



**FIRST - TIER  
TRIBUNAL**

**PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : LON/00AD/HMR/2018/0001

**Property** : 188-192 West Street, Erith, Kent, DA8 1AN

**Applicants** : Eric Patrick Care Limited (Owner)

**Representative** : Mr E. Patrick (Managing Director)

**Respondent** : London Borough of Bexley

**Representative** : Mr M. Cooper (Team Leader; Property Licensing)

**Type of Application** : Appeal against refusal to vary Licence relating to House in Multiple Occupation; sections 64 - 67 of the Housing Act 2004

**Dates of Notice** : 22nd January 2018

**Date of Appeal application** : 17th April 2018

**Date & Venue of Determination** : 17th May 2018  
10 Alfred Place, London WC1E 7LR

**Date of Decision** : 16th July 2018

**Tribunal** : Judge Lancelot Robson  
Mr T. Sennett FCIEH

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**DECISION**

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## **DETERMINATION**

(1) The Appeal is allowed. The Notice to Refuse to vary the Licence for a House in Multiple Occupation dated 22nd January 2018 pursuant to Section 64 and schedule 5 (21) of the Housing Act 2004 is reversed.

(2) The Tribunal decided to vary the Licence Notice dated 22nd January 2018 by making the following amendments:

- a) Condition 8.5 of the Licence shall be deleted
- b) Condition 8.4. shall be varied as follows:

*“The Licence Holder will only allow the property to be occupied by persons placed there by Local Authorities pursuant to detailed agreements made between the Licence Holder and the relevant Authorities, which include terms relating to the supervision and support of the occupants, and which include reference to the necessity to reduce or avoid anti-social behaviour by the occupants or persons associated with them. The Council agrees to promptly share any information received by it relating to any such alleged anti-social behaviour, and is entitled to be reasonably informed as to what measures have been put in place to investigate any such allegations and, if necessary, actions taken to prevent a recurrence.”*

## **REASONS FOR THE TRIBUNAL’S DECISION**

### **Introduction**

1. This is an appeal by way of a paper determination made to the First-tier Tribunal by Eric Patrick Care Limited (the Applicant) the tenant of the property owner against the refusal of the Respondent to vary the terms of HMO Licence dated 22nd January 2018 (which was itself a variation by the Respondent of a previous HMO Licence dated 12th January 2018).
2. The background to this appeal differs somewhat from the norm. The evidence shows that the Applicant currently has a five year lease of the property and provides accommodation for homeless persons under the age of 18 (i.e. minors) placed in its care by a number of local authority Children’s Services, (including the Respondent authority, although that is not germane to the issue before the Tribunal). The Applicant formerly had a five year HMO Licence, which it applied to renew, apparently in good time on 9th March 2017. For reasons which are not entirely clear, the Respondent did not deal with the application before the licence expired on 6th July 2017. A proposed licence was issued on 14th July 2107. The Applicant made representations about that proposal, which the Respondent agreed to vary but in the fresh draft issued on 13th September 2017 inserted new (and extensive) conditions purporting to deal with anti-social behaviour by the occupants. The Applicant made observations on this new proposal. A further proposal was made by the Respondent on 19th December 2017, which the Applicant only received on 9th January 2018. The Respondent issued a final licence on 12th January 2018, having received no observations on its letter of 19th December 2017. The Applicant made its observations on that proposal on 16th January 2018, which were rejected as being too late. The Respondent then noticed an error in the

Licence, and issued a corrective Licence on 22nd January 2018, without commenting on the observations of 16th January 2018. For all intents and purposes, the material terms of the the Licence dated 22nd January 2018 are the same as those in the Licence dated 12th January 2018.

### **Applicant's Case**

3. The Applicant's stated case dated 17th April 2018 essentially followed its observations made on 16th January 2018. It particularly objected to Conditions 8.4 and 8.5 in the licence, which state:

*"8.4 The licence holder is to obtain a reference or make a risk assessment for any new tenancy. References or risk assessment (sic) need to provide sufficient detail as to the tenants past record to show the tenant has not been responsible for anti-social behaviour and include the name and address of the person providing it.*

*8.5 If tenants are unable to provide a reference for good reason for example because they were previously homeless, it is their first tenancy or the landlord is unwilling to provide one in this case the tenant should be asked to sign a declaration confirming they have been informed of and understand the need to comply with the tenancy agreement and not cause anti-social behaviour"*

4. During preparation for the determination, the parties negotiated further, and their positions changed. On 28th March 2018 the Respondent proposed amendments to Condition 8.4 so that it would read as follows:

"8.4 The licence holder will:

8.4.1 obtain a reference or make a risk assessment for any new tenancy. References or risk assessment need to provide sufficient detail as to the tenants past record to show the tenant has not been responsible for anti-social behaviour and include the name of the person providing it; or

8.4.2 submit a monthly report to the respective Local Authority for each tenant residing in the property from time to time. The Licence holder will also provide supervision, guidance and support to each tenant during the period of their occupancy of the property. The Licence holder will bring any reports of incidents of anti-social behaviour to the respective Local Authority's attention as well as that of the Police and the Local Authority's Designated Officer as appropriate."

5. The Applicant replied to this proposal on 29th March 2018. Its position was reiterated and amplified in its statement of 17th April 2018. It submitted that:

a) the occupants of the property were vulnerable children placed on a temporary basis by various Local Authorities. Some might be placed with children of their own. No tenancy contract existed between the Applicant and the children, because it was not feasible, and the children were under legal contractual constraints due to their age. They had no security of tenure and were subject to removal by the relevant local authority on a day's notice. The children did not have exclusive possession rights to occupy the property for a specific term and

- did not pay rent to the Applicant. Each local authority paid the Applicant an agreed daily rate for the “placement’s” occupancy of a bedroom and shared use of communal facilities. The daily rate included an element for supervision, support and guidance with specific regard to issues around living in a safe and secure environment. This involved regular monitoring and monthly progress reports, and liaising closely with nominated social workers and others.
- b) If the occupants were not tenants then the provisions in the HMO licence referring to tenants did not apply at all.
  - c) If conditions 8.4 and 8.5 did not apply, the Applicant apologised for not being qualified or able to offer replacement anti-social behaviour conditions for the Tribunal, but made the following points:
    - (i) The Respondent was paying too much attention to the anti-social behaviour conditions. About a third of the conditions in the Schedule to the licence were devoted to anti-social behaviour, which was excessive.
    - (ii) There had been no proven instances of anti-social behaviour by the placements cared for by the Applicant since the property had become an HMO in 2012. The Applicant considered that the allegations made in correspondence were alarmist and misconceived.
    - (iii) The requirements in Conditions 8.4 and 8.5 could be construed as a gross invasion of the occupants’ privacy, leading to distrust between them and the Applicant, and possible legal action against the Applicant if “reports of incidents of anti-social behaviour” proved unfounded. There were clear procedures in the care documents in place between the various local authorities and the Applicant. It was unnecessary to have further overriding obligations to provide the Respondent with such confidential information. The Applicant was unaware whether the Respondent had made other local authorities with placements in the property fully aware of its additional requirements, and whether they had been given the opportunity to examine their impact on their own obligations.
    - (iv) If Condition 8.4 was applied to all HMOs in the borough, licence holders would be obliged to provide supervision guidance and support to adult tenants, which was submitted to be ridiculous.
    - (v) Condition 8.5 was unnecessary, as these matters were already dealt with as between the Applicant the local authorities and the placements.
6. The Respondent authority in written submissions dated 1st May 2018 submitted;
- a) The Applicant had not explained why in law the the children did not occupy the premises as equitable tenants. Gillick v West Norfolk and Wisbech AHA [1986] AC 112 (HL) was authority that they could do so.
  - b) The Respondent had received information from the Police intelligence, and its own local Anti-Social-Behaviour Team that there were problems emanating directly from No 188 West Street. As the Applicant had requested an increase in the numbers of occupiers, the Respondent took the opportunity to add the conditions relating to anti-social behaviour.
  - c) Under Section 67(1) of the Housing Act 2004, a licence may include appropriate conditions for regulating the management, use and occupation of the house concerned. Section 67(2)(b) permits conditions to prevent or reduce anti-social behaviour.
  - d) The existing anti-social behaviour conditions in the previous licence were considered insufficient. The Respondent now has an approved (after the

application was made) designated selective licensing scheme and this property is within the area designated. The licensing conditions 8.4 and 8.5 will appear on all HMO property licences as they were approved by the Respondent authority on 10th April 2018.

- e) The Respondent attempted mediation, as requested by the Directions. It had attempted to accommodate the Applicant's concerns by modifying paragraph 8.4 to reflect what the Applicant stated was already its practice. Paragraph 8.5 was unchanged. The Respondent did not consider it was placing any additional burden on the Applicant. The Applicant seemed happy with the amendments in his reply on 16th April 2018.
- f) Thus the Tribunal's decision was required on the tenancy issue, and if the conditions could be applied.

### **Determination**

- 7. The Tribunal notes that this is a determination without a hearing. If there had been a hearing, the Tribunal might have considered other issues with the parties. However, particularly since it has been advised by the Respondent that the Applicant has given notice to its landlord due to physical problems with the premises, the Tribunal has decided merely to deal with the issues the parties have raised. Thus it should not be inferred that its determination implies approval of matters not specifically dealt with in the determination.

### **The Applicable Law**

- 8. Section 254(2)(e) of the Housing Act 2004 makes it clear that a tenancy is not necessary. The relevant part of the section 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.”

9. Thus no tenancy is necessary for the property to be an HMO. The Tribunal also considered that the Respondent's submission that an equitable tenancy in favour of the children existed, was unsound. Gillick (supra) dealt with a very particular subject matter, and it is now well settled law that for a tenancy to exist, there must be exclusive possession, a term and (normally) a rent (see e.g. Street v Mountford [1985] AC 809.) In this case, the Tribunal had been given little information as to the detailed terms of the arrangement, but as it could be terminated by a third party on 24 hours' notice given at any time, there appeared to be no period of tenancy (i.e. a term). If there was no tenancy of any kind, then most, if not all, references in the licence conditions to a tenant or tenancy would not be binding on the occupants or the manager, and of no practical utility.

10. On the other hand, as noted in Section 254(2)(e), it is not necessary for a tenancy to exist for a property to be subject to the HMO legislation. It was apparently common ground in this case that there was “other consideration” in respect of the occupants' occupation.

### **Findings**

11. The Tribunal thus considered that a basic premise in the licence conditions was defective, and that they should be extensively redrafted. However this was a task which was inappropriate for the Tribunal to carry out in this application, apart from observing that;

a) conditions which referred to “landlord”, “tenant” and “tenancy” require amendment to prevent their application from being restricted to tenancies, or otherwise impose impossible or absurd requirements on licence holders managing non-tenant occupiers.

b) other conditions should not impose unnecessary or repetitive administrative burdens, or require a licence holder to breach occupants' or third parties' legal rights to have certain information kept confidential by the Licence Holder.

c) the Tribunal decided to limit its detailed consideration to the terms of Conditions 8.4 and 8.5.

12. Considering those conditions, the Tribunal noted that it was appropriate for the Respondent to try to prevent anti-social behaviour, but that it was in danger of

becoming over-involved in complex management decisions relating to the occupants, for which its HMO team was unlikely to be qualified, and also use the same or similar conditions to impose standard conditions upon all properties in the area, which the Tribunal considered likely to create more problems than would be solved. “One size fits all” is inappropriate to cover the circumstances and activities of all licence holders.

13. Contrary to the Respondent’s submission, the Applicant had not accepted its suggested redrafting of Condition 8.4, or 8.5. In its letter of 16th April 2018. In the third paragraph it specifically complained that the Respondent had not replied to certain other matters raised in the application and the Applicant’s letter of 29th March 2018. It referred the Respondent to its statement of case shortly to be served (noted above).

14. The Tribunal decided that the Respondent’s Conditions 8.4 and 8.5 were not appropriate, either as originally notified on 22nd January 2018, or proposed as amendments, and the Tribunal accepted the Applicant’s submissions that some of the requirements appeared likely to endanger the occupants’ confidentiality and/or unnecessarily increase its reporting burden. This particular problem appeared to arise from the Respondent’s apparent wish to replicate at least parts of the (apparently unseen) agreements which the Applicant had with its client local authorities (acting in their care capacity) and impose them as conditions to the HMO Notice, for enforcement by the Respondent’s HMO Team. The Tribunal considered that this was not an appropriate use of the Respondent’s powers.

15. In the absence of sufficiently considered proposals from either party, the Tribunal decided that Conditions 8.4 and 8.5 should be deleted, and a new condition 8.4 inserted as noted below.

16. Thus the Tribunal decided that the Appeal should be allowed. The HMO Notice of refusal to vary the Licence terms dated 22nd January 2018 is reversed.

17. The HMO Notice dated 22nd January 2018 shall be varied as follows:

- a) The notice shall be substantially redrafted to address the general matters raised in paragraph 11 above relating to all Conditions in the Schedule.
- b) Conditions 8.4 and 8.5 shall be deleted.
- c) A new Condition 8.4 (Within a Condition 8 appropriately amended to avoid restricting its application only to tenants) shall be inserted as follows:

*“The Licence Holder will only allow the property to be occupied by persons placed there by Local Authorities pursuant to detailed agreements made between the Licence Holder and the relevant Authorities, which include terms relating to the supervision and support of the occupants, and which include reference to the necessity to reduce or avoid anti-social behaviour by the occupants or persons associated with them. The Council agrees to promptly share any information received by it relating to any such alleged anti-social behaviour, and is entitled to be reasonably informed as to what measures*

*have been put in place to investigate any such allegations and, if necessary, actions taken to prevent a recurrence.”*

**Next steps**

18. If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (Rule 52 (2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

**Tribunal Judge:**

**Lancelot Robson**

**16th July 2018**