

Y TRIBIWNLYS EIDDO PRESWYL
RESIDENTIAL PROPERTY TRIBUNAL

Ref: RPT/0018/05/18

In the matter of section 20 of The Housing (Wales) Act 2014

Tribunal: Andrew Sheftel
Hefin Lewis
Carole Calvin-Thomas

Applicant: David Lubin
Represented by: Lawrence Jones (Counsel)

Respondent: Rent Smart Wales
Represented by: Richard Griggs (Solicitor)

DECISION

The decision in summary

1. For the reasons set out below, the Applicant's appeal is dismissed.

Background

2. This is an appeal by the Applicant against a decision of Rent Smart Wales (RSW) to refuse to grant a licence to the Applicant. The decision of RSW was made principally on the ground that the Applicant did not satisfy the 'fit and proper person' test as set out in section 20 of the Housing (Wales) Act 2014 (the 2014 Act).
3. The hearing was held on 12 October 2018. The Applicant was represented by Mr Jones (counsel) and the Respondent was represented by Mr Grigg (solicitor). Also in attendance on behalf of the Respondent

were Angharad Thomas, Christina Brown, Bethan Jones and Val Broomfield.

4. In advance of the hearing, the Tribunal received evidence from both parties. Both expanded upon their submissions at the hearing. In addition, the Tribunal heard evidence from the Applicant and Christina Brown on behalf of RSW as well as briefly from Angharad Thomas.

The relevant law

5. The issue in the present case is whether the Applicant satisfies the 'fit and proper person' test under the 2014 Act.
6. In Wales, pursuant to the terms of the 2014 Act, it is a requirement for landlords of a dwelling subject to, or marketed or offered for let under a domestic tenancy, to be registered and licensed to carry out lettings and property management activities. Likewise any person acting as agent on behalf of the landlord of a dwelling marketed or offered for let under a domestic tenancy must be similarly licensed to carry out lettings and property management work. Pursuant to section 3 of the 2004 Act, the designated licensing authority for the whole of Wales exercises its licensing powers and duties under the name "Rent Smart Wales".
7. Under section 18 of the Act the licensing authority, Rent Smart Wales, may grant a licence to landlords to carry out letting and property management activities in accordance with sections 6 and 7 of the 2004 Act. Section 19 contains details of mandatory requirements for the licence application. Before Rent Smart Wales grant a licence to an applicant they must be satisfied that certain training requirements have been met or will be met and that the applicant is a fit and proper person to be licensed.
8. The fit and proper person test is set out in section 20 of the 2014 Act:
 - "(1) In deciding whether a person is a fit and proper person to be licensed as required by section 19(2)(a), a licensing authority must have regard to all matters it considers appropriate.*
 - (2) Among the matters to which the licensing authority must have regard is any evidence within subsections (3) to (5).*
 - (3) Evidence is within this subsection if it shows that the person has*
 - (a) committed any offence involving fraud or other dishonesty, violence, firearms or drugs or any offence listed in Schedule 3 to the Sexual Offences Act 2003 (offences attracting notification requirements);*

- (b) practised unlawful discrimination or harassment on the grounds of any characteristic which is a protected characteristic under section 4 of the Equality Act 2010, or victimised another person contrary to that Act, in or in connection with the carrying on of any business, or*
- (c) contravened any provision of the law relating to housing or landlord and tenant.*

...

(6) The Welsh Ministers must give guidance to licensing authorities about deciding whether a person is a fit and proper person to be licensed as required by section 19(2)(a)."

9. In October 2015 a document bearing the names of both Rent Smart Wales and the Welsh Government entitled 'Guidance on "the fit and proper person" test for licensing of landlords and agents' ("the guidance") was published. Paragraph 2 of the guidance states:

"This requirement is to ensure that those responsible for letting and managing a property in the private rented sector are of sufficient integrity and good character to be involved in the management of the property to which the licence relates. In addition, that they do not pose a risk to the welfare or safety of persons occupying the property".

10. Paragraph 5 states that the licensing authority must have regard to all matters it considers appropriate. However, it also adds that *"Any evidence considered should be relevant to the person's fitness to hold a licence and let and manage rental properties in Wales."*
11. Paragraph 6 of the guidance makes it clear that in respect of criminal offences, Rent Smart Wales "must have regard to" any convictions unless the person is not obliged to disclose those convictions in accordance with the Rehabilitation of Offenders Act 1974 and associated statutory instruments. Further, paragraph 12 of the guidance states that:

"In deciding whether a conviction is relevant to a person being a fit and proper person for the purposes of a licence, the Licensing Authority may wish to consider the following factors:

- *the relevance of the conviction in relation to the applicant's character and integrity to let or manage residential properties;*
- *the seriousness of the conviction, in terms of impact, or potential impact, upon the residents and the wider community, including if more than one conviction is involved, the cumulative impact;*
- *the length of time since any conviction; and*

- *any mitigating circumstances.*"

12. An appeal against the decision of Rent Smart Wales may be made to the tribunal under section 27 of the 2004 Act. The tribunal may confirm the decision of the licensing authority or alternatively direct the authority to grant a licence on such terms as the tribunal considers appropriate. Further, section 27(3)(b) provides that an appeal "*may be determined having regard to matters of which the licensing authority was unaware.*" Both sides accordingly agreed that the Tribunal is entitled to examine the matter afresh and is not limited to reviewing RSW's decision.

The present appeal

13. The Applicant has been a residential landlord for over three decades and currently owns in excess of 80 rental properties, principally through two companies. This portfolio includes several properties registered as HMOs.

14. On 29 March 2018, RSW refused Mr Lubin's application for a licence on the basis that he did not satisfy the 'fit and proper person' test as set out in the 2004 Act. He now appeals that decision. It should be noted that by earlier decision of the Tribunal, the Applicant, whose appeal was lodged on 9 May 2018, was given permission to appeal out of time.

15. RSW seeks to rely principally on the provisions of s.20(3)(a) of the 2004 Act (as set out above), on the basis of the Applicant's conviction in 2017 for Perverting the Course of Justice. At the hearing, and despite some initial confusion, RSW stressed that although the 2017 conviction was the principal factor in its decision, and without it they would not have concluded that Mr Lubin was not a fit and proper person, RSW maintained that there were additional contraventions of housing law by Mr Lubin which should also be taken into account and should be considered as part of the overall decision. RSW therefore contended that s.20(3)(c) of the 2004 Act was also engaged. These matters are addressed further below.

The parties' submissions

The Applicant's conviction

16. In 2017, the Applicant received a custodial sentence following his conviction for Perverting the Course of Justice. While it is not disputed that the fact of such a conviction does not of itself disqualify the Applicant from being a 'fit and proper' person under the 2014 Act, RSW were of the view that the circumstances surrounding the conviction were such as to

lead them to conclude that the Applicant was not in fact a fit and proper person.

17. It transpired that the Applicant had committed seven speeding offences over a 4-year period. Initially, he had not been prosecuted for these offences as he had claimed that tenants of his had been driving the cars at the relevant times. In this regard, he created false tenant names but gave actual addresses at some of his rental properties. In RSW's view, this shows that it was not a one-off out of character act and, moreover, that there was a clear link here between his offence and his business life and that he had exploited his position as a landlord. RSW also referred to the fact that the Applicant had involved another person in this activity: Mr Jeffreys, a long-standing friend, aged 74, who he had asked to lie for him. In RSW's submission, insofar as he had taken advantage of an elderly gentleman, there was a clear risk that he might also take advantage of tenants, many of whom were vulnerable.
18. At the hearing, the Applicant, to his credit, never sought to deny or downplay his conviction. He has maintained that his actions were out of character and that he has learnt his lesson. He also sought to emphasise that he had entered an early guilty plea and was released on parole after 9 weeks. Further, he was assessed as a low risk of reoffending and a low risk to himself and others of serious harm. It was also pointed out that while in prison, he acted as a mentor to two young prisoners.
19. Moreover, the Applicant had earlier provided a number of letters from individuals attesting to his character. Mr Jones submitted that they had not been properly taken into account by RSW in assessing aspects of mitigation, a factor specifically cited in the guidance as set out above. The references which had previously been supplied to RSW were supplemented at the hearing by several additional letters as well as a number of surveys which had been completed by tenants. Evidence in the form of graphs was also produced on Mr Lubin's behalf, which purported to show that the majority of Mr Lubin's tenants had been renting with him for more than two years and 32% had been renting from him for more than five years. The picture, as submitted on behalf of the Applicant, was in fact one of a conscientious and responsible landlord.
20. One issue going the other way as to his relationship with his tenants, was an alleged complaint of unlawful eviction by a particular tenant. The relevant extract from the initial complaint (contained in RSW's statement) stated: that the Applicant "had added an extra lock to the front door and gave all the tenants keys accept (sic) me". The alleged unlawful eviction was denied by Mr Lubin at the hearing. He stated that he had been unable to give keys to the tenant in question. In the Tribunal's view there was insufficient evidence presented to it to draw any firm

conclusions in relation to this allegation and accordingly, the Tribunal concludes that it would be wrong to attach any weight to it when applying the fit and proper person test.

21. It was submitted on behalf of the Applicant that RSW had been incorrect to draw the link they did between the conviction and Mr Lubin's role as a landlord. In particular, it was contended on Mr Lubin's behalf that there was no evidence of consideration by RSW of the "*impact, or potential impact, upon the residents and the wider community*" having regard to the Guidance set out above. Further, it was submitted that RSW could and should have contacted tenants of Mr Lubin on the issue of any potential risk and had unfairly disregarded or not given sufficient weight to the testimonials and references provided on Mr Lubin's behalf.
22. Mr Jones was similarly critical of RSW's approach to, and conclusion in respect of, the involvement of Mr Jeffreys. For example, Mr Jones highlighted and criticised the use of the word 'coerce' in relation to Mr Jeffreys in the statement prepared by RSW for the appeal, on the basis that there had never been any suggestion that the Applicant had made threats of any kind to Mr Jeffreys. Rather, as Mr Lubin has stated when giving evidence, he had simply asked Mr Jeffreys to help him. Mr Lubin also stressed that he took full responsibility for his actions with regard to Mr Jeffreys at the earliest opportunity.
23. Ultimately, Mr Jones submitted that RSW had not undertaken a proper balancing exercise. Their role was to undertake a balanced investigation and they should have provided a balanced presentation of the evidence. Instead, he submitted that RSW had ignored or not given sufficient weight to, the mitigating circumstances. Further, they had failed to take into consideration the potential impact of the conviction on tenants and should have taken the opportunity to investigate or speak to tenants. While there may be merit to aspects of Mr Jones's submissions, it is worth repeating that, as both parties agreed, the appeal is not a review of RSW's decision, but rather the Tribunal is able to determine the matter afresh.

Other matters

24. As noted above, aside from the Applicant's conviction for Perverting the Course of Justice, RSW also relies on a number of other matters relating to his conduct as a landlord.
25. First, RSW makes reference to the fact that the Applicant was prosecuted by Cardiff Council in 2014 for offences under the Housing Act 2004 (the 2004 Act) and fined £4,000. Although this conviction is now spent, RSW argued that it was still relevant as a matter to take into

consideration under section 20(3)(c) of the 2004 Act, i.e. an instance where the Applicant has contravened “*any provision of the law relating to housing or landlord and tenant*”. However, even on RSW’s case, the weight to be attached to this matter was minimal.

26. In addition, RSW were critical of Mr Lubin’s approach to the licensing of HMOs and the fact that, in their submission, he waits for the council to inform him that he needs a HMO licence rather than being proactive. When questioned about this at the hearing, Mr Lubin did not deny it, although maintained that this was no longer his approach. He noted that there could be substantial costs of having to do various works in a short period of time. In RSW’s view, this was an example of him putting profit before the safety of tenants.
27. In Mr Lubin’s defence, Mr Jones pointed out that pursuant to section 61(4) of the 2004 Act, a local housing authority must take all reasonable steps to secure that applications for licences are made to them in respect of HMOs in their area which are required to be licensed but are not. While this is correct, it is also the case that failure to licence an HMO is of itself an offence under section 72(1) of the 2004 Act: a “*person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part ... but is not so licensed*”. The legislation does not provide a defence that the owner had not been notified of the need to obtain a licence by the local authority.
28. RSW also referred to the fact that the Applicant has been served with a number of informal improvement notices and formal improvement notices, as well as the fact that a number of complaints from tenants have been registered in previous years.
29. In response, it was submitted that the fact that a complaint has been made by a tenant does not mean that it has merit and also that the number of complaints identified by RSW was not at all excessive given the number of properties owned by the Applicant and the period of time in question. It was also pointed out that the formal improvement notices had been complied with by Mr Lubin. Further, it was contended that with regard to the informal notices, aside from the fact that they have no legal force, the works had in fact been done, albeit not yet signed off by the Council. Although there was no evidence to demonstrate the latter assertion either way, on balance, the Tribunal is of the view that the references to tenant complaints and improvement notices relied on by RSW do little to advance its case that the Applicant is not a fit and proper person.

30. Finally, it is worth noting that even since his (now spent) conviction under the Housing Act 2004, the Applicant has been granted a number of licenses for HMOs. The criteria for granting an HMO licence under the 2004 Act contains a fit and proper person test in similar terms to that under the 2014 Act. Accordingly, the Applicant noted that the relevant licensing authority has considered him a fit and proper person, notwithstanding the Housing Act conviction. This point is of relatively limited assistance because RSW agreed that they would not have refused Mr Lubin a licence on the basis of the Housing Act conviction alone. This does not mean, however, that it should be wholly disregarded when determining whether the Applicant is a fit and proper person – although as per RSW’s own approach, the Tribunal considers that any weight to be attached should be minimal.
31. However, a further point is that Mr Lubin has in fact been granted HMO licences, with the equivalent fit and proper person test, *since* his 2017 conviction for Perverting the Course of Justice. In response, Ms Thomas, of RSW, suggested that the relevant licensing authority had not in fact appreciated the nature of the conviction. The Tribunal has no evidence as to what factors the licensing authority took into consideration and it would be wrong to speculate as to why the decisions had been reached. Moreover, insofar as the 2014 Act provides that the Tribunal is entitled to take into account evidence that was not before RSW (let alone any other decision-making body), the Tribunal must approach the question fresh, based on the evidence before us.

The Tribunal’s determination

32. Having regard to the matters relied on by RSW which are additional to the Applicant’s conviction for Perverting the Course of Justice, while the Tribunal does not criticise RSW for referring to them, in the Tribunal’s view they add very little to the matter. Indeed, RSW accepted at the hearing that the parties would not have been before the Tribunal but for the 2017 conviction.
33. Turning to that conviction, it is accepted that the mere fact of a conviction falling within those categories listed within section 20(3)(a) of the 2014 Act does not of itself mean that a person necessarily cannot be a fit and proper person for the purposes of the 2014 Act – but is rather a factor to be taken into account. However, the Tribunal cannot ignore the seriousness of the conviction.
34. As set out in the Guidance (referred to above), the purpose of the fit and proper person test “*is to ensure that those responsible for letting and managing a property in the private rented sector are of sufficient integrity and good character to be involved in the management of the property to*

*which the licence relates. In addition, that they do not pose a risk to the welfare or safety of persons occupying the property". In deciding whether a conviction is relevant to a person being a fit and proper person, the authority "may wish to consider" (i) *the relevance of the conviction in relation to the applicant's character and integrity to let or manage residential properties*; (ii) *the seriousness of the conviction, in terms of impact, or potential impact, upon the residents and the wider community ...*; (iii) *the length of time since any conviction*; and (iv) *any mitigating circumstances*".*

35. It should be stressed that according to the Guidance, these factors *may* be taken into account in deciding whether a conviction is relevant in deciding whether a conviction is relevant to a person being a fit and proper person. As such, there is an element of discretion, although so far as this Tribunal is concerned, all factors identified by the Guidance should be and have been considered.
36. As to the four factors so identified in the Guidance: there is no dispute that the conviction was a recent one. With regard to mitigating factors, the Tribunal notes the volume of references provided on behalf of Mr Lubin, as well as the tenant surveys provided to the Tribunal at the hearing. In the Tribunal's view, such evidence provides a significant degree of mitigation when applying the fit and proper person test. Further, in the Tribunal's view, Mr Lubin answered questions put to him at the hearing honestly, and did not try to deny or downplay the significance of his conviction.
37. While Mr Jones sought to argue that RSW had not assessed the extent to which the conviction created a risk for tenants per se, the Tribunal nevertheless concludes that the conviction is a relevant one having regard to each of the first two limbs of the Guidance. Although no actual tenants were implicated by Mr Lubin, he did nevertheless use addresses of properties which he owned and let in his attempts to evade liability. Moreover, given the reference *to the wider community* in the Guidance, the Tribunal is mindful of the fact that Mr Lubin involved another person in his conduct, Mr Jeffreys.
38. Of principal concern is the fact that the offence is one of dishonesty and moreover, involved multiple incidents over a number of years. Whilst a single incident might be forgiven as being reckless or 'in the heat of the moment', the Tribunal is unable to overlook the recurring nature of the conduct when assessing whether the Applicant is a fit and proper person.

39. When all the evidence is weighed together, the Tribunal finds that the evidence and submissions on behalf of the Applicant do not go so far as to tip the balance in his favour. In the Tribunal's view, they are outweighed by the nature and circumstances of the conviction as highlighted above. Accordingly, notwithstanding the mitigation put forward on behalf of Mr Lubin, the Tribunal is unable to conclude that the Applicant is "*of sufficient integrity and good character*" to be granted a licence.
40. Ultimately, weighing all the evidence together, the Tribunal determines that the decision of RSW should be upheld, having regard to the reasons set out above and accordingly it follows that the Applicant's appeal must be dismissed.

Dated this 22nd day of November 2018

A handwritten signature in blue ink, appearing to read 'A Sheftel', with a stylized flourish at the end.

A Sheftel
Chairman