



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00MR/HML/2019/0002

Property : 5 Ophir Road, North End, Portsmouth
PO2 9EL

Applicant : Canny Property Solutions Limited

Representative : Lucy Fryer

Respondent : Portsmouth City Council (Private
Housing)

Representative : Michael Conway

Type of Application : Appeal in respect of an HMO licence

Tribunal Member(s) : Judge Cohen
Mr D Banfield FRICS

Date and venue of hearing: Havant Justice Centre

Date of Decision : 11 March 2019

DECISION

Background

1 On 28 November 2018, the Tribunal received from Canny Property Solutions Limited (the Applicant) an appeal to vary the terms of a licence dated 13 November 2018 (the Licence) relating to 5 Ophir Road, North End, Portsmouth, Hants PO2 9EL (the Property) issued by Portsmouth City Council (the Respondent) as the local housing authority, in accordance with section 64 of the Housing Act 2004 (the Act). The Licence licensed the Property as a House in Multiple Occupation (HMO) following an application made to the Respondent pursuant to section 61 of the Act.

2 This appeal was concerned with one condition of the licence. This condition related to a second floor room, bedroom 7, as follows:

“Special conditions relating to the provision of a licence for this property

The licence holder will carry out the following works, within the times set out below, to the satisfaction of the Council.

Remove washing and bathing facilities located in the room marked as bedroom 7 on the plan provided with the application. Use the additional vacant space created to increase the size and layout of bedroom 7 so as to give a safe satisfactory living environment.

To be completed within 12 months”.

3 The jurisdiction of the Tribunal arises from paragraph 31 part 3 Schedule 5 to the Act. Paragraph 34(3) gives the Tribunal the power to confirm, reverse or vary the Licence.

Directions

4 Directions were issued on 8 January 2019. In accordance therewith, the parties filed a bundle of relevant documents.

Hearing

5 At the hearing, the Applicant was represented by its director, Ms Fryer. The Respondent was represented by two of its officers, Mr Conway and Ms Hardwick.

Description of the Property

6 The Property in general and bedroom 7, in particular, are described in the documents produced to the Tribunal in text, by drawings and plans and in photographs.

7 The Property is a Victorian brick-built terraced house. In 2017-2018 it was extended, modified and renovated to create a seven bedroom, seven bathroom house for multiple occupation. The current layout comprises two bedrooms both with ensuite bathrooms on the ground floor together with communal open plan kitchen/dining/sitting room. Three bedrooms, two of which have ensuite bathrooms, are on the first floor. The remaining bedroom uses the main shared bathroom on that floor. The second floor comprises two bedrooms both with ensuite bathrooms, one of which is bedroom 7. Outside there is a front garden with bicycle shed and a rear garden with a large outdoor building used for additional storage.

8 Bedroom 7 is located on the second floor which formerly was loft space. Bedroom 7 is attractively laid out and contains its own ensuite washing facility.

9 Mr Leighton of Access Architects wrote an undated report on the instructions of the Applicant describing bedroom 7 in terms which were not challenged by the Respondent and which the Tribunal accepts, as follows:

- 1 total room area is 12.32sqm;
- 2 room area where the ceiling height is in excess of 1.5m is 8.76sqm;
- 3 room area where the ceiling height is in excess of 1.8m is 6.51sqm;

- 4 the down stand section of ceiling (similar to a beam) has a height of 2210mm; and
- 5 the boxing and chimney area has been excluded from the measured room area.

Mr Leighton's report annexed drawings showing the dimensions in detail which supported his findings.

- 10 An assessment of the Property was performed by the Respondent by reference to the Housing Health and Safety Rating System. The assessment was performed by a technical officer following an inspection on 23 July 2018 and was recorded in a report dated 8 August 2018. The assessment recorded that the Property was accommodating university students. So far as is also relevant to this appeal, the assessment report stated:

"Crowding and space

Deficiencies

Bedroom #7 located in the roof eaves is too (sic) small and an inappropriate shape to provide a safe and useable environment

...

Hazard Assessment

Rating H(21)

Likelihood justification in relation to the rating

The likelihood of an occurrence has been increased due to the following factors

Bedroom size – where the floor to ceiling height is less than 1.5m this space is classed as unusable and cannot be included within the overall room size. In bedroom #7 there is "unusable" space to accommodate a desk, chair and double bed. Due to the configuration of the room, door clearances and the ensuite there is no alternative area in which to accommodate this furniture.

The lack of space available in the bedroom and the inability to re-configure the furniture to a personal preference can have a psychological impact on the occupant.

There is no average vulnerable group associated with this hazard, so consideration is given to the occupant either in situ or intended – in this Property the preferred tenant is a student, who will require a suitable area to study. There is no separate designated study/living area within the Property – there is an open planned kitchen, dining/living room located on the ground floor which is a thoroughfare to the garden and not suitable as a study area.

Health justifications in relation to the rating

There is no evidence to suggest that the outcome of harm is greater than the national average.

Schedule of works

(1) re-purpose the room for an activity other than a bedroom/sleeping area

Timescales proposed (1) 19 September 2018”

- 11 On 20 September 2018 the technical officer wrote to the Applicant with a notice of intention to grant a licence for an HMO under Schedule 5 Part 1(1) of the Act. The draft licence enclosed contained a special condition in the terms now under appeal, say for the time for completion of the works required for six months.
- 12 On 19 October 2018 Mr Conway wrote to the Applicant referring to an inspection he had undertaken on 18 October 2018. He stated that bedroom 7 was not suitable for occupancy but the alternative solutions investigated had not resolved the issue. As the bedroom was occupied with a tenant on a 12 month tenancy, the draft special condition would be amended to allow 12 months, rather than six months, for completion of the required works. A draft licence with 12 months for completion was issued with a further notice of intention to grant.

13 On 9 November 2018 the Respondent’s licensing team leader, private sector housing team, Mr Conway wrote to the Applicant enclosing a house in multiple occupation licence for the Property dated 13 November 2018. This licensed the Applicant to operate the Property as a House in Multiple Occupation for occupation by no more than seven persons under section 61 of the Housing Act 2004. The licence was for a period of five years expiring on 12 November 2023 (the licence erroneously said 2013). The licence was awarded subject to 17 general conditions and the one special condition set out in paragraph 2 above.

14 The notice of decision stated that the reason for making the decision to grant was:

“The Property was assessed under Part 1 of the Act crowding and space on 23 July 2018 and it was determined that room 7 as detailed on the plan provided was not of a suitable size and layout to provide a safe useable environment for a sleeping occupant. Negotiations have failed to mitigate the risks identified and special conditions are attached to the licence (to) ensure the suitability of the room for occupation. The special condition identified does not increase the potential for making a person homeless as the room can continue to be used with adjustments detailed. The removal of the ensuite from room 7 does not contravene current statutory amenity requirements for a licence-able property as detailed in SI2006 No 373 Schedule 3.”

15 On 28 November 2018 the Applicant filed its application to the Tribunal relating to the licensing of the Property as an HMO. The grounds of application made it clear that the Applicant’s appeal was against the special condition relating to bedroom 7. The Applicant relied on 25 individual grounds, to which the Respondent responded with a statement of reasons to which the Applicant replied. Those 25 grounds, in overview, concerned:

- (1) the detailed dimensions of bedroom 7;
- (2) the suitability of bedroom 7 as it now is; and

(3) the relevant law and guidance.

16 The Applicant sought the variation of the licence to delete the special condition. The Respondent contended that the special condition was appropriate.

17 The Tribunal was shown, without objection from the Respondent, a letter from the current tenant dated 22 January 2019 which stated:

“I moved into this room at the end of August 2018, so I have lived here for around five months. I love this room. My room has a double bed which opens up allowing a lot of storage. I have a triple wardrobe which accommodates all of my clothes, and I have two chest of drawers, a desk (/make up table!) and chair and still plenty of room to walk around and carry out various activities such as getting ready and even “home exercises” such as sit ups and stretches in the morning! I also have an ensuite which is also a very good size and also provides living space....my room in 5 Ophir Road is the best room I have had during the 12 years I have lived in Portsmouth....I have more than enough room and space to carry out all activities one should expect to carry out in their bedroom. I have never for one moment wished I had more space, or wish the ceiling was any different. I do not struggle to stand up straight – even when I am going to sit at my desk or get anything out from my chest of drawers closest to the slope.”

Submissions

18 At the outset of the hearing, the Tribunal asked Mr Conway to confirm whether the case for the Respondent was based on dimensions for bedroom 7 that did not comply either with statute or guidance. Mr Conway told the Tribunal that the Respondent’s case was that given the bedroom had a sloping ceiling rather than perpendicular walls, the Respondent was concerned about the t shape and usability of bedroom 7. The Respondent was seeking to apply the guidance as to suitability of the bedroom following the 23 July 2018 assessment .

19 Mr Conway referred to the following documents.

20 In September 2018 the Respondent published “Standards for Houses in Multiple Occupation” which was a guide to understanding the basic standards for Houses in Multiple Occupation. The document was produced by the Respondent to assist owners and tenants who manage and reside in HMO’s within the City. This guide included the following:

“Space

It is important to ensure that all HML’s in the City offer a good standard of accommodation and provide a safe living environment. All rooms shall be of a convenient, accessible and a useable shape for their intended purpose.

When ascertaining the size of any room attention must be paid to the “usability” of the space, along with the height and shape of the room.

All rooms should have a minimum floor to ceiling height of 2.3m over 75% of the room and any areas under a ceiling height of 1.5m is unusable space.

Where a room has beams the height from the floor to the beam must be a minimum of 2m. Unusable space also include chimney breasts, circulation spaces behind doorways and around staircases.”

The guide specified minimum space requirement for a home for seven people of 6.51m² for a bedroom.

21 Mr Conway submitted that the Respondent’s concern was that bedroom 7 did not have the functionality referred to in the September 2018 document. Mr Conway also referred to the Operating Guidance for the Housing Health and Safety Rating System published by the Office of the Deputy Prime Minister in February 2006 which contains guidance about inspections and the assessment of hazards given under section 9 of the Act. This guidance refers at page 91 to the psychological requirements for space, security, light and noise . At paragraph 11.06 this guidance records that lack of space and overcrowded conditions have been linked to a number of health outcomes, including psychological distress and mental disorders. At paragraph 26.18, matters

relevant to the likelihood of an occurrence to the likelihood of an occurrence and to the severity of the outcome include:

j) Low headroom to doors – well under 1.9m

k) Low beams and ceilings – well under 1.9m

22 Paragraph 11.08 notes that there should be sufficient space to provide for social interaction between members of a household, while allowing for private time away from other household members. At section 26 the guidance refers to the risk of physical injury from trapping body parts in architectural features, such as trapping limbs or fingers in doors or windows; and striking (colliding with) objects such as architectural glazing, windows, doors, low ceilings and walls. Mr Conway was concerned that the access to the mechanism for opening the dormer windows invited some risk of such injury.

23 In March 2015 the Department of Communities and Local Government published “Technical Housing Standards – Nationally Described Space Standard” which is the standard dealing with internal space within new dwellings and is suitable for application across all tenures. It set out requirements for the gross internal area(GIA) of new dwellings as defined level of occupancy as well as floor areas and dimensions for key parts of the home, notably bedrooms, storage and floor to ceiling height. The standard requires that:

(C) In order to provide one bed space, a single bedroom has a floor area of at least 7.5m² and is at least 2.5m wide.

(F) Any area with a head room of less than 1.5m is not counted within the GIA unless used solely for storage.

(I) The minimum floor to ceiling height is 2.3m for at least 75% of the GIA.

It was accepted that the NDSS applies to new dwellings and therefore would not apply directly to Property.

24 In July 2018 (after planning permission had been granted for the conversion of the Property) the Respondent published a revised Supplementary Planning

Document (SPD) which set out how policies in the Portsmouth Plan relating to houses in multiple occupation would be implemented. The revised SPD details how the Respondent will apply its planning policy on HMO's to all planning applications for HMO's. The revised SPD provides at paragraph 1.17:

“Whilst acknowledging that the National Described Space Standard (NDSS) relates to new dwellings, nevertheless the Respondent will require that bedrooms comply with this space standard, as set out below, or any subsequent standard replacing the NDSS. Planning permission will be refused for all HMO's that fail to provide adequate community or amenity space for occupiers in accordance with the standards set out below.”

- 25 At paragraph 1.18 the bedroom space standard is that single bedrooms must have a minimum gross internal floor area (GIA) of 7.5m² with a minimum width of 2.15m. Any area with a headroom of less than 1.5m is not counted within the GIA unless used solely for storage. Any other area that is used solely for storage and has a headroom of 900 to 1500mm is counted as 50% of its floor area and any area lower than 900mm is not counted at all.
- 26 At paragraph 1.21 a built-in wardrobe counts towards the GIA and bedroom floor area requirements but should not reduce the effective width of the room below the minimum widths set out above.
- 27 Mr Conway's concern was that the majority of the living area was not of a suitable height, being under a sloping ceiling. This affects the usability of the room, notwithstanding its perimeter dimensions.
- 28 It would be acceptable to the Respondent if the area of the ensuite in bedroom 7 was incorporated not as an ensuite but as additional living space. There was no objection to the provision of ensuite facilities if the footprint of the room lends itself to that arrangement. There was an issue if the ensuite took up habitable space.

- 29 The ceiling heights by the light wells were less than the 1.9m referenced in the Housing Health & Safety Rating System, which was a concern having regard to the average height of the population being 5' 9".
- 30 Mr Conway noted that both windows are roof lights that open into usable space. The photographs of the windows taken before and after letting produced to the Tribunal show the need for a taller person to bend over to open the window. If the ensuite was moved, it would be possible to arrange the room to provide full height access to the window. Also, the majority of the drawers in the furniture now in bedroom 7 are not accessible from height.
- 31 The adjoining cupboard was not taken into account as storage space because the cupboard includes a boiler. Mr Conway considered that the ensuite could be removed in five days as all that was required was work to a studwork wall, not a masonry wall.
- 32 Ms Fryer's case was that bedroom 7 was both usable and suitable in that the tenant could sleep, stand, sit, walk, move around and store provisions within it. The furnishings were a 4' bed with storage, a desk and associated chair, bedside table with drawers and a chest, a three door wardrobe, and two more chests of drawers. There was plenty of room for storage and furniture. Cupboard space adjoining bedroom 7.
- 33 Ms Fryer accepted that a person of 6' tall would not choose to occupy bedroom 7 but many people are not 6' tall. Ms Fryer submitted that if the ensuite was removed, all that would be gained is 3sqm of space. How would it be used. If a tenant was asked how that space should be used they would ask for washing facilities.
- 34 Faced with the choice of smaller ensuite facilities or larger washing facilities requiring one to go downstairs at night, it would be reasonable to choose smaller ensuite facilities. For practical purposes, the occupier of bedroom 3 had exclusive use of the washing facilities on the first floor.

35 A bedroom without washing facilities was less usable than a bedroom with an ensuite. The ceiling height of 1.8m was sufficient. A ceiling height of 2.3m requires a step ladder to change a light bulb.

36 The windows can only be opened within the light well and are safe.

37 The removal of the ensuite would include knocking tiles off and knocking down a stud work wall. It would not be practicable to perform the work with the tenant in situ. Although the special condition enabled the removal of the ensuite to take place upon the termination of the tenancy, the tenant had shown no sign of wishing to move and would be extremely upset if given notice to leave.

The Law

38 With effect from 1 October 2018 a licence for an HMO must ensure that the floor area of any room in an HMO used as sleeping accommodation by one person over 10 years is not less than 6.51sqm. (see The Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018 (SI 2018 No 616). It was agreed between the parties that this standard was met.

39 The Tribunal was referred to two previous decisions to the First-tier Tribunal and one of the Upper Tribunal. The former are simply illustrations of the principles being applied to particular sets of facts. We bear in mind the guidance in the latter (*Clark v Manchester City Council* [2015] UKUT 129 (LC)) of Mr. Martin Rodger QC, Deputy President of the Upper Tribunal at [40] that “the appeal is a “complete rehearing”, but not one which disregards entirely the decision of the local housing authority. The Deputy President said at [41]

“On issues which depend on weighing and assessing a number of different factors ... reasonable people may well arise at different conclusions. On a rehearing an appellant is entitled to expect that the First-tier Tribunal make up its own mindand it is entitled to have

regard to the views of the local housing authority whose decision is under appeal.”

Site visit

40 At the conclusion of the hearing Ms Fryer requested the Tribunal to make a site visit to inspect the Property. Mr Conway was content to leave it to the Tribunal to decide. The Tribunal decided that the quality of the evidence including photographs, plans and measurements was such that, an inspection of the Property was not necessary.

Discussion

41 The origin of the special condition is the assessment by the Respondent’s technical officer following her inspection. Her concern was not that bedroom 7 failed to comply with quantitative requirements. Rather it was two qualitative concerns as to the absence of any alternative area in which to accommodate furniture and that the lack of space available in the bedroom. This brought in its train the inability to re-configure the furniture to a personal preference, which carries the risk of a psychological impact on the occupant.

42 Therefore, what is required is an assessment by the Tribunal of the qualitative effects of bedroom 7 having in part a sloping ceiling and the presence of an ensuite rather than additional living space. The Tribunal is satisfied that the configuration as at present is both objectively attractive and functionally useful. The Tribunal accepts the observation of Ms Fryer that the occupant can perform all usual living activities in this bedroom. It may be that bedroom 7 has an over generous provision of furniture, but that is a matter for the current occupant.

43 The plans and photographs, supplemented by the current tenant: letter, describe accommodation which is without doubt suitable. This is subject to one caveat. The Tribunal accepts that not everyone would choose this room. The sloping ceiling of part makes the room unsuitable for taller members of the population. That does not make bedroom 7 unsuitable in general terms.

The Tribunal considers that the provision of ensuite washing facilities in the context of bedroom 7 is an advantage and one that can be properly allowed to be enjoyed having regard to the area, height and layout of the bedroom.

44 As the Housing Health & Safety Rating Standards recognise, the Tribunal accepts that there will be locations in which the lack of usable space could cause psychological harm to an occupier. Not so in bedroom 7.

45 The room is attractively arranged and provides a facility that is suitable. To require the removal of the ensuite would be a waste of time, effort and money which would not serve any statutory purpose. Of course, if the arrangements for bedroom 7 were not suitable, requiring the removal of the ensuite facility, the condition would have been legitimately imposed and this appeal would have failed. However, that is not the case. The suitability of bedroom 7 for occupation in the HMO which is the Property is plain to see. Bedroom 7 provides a safe, useable environment for its occupier.

46 Accordingly, we allow this appeal and direct that the licence is varied by the deletion of the special conditions.

Costs

47 The Applicant provided details of its costs which it intended to claim if the appeal was successful. However, the power of the Tribunal is limited to awarding wasted costs ; see rule 13(1) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. Although the Respondent 's position was not supported by the Tribunal it does follow that it becomes liable for wasted costs. Accordingly, we make no order for costs.

The Tribunal

1. RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application

to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.