence is granted, from the end of that tenancy up to a maximum of 18 months from the date of this licence. This condition will be included in all subsequent licences.*
>
> *AUTHORITY: para 1A of Schedule 4 of the Housing Act 2004 inserted by Regulation 2 Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018 SI 2018/616*"

6. The discretionary condition in Schedule 2 required the Applicant to:

> "*Provide a separate toilet compartment at a suitable location within the house and install in it a toilet and a wash hand basin, heating and ventilation…*
>
> *COMPLETION: This must be done within twelve (12) months from date of licence."*

7. The Tribunal issued Directions on 29th October 2020 and, in accordance with the same, both parties provided a statement of case. The parties were invited to provide their availability for an inspection to take place in January 2021, however, due to the increasing number of cases of the COVID-19 virus and the likelihood of a third national lockdown, in line with paragraph 10 of the Amended General Pilot Practice Directions: Contingency Arrangements in the First-Tier Tribunal and Upper Tribunal, the matter was stayed until 22nd January 2021.

8. Following a review of the matter in January 2021, the Tribunal issued a further Directions Order, on 20th January 2021, confirming that the Tribunal proposed to decide the matter without an inspection but that a remote oral hearing would be required. Further documentation was requested from both parties, including details of the calculations for the size of Bedroom Five.

The Law

9. Section 67 of the Act (as amended) details the provisions relating to a local authority's powers to grant a licence and provides:

> ***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;*
> *…*
>
> *(3) A licence must include the conditions required by Schedule 4.*

10. Section 69 of the Act details the provisions relating to a local authority's powers to vary a licence and section 69(1) provides:

> ***69 Variation of licences***
>
> *(1) The local authority may vary a licence –*
>
> *(a) if they do so with the agreement of the licence holder, or*
> *(b) if they consider that there has been a change of circumstances since the time when the licence was granted.*
>
> *For this purpose "change of circumstances" includes any discovery of new information.*

11. Schedule 4 of the Act details mandatory conditions to be included in licences for HMOs. Paragraphs 1A to 1C were inserted by The Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences)

(England) Regulations 2018 ('the 2018 Regulations'). Paragraph 1A relates to floor area and provides:

Schedule 4

1A.— Additional conditions to be included in licences under Part 2: floor area etc.

(1) Where the HMO is in England, a licence under Part 2 must include the following conditions.

(2) Conditions requiring the licence holder—

(a) to ensure that the floor area of any room in the HMO used as sleeping accommodation by one person aged over 10 years is not less than 6.51 square metres;

…

(9) Any part of the floor area of a room in relation to which the height of the ceiling is less than 1.5 metres is not to be taken into account in determining the floor area of that room for the purposes of this paragraph.

…

12. The licence holder, or any relevant person, may appeal to the First-tier Tribunal (Property Chamber) under paragraphs 31 and 32 of Part 3 of Schedule 5 to the Act, against a decision by the local housing authority to grant, vary or revoke a licence. An appeal made under paragraph 31(1)(b), relating to the granting of a licence, may relate to any of the terms of the said licence.

13. The powers of the tribunal hearing the appeal are set out in paragraph 34:

34 Powers of … tribunal hearing appeal

(1) This paragraph applies to appeals to the appropriate 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.

…

Property

14. No physical inspection was carried out by the Tribunal but information provided by both parties, along with online street view information, show that the Property is a two storey, semi-detached house situated on Scarborough Way, close to the University of Warwick.

15. The house had been renovated by the Applicant since his purchase of the Property and, in 2017, he had converted the garage to form two additional bedrooms. The Property now comprises a five-bedroom HMO – the ground floor consisting of two bedrooms, a living room and a shared kitchen/diner and the first floor comprising three bedrooms and a shared bathroom, in which the only w.c. at the Property is located.

16. Both parties had submitted a floor plan and photographs of Bedroom Five. Although the measurements on the two floor plans differed, the plans and photographs show that the bedroom is L-shaped, with the smaller section of the room being utilised to form a built-in single bed (with three under bed storage compartments).

17. There appeared to be no dispute between the parties regarding the quality of the accommodation, the suitability of the Property for occupation or the fit and proper status of the licence holder/manager.

Hearing

18. An oral (audio) hearing was held remotely via CVP on 8th March 2021. The hearing was attended by the Applicant. Mr Steven Chantler (the Respondent's Principal Environmental Health Officer) and Mrs Rachel Watton (an Environmental Health Officer employed by the Respondent) attended on behalf of the Respondent.

The Applicant's submissions

19. The Applicant confirmed that he purchased the Property in 2016, renovating it to form a five-bedroom HMO. He stated that he was aware, prior to the commencement of renovations, that new regulations in relation to HMOs were due to come into force in October 2018. As such, he stated that he completed the renovations to ensure that the Property would comply with them, in accordance with advice and recommendations that he received from the Respondent and the accommodation department at Warwick University, as he proposed to let to university students.

20. The Applicant stated that the Respondent had referred him to the Respondent's 'Guidance for Houses in Multiple Occupation, 2016 Edition' ('IGGY') and that he renovated the Property in accordance with the same. He confirmed that he completed the application for an HMO licence and submitted this around August 2018, paying the appropriate fee.

21. Following the submission of his application, and a number of conversations between the Applicant and Respondent by email and telephone regarding the progress of his application, in February 2019, the Applicant stated that he received an email from Mr James Powell (a Senior Administrator employed by the Respondent). In the email, Mr Powell confirmed that, as a complete application had been received, it was lawful for the Property to operate as a licensable HMO. The Applicant stated that, as far as he was concerned, the Property had a licence from this point.

22. The Applicant stated that, over a year later, in July 2020, he was contacted by Mrs Anne Lakey (a Property Manager with Warwick University accommodation, who managed the Property), who stated that she had been contacted by the Respondent who had confirmed that they wished to carry out an inspection in relation to the Applicant's application for an HMO licence. The Applicant stated that he was surprised to hear this, as it had been almost two years since he had made his application and over a year since he had received the email from Mr Powell.

23. The Applicant confirmed that an inspection took place on 24th July 2020, in the presence of himself and Mrs Lakey, by two of the Respondent's officers, Ms Claire Taylor (a Senior Housing Enforcement Officer) and Mrs Watton. He stated that, at the conclusion of the inspection, he was informed that the Property was of a suitable standard and that the rooms were of a suitable size and that, subject to him adding an additional smoke alarm to the lounge area and replacing a UPVC window bracket, he would be issued with a full five-year licence for all five rooms. The Applicant confirmed that both of these items were remedied by him and that photographs and an update were sent to the Respondent.

24. Following his update to the Respondent, the Applicant stated that he received an email from Mrs Watton, on 11th August 2020. In the email, Mrs Watton instructed him that, after receiving further advice, as the bed in Bedroom Five was built over part of a bulkhead, the area of the bulkhead could not be counted towards 'useable space' and, accordingly, Bedroom Five would fall short of the minimum space required in a bedroom for one person. In addition, she stated that a second w.c. would be required at the Property to meet the standards required for occupation by five people. The Applicant confirmed that the Notice of Intention to issue the licence, sent to him on 20th August 2020, referred to his grant of a licence being made subject to these two conditions.

25. The Applicant stated that the information given in Mrs Watton's email was a complete U-turn on what he had been told at the inspection. He submitted that it was his belief that that the U-turn was as a result of a dispute between the Respondent and a former colleague and friend of the Applicant, Mr Wright. He stated that the Respondent had carried out a similar inspection of Mr Wright's property, and had found that one of his bedrooms, which was of a similar layout and size to Bedroom Five, had been deemed as not meeting the minimum requirements for room size.

26. The Applicant raised three points of appeal in his application to the Tribunal. Firstly, he submitted that he had already received tacit consent for a licence in February 2019, as evidenced by an email he had received from Mr Powell on 21st August 2020. He stated that the Licence supported this as it referred to his five-year licence having commenced on 12th November 2018.

27. The Applicant referred to the general duties of local housing authorities in the Act, which confirmed that licences had to be issued within a "reasonable time". He also referred to Article 13 of the European Union Directive 2006/123/EC of the European Parliament and Council of 12th December 2006 ('the Services Directive'), which stated as follows:

> "*Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired."*

28. He stated that the Respondent's own HMO Licensing Policy, dated January 2020, confirmed that the Respondent had taken into consideration the High Court decision in the case of *R (Gaskin) v Richmond LBC* [2018] EWHC 1996 (Admin) ('*Gaskin*') and that the Respondent aimed to process all valid licensing applications within 20 weeks of receipt. The policy went on to confirm that, if a decision was not received after this period, "*tacit approval will apply from the date the application was made*."

29. As such, the Applicant contended that an unconditional five-year HMO licence for the Property was granted by tacit approval when the Respondent had failed to comply with the 20-week timescale. As tacit approval had already been granted, the Applicant contended that, by trying to include new conditions following the inspection, the Respondent was, in fact, attempting to vary an existing licence.

30. The Applicant stated that, under section 69 of the Act, a local housing authority may only vary a licence if done so with the agreement of the licence holder or if they consider that there has been a change of circumstances since the licence was granted. The Applicant confirmed that he had not given any consent and that there had been no change to the Property, in structure or usage, since the granting of the licence by tacit agreement. Accordingly, he submitted that the licence could not be varied by the addition of the two conditions.

31. The Applicant's second point of appeal related to the measurement of Bedroom Five. He provided a plan with his written submissions and

confirmed that he had measured the room as having a useable space of 6.698 m². He stated that the legislation required that, subject to providing adequate communal space, the minimal useable space of an adult sleeping room should be 6.51 m². He stated that the measurement of a room should be wall-to-wall excluding any feature that has a ceiling height of less than 1.5 m. The Applicant confirmed that, even when measuring from the built-in bed to the ceiling, the height was 1.937m.

32. The Applicant referred to the Respondent's plan of Bedroom Five, in which he stated that they had detailed the measurement of the area where the built-in bed was situated as 1.664m by 0.702m. The Applicant stated that, since the bed could hold a standard size single mattress (measuring 1.9m x 0.9m), the Respondent's measurement of this area could not be correct.

33. The Applicant stated that, after measuring the room, the Respondent later tried to deduct a figure of 1.1 m² for an area of floor space underneath the built-in bed, which they believed contained a concealed bulkhead. The Applicant confirmed that it was impossible to access the bulkhead from the room and he could not, therefore, understand how Ms Taylor had concluded that the floor area of the bulkhead measured 1.1 m².

34. In his written submissions, the Applicant referred to there being no definitive definition for how 'useable' room space should be calculated and that different local housing authorities gave different guidance. He stated that the Respondent's measurement of Bedroom Five was "*unusual at best and definitely at odds with the intention of the legislation*", as the concealed bulkhead had no direct or indirect impact on the useable space of the room. He confirmed that the room had been occupied for the last three years with students from the university, without complaint.

35. The Applicant did state that he was not entirely sure as to whether the bulkhead had been cut back completely by his carpenter and that any remaining part was likely to have a sloped angle. He stated that, at most, what was left would have protruded around 6 to 8 inches into the room and that this was still useable space as the bed was built over it and the height space above the bed was still in excess of 1.5m.

36. The Applicant submitted that the Respondent's logic in calculating useable floor space was misguided. He referred to the Respondent's revised Amenities and Facilities Guide for HMOs (issued in November 2020), in which the Respondent classed fitted wardrobes as useable space but not bulkheads. The Applicant stated that using the Respondent's logic in this matter i.e. that useable floor space meant that you could only include spaces upon which you could actually stand upon the floor, fitted wardrobes should not be included in the measurement, nor could any areas of a room which encompassed a fitted bed or desk space.

37. The Applicant's third point of appeal related to the requirement for a separate w.c. at the Property. The Applicant stated that the Property had

been completely renovated in accordance with the IGGY guidance produced by the Respondent, to which he had been directed by them. He stated that page 12 of IGGY stated that: "*Water closets must be provided such that there is at least one water closet for every five occupants*". He submitted that, as the Property was only to be occupied by five occupants, the Respondent's requirement for a separate w.c. was completely at odds with their own guidance at the time.

38. In relation to the Respondent's assertion – that their mandatory conditions were downloadable from the website alongside the IGGY guidance and that these confirmed that a bathroom and separate w.c. would be required for properties for the occupation of five or more people – the Applicant vehemently disputed this and stated that, had the Respondent's mandatory conditions been available, he would have queried why there was a discrepancy in relation to the number of water closets required by those conditions compared to those required in IGGY.

39. Finally, the Applicant stated that he had acted with honesty and integrity and complied with the Respondent's guidance throughout his renovation of the Property to ensure that it would comply with their HMO guidelines.

The Respondent's submissions

40. In their written submissions to the Tribunal, the Respondent confirmed that they were required, under the Act, to secure effective implementation of licences of HMOs. They stated that in October 2018, the Government introduced changes to mandatory licensing and the prescribed description of HMOs. At the same time, the Government also set out minimum room sizes for licensable HMOs and, depending on the nature of the occupancy, imposed a requirement for these to be added as a condition to a licence, with up to 18 months' notice for a landlord to comply with the same.

41. The Respondent confirmed that Mrs Watton and Ms Taylor carried out an inspection of the Property on 24th July 2020 in respect of the application made by the Applicant for an HMO licence. The Respondent stated that they inspected all properties prior to issuing a HMO licence, so that they could assess the suitability for occupation and determine what discretionary conditions, if any, may be required on the licence.

42. The Respondent stated that the useable floor space of Bedroom Five was measured and photographs were taken of the room. The Respondent submitted that, during the inspection, the Applicant had advised that the bulkhead had been cut back and he stated that the under bed storage did not encompass the whole of the space underneath the bed in order to provide stability. The Respondent considered that the bulkhead was still in place, as there was no sign that it had been cutback from viewing the ceiling of the staircase.

43. The Respondent stated that, during the inspection, it was also noted that there was only one w.c. available to all occupants (which was situated

within the shared bathroom), that an additional mains wired interlinked detector was required in the living room and that one of the escape windows on the ground floor was not opening correctly. The Respondent confirmed that the last two items were rectified by the Applicant prior to the Notice of Intention being issued.

44. Ms Taylor did not attend the hearing but had provided a written statement which was contained within the Respondent's bundle. Ms Taylor stated that she had informed the Applicant, following the inspection, that there would be a thorough assessment made of the Property at the Respondent's office. Ms Taylor further stated that she had noted that when Mrs Watton had measured Bedroom Five during the inspection, she had failed to discount the area under the bed which formed the ceiling of the staircase. Ms Taylor stated that she pointed this out to Mrs Watton after the inspection and confirmed that she had measured this area as being 1.1 m^2. As Mrs Watton had measured Bedroom Five at 6.79 m^2, Ms Taylor stated that she advised Mrs Watton to deduct 1.1 m^2 for the bulkhead, as this was not useable floor space.

45. The Respondent confirmed that a Notice of Intention to grant a licence was issued to the Applicant on 20th August 2020, which contained conditions relating to the floor area of Bedroom Five and a requirement for an additional toilet in a separate compartment. The Respondent gave the Applicant a maximum of 18 months to comply with the floor size condition and a maximum of 12 months to comply with the condition relating to the additional toilet.

46. The Respondent stated that representations were received from the Applicant on 21st and 26th August 2020 and that a Response to representations was sent on 2nd October 2020. A copy of the Response to representations was included within the bundle. In addition to dismissing the Applicant's submission of there being an abuse of process and the allegations regarding the dispute between the Respondent and Mr Wright having any bearing upon the matter, the Response stated that, although the Property had been given tacit approval, this did not prevent the Respondent from subsequently adding conditions to the licence and that, under section 69(1)(b) of the Act, the Respondent could vary a licence if there had been a change of circumstances.

47. The Respondent confirmed that they were of the opinion that they must grant the Applicant a licence because, although they considered Bedroom Five was below the statutory minimum room size and the Property was missing a separate toilet, the Respondent had no concerns regarding the suitability for occupation or the fit and proper person status of the licence holder/manager, which were the two criteria the Respondent is required to decide upon when granting a licence. The Respondent also considered that the Property could be made suitable for the occupation of five people with the imposition of the licence conditions.

48. At the hearing, Mr Chantler acknowledged that the amount of time taken to deal with the Applicant's licence application was "*not good enough*". He confirmed that the application had been processed in October 2018 and that the Respondent, being satisfied that the Applicant had forwarded a valid application, had given consent for the Property to operate as a HMO in February 2019. He stated, however, that a licence had not been issued at that point as the Respondent inspected all properties before issuing licences.

49. In relation to whether the conditions imposed by the Respondent were conditions on a new licence or constituted a variation to an existing licence, Mr Chantler, initially, submitted that he considered the Licence was a new licence, as it was dated 1st October 2020 and was the only paper licence issued to the Applicant. He did accept that tacit approval had been given by the Respondent previously, hence the Licence was detailed as commencing from 12th November 2018, and conceded that the imposition of additional conditions in 2020 might, therefore, constitute a variation. He submitted that, even if the imposition of the conditions was determined to be a variation, the inspection of the Property could be considered a 'change in circumstances', under section 69 (1)(b) of the Act.

50. In relation to the calculation of room sizes, Mr Chantler confirmed that the Respondent did not class areas which formed part of bulkheads as 'useable' floor space in a room. Mr Chantler accepted the Applicant's argument – that different local housing authorities interpreted the room size regulations in different ways – but stated that the Respondent considered 'useable' floor space to be space that was level with the entire floor. Mr Chantler confirmed that the Respondent agreed that the ceiling height of the room was not in issue as, even above the built-in bed, the height exceeded 1.5m.

51. Mrs Watton confirmed that she had drawn up the floorplan of Bedroom Five, which had been submitted by the Respondent in their bundle. After questioning by the Applicant and the Tribunal, she accepted that the measurements on her plan could not be correct. The measurements detailing the length and width of the room appeared to have been transposed. In addition, the measurement of the area of the smaller section of the room containing the built-in bed (detailed on her plan as being 1.664m long and 0.702m wide) was inaccurate, as a standard sized single mattress was in situ on the built-in bed during the inspection.

52. Mrs Watton accepted that the bulkhead was not visible, so any measurement of its area was an estimation. She also acknowledged that the estimation of 1.1 m^2 could not be correct as, even based on the figures in the Applicant's plan (which were more generous than Mrs Watton's measurements - the length of this section being detailed as 2.097m and the width as 0.970m), it would have meant that the bulkhead extended to an area covering over half of the length of the built-in bed, something which was obviously not the case as evidenced by the photographs.

53. In relation to the condition requiring an additional toilet, Mr Chantler stated that the Respondent did not accept that a single toilet contained within a shared bathroom was adequate for five occupiers as, if someone was using the bath, no one else could use the toilet. He confirmed that the Respondent did not require the Applicant to install an additional toilet at the Property, simply that the toilet should be contained within a separate toilet compartment. Mr Chantler submitted that this was reasonable.

54. Mr Chantler accepted that the Respondent's position with regard to bulkheads and additional toilets had not been detailed in IGGY but confirmed that a new amenities and facilities guide had been issued by the Respondent in November 2020, which clarified the situation in both respects. Mr Chantler appreciated that this was of little assistance to the Applicant, as he had made his application two years prior to the guidance being updated, but stated that the Respondent's mandatory conditions (which detailed the Respondent's requirements with regard to w.c.s) had been available and could have been downloaded from the website. He also stated that it was the legislation, not the guidance, which landlords should adhere to.

55. Mr Chantler acknowledged that the prescribed standards set out in The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006, which had required a toilet separate from the bathroom for five or more occupiers, had been amended by The Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007 ('the 2007 Regulations'). Accordingly, the legislation was now less prescriptive and only required properties to have "*an adequate number of bathrooms, toilets and wash-hand basins…for the number of persons sharing those facilities*".

The Tribunal's Deliberations

56. The Tribunal considered all of the evidence submitted by the parties, both written and oral and briefly summarised above.

57. In relation to the Applicant's first point of appeal, the Tribunal notes that in *Gaskin* the High Court confirmed that, for the purposes of HMO licensing schemes, local housing authorities were competent authorities running 'authorisation schemes' within the meaning of the Services Directive.

58. The Applicant is correct in that, under paragraph 3 of Article 13 of the Services Directive, local housing authorities are required to provide applicants with a guarantee that any applications will be processed as quickly as possible and within a reasonable time period which is fixed and made public. The Services Directive confirms that this time period shall run from the date that all documentation has been submitted and that, although it can be extended once, this can only be for a limited time and

the applicant must be notified of the extension and its duration prior to the original time period expiring.

59. Article 13, paragraph 4 states as follows:

> "*Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to public interest, including a legitimate interest of third parties.*"

60. The Tribunal notes that the Respondent had, quite rightly, taken into consideration the decision in *Gaskin* in their HMO Licensing Policy, dated January 2020. Their policy confirmed that, upon receiving a valid application the Respondent aimed to provide a decision as soon as reasonably practicable and, generally, within 20 weeks of receipt. The policy document went on to state that:

> "*If a decision about a licence application has not been received after this period, then tacit approval will apply from the date the application was made. It is therefore lawful for a property to operate as a licensable HMO.*"

61. Having failed to make a decision regarding the Applicant's HMO licensing application within the 20-week period, and not having notified the Applicant of any time extension required, in line with the Services Directive and the Respondent's licensing policy, the Tribunal considers that authorisation was deemed to have been granted to the Applicant from such time as he had submitted all of his documentation to the Respondent. Such authorisation is clearly evidenced by the email from Mr Powell to the Applicant, on 21st August 2020, in which he states that tacit consent had been provided to the Applicant in February 2019, and further evidenced by the Licence referring to a commencement date of 12th November 2018.

62. As the Respondent's licensing policy did not state that tacit approval was subject to any of the Respondent's Schedule 1 Mandatory Conditions, the Tribunal considers that a HMO licence was granted to the Applicant on 12th November 2018, subject only to those mandatory conditions required by legislation.

63. The Tribunal being satisfied that the Applicant was granted his licence in November 2018, albeit by tacit approval, the question arises as to whether the Respondent was able to add conditions to this licence following its inspection. Although the Respondent, in their written submissions, submitted that they could, the Service Directive makes it very clear that different arrangements may only be put in place when justified by "*overriding reasons relating to the public interest*".

64. At no point has the Respondent provided any evidence that the two conditions they proposed to impose were either 'overriding reasons' or in

the 'public interest'. The written submissions from the Respondent, in fact, confirmed that the Respondent had no concerns regarding the general suitability of the Property for occupation. The Respondent had allowed the Property to be let in its current state for some 20 months prior to the inspection and had been happy for it to continue running in the same condition for at least 12 months thereafter. As such, the Tribunal does not consider that the imposition of the two conditions disputed by the Applicant could in any way be described as 'overriding reasons'.

65. As the Tribunal is satisfied that a licence was granted on 12th November 2018 and the Notice of Intention was not issued until 20th August 2020, following the inspection, the Tribunal considers that the imposition of the conditions was an attempt by the Respondent to vary the licence. Accordingly, the provisions of section 69 of the Act apply. It is clear that any variation was not with the agreement of the Applicant, as such, the only route for such a variation would be under section 69(1)(b), if the Respondent considered that there had been a change of circumstances since when the licence was granted.

66. Section 69(1) of the Act, does confirm that a change of circumstances includes "*any discovery of new information*" and the Tribunal accepts, in theory, the Respondent's submission that an inspection of a property could constitute a change of circumstances, however, this would require such an inspection to bring to light new information which was previously unknown.

67. In relation to the matter before us, the Applicant had detailed in his application form for the licence that the Property contained five bedrooms and one bathroom. The form also indicated that there was a toilet within the bathroom and no separate toilet compartment. In addition, the plan attached to the form made it clear that the only toilet at the Property was contained within the bathroom. As such, although the Tribunal agrees with the Respondent – that it is reasonable that where there is a single toilet in a property shared by five people that such toilet should be contained within a separate compartment to the bathroom – it cannot be said that this was 'new information' only discovered by the Respondent upon inspecting the Property.

68. With regard to the size of Bedroom Five, although the plan attached to the application form detailed the floor area of this bedroom as 7.54 m², both the floor plans provided by the Applicant and the Respondent calculated the floor area, prior to the deduction for any bulkhead, as 6.69 m² (the Tribunal notes that Ms Taylor's statement referred to the room area as being measured at 6.79 m² but considers this to be in error). As such, although the plan to the application form indicated that the Bedroom Five was larger, prior to any deduction for the bulkhead, the floor area was still greater than 6.51 m², the minimum size required by the Respondent.

69. In relation to the deduction made for the bulkhead, the Tribunal finds that, firstly, the Respondent has produced no evidence that a bulkhead

actually exists, secondly, as any potential bulkhead was not visible, the measurement of the same was clearly an estimation and, thirdly, that the estimation made 1.1 m² was a gross overestimation. As a result, the Tribunal does not consider that the Respondent can be said to have discovered any new information during its inspection of Bedroom Five which would give rise to a change of circumstances such that it would entitle the Respondent to vary the licence.

70. Accordingly, the Tribunal determines that the results of the inspection of the Property did not give the Respondent grounds upon which to vary the licence which was granted by tacit approval on 12th November 2018.

71. Although the Tribunal is no longer required to determine the Applicant's further points of appeal, the Tribunal would like to make the following observation in relation to the Respondent's calculation of the *useable* floor space. The Tribunal notes that in their new Amenities and Facilities Guide, dated November 2020, the Respondent states that in calculating useable floor space they include the floor space in floor-to-ceiling fitted wardrobes and walk- in cupboards. They also, understandably, exclude floor space encompassing chimney breasts and en-suite facilities, as such areas would generally extend from the floor to the ceiling. The Tribunal is, however, slightly perplexed with the Respondent's blanket exclusion of areas containing a bulkhead.

72. In the matter before the Tribunal, the floor space in which the purported bulkhead was contained was wholly encompassed within the structure of a built-in bed. As such, this floor space was clearly *useable* and being *used*. In the future, the Respondent could come across a scenario where a bulkhead (which has been levelled off) is completely contained within a bulkhead-to-ceiling fitted wardrobe in a bedroom where the ceiling height above the bulkhead still amounts to, say 2.6m. In such a scenario, the Respondent would, based upon their new guidance, exclude the entire area encompassing the bulkhead from the useable space. Conversely, if a floor-to-ceiling wardrobe with a similar width and depth had been fitted in a bedroom without a bulkhead, where the floor-to-ceiling height of that room only amounted to 2.3 m, this would still be counted as useable space, even though the fitted wardrobes in both rooms took up the same amount of floor area and, based on the height to ceiling measurement, the storage capacity (useable space) in the wardrobe in the first bedroom would have been greater than that in the second.

73. That being said, as previously stated, the Applicant has succeeded in his first point of appeal. Accordingly, the Tribunal directs the Respondent to issue a licence to the Applicant for the Property for five years from 12th November 2018, permitting no more than 5 households and 5 residents for occupation, subject only to those mandatory conditions detailed in Schedule 4 to the Act which relate to houses requiring licences under Part 2 of the Act.

Appeal

74. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
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Judge M. K. Gandham