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RESIDENTIAL PROPERTY TRIBUNAL

Reference: RPT/0013/08/19, RPT/0014/08/19, RPT/0015/08/19

In the Matter of 91, Claude Road, Roath, Cardiff CF24 3QD, 119, Claude Road, Roath, Cardiff, CF24 3QE and 12, Penywain Road, Roath, Cardiff, CF24 4GG

And in the matter of appeals under paragraph 31 of Part 3 of Schedule 5 to the Housing Act 2004

Applicant:	**Mr Assan Khan**
Representation:	**In person**
Respondent:	**Cardiff County Council**
Representation:	**Alys Williams of counsel**
Type of Application:	**Appeals against the granting of HMO Licences**
Tribunal:	**Mr. C. R. Green (Chairman)** **Ms. A. Harrison (Valuer Member)** **Mr. H.E. Jones (Lay Member)**
Date of determination:	**22 July 2021**

DECISION

(1) In respect of issue i) directed to be determined by paragraph 4 of the Tribunal's order of 26 January 2021, the three HMO licences dated 18 July 2019 granted by the Respondent in respect of the above premises are invalid as they were issued prior to the expiry of the minimum 14-day consultation period required by Schedule 5, paragraphs 1 and 2 of the Housing Act 2004.

(2) As a result, the Applicant's appeals in respect of such licences are dismissed.

(3) In respect of issue ii) directed to be determined by paragraph 4 of the said order, it is permissible, and the Tribunal has jurisdiction, on an appeal under Schedule 5 paragraph 31, to consider not only the terms of HMO licences granted but also whether the subject properties have correctly been designated as HMOs.

(4) In respect of any application for costs:

a. By 5.00 pm on 2 August 2021, the party claiming costs shall serve on the other party and file with the Tribunal written submissions setting out the

grounds on which costs are claimed, the amount claimed, and a breakdown of how such costs have been calculated.

b. The party from whom costs are sought is entitled to serve written submissions in reply, and shall file the same with the Tribunal, by 5.00 pm on 16 August 2021.

REASONS FOR DECISION

Background

1. The Applicant, Mr. Assan Khan, by application forms each dated 14th August 2019 appealed against the terms on which HMO (Houses in Multiple Occupation) licences dated 18th July 2019 were granted by the Respondent Council in respect of the above three properties. Each licence was granted subject to a number of terms and conditions, including the execution of various works and compliance with a number of other requirements. The appeals were made under Section 71 and Schedule 5, Part 3, paragraphs 31(1)(b) and 31(2) of the Housing Act 2004.

2. The relevant procedural background to the appeals is set out in paragraphs 2 to 12 of the Tribunal's reasons of 26 January 2021, written by Mr. E. W. Paton, the Tribunal chairman on that occasion, at which there was determined strike out applications made by both parties.

3. As can be seen from the order of that date, the Council's application to strike out Mr. Khan's appeals was granted in part in relation to two issues (paragraph 1) but otherwise dismissed (paragraph 2); and Mr. Khan's application to strike out the Council's Statement of Case was dismissed on the footing that it had subsequently been verified by a statement of truth (paragraph 3).

4. In addition, by paragraph 4 the Tribunal directed two preliminary issues be determined in the proceedings:

> *"4. It is directed that there shall be a hearing of two preliminary issues of validity and jurisdiction, as follows:-*
> *i) whether the HMO licences granted are invalid through, as the Applicant alleges, being issued prior to the expiry of the 14 day consultation period required by Schedule 5 paragraphs 1 and 2 Housing Act 2004*
> *ii) whether it is permissible and the Tribunal has jurisdiction, on an appeal under Schedule 5 paragraph 31 as to the terms of HMO licences granted, to consider whether the subject properties have correctly been designated as HMOs".*

5. In his written reasons, after identifying those two issues, Mr. Paton explained the Tribunal's reasoning in the following terms:

> *"41. We consider that rather than trading arguments, aspersions and strike out applications as has occurred thus far, the parties should focus their attention and resources on dealing with the remaining issues, as broadly summarised above.*

42. We propose taking this in two stages. The Applicant clearly places great emphasis in these appeals on his argument about the 14 day consultation period, and the licences being prematurely issued and therefore invalid. He also attempts to make the argument that these properties are not HMOs at all.

43. While in many cases directing the trial of preliminary issues can prove to be a "treacherous shortcut", in this case we consider it has some benefit. If the Applicant is right on the first point above, then he succeeds and there would be no need to have a further hearing on the specific conditions. If he is wrong on that point, and the Tribunal also decides that a challenge to HMO designation is not even possible in an appeal of this type, there will then be a reasoned Tribunal decision on those points, of benefit to both parties. They can then focus their minds and preparation for the hearing solely on dealing with such points as to the specific conditions attached to these licences as the Applicant then still pursues. If the HMO issue of principle were decided against the Applicant, there would then be no need to file evidence going to that issue. If it were decided in his favour, then there would be some such evidence, as there was in the 152 and 154 Mackintosh Place appeals."

The Hearing

6. Prior to the hearing the Tribunal received a skeleton argument dated 8 July with enclosures (in total, over 500 pages) from the Council, and a further skeleton argument dated 14 July, a 4-page condensed version of the previous skeleton. Mr. Khan provided a skeleton argument consisting of 98 pages with enclosures, dated 14 July.

7. The hearing was held via CVP on 22 July. Mr. Khan appeared in person and the Council was represented by Alys Williams of counsel. The Tribunal is grateful for the assistance they provided in presenting their respective cases.

The First Issue

Whether the HMO licences granted are invalid through, as the Applicant alleges, being issued prior to the expiry of the 14-day consultation period required by Schedule 5 paragraphs 1 and 2 Housing Act 2004.

8. The provisions of Part 1 of Schedule 5 to the 2004 Act govern the procedure relating to the grant or refusal of HMO licences. In particular, the following paragraphs are relevant:

"1 Before granting a licence, the local housing authority must—

(a) serve a notice under this paragraph, together with a copy of the proposed licence, on the applicant for the licence and each relevant person, and

(b) consider any representations made in accordance with the notice and not withdrawn.

2 The notice under paragraph 1 must state that the authority are proposing to grant the licence and set out—

(a) the reasons for granting the licence,

(b) the main terms of the licence, and
(c) the end of the consultation period.

Meaning of "the end of the consultation period"

12(1) In this Part of this Schedule "the end of the consultation period" means the last day for making representations in respect of the matter in question.

(2) The end of the consultation period must be—

(a) in the case of a notice under paragraph 1 or 5, a day which is at least 14 days after the date of service of the notice; and

(b) in the case of a notice under paragraph 3, a day which is at least 7 days after the date of service of the notice.

(3) In sub-paragraph (2) "the date of service" of a notice means, in a case where more than one notice is served, the date on which the last of the notices is served."

9. Therefore, it is a mandatory requirement that a notice be served before a licence is granted and that notice must state the end of the consultation period, which in respect of a notice under paragraph 1 must be at least 14 days *after* the date of service of the notice. Though not expressly stated, it is clear that the licence cannot be granted until after the end of the consultation period. This means that there must be at least 14 clear days between the date of service and the date of the grant of the licence.

10. Here, each of the notices under paragraph 1 of Schedule 5 was dated 4 July 2019 and addressed to Mr. Khan at the same address, and included the following as their third and fourth paragraphs:

> *"This letter is your notice of the proposal to licence the property, and as such, your attention is drawn to the attached draft conditions of Licence. These conditions contain requirements that need to be complied with so it is important that you review them.*
> *If you disagree with any of the conditions, you must make representations to this office within 14 days of the date of this letter. Your representations will be considered and you will be informed accordingly."*

The licences were granted on 18 July 2019 and bear that date.

11. The Tribunal heard evidence from Rachel Stickler, a neighbourhood service officer in the Housing Enforcement Division of Shared Regulatory Services. Ms Stickler had no personal involvement with the service of the notices in this case, which were dealt with by the HMO licensing department, but her evidence was that such notices would normally be sent on the date of the letter by first-class post, before 4.30 p.m.

12. On that footing, the earliest date of service by post in respect of notices dated 4 July would be the following day, 5 July, and 14 days after 5 July is 19 July. Therefore, the licences of 18 July were granted prematurely, before the expiry of the minimum 14-day consultation period. In the light of that the Tribunal did not consider it relevant whether service by post should be regarded as having been affected one, two, or three days after 4 July as

the result would remain the same. After taking instructions Miss Williams conceded – in the Tribunal's view, correctly – that the three licences were invalid as they were granted prematurely, and she accepted that in such circumstances the Tribunal had no alternative but to dismiss the three appeals.

The Second Issue

Whether it is permissible and the Tribunal has jurisdiction, on an appeal under Schedule 5 paragraph 31 as to the terms of HMO licences granted, to consider whether the subject properties have correctly been designated as HMOs.

13. Strictly speaking, because of the dismissal of the appeals as a result of the outcome on the first issue, it is not necessary for the Tribunal to address the second issue. Nevertheless, since the Tribunal had the benefit of Miss Williams' research and submissions on this issue it has decided to determine the same.

14. The three appeals have been made by Mr. Khan under section 71 and paragraph 31 of Schedule 5. Paragraph 31 provides:

> *"31(1) The applicant or any relevant person may appeal to the appropriate Tribunal against a decision by the local housing authority on an application for a licence—*
>
> *(a) to refuse to grant the licence, or*
>
> *(b) to grant the licence.*
>
> *(2) An appeal under sub-paragraph (1)(b) may, in particular, relate to any of the terms of the licence."*

Paragraph 34 provides:

> *"34(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"*

15. In the present appeals, and all other HMO licence appeals made by Mr. Khan which have been determined by the Residential Property Tribunal, he has contested not only the terms of the licences but also whether the relevant premises had HMO status. Therefore, the issue as framed above might be considered slightly misleading as these three appeals, as presented by Mr. Khan, are not limited to the terms of the licences (which the Tribunal indisputably has jurisdiction to consider) but have been extended by him to the issue of HMO status, the jurisdictional point that has been directed for determination. Perhaps the issue might be better worded as:

Whether it is permissible, and the Tribunal has jurisdiction, on an appeal under Schedule 5 paragraph 31, to consider not only the terms of HMO licences granted but also whether the subject properties have correctly been designated as HMOs.

16. Miss Williams' research uncovered no direct authority on the point but there are two cases that might assist. First, some remarks made by Timothy Walsh, the Tribunal chairman in the decision in relation to *152 and 154 Mackintosh Place* (RPT 0015/10/17 and RPT 0016/11/17) dated 13th September 2018, involving the same parties as the present appeals, and mentioned by Mr. Paton at paragraph 33 of the decision of 26 January. Mr. Walsh stated at paragraphs 51 and 52:

> *"51. In light of the preceding determination, it is unnecessary for us to decide the question of whether it is open to the Applicant to challenge the status of the Premises as HMOs in this appeal. Whilst the language of paragraph 31(1)(b) of Part 3 to Schedule 5 of the 2004 Act does admit of the possibility of an applicant for a licence appealing a decision to grant him a licence, paragraph 31(2) also makes it clear that appeals by an applicant for a licence may relate to the terms of such a licence.*
>
> *52. It would be an odd mechanism for challenging the status of a property as an HMO to require a property owner to apply for a licence (on the ostensible basis that he accepts that he must do so) only for him to then appeal against a favourable decision granting him the licence. It might be said that the simple solution is to make no application and to defend any enforcement proceedings if they are brought. Had it been necessary to do so, absent authority to the contrary (and we were referred to none), we would have determined the present Applicant's appeal did not engage the question of whether he should have been granted a licence at all because he cannot really be said to be appealing the decision to grant his own application (save as to the conditions of the Licences themselves)."*

17. Mr. Paton was of the view that such observations were not binding in respect of these appeals, the Tribunal agrees, and Miss Williams concurred. She adopted Mr. Walsh's comments however and elaborated on them as follows.

17.1. Whether premises require to be HMO licenced can be challenged in a number of ways: in defending a prosecution, appealing a fixed penalty notice, or appealing an HMO declaration served by a local housing authority under section 255(1) of the 2004 Act.

17.2. In the present case, paragraph 8 of the application form for a licence required Mr. Khan to give details of the property to be licenced, and at 8a. he ticked the box "House in multiple occupation". He also signed the declaration at paragraph 18 that the information in the application was true to the best of his knowledge. Therefore, it would be wrong for him to seek to reverse by appeal something he has declared to be true.

18. It is correct that under paragraph 31(2) an appeal, "may, in particular, relate to any of the terms of the licence" but the Tribunal considers that these are words of illustration not

limitation. They are an example of what issues may be raised on an appeal where a licence has been granted, and no doubt terms of the licence are the most commonly contested, but it is clear that the provision allows scope for other, unspecified, matters. Certainly, paragraph 32(2) does not limit the Tribunal's jurisdiction on appeal to only a consideration of the terms of the licence.

19. Concerning other ways to have the issue of HMO status determined, Miss Williams accepted that in the present case none were actually available to Mr. Khan at the time he made his applications for a licence, since although the Council had threatened him with prosecution none had been brought, and there was no fixed penalty notice or HMO declaration. As a matter of principle, the Tribunal does not consider that the availability of other forums, hypothetical or otherwise, would be sufficient of itself to preclude jurisdiction on the issue where there is an appeal, which is by way of a rehearing.

20. The Tribunal is also reluctant to regard challenging HMO status in enforcement proceedings as a "simple solution". With justification, a property owner might wish to avoid an appearance in the magistrates court and the possibility of criminal conviction in order to have determined whether an HMO licence is required, when that is in dispute. Mr. Khan claims to have made his applications as the result of an article he read which suggested that where HMO status is disputed it would be prudent to make a "protective" application for a licence in order to avoid enforcement action. Irrespective of whether this was his actual motive (and the Tribunal makes no finding on that) as a general observation the point has some force.

21. The Tribunal also considers that jurisdiction to determine whether premises have HMO status cannot be excluded by reason of the way the licence application form has been worded, particularly where there is no option within the form to indicate that the applicant considers no licence is required or wishes to reserve their position.

22. The second case that might assist is *Hastings Borough Council v. Turner* [2020] UKUT 184 (LC) ("the *Turner* case") a decision of Judge Elizabeth Cooke in the Upper Tribunal ("UT"). In that case Ms Turner was a joint registered proprietor, along with three others, of the freehold of a five-storey late Victorian house. The council wrote to each of the owners to say they needed to apply for an HMO licence. A Mr. Lawson, who owned two flats at the property, applied online for an HMO licence stating that he was the person managing the building and that he was applying on behalf of the four freeholders who would be the licence holder. The council gave notice to each of the freeholders that it intended to grant an HMO licence, and Ms Turner wrote back saying that she objected to the grant of the licence because of the financial burden it would impose upon her and making complaints about Mr Lawson. The Council granted a licence and Ms Turner appealed to the First-tier Tribunal ("FTT") against the grant.

23. In her application Ms Turner raised a number of matters, including an assertion that the property was not an HMO within the definition of section 257 of the 2004 Act, in the light of which the FTT directed that the issue of whether the property was an HMO within that definition was to be determined as a preliminary issue. The FTT's decision on the issue was that the property did not require a licence because it was not a house in multiple occupation for the purposes of section 257, and it revoked the licence. The council

appealed to the UT which reversed the decision, finding that the burden of proof was on Ms Turner, not the council, and she had failed to discharge that burden.

24. Although the case supports the view that the Tribunal has jurisdiction on appeal to determine if premises require an HMO licence, the question of whether such jurisdiction exists was not raised and determined by either the FTT or UT. It appears to have been accepted that there was jurisdiction to decide the matter, without demur.

25. Miss Williams sought to distinguish the *Turner* case from the present on the basis that there, the application for a licence had been made by Mr. Lawson, who completed the online form, and that it was someone else, Ms Turner, who appealed the grant of the licence to the FTT. Miss Williams argued that where the person appealing is the same person who applied for the licence, the Tribunal has no jurisdiction to determine if there are HMO premises – it is not consistent for the person on whom the burden of proof lies to establish that no licence is required, to also be the person who applied for the licence on the footing it was required, but in the *Turner* case there was no such inconsistency.

26. The Tribunal does not consider that the distinction Miss Williams makes is one that can properly be drawn in considering the *Turner* case or its significance. The decision of the UT only provides a summary of the procedural history so far as relevant to the council's appeal, but it would seem that in applying for the licence. Mr. Lawson was acting as agent for Ms Turner and the other three freeholders, and it was to the freeholders that the licence was granted. As their agent, in making the application he was representing on their behalf that the property required an HMO licence, and Ms Turner's initial objections appear to have addressed matters other than HMO status. So far as concerns the issue in hand the *Turner* case is in substance no different from the present.

27. In summary, there is good reason why the Tribunal should have jurisdiction concerning HMO status on an appeal from the grant of a licence, or in respect of any other matter that would call into question the validity of the licence on the facts of a particular case, as with the first issue above. While acknowledging that that there is something self-contradictory about this, that is not a sufficient reason to exclude jurisdiction, and there is nothing in the statutory provisions which does so. There has also been at least one case in which the FTT, and UT, proceeded on the uncontested basis that such jurisdiction existed.

28. For the avoidance of doubt, in deciding the second issue the Tribunal of course leaves open the question whether in any particular case there is sufficient merit to allow the matter of HMO status to be raised, and if so, what the outcome on that issue would be.

Costs

29. The Council has indicated that it might wish to make an application for costs. Directions are made for the exchange of written submissions and details of any costs claimed. The parties have agreed that the issue of costs can be determined by the Tribunal on paper without the need for a further hearing.

Dated this 30th day of July 2021

C. R. Green
Chair, Residential Property Tribunal