Y TRIBIWNLYS EIDDO PRESWYL (CYMRU)

THE RESIDENTIAL PROPERTY TRIBUNAL (WALES)

Reference:	RPT/0003/04/18
Tribunal:	Dr Christopher McNall (Lawyer – Chairperson) Mr Mark Taylor MRICS (Surveyor Member) Mrs Carole Calvin-Thomas (Lay Member)
Applicants:	Mr Edward Mills and Mrs Carol Mills
Respondent:	City of Cardiff Council (Represented by Mr Richard Grigg, Solicitor)
Hearing:	Heard in public at Southgate House, Wood Street, Cardiff CF10 1EW on 22 August 2018
Property:	103 Tewkesbury Street, Cathays, Cardiff CF24 4QS

Decision

The Appeal is allowed.

We reverse the Respondent's decision to impose the condition contained in Appendix B of the HMO Licence numbered 525187 and dated 23 March 2018 (namely, '*The current lounge is undersized but can be used as a bedroom. Switch the ground floor front bedroom with the lounge'*) and the HMO Licence aforesaid shall be varied accordingly.

Reasons

1. At the conclusion of the hearing, we announced that we would allow the Appeal, with full reasons to follow.

2. These are the full reasons for this panel's unanimous decision to order that a decision of the Respondent local authority to impose a condition on Mr Mills' HMO Licence ('**the Licence'**) be reversed, and to order that the HMO Licence be varied accordingly.

3. The Appellants own 103 Tewkesbury Street in Cathays ('**the Property'**). The Property is an HMO. Since 2006, the Appellants have been letting it out as such to students, and especially to post-graduate students. It is licensed for up to five occupants, and the Appellants tend to enter into separate letting agreements with each of the occupants (as opposed to a single agreement with a group of occupants).

4. The Property is not purpose-built student housing, but has been adapted for use as an HMO. The Property has two-storeys and five bedrooms (three of which were designed as bedrooms, and two of which, on the ground floor, were originally living rooms and have been converted into bedrooms). It was built in the late C19th or early C20th. It has small front and rear gardens. The rear garden is accessible both from the lounge at the back of the house, and also through an alleyway which is gated at both ends (to which the occupants have keys). This is a mid-terrace property in a long terrace, typical in style,

construction and internal layout to many other properties in this part of Cardiff.

5. Downstairs, the front hallway gives access to two bedrooms (one, the former main front room, and the other a middle room), and, at the end of the hallway, to a kitchen/diner, which leads through the lounge and the back garden.

6. The gross internal floor area of the lounge is 7.8m2 and the gross internal floor area of the kitchen is 10.8m2.

7. In January 2012, Mr Mills was granted an HMO Licence, which permitted up to five occupants, and which did not have any conditions attached relating to the use of the lounge.

8. When that Licence was coming up to expire, Mr Mills reapplied. On 8 March 2018, Mr Aled Godfrey (a Neighbourhood Services Technical Officer) inspected the Property. On 23 March 2018, the local authority, being satisfied (i) that the Property is licensable and (ii) that Mr Mills is a fit and proper person to hold an HMO Licence, gave notice of its proposal to licence the Property, under Section 64 of the Housing Act 2004.

9. However, that was subject to certain conditions which are expressed to be in draft. It is not entirely clear to us whether the Licence has in fact been issued subject to those conditions, and so we have proceeded on the basis that it has been.

10. Appendix B says:

"*the current lounge is undersized but can be used as a bedroom. Switch the ground floor front bedroom with the lounge". That is the condition appealed against:* '**the Condition'**

11. Mr and Mrs Mills promptly contacted the Tribunal seeking to appeal the Condition under HA 2004 section 31. Their letter dated 28 March 2018 raises a number of issues. It says that to switch the ground floor front bedroom with the lounge is 'most impractical' as the lounge has in it the rear entrance to the garden and back lane and is also a fire escape. They also say that using the ground floor front bedroom as a lounge would mean losing one of the best bedrooms in the house and reducing the number of bedrooms available.

12. Their formal Notice of Appeal is dated 18 April 2018. The Grounds set out in the Notice of Appeal are '1. House has been let for 12 years to post-graduate students and size of sitting room has never been an issue; 2. Post-graduate students rarely use the sitting room preferring to study in their bedrooms; 3. Licence granted in 2012 made no reference to the sitting room being too small'.

13. We have read and considered all the materials which both parties have placed before the Tribunal. In terms of the local authority, those materials were extensive and included a 'Full Statement of Reasons in response to the Grounds of Appeal'. In essence, the Respondents' position - in having made the decision challenged, and in resisting this appeal - is space. The Respondents also filed a witness statement from Mr Aled Godfrey, dated 13 June 2018.

14. We heard evidence from Mr and Mrs Mills and Mr Aled Godfrey. We find all to have been truthful witnesses of fact.

15. We wish to emphasise that the fact that we have reversed Mr Godfrey's decision does not mean that we have found him to be untruthful (we have not), or that his conduct (or that of his line manager Mr Tudball) somehow involved bad faith (it did not), or that we have found Mr Godfrey or Mr Tudball to be bad at their jobs (we have not).

16. In a nutshell, we consider that the Condition was inappropriate since it reflected an insufficiently flexible application of the relevant Cardiff Standards in circumstances where some flexibility was appropriate.

Discussion

17. It is important to note that this appeal does not relate to *'prescribed standards'* for HMOs (see HA 2004 section 65) since there are no prescribed standards for the size of bedrooms or lounges/living rooms: see HA 2004 s 65(4) and *The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (Wales) Regulations 2006 / Rheoliadau Trwyddedi a Rheoli Tai Amlfeddianaeth a Thai Eraill (Darpariaethau Amrywiol) (Cymru) 2006*: SI 2006/1715 (W 177) Article 8 and Schedule 3.

18. Rather, the condition appealed against was applied by the local authority under HA 2004 s 67(1)(a) ('Licence Conditions'). That section reads 'A licence may include such conditions as to the local housing authority consider appropriate regulating all or any of the following (a) the management, use and occupation of the house concerned. Those conditions may, in particular, include (so far as is appropriate in the circumstances) conditions imposing restrictions or prohibitions on the use or occupation of particular parts of the house by persons occupying it': HA 2004 s 67(2)(a).

19. In effect, this is such a condition. It prohibits the continuing use of the lounge as a lounge, and it prohibits the continuing use of the front ground floor bedroom as a bedroom.

20. The appeal is brought under HA 2004 s 31. It is therefore to be by way of a re-hearing, but may be determined having regard to matters of which the local authority were unaware: HA 2005 Schedule 5 Para 34(2). We may confirm, reverse, or vary the decision of the local housing authority: Para 34(3).

21. The fundamental basis for the local authority's decision to impose the Condition is space. Unpacked, that can be seen to involve a number of different considerations.

22. Mr Godfrey formed the view, which after the inspection was discussed with and confirmed with his line manager, Mr Tudball, the Team Manager for Neighbourhood Services, that the lounge was too small for this HMO.

23. In arriving at this view, Mr Godfrey and Mr Tudball were principally guided by Cardiff Council's *'Amenity and Space Standards' for licensable properties'* ('**the Cardiff Standards'**). This is the A4 landscape format 2 page document appearing in Appendix D of the materials placed before us. We were told (by

Mr Grigg, taking instructions from Mr Tudball) that the Cardiff Standards were in force, and materially the same, in 2012 as now.

24. We do not know anything as to the rationale leading to the minimum room sizes which the Cardiff Standards adopt. We do not know anything as to the process whereby Cardiff came to adopt or implement the Cardiff Standards.

25. However, and be that as it may, it is not in dispute in this Appeal (i) that HA 2004 section 67(1) entitled the local authority to make the Cardiff Standards, (ii) that the Cardiff Standards are rational and concern matters which properly fall under the scope of section 67, and (iii) that the Cardiff Standards were validly and lawfully adopted by the local authority.

26. Insofar as material, the Cardiff Standards for a shared house of 3 or more occupants (described as 'Example 1') read as follows:

> "**Kitchen:**
> 7m2 for up to 6 persons …
>
> **Bedroom:**
> Where a separate living room is provided:
> Minimum 6.5m2 for a single room
> Minimum 11m2 for a double room
>
> Where no separate living room is provided
> Minimum 10.0m2 for a single room
> Minimum 15m2 for a double room
>
> **Living room:**
> 11.5m for up to 6 persons…"

27. There is no single Welsh standard of minimum room size for a living room. Different local authorities in South Wales apply different minimum living room sizes as part of their standards. These vary from 10m2 (Newport) to 11.5m2 (Cardiff). In itself, that is a non-trivial variation – 15%. The Cardiff Standards have the highest threshold in this regard, although they do not exceed the next highest by a significant margin. This leads us to conclude that there obviously was a margin of appreciation afforded to different local authorities when it came to arriving at their standards.

28. The margin of appreciation is not only at authority level, but is also at decision-making level. An 'Additional Note' to the Cardiff Standards says *"The examples provided are a guide only and Cardiff Council accepts that alternative combinations or sizes of rooms may be acceptable in some situations for the purposes of HMO licensing".* In his evidence, Mr Godfrey accepted that, when it comes to compliance with the Cardiff Standards, there is a residual, albeit modest, degree of 'tolerance' which gives a discretion to the decision-maker. He put that at 95% and only in respect of living accommodation, and not sleeping accommodation. But it makes the point that the Cardiff Standards are not standards which can never, in an appropriate case, be departed from.

29. To adopt a well-known expression, we have treated the Standards as useful guidelines, but not tramlines. They are to be treated as generally applicable

but strict, literal, application of the Standards may not be appropriate in all cases.

30. Our task in this appeal is simply to determine whether the condition appealed against is appropriate or not. The legislation does not give us further guidance as to the meaning of 'appropriate'. But, in directing that appeals are to be heard by the Tribunal (with a panel not limited to a lawyer, but including a surveyor, and a lay member) Parliament must be taken to have intended that we apply our particular knowledge and expertise and common sense, and not some narrowly legalistic test.

31. In our view, strict application of the Standards, when it came to the minimum size of living room, and prohibiting use of that room as a living room (with the consequential prohibition of the use of the front ground floor bedroom as a bedroom) was not appropriate in the circumstances of this case.

32. We arrive at this conclusion having visited the house, and having read and heard the totality of the evidence. As such, this decision is fact-sensitive and is an ordinary exercise of this Tribunal's appellate powers. It not intended, and should not be treated, as laying down any principles which are more generally applicable.

33. These are the relevant circumstances.

34. The kitchen adjoins the lounge. The kitchen is a large space. At 10.8m2 it is comfortably in excess of the minimum kitchen size laid down in the Cardiff Standards (7m2). It is 3.8m2 or 54% bigger than the minimum size laid down in the Standards.

35. Part of the Respondent's rationale, set out in the Response to the Appeal, was that were the lounge to remain as a lounge, this would create a thoroughfare in the kitchen 'which would lead to an increased risk of burns/scalds/incidents'.

36. This rationale does not seem to have been something which was discussed with Mr Mills at the time of the inspection. It is not mentioned in Mr Godfrey's witness statement. The impression is that it is something which emerged only subsequently, and in the course of this appeal. Nonetheless, and taking it at face value, we are not persuaded that this analysis should properly bear the weight which the local authority sought to place on it, nor is it borne out in reality.

37. There was no evidence as to any previous such incidents. No HHSRS score sheet was placed before us (unlike in relation to the scoring of 'Crowding and Space', which we shall discuss below). Having seen the kitchen, it did not seem to us that the kitchen would be used 'as a thoroughfare' in the fullest sense of the word. The kitchen is a rectangle, with the long axis being between the hallway and the lounge. The door to the kitchen is against the left hand wall of the kitchen (being the party wall) and the door to the lounge is on the same axis. Whilst there is a table in the way (which Mrs Mills suggested she had planned to change to a drop leaf), someone passing between these doors would be walking on the other side of the kitchen, and away, from the cooking appliances. Moreover, and paradoxically, the smaller the lounge and the less the realistic prospect of it being in regular use, the less chance anyone would be passing along that route in any event.

38. The living room has a back door which gives onto the back garden. That back door is presently used as a fire-door, and is furnished with a thumb turn on the inside rather than with a lock.

39. According to the Standards, this is a property which needs a living room because some of the bedrooms are too small. There was no appeal that the Standards should be treated in this case in a way so as to dispense with the need for a living room at all. Hence, the Appellants accept the need for a living room.

40. Whilst the living room is modest in size, it contains a three-seater sofa, an ottoman and a chair. It is a cosy room but contains its furniture without a feeling of being cramped. We were told that the furniture which we saw was recently bought, and that the living room used to contain two two-seater sofas (which were present during the 2018 inspection) as well as a mirror and some pictures. It is a room where someone could sit and read a book or browse the web if they did not want to do so in their bedroom or at the kitchen table. The room is, in our view, a functional living room or lounge, and can genuinely be described as such. The Respondents accept that there is no requirement that all the occupants of the property should be able to occupy the living room at one time.

41. The lounge has a west-facing window, onto the back garden, which (although small and laid to hard-standing) itself is a pleasant space, used for relaxation, storage, and other tasks associated with the occupation of the whole house. The back garden adds materially to the amenity of the Property. Easy access to the back garden adds materially to the amenity of the Property.

42. It seemed to us that there was a natural flow between the kitchen and the lounge. The table in the kitchen – being one natural focus of communal life and activity in the kitchen - was positioned so as to allow persons sitting at it to look through the open door into the lounge. It would be possible for two people to sit – one at the table in the kitchen, and one on the sofa in the living room – and to easily and naturally converse, without a need to raise voices. To our mind, there seems no real difference between this scenario (which is not acceptable to the local authority) and 'knocking through' the kitchen into the lounge, even by means of a large serving hatch (which may have been acceptable).

43. In the same way, there is a natural flow from the living room to the garden. The interior of the kitchen can be viewed from the garden, and vice versa.

44. The back garden has an outdoor table and chairs, room for bicycles (one being stored there when we visited), and a washing line (on which clothes were drying, during our viewing). If the living room were to be converted into a bedroom, then any person wishing to use the back garden for any of these purposes would either have to go through the bedroom, or would have to go out of the front door, round the block, though the gated entry at the end of the passageway behind the houses, and through the (locked) back gate of the garden.

45. We accept that Mr Godfrey discussed various options with Mr Mills on 8 March 2018, including 'removing the wall between the kitchen and the lounge'. Our discussion of this with Mr Godfrey served simply to reveal and

emphasise that inflexible application of the Standards can lead to anomalous situations. The Standards are expressed as a 'one size fits all', but it is not self-evident that they translate equally well or intelligibly to all types of property occupied as an HMO. For example, applied to an HMO in a late C19th terrace, with conventionally sized and shaped rooms, they are potentially productive of one outcome. But, applied to more modern 'open-plan' or unsegregated living/dining/cooking spaces they are potentially productive of other outcomes. All that does is emphasise that there has to be a degree of common sense and flexibility when it comes to assessing the suitability of the HMO when measured against the Standard.

46. The local authority advances a further rationale for its decision on the basis that it has identified an overcrowding hazard rated as a Category 1 hazard. Again, this is something which does not seem to have been discussed at the time, but which has emerged only in the course of the appeal. Reliance is placed on the HHSRS (Housing, Health, and Safety Rating System) Operating Guidance for 'Crowding and Space' (Hazard 11). The average likelihood of harm in a pre-1920 house is 1 in 6950: see §11.04. The local authority's likelihood was automatically generated at 1 in 4710. However, Mr Godfrey's likelihood assessment (which was not automatically generated) was 1 in 100. He wrote 'the likelihood of an occurrence is judged to be significantly greater than average'.

47. We respectfully disagree and we reject this analysis. That is an extremely high risk when compared to the standard risk. We simply did not see any feature of the lounge which presented such a risk. 1 in 100 simply seems to us to be far too high, whether the baseline is 1 in 4710 or 1 in 6950. It is far from clear how this has been arrived at.

48. This is a lounge with comfy chairs, two doors (one internal, one external) and a window. It is not a prison cell. People can use it, or not use it, as and when they please. If they do not want to use it, they can leave, and retreat to their own bedroom, the kitchen, or the garden. The nature of the occupants and their occupancy is a relevant feature. This is a house in which the occupants are not a family unit. They each have their own bedrooms. They are post-graduate students. There was no evidence that they spent much of their free time in the lounge (or, if studying in the house, their working time in the lounge). The chances of anyone suffering measurable harm arising from the size of this lounge are on any view significantly less than 1/100. As such, the type of harm assessment (which uses a figure of 1/100) is also wrong.

49. There was no apparent consideration of what the HHSRS describes as 'relevant matters affecting likelihood and harm outcome', none of which seems to have been expressly considered, including whether (a) there is a separate kitchen area of an adequate size (there is, and it is 54% bigger than the Standards say it should be); (b) whether there are separate personal washing areas (there are); (c) whether there is appropriately sited and sized sanitary areas (there are); (d) whether there is an adequate number of bedrooms (there is); whether the bedrooms are adequately sized (they are, when judged against the Standards if the lounge is larger); whether there is recreational space (there is). There is no apparent consideration of other factors affecting the risk such as people spending only a proportion of their time at home, and whether the people occupying this HMO can fairly be said to be people suffering multiple deprivations.

50. In short, the HHSRS analysis when it comes to crowding and space is badly awry. The adherence to it by the local authority caused particular anxiety to Mr and Mrs Mills, who apprehended it to mean that, in using the lounge as a lounge, they had been deliberately exposing their tenants to a serious risk of psychological harm. They should be reassured that, in our view, they have not.

51. The local authority also advanced an argument that the lounge, if turned into a bedroom, need not function as a secondary means of escape. We consider this argument (set out at §6.2 of its Grounds of Response), whilst technically correct, to be quite an artificial one, since it has no apparent regard to what would happen if access to the front door, via the one and only protected means of escape, were to be blocked.

52. The fact that the 2012 HMO Licence was granted without such a Condition carries some weight in the overall assessment, although it is not decisive one way or the other. The Council's change of position between 2012 and 2018, when nothing relevant had changed at the Property, obviously surprised and rankled Mr Mills, who saw this as inconsistent. But it was not argued that the 2012 HMO was legally binding on the local authority, so that it could not introduce any new conditions.

53. The explanation for the 2012 HMO not having any such condition was said to be 'simple error', but we were not shown any of the working papers which had led to the decision, and the officer who had taken the decision was no longer working for the council in the same department. One possible explanation could be that the decision-maker in 2012 had taken a similar view of the facts of the situation as we have, but ultimately we cannot make any findings on the matter.

54. Our conclusions as to the outcome of this appeal are not affected (i) by the Appellants' position that, if their appeal failed, and the lounge could no longer be used as a lounge, then they would not convert it into a bedroom; or (ii) the Respondent's position that, if that were indeed the case, the HMO Licence should be further varied so as to restrict the number of occupants to 4. (i) is a commercial matter for the Appellants. (ii) falls away, but in any event is outside the scope of the appeal.

55. The Condition is not appropriate. We order accordingly.

Dated this 7th day of September 2018

CHAIRMAN