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RESIDENTIAL PROPERTY TRIBUNAL

Reference: RPT/0015/10/17
Reference: RPT/0016/11/17

In the matter of numbers 152 and 154 Mackintosh Place, Roath, Cardiff, CF24 4RS

And in the matter of an application under paragraph 31 of Part 3 to Schedule 5 of the Housing Act 2004 regarding the conditions of an HMO Licence

TRIBUNAL:	**Timothy Walsh (Chairman)** **John Singleton (Surveyor)** **Angela Ash**
APPLICANT:	**Mr. Assan Khan**
RESPONDENT:	**Cardiff County Council**

REASONS FOR THE DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL

Summary of Determination

1. In accordance with paragraph 34 of Schedule 5 of the Housing Act 2004, the Residential Property Tribunal directs the Respondent to grant HMO licences for each of the premises known as numbers 152 and 154 Mackintosh Place, Roath, Cardiff to the Applicant subject to the conditions originally imposed in October 2017 save as varied in paragraph 130 of this decision.

The Substantive Applications and an Overview of the Relevant Legislation

2. These appeals were heard over two days on 27 June 2018 and 19 July 2018. At each hearing the Applicant, Mr. Assan Khan, appeared in person. The Respondent, Cardiff County Council, was represented by its Solicitor Mr. Richard Grigg.

3. Each of these cases concerns a dispute over the grant and conditions of HMO licences for two adjacent mid-terrace properties known respectively as numbers 152 and 154 Mackintosh Place in Roath, Cardiff (hereafter "Number 152" and "Number 154" and, collectively, "the Premises"). Because the two cases involve the same parties, adjacent properties and very similar issues, the Tribunal directed that they should be heard together in directions issued on 30 November 2017. There was no appeal from that order which was plainly appropriate. For the same reasons, this decision is the Tribunal's final determination for both cases.

4. The Applicant made his substantive applications to appeal in the Tribunal's Form RPT9; that is the correct form to use where the owner or manager of premises wishes to appeal against a

decision of a Local Housing Authority (in this case the Respondent, Cardiff County Council) in relation to the grant of a licence under paragraphs 31(1) or 32(1) of Schedule 5 of the Housing Act 2004 ("the Act").

5. With regard to the Premises in issue, the licences (hereafter "the Licences") in question are both numbered 529118. The Licence for Number 152 was issued on 5 October 2017 and the Licence for Number 154 was issued by the Respondent on 23 October 2017; both licences were issued to the Applicant as the Licence holder. It is common ground that many of the conditions in those licences are reasonable and appropriate for regulating the matters enumerated under section 67 of the Act (as to which, see below) and that those conditions should, or can, be imposed if the Premises are HMOs. As such, in this decision it is unnecessary for this Tribunal to make express determinations on all of the conditions imposed in each Licence. We have, however, considered the entirety of the conditions in the Licences and, having regard to the character and location of the Premises, we do determine that those conditions should be included under section 67(1). For ease of reference, this decision should be read as though the two licences issued in October 2017 are appended to it. Unless otherwise stated, all of the conditions that are not in dispute are to be included in the Licences.

6. Further, it was not altogether clear from the written applications/appeals submitted precisely what the issues were. That is not a criticism of the Applicant but, rather, serves to illustrate the difficulty of providing clarity in a case of this type or complexity. One of the matters that was plainly a concern for the Applicant, for example, resulted from schedules of "Works Required" that accompanied the Licences but were not specifically referenced therein. The Applicant was understandably anxious that those schedules may require considerable work and expenditure. At the hearings, however, the Respondent made plain to the Applicant that those schedules did not form part of the Licences by incorporation and were advisory only. As such, their contents are not relevant to the present appeals and we do not consider them further in this judgment. Those schedules are not, however, to be confused with the appendices to the Licences, some of which do require works, and are incorporated as part of the conditions of the Licences.

7. At the commencement of the hearing, the Applicant was given the opportunity to clarify what the remaining issues were. Very broadly, they were as follows: (I) the Applicant disputes that the two premises are HMOs; (II) if they are HMOs, he considers that a number of the licence conditions are unwarranted; (III) finally, the Applicant asserts that there is institutional discrimination at the Respondent local authority and he maintains that the licence conditions which have been imposed are more onerous because of his ethnic background. A considerable amount of time was devoted to each of these points and, in particular, the Applicant was given the opportunity to go through both Licences (effectively line by line) in order to be clear about which of the conditions were in dispute and which were agreed.

An overview of the legislation

8. By way of general overview, the material statutory provisions concern the licensing scheme in Part 2 of the Housing Act 2004 as they apply to an "HMO". For the purposes of the Act, an HMO is a house in multiple occupation as defined by sections 77 and 254 to 259 of the 2004 Act. Where Part 2 of the Act applies, section 61(1) of the Act requires an HMO to be licensed (save in limited circumstances). Sections 63 to 67 of the Act deal with applications for

licences, the granting or refusal of licences and the imposition of licence conditions. An application for a licence is made under section 63 of the Act and that application must be granted or refused in accordance with section 64.

9. Here, the respondent Local Authority granted the Licences pursuant to its statutory power to do so under section 64. Section 67 of the Act is concerned with licence conditions and section 67(1) states, in terms, that a licence may include such conditions as the local housing authority consider appropriate for regulating all or any of (a) the management, use and occupation of the house concerned, and (b) its condition and contents.

10. Section 71 of the Act provides that Schedule 5 has effect to deal with the procedural requirements relating to the grant, refusal, variation or revocation of licences and appeals against licence decisions. The provisions concerning appeals against licence conditions are contained in Part 3 of Schedule 5 and provide as follows:

Part 3 Appeals against Licence Decisions

Right to appeal against refusal or grant of licence

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.

Right to appeal against decision or refusal to vary or revoke licence

32(1) The licence holder or any relevant person may appeal to the appropriate tribunal against a decision by the local housing authority—
(a) to vary or revoke a licence, or
(b) to refuse to vary or revoke a licence.
(2) But this does not apply to the licence holder in a case where the decision to vary or revoke the licence was made with his agreement.
…

Powers of tribunal hearing appeal

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…"

11. For these purposes, in respect of premises situated in Wales, the "appropriate tribunal" remains the Residential Property Tribunal.

12. Crucially, as will be apparent form the foregoing, an appeal is by way of re-hearing. The character of this exercise was considered in Clark v. Manchester CC [2015] [UKUT] 0129 (LC). There, the following guidance was given:

"[38] Guidance on the proper approach to be taken by a tribunal on an appeal under Part 2 of the 2004 Act can be found in London Borough of Brent v Reynolds [2001] EWCA Civ 1843, a decision of the Court of Appeal on the provisions relating to HMO registration schemes in Part XI of the Housing Act 1985 (which have been repealed and replaced by Part 2 of the Housing Act 2004). The appeal concerned a local housing authority's decision that an applicant for the registration of two HMOs under section 348 of the 1985 Act was not a fit and proper person to manage them. The applicant exercised his right to appeal to the county court which was empowered by section 348(4) to confirm, reverse or vary the decision of the authority. The judge in the county court dismissed the appeal, and Mr Reynolds appealed to the Court of Appeal.

[39] The 1985 Act contained no provision equivalent to paragraph 34(2) of Schedule 5 to the Housing Act 2004 that an appeal from a decision of the local housing authority is to be "by way of re-hearing". In paragraph 16 of his judgment, with which the other members of the Court of Appeal agreed, Buxton LJ considered the nature of the appeal to the county court, saying this:

> *"Mr Arden QC, who appeared before us for Brent, accepted that the appeal was a complete rehearing. Accordingly, the judge hears evidence and makes up his own mind on the facts; and his task is to make his own decision on the application, in place of that made by the LHA, and not merely to act as a court of review of that LHA decision. That said, however, the county court's jurisdiction is subject to the very significant condition that the court should pay great attention to any views expressed by the LHA, and should be slow to disagree with it. That principle is to be found in the judgments of the majority of this court in Sagnata Investments Ltd v Norwich Corporation [1971] 2 QB 614 …"*

[40] It seems reasonable to assume that Parliament had this guidance in mind when it spelled out the role of the tribunal on appeals under Part 2 of the 2004 Act in paragraph 34(2) of Schedule 5. The appeal is a "complete rehearing", but not one which disregards entirely the decision of the local housing authority.

[41] On issues which depends [sic] on weighing and assessing a number of different factors (tasks which the F-tT with its relevant experience and composition is well equipped to undertake) reasonable people may well arrive at different conclusions. On a rehearing an appellant is entitled to expect that the F-tT will make up its own mind. In doing so it is not required to adopt the approach advocated by Mr Madden of starting with a blank sheet of paper, and it is entitled to have regard to the views of the local housing authority whose decision is under appeal. How influential those views will be is likely to depend on the subject matter; Buxton LJ's recommendation that a county court judge should be slow to disagree

with the views of the authority does not seem to me to apply with the same force to a specialist tribunal."

13. That guidance makes plain that any Tribunal must "make up its own mind" but, when doing so, it does not wholly disregard the views of the local authority. Indeed, and in any event, most Tribunals will hear submissions from the local authority who will explain their decision and make submissions in support of imposing certain conditions or in support of the Tribunal reaching certain conclusions.

14. The foregoing guidance is also relevant in a case such as the present in which the Applicant-Appellant does not challenge the necessity for, or reasonableness of, a great many of the conditions in two licences which each extend to well over 30 conditions (at least once the appendices are considered). In respect of conditions which are not contested, a Tribunal is entitled in our view to adopt the proportionate approach of inferring that those conditions should be included in the licence unless upon considering the licences that are under appeal, it is apparent that such an approach is misplaced for some reason.

15. All of the foregoing inevitably means that the licences that prompted the appeal provide the structure for the parties' respective submissions and the starting point for the Tribunal rehearing the matter when formulating the conditions that the Tribunal considers appropriate or necessary. In doing so, however, this Tribunal has been careful to consider each condition and to weigh independently and objectively whether a given condition should or should not feature in these licences having regard to the character of the properties, the statutory requirements and prescribed standards and the wider objectives of the legislation. The fact that we have structured our determination around the terms of the licences that prompted the appeal flows from both the need to be proportionate and the vast amount of common ground that the parties share. That does not mean, however, that we have adopted uncontested conditions without a proper assessment of their merit.

The Premises

16. As already explained, the Premises comprise a pair of contiguous mid-terrace properties built in the first half of the twentieth century as single private residential dwelling-houses. Each now comprises four flats accessed from a common hall, stairway and landing.

17. Starting with Number 152, from the ground floor entrance there is access to what was accurately described as the Ground Floor Front Flat. It has an entrance into a small kitchen area with a livingroom/bedroom off the kitchen. We had no access to this flat at the inspection but the layout was shown on a plan provided within the hearing bundle and it is evidently similar to the Ground Floor Front Flat at Number 154.

18. On the ground floor to Number 152 there is also a Ground Floor Rear Flat with an entrance into a living room/bedroom with shower room/w.c. off it and a door leading to a kitchen at the rear.

19. A common staircase from the hall leads to two further flats accessed off a common landing.

20. There is a First Floor Rear Flat with an entrance to a kitchen with shower room/w.c. off it and a door leading into a living room/bedroom at the rear; there is no direct fire escape from this room.

21. Finally, there is a First Floor Front Flat which has a self-contained bedroom. There is also a kitchen with a shower room/w.c. off it and a door leading into the living room at the front of the property. Again, there is no direct fire escape from this room. From within the flat there is also a door opening onto stairs leading to a second bedroom comprising part of the First Floor Front Flat.

22. On inspection of all of the flats comprising the accommodation were seen to contain the amenities in the positions described in the "licencing survey sheets" contained in Appendix "E" of the Respondent's bundle relevant to Number 152.

23. Turning to Number 154, there is also a common ground floor entrance lobby from the street. That leads to two flats on that level. There is a Ground Floor Front Flat with an entrance into a kitchen with a shower room/w.c. off it and a door leading to a living room/bedroom from the kitchen area; there is no direct fire escape from that living room.

24. There is also a Ground Floor Rear Flat. The entrance to that flat leads into a living/bedroom with a shower room/w.c. off it and there is a door leading to a kitchen at the rear.

25. From the common entrance hall, there is a common staircase to the first floor. From the landing two further flats can be accessed. There is a First Floor Rear Flat with an entrance into a Kitchen with an adjacent shower room/w.c. and a door leading into a living/bedroom at the rear. There is no direct fire escape from this room.

26. The second flat accessible from the landing is the First Floor Front Flat. That flat has a self-contained bedroom and a Kitchen with a shower room/w.c. off it and a door leading into the living room at the front of the property. There is no direct fire escape from the living room without passing through the kitchen. As in the corresponding flat in Number 152, there is a private staircase leading to a second bedroom comprising part of the First Floor Front Flat.

27. All four flats comprising Number 154 were seen on inspection to contain the amenities in the positions described in the "licencing survey sheets" contained in Appendix "D" of the Respondent's bundle for Number 154.

Are the Premises Houses in Multiple Occupation and does this Tribunal have Jurisdiction to Determine that Issue?

28. As noted above, the Applicant disputes that the Premises are HMOs. He concedes that he applied for the present licences but states that he did so under compulsion and because he was concerned that, if he did not do so, he would face prosecution on the basis that he might be alleged to be committing an offence under section 72 of the Act.

29. The Respondent asserts that the Premises are HMOs but it also maintains that these appeals do not engage this issue. The Respondent submits that the Applicant cannot sensibly be described as appealing against the decision to grant him a licence and so asserts that this Tribunal has no jurisdiction to determine that the Premises are not HMOs.

30. As stated above, the definitional provisions of the Act are to be found in sections 77, 254 to 257. Section 254 states:

*"**254 Meaning of "house in multiple occupation"***

(1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if—
(a) it meets the conditions in subsection (2) ("the standard test");
(b) it meets the conditions in subsection (3) ("the self-contained flat test");
(c) it meets the conditions in subsection (4) ("the converted building test");
(d) an HMO declaration is in force in respect of it under section 255; or
(e) it is a converted block of flats to which section 257 applies.

(2) A building or a part of a building meets the standard test if—
(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
(b) the living accommodation is occupied by persons who do not form a single household (see section 258);
(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
(d) their occupation of the living accommodation constitutes the only use of that accommodation;
(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

(3) A part of a building meets the self-contained flat test if—
(a) it consists of a self-contained flat; and
(b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat).

(4) A building or a part of a building meets the converted building test if—
(a) it is a converted building;
(b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);
(c) the living accommodation is occupied by persons who do not form a single household (see section 258);
(d) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
(e) their occupation of the living accommodation constitutes the only use of that accommodation; and
(f) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.

(5) But for any purposes of this Act (other than those of Part 1) a building or part of a building within subsection (1) is not a house in multiple occupation if it is listed in Schedule 14.

(6) The appropriate national authority may by regulations—
(a) make such amendments of this section and sections 255 to 259 as the authority considers appropriate with a view to securing that any building or part of a building of a description specified in the regulations is or is not to be a house in multiple occupation for any specified purposes of this Act;

(b) provide for such amendments to have effect also for the purposes of definitions in other enactments that operate by reference to this Act;
(c) make such consequential amendments of any provision of this Act, or any other enactment, as the authority considers appropriate.

(7) Regulations under subsection (6) may frame any description by reference to any matters or circumstances whatever.

(8) In this section—
"basic amenities" means—
(a) a toilet,
(b) personal washing facilities, or
(c) cooking facilities;
"converted building" means a building or part of a building consisting of living accommodation in which one or more units of such accommodation have been created since the building or part was constructed;
"enactment" includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30);
"self-contained flat" means a separate set of premises (whether or not on the same floor)—
(a) which forms part of a building;
(b) either the whole or a material part of which lies above or below some other part of the building; and
(c) in which all three basic amenities are available for the exclusive use of its occupants."

31. Section 257 is in the following terms:

*"**257 HMOs: certain converted blocks of flats***

(1) For the purposes of this section a "converted block of flats" means a building or part of a building which—
(a) has been converted into, and
(b) consists of,
self-contained flats.

(2) This section applies to a converted block of flats if—
(a) building work undertaken in connection with the conversion did not comply with the appropriate building standards and still does not comply with them; and
(b) less than two-thirds of the self-contained flats are owner-occupied.

(3) In subsection (2) "appropriate building standards" means—
(a) in the case of a converted block of flats—
(i) on which building work was completed before 1st June 1992 or which is dealt with by regulation 20 of the Building Regulations 1991 (S.I. 1991/2768), and
(ii) which would not have been exempt under those Regulations,
building standards equivalent to those imposed, in relation to a building or part of a building to which those Regulations applied, by those Regulations as they had effect on 1st June 1992; and
(b) in the case of any other converted block of flats, the requirements imposed at the time in relation to it by regulations under section 1 of the Building Act 1984 (c. 55).

(4) For the purposes of subsection (2) a flat is "owner-occupied" if it is occupied—

(a) by a person who has a lease of the flat which has been granted for a term of more than 21 years,
(b) by a person who has the freehold estate in the converted block of flats, or
(c) by a member of the household of a person within paragraph (a) or (b).

(5) The fact that this section applies to a converted block of flats (with the result that it is a house in multiple occupation under section 254(1)(e)), does not affect the status of any flat in the block as a house in multiple occupation.

(6) In this section "self-contained flat" has the same meaning as in section 254."

32. The Premises both contain only "self-contained flats" with each of the flats having all three of the basic amenities as defined in section 254 of the Act; the Premises have at some point been converted into self-contained flats having formerly self-evidently been single residential buildings. That was obvious from the character of the Premises on our inspection. It is common ground that none of the flats are owner-occupied. It follows that both Premises are HMOs if section 257(2)(a) applies and the building work undertaken on conversion did not comply with the appropriate building standards and still does not comply with them.

The Respondent's Case on the HMO Issue

33. The Respondent's case in respect of both of the Premises is broadly the same for each.

34. In respect of both properties it is asserted, and we accept, that the Premises were each originally constructed as family homes in around the 1920s and they have since been reconfigured so that each contains four self-contained flats. That work would require planning consent but the Respondent's planning records do not contain evidence of any such planning consent for either property. In addition, there are no records of any Building Regulation approvals. Email correspondence from the Respondent's Building Control and Development Management Departments confirms this is the position and the Applicant produced no documentation to contradict this.

35. There is evidence that in 1991 an application was made for planning permission to convert Number 152 from a single dwelling into two self-contained flats. That application was made by a Mr. Weeks and was refused on 11 February 1992. Documents bearing that date stamp, and which were obviously before the Planning and Development Committee (being stamped as such), record that the main issue with the planning application was the lack of off street parking. Significantly, that document also relates that: "The adjoining properties are single dwellings".

36. From those planning papers we find that neither 152 nor 154 had yet been converted into self-contained flats before February 1992. Whilst it is possible that conversion works were undertaken shortly thereafter, it is far more likely, and we accordingly find, that the conversion of both Premises into four self-contained flats was undertaken after 1 June 1992. As such, the Building Regulations 1991 (being regulations enacted under section 1 of the Building Act 1984) probably applied (or a later reiteration of them).

37. We should add that the Respondent goes further. It is common ground that the Applicant purchased Number 152 in 2004 and the Respondent states that its records of Council Tax payments indicate that that property was a single family house in 2004 and, more generally, that those records show that Number 152 was converted by the Applicant since his acquisition

of the freehold in 2004. The Applicant disputes this and states that the Council Tax records simply reflect the character of those who occupied. He is also adamant that there has not been full disclosure of all of the planning and building regulation records by the Respondent.

38. In respect of this last point, the Respondent's Ms. Rachel Stickler is its Neighbourhood Services Officer in its Housing Enforcement Division. She gave evidence that she had liaised with the various departments of the Respondent and that everything available had been disclosed such that she could only conclude that the were no relevant planning or Building Regulation consents.

39. For his part, the Applicant has made various requests of the Respondent for disclosure (principally Freedom of Information Act requests) and he maintains that there may still be documentation in existence that assists his case but which has not been disclosed.

40. In our view, it is unnecessary to make any finding as to whether or not the Applicant personally carried out the conversion works at Number 152 after 2004. Based on the documentation referred to above both properties were probably converted at a time after 1992 when the Building Regulations 1991 were in force or a later iteration of those regulations as they have subsequently evolved.

41. What is also equally plain is that neither of the Premises has been converted in accordance with the prevailing building regulations. We are of that view for two reasons. First, neither the Applicant nor the Respondent hold any records evidencing the necessary consents for the works that have obviously been necessary to convert the Premises into two lots of four flats. Secondly, it was clear from the character of the Premises that the conversion works are not Building Regulation compliant.

42. In reaching these conclusions, we acknowledge the Applicant's belief that the Respondent may hold relevant material that has not been disclosed but we find that this is unlikely. Ms. Stickler gave evidence in a candid and credible way and we accordingly accept her evidence that she has liaised with colleagues but has been told that no documentation exists; given the character of the conversion we consider it unlikely that there is any relevant undisclosed documentation with regard to planning or building regulation consent or approval.

43. The Respondent's submission was exclusively confined to the Building Regulations 1991. The Respondent points to Regulation 3(1)(b) of the 1991 Regulations which defines "building work" for the purposes of the Regulations as "the provision or extension of a controlled service or fitting in connection with a building" whilst Regulation 3(1)(c) states that it includes "the material alteration of a building, or a controlled service or fitting...". The conversion of the Premises into eight flats with their own kitchens and bathrooms self-evidently would require "building work". Similarly, a material change of use is defined in Regulation 5(b) as including the creation of flats where previously there were none. As already noted, there are no completion certificates issued under Regulation 15 evidencing that the works were carried out in accordance with the requirements of the 1991 Regulations.

44. The Building Regulations 2010 are materially the same in these respects to the 1991 Regulations (although the provisions for Completion Certificates can be found in Regulation 17 of the 2010 Regulations).

45. As to which of the Building Regulation requirements were not, or are not, met the Respondent points to the provisions of Schedule 1 Part B of the 1991 Regulations. In particular, paragraph B1 reads:

> ***Means of escape***
> ***B1.*** *The building shall be designed and constructed so that there are means of escape in case of fire from the building to a place of safety outside the building capable of being safely and effectively used at all material times.*

46. The 2010 formulation of that requirement was only slightly different:

> ***B1*** *The building shall be designed and constructed so that there are appropriate provisions for the early warning of fire, and appropriate means of escape in case of fire from the building to a place of safety outside the building capable of being safely and effectively used at all material times.*

47. In relation to both Number 152 and Number 154 it is asserted by the Respondent that the design and construction of the Premises is unsafe. In respect of several flats in both Premises it is said that, in the event of a fire in the kitchen blocking access or egress through that room, the occupiers could be trapped in bed or living rooms that can only be accessed through the kitchen areas. This is said to be an acute concern because the most likely source of any fire is the kitchen.

48. Having inspected the Premises it is incontrovertible that the present configuration and design of the Premises would make escape difficult or impossible in the event of fire in any of the kitchen areas in question (i.e. those through which escape might be necessary). Based on that inspection, it is of no surprise to us that there are no completion certificates in existence because we do not believe that these conversions would have been "signed off" as sufficiently safe for building regulation compliance.

49. It follows from the foregoing conclusion that both Number 152 and Number 154 qualify as HMOs for the purposes of section 77, section 254 and section 257 of the 2004 Act. This means that the regulatory regime requiring that the Applicant has an HMO Licence and complies with any Licence conditions applies in this case.

50. We should add, however, that the Applicant asserts that the Respondent could waive any breaches of the building regulations and he complains that they have not done so and that they have not explored possible options for doing so with him. In his written submission, the Applicant summarises his position thus: "In summary, the tribunal should allow the appellant to explore and pursue building regulation regularisation rather than avenues of HMO registration". This Tribunal has no power, however, to direct any local authority to waive, or consider waiving, building regulation breaches. Rather, the short point is that we have determined that the Premises do not comply with the appropriate building regulation standards and, whether or not the breaches could have been waived, as they have not been the Premises are HMOs and the Applicant's argument on this point does not advance matters.

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).

The Licence Conditions

53. When considering an application for an HMO Licence the local authority must be satisfied, inter alia, that the house is reasonably suitable for occupation by not more than the maximum number of households or persons specified in the application or otherwise determined by that authority (per section 64):

> *"**64 Grant or refusal of licence***
> *(1) Where an application in respect of an HMO is made to the local housing authority under section 63, the authority must either—*
> *(a) grant a licence in accordance with subsection (2), or*
> *(b) refuse to grant a licence.*
> *(2) If the authority are satisfied as to the matters mentioned in subsection (3), they may grant a licence either—*
> *(a) to the applicant, or*
> *(b) to some other person, if both he and the applicant agree.*
> *(3) The matters are—*
> *(a) that the house is reasonably suitable for occupation by not more than the maximum number of households or persons mentioned in subsection (4) or that it can be made so suitable by the imposition of conditions under section 67…"*

54. A house is not "reasonably suitable for occupation" under section 64(3)(a) unless it satisfies the requirements and prescribed standards of section 65 of the Act. For these purposes "prescribed standards" means standards prescribed by regulations made by the appropriate national authority. Section 65 states as follows:

> *"**65 Tests as to suitability for multiple occupation***
>
> *(1) The local housing authority cannot be satisfied for the purposes of section 64(3)(a) that the house is reasonably suitable for occupation by a particular maximum number of households or persons if they consider that it fails to meet prescribed standards for occupation by that number of households or persons.*
> *(2) But the authority may decide that the house is not reasonably suitable for occupation by a particular maximum number of households or persons even if it does meet prescribed standards for occupation by that number of households or persons.*
> *(3) In this section "prescribed standards" means standards prescribed by regulations made by the appropriate national authority.*
> *(4) The standards that may be so prescribed include—*

(a) standards as to the number, type and quality of—
(i) bathrooms, toilets, washbasins and showers,
(ii) areas for food storage, preparation and cooking, and
(iii) laundry facilities,
which should be available in particular circumstances; and
(b) standards as to the number, type and quality of other facilities or equipment which should be available in particular circumstances.

55. In Wales, the material secondary legislation includes the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (Wales) Regulations 2006 (SI 2006/1715) and the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (Wales) Regulations 2007.

56. In this case, it is material to note that the 2006 Regulations were amended by the 2007 Regulations in relation to the application of the Regulations to HMOs to which section 257 of the 2004 Act applies. Regulation 8 of the 2006 Regulations now reads:

"8 Prescribed standards for deciding the suitability of a house for multiple occupation by a particular maximum number of households or persons

(1) The standards prescribed for HMOs other than section 257 HMOs for the purpose of section 65 of the Act (tests as to suitability of HMO for multiple occupation) are those set out in Schedule 3.
(2) The standards prescribed for section 257 HMOs for the purpose of section 65 of the Act are—
(a) that all bathrooms and toilets contained in each flat must be of an adequate size and layout, and all wash-hand basins must be suitably located and be fit for purpose, having regard to the age and character of the HMO, the size and layout of each flat and its existing provision for wash-hand basins, toilets and bathrooms;
(b) those standards set out in paragraph 4(1) of Schedule 3, in so far as it is reasonably practicable to comply with them; and
(c) those standards set out in paragraph 5 of Schedule 3."

57. We do not set out the entirety of Schedule 3 here but paragraphs 4(1) and 5 of that Schedule prescribe the following standards:

"Units of living accommodation without shared basic amenities

4(1) Where a unit of living accommodation contains kitchen facilities for the exclusive use of the individual household, and there are no other kitchen facilities available for that household, that unit must be provided with—
(a) adequate appliances and equipment for the cooking of food;
(b) a sink with an adequate supply of cold and constant hot water;
(c) a work top for the preparation of food;
(d) sufficient electrical sockets;
(e) a cupboard for the storage of kitchen utensils and crockery; and
(f) a refrigerator…

Fire precautionary facilities
5 Appropriate fire precaution facilities and equipment must be provided of such type, number and location as is considered necessary."

58. It follows from this that, insofar as reasonably practicable, a section 257 HMO must have adequate appliances and equipment for the cooking of food and a suitable worktop space for food preparation. There must also be appropriate fire precaution facilities and equipment.

59. The Applicant sought to argue that the 2006 Regulations did not apply to HMOs of the present description but, to the extent explained above, they do apply. In any event, whilst compliance with the prescribed standards is an essential precondition of suitability under section 65(1), such compliance may not be sufficient to render a house suitable for occupation by a particular number of households or persons. This is clear from section 65(2) and the decision in Clark v. Manchester CC at paragraph 15.

60. Section 67 of the Act addresses licence conditions:

*"**67Licence 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;
(b) conditions requiring the taking of reasonable and practicable steps to prevent or reduce anti-social behaviour by persons occupying or visiting the house;
(c) conditions requiring facilities and equipment to be made available in the house for the purpose of meeting standards prescribed under section 65;
(d) conditions requiring such facilities and equipment to be kept in repair and proper working order;
(e) conditions requiring, in the case of any works needed in order for any such facilities or equipment to be made available or to meet any such standards, that the works are carried out within such period or periods as may be specified in, or determined under, the licence;
(f) conditions requiring the licence holder or the manager of the house to attend training courses in relation to any applicable code of practice approved under section 233.
(3) A licence must include the conditions required by Schedule 4.
(4) As regards the relationship between the authority's power to impose conditions under this section and functions exercisable by them under or for the purposes of Part 1 ("Part 1 functions")—
(a) the authority must proceed on the basis that, in general, they should seek to identify, remove or reduce category 1 or category 2 hazards in the house by the exercise of Part 1 functions and not by means of licence conditions;
(b) this does not, however, prevent the authority from imposing licence conditions relating to the installation or maintenance of facilities or equipment within subsection (2)(c) above, even if the same result could be achieved by the exercise of Part 1 functions;
(c) the fact that licence conditions are imposed for a particular purpose that could be achieved by the exercise of Part 1 functions does not affect the way in which Part 1 functions can be subsequently exercised by the authority.
(5) A licence may not include conditions imposing restrictions or obligations on a particular person other than the licence holder unless that person has consented to the imposition of the restrictions or obligations.

(6) A licence may not include conditions requiring (or intended to secure) any alteration in the terms of any tenancy or licence under which any person occupies the house."

61. It follows that a key question is whether any non-mandatory licence condition is appropriate for the purpose of regulating the management, use and occupation or the condition and contents of the Premises. That exercise must be undertaken and understood in the context of the wider requirements and aims of the legislation including the identification and removal of category 1 and 2 hazards (usefully explained in the aforementioned case of *Clark v. Manchester CC at paragraphs 17 and 18).*

The Licence Conditions for Number 152

62. We turn, then to the conditions in dispute in relation to Number 152.

63. The Applicant takes issue with Condition 10 which requires that adequate means of escape from fire should be provided in accordance with Appendix A. Within Appendix A the following matters were objected to:

- The Applicant is required to provide and fit an escape window to the Ground Floor Front Flat bedroom and the First Floor Rear Flat bedroom and the First Floor Front Flat living room.

- For the bedroom doors to the Ground Floor Front Flat, the First Floor Rear Flat bedroom and the First Floor Front Flat kitchen the Applicant is required to ensure that the doors were fitted with *"overhead hydraulic door closers <u>or</u> self closing hinges (x3) that comply with BS 476-22:1987"*.

- The Applicant is required to provide a fire blanket conforming to BS EN 1869:1997 for the kitchen within each flat sited approximately 1.5m high in a suitable position on the wall.

64. The Applicant considers that each of those requirements is unnecessary. More particularly, he considers that the provision of fire windows is an unnecessary cost. With regard to the door closers or self-closing hinges he questions why the present double "*Perko*" hinges are not sufficient and, again, he points to the cost of compliance with the condition at around £250 per door. Finally, with regard to the fire blankets the Applicant makes the not unreasonable observation that most residential dwellings do not have fire blankets in the kitchen and this is, he says, again somewhat excessive.

65. Taking the issue of the fire blanket first, the distinction between an HMO and single occupancy dwellings is that there are multiple kitchens and multiple households. If a fire breaks out in the kitchen of one, the possibility that a neighbouring flat occupier will be ignorant of the risk is necessarily that much higher. The Tribunal heard uncontested evidence that each fire blanket would cost less than £10 and we regard that an as appropriate condition caught by section 67 of the Act. Whilst not mandatory it is, moreover, a condition which is in keeping with the mandatory conditions in Schedule 4 which require, for example, the provision of fire alarms.

66. We might add that the Respondent draws on a document called the LACORS fire safety guidance. LACORS are the Local Authorities Coordinators of Regulatory Services and it was

Ms. Stickler's evidence that the guidance provided by them is that it is "good practice" to provide fire blankets.

67. Of course, without having "chapter and verse" on the LACORS guidance and an explanation for its recommendations, any Tribunal should be slow to simply adopt its recommendations. At most, such guidance provides a general indication of what local authorities consider good practice based on an informed judgment and assessment of the risks. We would add that the Respondent's reliance on the LACORS guidance is also evidence that the present Respondent is not acting arbitrarily or by reason of some nefarious motivation detached from the approach of other local authorities discharging the same statutory functions.

68. With regard to the hinges or door closers, we did not understand the Applicant to contest the propriety of a safe mechanism for closing the doors and there was some confusion in Ms. Stickler's evidence about the appropriate BS standards. Ultimately, the Respondent was content that the Applicant should install appropriate hinges of whatever description provided they complied with the applicable BS Standard or, if they did not, provided that the entire door was fire resistant for not less than 30 minutes in compliance with BS standards.

69. We consider that appropriate door closers or fire-resistant doors are essential given the density of the occupation and the number and character of the kitchens in these properties. Appendix A should, however, be amended to include the correct BS standards and so that after the words *""overhead hydraulic door closers or self closing hinges (x3) that comply with [BS EN 1154:1997]"* are inserted the additional words *"or the prevailing applicable BS standard or the entire door must comply with BS 8214: 1990 or the prevailing applicable BS standard for fire door fire resistance".*

70. The issue with the installation of windows which facilitate a fire escape is perhaps best addressed through the prism of the Building Regulations. The Premises are only licensable as HMOs because they are not building regulation compliant and, specifically, because the converted building(s) have not been designed and constructed so that there are adequate or appropriate means of escape from the Premises in case of fire. In those circumstances, a particular function of the licensing regime should, in our view, be to mitigate the resulting risks. In our judgment that is best achieved by ensuring that there are suitable "escape windows" in any flats in which a bedroom could be rendered wholly inescapable in the event of fire in a kitchen. The counterbalancing complaint that it is costly weighs only lightly in the scales and is easily outweighed by considerations of safety.

71. Again we note, but do not place heavy reliance upon, Ms. Stickler's evidence that paragraph 12.2 of the LACORS fire safety guidance directs that living accommodation is only acceptable if alternative means of escape from an inner room is possible (as through an escape window).

72. Condition 19 of the Licence incorporates the requirements of Appendix C. There are two limbs of Appendix C that were in issue. The second paragraph of Appendix C required the provision of a *"storage area to the rear yard and suitable receptacles for the storage of general household waste and recyclable waste..."*. The parties agree that that paragraph should remain subject to deletion of the words "*to the rear yard*" which the Tribunal agrees is a suitable amendment; it makes the clause less needlessly prescriptive.

73. The Applicant also takes issue with the first paragraph of Appendix C which requires provision of *"a general waste bin and recycling waste bin to the kitchen area"*. We agree that the occupants can reasonably be expected to provide their own kitchen bins and, as such, that

first paragraph of Appendix C should be deleted. We are endorsed in that view by the other requirements that we will impose at conditions 13 onwards under the heading "Waste" which we consider sufficient for the management of waste generally.

74. Conditions 23 and 24 are disputed. Condition 24 condition incorporates Appendix B and the objections to that Appendix concern the following requirements:

- For the Ground Floor Front Flat the Respondent states that: *"The cooker is inappropriately located and must be positioned within the kitchen away from exit and entrance thoroughfares and have a minimum of 300 mm work top either side of the cooker."*

- For the Ground Floor Rear Flat Appendix B reads: *"The cooker is inappropriately located and must be positioned within the kitchen away from exit and entrance thoroughfares and have a minimum of 300 mm work top either side of the cooker.*

  Provide a double kitchen cupboard unit either wall or floor mounted and securely fixed to enable the occupant to store foods."

- For the First Floor Rear Flat the matters in dispute read: *"The cooker is inappropriately located and must be positioned within the kitchen away from exit and entrance thoroughfares and have a minimum of 300 mm work top either side of the cooker.*

  Provide a fixed, impervious, readily cleansable worktop, to meet the required 1.3 linear meters. Prepare and run suitable proprietary sealant to open joints between worktop and wall and leave sound and watertight."

75. The requirements are largely uniform for each of the three identified flats and they require the cookers to be positioned within the kitchens away from thoroughfares and to have 300mm worktops on either side.

76. With regard to Condition 23, that specifically states that:

"The kitchen and bathroom amenities shown in the attached Appendix B to this document must be provided and maintained in the appropriate quantities as required under Schedule 3 of the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (Wales) Regulations 2006 (as amended) for the current occupiers".

77. As explained above, paragraphs 4(1) and 5 of Schedule 3 to those regulations applies here and that is a base level below which the standard of condition cannot fall but that does not mean that higher standards are not appropriate in a given case.

78. The purpose of the requirements imposed in Appendix B of the Licence are reasonably self-evident but Ms. Stickler gave evidence confirming that they were driven by safety concerns. Namely, that there was more of a risk of injury if the kitchen layout places the cooker in a position that requires its use near a thoroughfare; similarly, areas of worktop allow for food cooking and preparation near to the hob.

79. We were shown various guidance documents used by the Respondent when assessing the safety of kitchens including one headed "Kitchen Layouts" and giving examples of good and bad practice. Those documents highlight, in particular, the view that a *"300 mm worktop is a minimum and should be wider where possible"*. They also state that: *"A satisfactory kitchen must be safe, convenient and must allow good hygiene practices. It must be possible to stand directly in front of the cooker or sink and to place utensils down on both sides of each. Worktops must be secure, level and impervious and must be of adequate size..."*.

80. The provenance or authorship of that guidance is not clear but it is, with respect, commonsense.

81. The Applicant complains that the reconfiguration of the kitchens in the way prescribed will be difficult, if it is possible at all, and he states that it will be expensive to implement to the extent that it is possible. He regards that expense to be disproportionate and so not reasonably necessary.

82. Having heard the evidence of Ms. Stickler, having considered the guidance upon which the requirements in issue have been based and having viewed the configuration of the kitchens we conclude that the present layout of the kitchens is unsafe and presents a material risk of injury by scalding or otherwise which can and should be addressed in the ways proposed. Moreover, the guidance serves to demonstrate that Ms. Stickler's decision to include those conditions is not arbitrary but is instead based manifestly sensible guidance as to good practice. On the basis of considerations of safety, which include the need to avoid cooking in thoroughfares and with suitable worktops, we determine that these requirements of Appendix B are appropriate conditions. They are also necessary conditions given the requirements of paragraph 4(1) of Schedule 3 of the amended 2006 regulations set out above; we regard them as reasonably practicable.

83. The requirement to provide a double kitchen cupboard unit in the Ground Floor Rear Flat to enable the occupant to store foods was stated by Ms. Stickler to be necessary to provide an adequate amount of food storage to protect food from humidity or vermin. Having inspected the flat we are of the view that the present storage space for food is not adequate and a further cupboard unit is warranted. There is room to provide such a cupboard and the cost is proportionate.

84. Condition 26 was in dispute but the parties agreed terms to amend it. As such, the agreed amended condition will read: *"The licence holder shall ensure that all issues concerning repairs to the structure and exterior of the building and appliances, equipment or furniture made available by him notified to him by tenants, Council officers or visitors to the property are undertaken within a time period appropriate to their urgency."* Similarly, condition 29 was in dispute insofar as it required a "logbook" to be maintained containing sundry documents like safety certificates and occupancy agreements. The parties agreed that the condition should be amended to require the landlord to maintain a "file" rather than a logbook which the Applicant in fact confirmed he already did.

85. Conditions 27 and 28 were partially disputed. Condition 27 provides that: *"The front and rear external appearance of the house, including gardens, boundary walls & fences shall be maintained in good order and repair".* Condition 28 states: *"All gardens, yards and forecourts shall be kept free from refuse, litter or other accumulations and shall be maintained in a clean and tidy condition".* The Applicant objected to condition 27 to the extent that it included gardens and to the entirety of condition 28 on the basis that these were matters for which the

tenants were responsible. He was asked to disclose the material tenancy agreements but none were made available to the Tribunal. It would be open to him, in any event, to enforce any tenant's obligations in respect of these matters. As such, the objection that the tenants are responsible for the gardens is not one that we find convincing. Generally, keeping all gardens and forecourts clear of waste is essential to ensure satisfactory and sanitary conditions and it is accordingly appropriate to retain both conditions unamended.

86. Finally, Condition 30 refers to Appendix D. There is no Appendix D for Number 152 and so Condition 30 is deleted.

The Licence Conditions for Number 154

87. The Licence conditions in dispute are substantially, but not entirely, the same for Number 154 as for Number 152.

88. Condition 10 again incorporates Appendix A. The Applicant took issue with three requirements of that Appendix:

- In respect of the Ground Floor Front Flat the Applicant is required to: *"Provide a FD30S (with smoke seals) Fire Door to the ground floor front flat bed/living room..."*. A detailed specification is then provided.

- For the Ground Floor Front Flat the Applicant must also *"Provide and fit an escape window to the ground floor front bedroom"*.

- Similarly, for the First Floor Rear Flat the Applicant must *"Provide and fit an escape window to the first floor rear bedroom"*.

89. Appendix A provides a detailed specification prescriptive of the required works for the door and windows. The Applicant does not object to the minutiae, however, but to the requirement to undertake any of the work. With regard to the fire door, he states that this is an unnecessary condition because there is already a fire door in the entrance. As with the escape windows for Number 152, he complains about the expense and questions the necessity for such.

90. With regard to the escape windows, the risk with each of the flats is that if a fire were to break out in the kitchen in the affected flats then any occupants in the respective bedrooms would become trapped. For the reasons already articulated in relation to Number 152, we determine that the conditions requiring the installation of escape windows are suitable and appropriate and necessary. The present licence omits any requirement to provide and fit an escape window to the first floor front flat but as, and to the extent that, escape from the living area requires passage through the kitchen it seems to us that that should be included in the licence conditions.

91. In relation to the requirement for a fire door, as noted the Applicant states that there is already a fire door at the entrance and so this is an unnecessary expense.

92. The short point in response from the Respondent is that the purpose of a fire door is to protect escape routes and contain fires within the self-contained units until such time as the other occupants are alerted and able to move to a place of safety. The Respondent's

evidence, which we accept having also inspected the property, is that the door(s) do not meet the required BS standards for fire doors and they need to be brought up to that standard.

93. We agree that it is appropriate to have such a door in the ground floor front flat bedroom owing to the configuration of the accommodation and the need to try and insulate accommodation rooms from the source of any fire. Whilst there will be an expense to the Applicant this is once again outweighed by safety considerations. We do, however, consider it appropriate to introduce a degree of flexibility with regard to this part of Appendix A and so after the first paragraph of text under the heading "Ground Floor Front Flat" a second paragraph should be inserted in the Appendix to read:

"Alternatively, any fire door hinges or closers should comply with the prevailing applicable BS standard such that the entire door complies with BS 8214: 1990 or the prevailing applicable BS standard for fire door fire resistance generally"

94. Condition 19 was challenged by the Applicant. It is identical to that for Number 152 and, for the reasons given above in relation to Number 152, we make the same determination in relation to condition 19 and Appendix C for Number 154.

95. As with Number 152, conditions 23 and 24 incorporate Appendix B as part of the Licence and those requirements are intimately connected with the prescribed standards resulting from the requirements of paragraphs 4(1) and 5 of Schedule 3 to the amended 2006 Regulations.

96. For each of the Ground Floor Front Flat, the Ground Floor Rear Flat and the First Floor Rear Flat, the Appendix identifies that the cookers have broken dials which need to be fixed. The Applicant does not dispute that the cookers should have working dials, and nor can he. That is a minimum requirement to ensure that the flats each have "*adequate appliances and equipment for the cooking of food*" (per paragraph 4(1)(a) of Schedule 3). Additionally, however, Appendix B adds that:

- The cookers from the Ground Floor Rear and First Floor Rear Flats must have a minimum of 300 mm worktop to either side.
- The Ground Floor Rear Flat requires a minimum 1.3 metre worktop in the kitchen.
- The cooker in the First Floor Rear Flat should be repositioned within the kitchen away from the entrance and exit thoroughfares.

97. For the reasons already provided in respect of Number 152, we consider that the first two conditions are necessary and appropriate. Less worktop space would be inadequate for the safe preparation of food and these works are, in our view, reasonably practicable albeit that they will involve some cost. Similarly, with regard to the location of the cooker in the First Floor Rear Flat, it simply is not reasonably safe in its present position and presents a clear risk of scalding or fire. As such we do require that the cooker is moved in the terms stated in the Appendix.

98. Condition 26 is identical both Licences. We are of the view that it is necessary and should be included in the licence for Number 154 in the revised terms agreed between the parties.

99. Similarly, conditions, 27, 28 and 29 are identical to those in the Number 152 Licence and we make the same determinations in relation to each for the same reasons.

100. One material respect in which the Respondent's Licence conditions for 154 differed from that for Number 152 was that condition 30 of the 154 Licence incorporated an Appendix D. That is a condition and Appendix with which the Applicant takes issue and it is in the following terms:

> *"**The ground floor front flat is currently occupied by 2 adults and a child. The available space within the property is below that required for 3 persons.***
>
> *Flat with combined lounge bedroom and a separate kitchen. (Total of 2 rooms excluding bathroom)*
>
> *Lounge – bedroom: 10m² for one person 15m² for 2 people.*
>
> *Kitchen: 5.5m² For up to 2 people.*
>
> *Therefore the flat has been restricted to 2 persons only. This restriction will come into force 2 months after the issuing of the full licence."*

101. The Applicant takes issue with this condition on a number of bases. He was of the view that the area of the living-room/bedroom had been miscalculated and had also failed to take a portion of bay window area into account. In the Respondent's "Licensing Survey Sheet Flats" the Ground Floor Front Flat is measured 3.5m by 4.1m (and so 14.35m²). The Applicant considers that the living area is actually something in the region of 18m². He considers that this should be adequate for two adults and a child.

102. The Respondent contends that the total square metres point is something of a "red herring" because it takes the view that it is never appropriate for three people to live in one lounge/bedroom (as would be the case here). Whether the correct measurement is around 14m² or 18m² the Respondent contends that the maximum number of persons that a flat of this type is suitable for is two.

103. It should be noted that the National Assembly for Wales enacted the Housing Health and Safety Rating System (Wales) Regulation 2006 (SI 2006/1702) pursuant to its powers under Part 1 of the 2004 Act. By Regulation 3(1) a hazard is of a "prescribed description" for the purposes of the 2004 Act where the risk of harm is associated with the occurrence of any of the matters or circumstances listed in Schedule 1. The "matters and circumstances" in Schedule 1 at paragraph 11 (under the heading "Crowding and Space") include a "*lack of adequate space for living and sleeping"*. As was observed in the *Clark* case at paragraph 46: *"As overcrowding was a hazard identified in Part 1 of the 2004 Act it would be anomalous for an authority to licence a room which would inevitably create a category 2 hazard and give rise to a duty to consider enforcement measures"*. In 2009 LACORS (i.e. the aforementioned Local Authorities Coordinators of Regulatory Services) adopted a guidance document on the regulation of "crowding and space" in residential premises which was principally concerned with the enforcement of housing standards under Part 1 of the 2004 Act. That guidance did not, however, set national standards and local authorities were apparently encouraged to set their own standards.

104. At the hearing of the present case Ms. Stickler gave evidence that standards as to overcrowding are adopted to try and reduce risks to health. That evidence should not be controversial given that it is an identified health risk. She also gave evidence that the

Respondent's policy is driven by evidence about the adverse effects of overcrowding and, in particular, the impact that it may have on the development of children who live in such an environment. Ms. Stickler also provided a sheet with worked examples explaining the Respondent's policy. In one example ("Example 3" on the sheet), a flat with a combined lounge-come-bedroom and a separate kitchen and bathroom indicates that 15m² is the required minimum.

105. Ms. Stickler also referred to the HHSRS Overcrowding Assessment which she said is used nationally to rate the risks presented by crowding or space. Bluntly, little real assistance could be derived from that system because the scoring was determined by the assessor's view of the property and risks and, to that extent, it becomes somewhat self-fulfilling. In any event, on authority the guidance upon which a local authority acts is something to which a Tribunal is entitled to have regard but it is not binding. Once again, the *Clark* case provides important guidance to this effect; the Deputy President concluded there that:

> *"[53] In every case the views of the local housing authority will be relevant and merit respect, but once the tribunal has carried out its own inspection and considered all of the characteristics of the Property, including the size and layout of individual rooms and any compensating amenities, it will be in a position to make its own assessment of the suitability of the house for the proposed number of occupiers."*

106. It was common ground that the flat is currently occupied by a couple with a child under school age. The question is: should it be limited to occupation by only two persons?

107. By analogy, some guidance may be derived from Part X of the Housing Act 1985 which is concerned with overcrowding of single dwellings. Neither party referred us to that Act which does not have direct application. In it a house is overcrowded if the room standard in section 325 or the space standard in section 326 is contravened.

108. Section 325 provides that the room standard is contravened when the number of persons sleeping in a dwelling and the number of rooms available as sleeping accommodation is such that two persons of opposite sexes who are not living together as husband and wife must sleep in the same room. For this purpose it is material to note that (a) children under the age of ten are left out of account, and (b) a room is available as sleeping accommodation if it is of a type normally used in the locality either as a bedroom or as a living room.

109. In section 326 of the Housing Act 1985 the space standard is somewhat more complicated. There is overcrowding when the number of persons sleeping in a dwelling is in excess of the permitted number having regard to the number of rooms available as sleeping accommodation or their floor space. For these purposes, where there is only one room available as sleeping accommodation the permitted maximum number of persons is two. For these purposes a child aged between one and ten years of age counts as a half.

110. The significance of the foregoing is that we were told that the Respondent's space standard limits the maximum number of occupants to two persons for one bedroom (as here) and that does mirror the standard enshrined in comparable legislation directed at the same mischief. It also serves to underscore that the Respondent has not applied an arbitrary figure with no proper basis to this Applicant's licence application.

111. Having carried out our own inspection, and having considered all of the characteristics of Number 154 in its entirety and the Ground Floor Flat in particular, we came to the clear view

that the accommodation offered was too limited to serve a three-person household for any prolonged period of time. The overall occupancy density for Number 154 is high and whilst each of the four flats have their own amenities, they all have small kitchens and small shower rooms with single toilets. Each of these factors makes the safe occupation of a flat by more than two people difficult and when this is coupled with the fact that the current child will not have a separate room we have no hesitation in concluding that the proposed limit on occupancy to two persons is appropriate in the medium to long term and subject to the caveat explained below.

112. The matter does not end there, however, because the Applicant's unchallenged evidence was that he renewed the tenancy of the Ground Floor Flat with the existing occupiers in around March 2018. He also stated that the renewed tenancy is for a 12 month fixed term and so will expire only in March 2019. The Applicant argues that if he is subject to a condition limiting the occupation of the Ground Floor Flat to two persons he will be placed in breach of the Licence immediately and will remain so until March 2019 because there is nothing that he can do to evict the tenants before that date. It is his case that they are not otherwise breaching their tenancy agreement by occupying the flat with a young child. The Applicant also points to sections 67(5) and 67(6) of the 2004 Act. He says that a condition limiting occupation to two persons thereby imposes a restriction on a person other than the licence holder in breach of section 67(5). Alternatively, he says that such a condition requires alteration in the terms of the tenancy and so is impermissible under section 67(6).

113. In terms of the chronology, it is right to observe that the Respondent granted a licence limiting the occupation density to two persons in October 2017 and so well before the Applicant renewed the present tenancy. At that point he knew the condition limited the number of occupants and, whilst an appeal reopened the matter, he must also have known that the Respondent would contend for a similar condition on any re-hearing. In those circumstances, it is not readily apparent why he needlessly granted a new fixed term in March 2018 when the tenancy automatically ran on as a statutory periodic tenancy anyway.

114. Neither party referred this Tribunal to any authority on this issue. For its part, the Respondent submitted that limiting the number of permissible occupiers does not impose a restriction directly on any third party and nor does it directly require any alteration to any tenancy agreement. It might also be said that a property should not be used as an HMO until a licence is obtained and so landlords who let out flats before a licence is granted do so at their own risk.

115. Without the benefit of any cited authority, it is necessary to consider this submission from first principle. Part of the avowed aim of the Act is to address hazards in housing and this expressly includes overcrowding; the whole scheme for granting licences in sections 64 and 65 (and elsewhere) is built around granting and tailoring licences for the use of HMOs by a maximum number of persons. It would, in our view, drive the proverbial "coach and horses" through the legislation if prospective licence holders were able to simply grant long-term tenancy agreements omitting any limit on occupation numbers (i.e. before seeking a licence) and then say that a local authority or tribunal were thereby deprived of any power or jurisdiction to prescribe the maximum number of persons that could occupy the HMO or part thereof. That possibility is rather graphically illustrated here.

116. On balance, we accordingly accept the Respondent's case that a condition limiting the maximum number of persons who can occupy part of an HMO does not fall foul of either section 67(5) or (6). No restriction is imposed directly on the tenant.

117. In this case, however, we consider that a sensible compromise solution should apply which meets the medium to long-term need to guard against overcrowding whilst recognising the reality of the present situation. We heard no satisfactory direct evidence about the age of the child living in the Ground Floor Flat but it was obvious from the cot-come-bed that the child was substantially under ten and still probably at least a couple of years from starting school. As the mechanics of the Housing Act 1985 demonstrate, it is not necessary or appropriate to treat very young children in the same way as adults when making an assessment of the impact of overcrowding on general well-being. For extremely young children the negative impact of sleeping in the same space as their parents is patently less. Indeed, during the first year it is not unusual in many households and a degree of sharing can be beneficial.

118. It seems to us that if the Applicant is constrained to enter into litigation with this young family to try to secure their eviction during the currency of a fixed term, there will inevitably be a delay in procuring possession and some period of time during which the Applicant will find himself in breach of the Licence. During that period, the licence condition will not satisfactorily bring about the limits on occupation that are necessary in the medium term (i.e. as the child gets older) and during that period the mischief of overcrowding is only slight owing to the character of the household and the young age of the child. In the circumstances, a balance can be struck by providing that the restriction to 2 persons shall only come into force on 31 March 2019 or the date upon which the present tenants vacate (whichever the sooner). We modify the condition accordingly.

119. Although that qualification on the condition is not necessary to avoid the effect of sections 67(5) and (6), it does have the added virtue of addressing the Applicant's section 67 arguments (if we are otherwise wrong) because, on his own evidence, the Applicant can secure possession by 31 March 2019 rather than imposing conditions upon the tenants.

120. For completeness, we should also add that the Respondent expressly conceded that if the tenants did vacate because of a condition limiting the number of occupiers in the Licence then those tenants would not be treated as intentionally homeless by the local authority.

Miscellaneous Amendments

121. Although not in terms a condition of either Licence, following condition 12 (conditions 11 and 12 are under the heading "Tenancies, Etc.") in each licence there is an unnumbered paragraph which reads: *"Please note that the Council supplied with the licence a "Tenant's Undertaking" document covering many of these issues. You should obtain each tenant's signature on a copy of this document and keep it with your logbook as proof you have discharged your duties"*. The parties agree that that paragraph is ambiguous and should be amended so that it will read as follows in both Licences:

> *"Please note that the Council supplied with the licence a "Tenant's Undertaking" document covering many of these issues. We would advise you to obtain each tenant's signature on a copy of the "Tenant's Undertaking" document and keep it with your file (retained under condition 29 of this licence) as proof you have discharged your duties".*

122. We would add that, unless we have stated otherwise, all time limits for compliance with the conditions of the Licences are varied to run 28 days from the date of this determination rather than the date of the original licence. Accordingly, by way of example, Condition 19 now

requires the works in Appendix C to be completed within 2 months and 28 days of the date of this decision.

Discrimination

123. The final point which it is necessary to address is the Applicant's assertion that he has been victimised or discriminated against by the Respondent. He says that the Respondent's attitude towards him and the licensing of the Premises has been unduly oppressive and he ascribes that to institutional discrimination against him because of his ethnic background.

124. In his written submission the Applicant asserted that the Respondent had infringed Article 14 of the Human Rights Act 1998 because, he asserted, it was treating him less favourably than others in a similar situation. Article 14 contains the prohibition on discrimination. The Applicant put his point this way:

> *"The Respondent's department is discriminating against individuals from Ethnic Minority backgrounds and is continuing to adopt a culture of institutional discrimination which has been incorporated into the hidden structures and cultures, through prejudice or because of failings to take account of particular needs of different social identities. It is paramount and necessary this hidden culture is eradicated to ensure equality".*

125. There were three main bases that the Applicant advanced in support of his assertion that the Respondent is institutionally discriminatory. First, he stated that he had discovered an online article referring to a Freedom of Information Act request which apparently states that 72 out of 125 prosecutions for offences under the Housing Act by the Respondent were of B.A.M.E. (i.e. Black, Asian, and minority ethnic) landlords. The Applicant states that he is part of this group. Secondly, the Applicant complains that when he telephones the Respondent its staff are rude. Indeed, he referred to a specific incident involving a Mr. Reynolds who apparently used the expression that the Applicant was "doing his head in". One assumes that he said this believing that the Applicant was on hold and unable to hear him but that would not excuse such discourtesy. We were told that it certainly did not help matters that Mr. Reynolds dishonestly denied making the remark and was only constrained to admit it because the Applicant had recorded the call.

126. The Applicant's third complaint concerns separate proceedings in the Magistrates' Court in which the Applicant was prosecuted by the Respondent for a number of management offences. We saw no papers in relation to that prosecution and no transcript of what occurred. The Applicant asserts, however, that most of the offences were not made out and he states that the Respondent was criticised by the Magistrates. This was, he said, because the Respondent had proceeded with the prosecutions despite having previously written to the Applicant stating that it would not prosecute if he took certain steps and carried out various works. Despite having done so, the local authority are said to have proceeded with the prosecution.

127. It is deeply regrettable if any Applicant or party considers that they have been victimised. Moreover, the allegation that an Applicant has been singled out because of his ethnicity is grave indeed. The role of this Tribunal is, however, to consider this matter by way of rehearing. As we have already stated, the Tribunal must "make up its own mind" on the question of whether a Licence is needed and, if so, the conditions that should be imposed when granting that licence. If any decision by a local housing authority was tainted in any way by irrelevant considerations, of whatever character, the Tribunal rehearing the matter is

independent and looks at the matter with fresh eyes. For this reason, it is not necessary for the Tribunal to make findings as to the subjective motivations of those who originally considered the Licence application. This Tribunal has no connection at all with the local authority and makes an impartial assessment of the licence application free of the alleged taint of discrimination.

128. Notwithstanding the foregoing, we would make the following additional observations. The local authority is under a statutory duty to implement the licensing regime contained within the 2004 Act. That duty is contained in section 61(4) of the 2004 Act. We have found that the Premises are both licensable HMOs and the Applicant did, of course, apply for the licences. Most of the conditions are agreed, some are mandatory and others reflect the Prescribed Standards or mirror other legislative provisions. In almost all cases, the Respondent also supported the proposed conditions by reference to general standards that it applies in almost all cases for kitchens, fire safety or overcrowding etc. We could not identify a single aberrant condition which might imply that the present Applicant was being treated differently from any other licence applicant.

129. We have also carefully considered the bases for the Applicant's belief that he is the subject of racial discrimination. We can draw no conclusions from the reference to the Freedom of Information Act request. We have not seen it and so we do not know the precise terms of the information requested nor that provided. If the figures in the article are correct, we are also unable draw any conclusions from them without more information, such as background data, that would give those figures context. Turning to the offensive comments made to the Applicant, plainly what was said was rude and unacceptable but we can draw no other inference or conclusion from that episode. Finally, with regard to the Magistrates' Court prosecution, the Respondent concedes that it made errors and, if the Applicant was prosecuted when he was told he would not be, then he would understandably feel aggrieved, but that was a different court case concerning different matters. It would be wrong for this Tribunal to make any further comment on that process. If proceedings were misguided or mishandled that does not mean that there was some discriminatory motive.

Conclusion

130. In light of the foregoing we accordingly make the following determinations:

(I) Both Number 152 and Number 154 Macintosh Place are presently licensable HMOs.

(II) We confirm that the Applicant requires and should be granted an HMO licence under Part 2 of the Housing Act 2004 subject to conditions for both properties.

(III) In relation to Number 152 Macintosh Place the licence conditions should be the same as those in the five-year licence awarded to the Applicant on 5 October 2017 save for the following amendments:

(a) Condition 10 shall incorporate Appendix A but amended so that in the tenth paragraph of the Appendix, it refers to the correct BS standard and after the words *""overhead hydraulic door closers or self closing hinges (x3) that comply with [BS EN 1154:1997]",* are inserted the additional words *"or the prevailing applicable BS standard or the entire door must comply with BS 8214: 1990 or the prevailing applicable BS standard for fire door fire resistance".*

(b) The text in bold being the last paragraph under condition 12 shall be amended to read:

"Please note that the Council supplied with the licence a "Tenant's Undertaking" document covering many of these issues. We would advise you to obtain each tenant's signature on a copy of the "Tenant's Undertaking" document and keep it with your file (retained under condition 29 of this licence) as proof you have discharged your duties."

(c) Condition 19 shall incorporate Appendix C but amended to delete the first paragraph of that Appendix and to amend the second paragraph to delete the words "*to the rear yard*".

(d) Conditions 23 and 24 shall incorporate Appendix B in its current form save for the deletion of the words *"(only applicable if the unit is made habitable)"* where they appear after the heading "Ground Floor Flat".

(e) Condition 26 shall be amended to read: *"The licence holder shall ensure that all issues concerning repairs to the structure and exterior of the building and appliances, equipment or furniture made available by him notified to him by tenants, Council officers or visitors to the property are undertaken within a time period appropriate to their urgency."*

(f) Condition 29 shall be included in the licence but amended to require the Applicant to retain a "file" rather than "logbook".

(g) Condition 30 shall be deleted.

(IV) In relation to Number 154 Macintosh Place the licence conditions should be the same as those in the five-year licence awarded to the Applicant on 23 October 2017 save for the following amendments:

(a) Condition 10 shall incorporate Appendix A but amended so that the first paragraph of that Appendix, under the heading "Ground Floor Flat", shall be followed by an additional paragraph which reads: *"Alternatively, any fire door hinges or closers should comply with the prevailing applicable BS standard such that the entire door complies with BS 8214: 1990 or the prevailing applicable BS standard for fire door fire resistance generally".* At the conclusion of Appendix A there should be added the following:
"FIRST FLOOR FRONT FLAT
Where, and to the extent that, the first floor front flat contains living accommodation from which escape is only possible via the kitchen then the window to that room (i.e. the room constituting living accommodation accessed through the kitchen) shall be replaced/supplied with an escape window complying with the specifications contained herein for the Ground Floor Front and First Floor Rear flats."

(b) As with Number 152, the text in bold forming the last paragraph under condition 12 shall be amended to read:

"Please note that the Council supplied with the licence a "Tenant's Undertaking" document covering many of these issues. We would advise you to obtain each tenant's signature on a copy of the "Tenant's Undertaking" document and keep it with your file (retained under condition 29 of this licence) as proof you have discharged your duties."

(c) Again, condition 19 shall incorporate Appendix C but amended to delete the first paragraph of that Appendix and to alter the second paragraph to delete the words "*to the rear yard*".

(d) Condition 26 shall read: *"The licence holder shall ensure that all issues concerning repairs to the structure and exterior of the building and appliances, equipment or furniture made available by him notified to him by tenants, Council officers or visitors to the property are undertaken within a time period appropriate to their urgency."*

(e) Condition 29 shall be included in the licence but amended to require the Applicant to retain a "file" rather than "logbook".

(f) Condition 30 shall incorporate Appendix D in its present form except that Appendix D shall provide that: "*This restriction will come into force on 31 March 2019 or the date upon which the present tenants shall vacate the Ground Floor Flat (whichever the sooner)*".

(V) In respect of any deadlines for compliance with conditions in the Licences those time limits start to run from 28 days after the date of this decision.

131. Finally, we would make one final point. The Respondent stated that uncertainty over the matters in issue meant that it was forced to assume everything was at large. This meant that, for each of the two properties, the Tribunal was supplied with multiple appendices and two very substantial bundles. In all, we estimate that the combined bundles must have extended to little short of a thousand pages. For one case there was a single bundle without dividers. For the other case there were six separately bound dividers. There was also considerable duplication and no pagination.

132. The preparation of hearing bundles in this way made the task of the Tribunal, both at the hearing and thereafter, considerably more difficult and time consuming. We would also make the observation that, whilst the Applicant coped admirably, when a litigant is acting in person they must be presented with bundles which are readily navigable and easy to understand. In future the parties are requested to ensure that hearing bundles are produced in marked lever-arch files with an index in each, appropriate dividers and sequential pagination.

133. The Tribunal makes the following order:

ORDER

In accordance with paragraph 34 of Schedule 5 of the Housing Act 2004, the Residential Property Tribunal directs the Respondent to grant HMO licences for each of the premises known as numbers

152 and 154 Mackintosh Place, Roath, Cardiff to the Applicant subject to the conditions originally imposed in October 2017 save as varied in paragraph 130 of this decision.

DATED this 13th day of September 2018

CHAIRMAN