RPT/WAL/HMO/1

THE RESIDENTIAL PROPERTY TRIBUNAL FOR WALES

IN THE MATTER OF THE HOUSING ACT 2004

AND IN THE MATTER OF 11 DIANA STREET ROATH CARDIFF CF 24 4TS

TRIBUNAL	Mr D J Evans LLB LLM Mrs R Thomas MRICS Mrs E C Calvin Thomas
APPELLANTS	Mr Richard Matheson Mr Gareth John
RESPONDENT	The County Council of the City and County of Cardiff
PROPERTY	11 Diana Street, Roath, Cardiff CF24 4TS

DECISION

1 INTRODUCTION

1.1 This is an appeal by Richard Matheson and Gareth John (the Appellants) against the decision of the Cardiff County Council (the Respondent) to impose certain conditions in a Licence granted under the Housing Act 2004 (the Act) permitting the Mr Gareth John (the Licensee) to operate number 11 Diana Street, Roath, Cardiff CF24 4TS as House in Multiple Occupation (HMO).

1.2 The Appeal was heard on the 9th and 12th of March 2010 at the Tribunal Offices, First Floor, West Wing, Southgate House, Wood Street, Cardiff CF10 1EW. The Appellants appeared in person and the Respondent was represented by Mr Richard Grigg, Solicitor, together with Mr S Tudball, the Service Manager responsible for HMO licensing, and Miss Angharad Thomas, an Environmental Health Officer.

1.3 Each of the parties had produced a bundle of documents totalling over 750 pages. In this decision we refer to those in the Appellants' bundle by adding the letter 'A' after the page number and to those in the Respondent's bundle by adding the letter 'R'. Additional pages or the occasional unnumbered back of a page will be identified by using letters 'a', 'b' and so on.

1.4 The parties agreed to deal with each licensing condition or group of conditions separately. However, we have considered evidence given in respect of one condition in relation to another condition where we have felt that evidence was relevant.

1.5 The parties also agreed that there were no preliminary issues for us to consider, that the Property was an HMO, that it was required to be licensed by the Respondent and that the only matters to be determined were the conditions set out in the Appellants' grounds of appeal. It was further agreed that the appeal was in effect a rehearing of the Appellants' application and that our powers were to confirm, reverse or vary Respondent's decision (see paragraph 34(3) of the 5th Schedule to the Act.)

1.6 During the course of this decision, we refer to a number of statutory instruments. In order to make the decision less cumbersome we shall refer to them as follows:

"the Licensing Regulations" – The Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions)(Wales) Regulations 2006

"the Management Regulations" – The Management of Houses in Multiple Occupation (Wales) Regulations 2006

"the Additional Regulations" – The Licensing and Management of Houses in Multiple Occupation (Additional Provisions)(Wales) Regulations 2007

1.7 Prior to the hearing, we inspected the Property in the presence of the Appellants. The Respondent's representatives were also present.

2 INSPECTION

2.1 The Property is a three storey terraced house situated in a side road leading to Albany Road, one of the principle shopping centres, in the Roath area of Cardiff. It would originally have been built over 100 years' ago as a substantial family residence with a small enclosed back garden. There is a plan showing the layout of the Property on page 294R. The only obvious discrepancy is that the central heating boiler is located on the back wall above the work top next to the window. There is also no door between the lounge and the kitchen, a matter which will be referred to later.

2.2 The house is double glazed with upvc window frames and has full gas fired central heating. The kitchen houses a cooker combining an electric oven with a gas hob. There is a recycling cooker hood over the hob. There are also a washing machine and a microwave oven. The boiler is vented directly to the outside. There is a heat detector in the kitchen and smoke alarms in the bedrooms. We could not fail to observe, however, that the smoke alarm in back bedroom on the first floor had been dismantled.

2.3 Although the internal masonry walls remain, those adjoining the hall and the landings are mainly the original lath and plaster. Some of these between bedrooms have been replaced by stud partitioning. The doors are pine with what seemed to us to be thin pinewood panels although intumescent strips have been added. It was also noted that part of the first floor landing is now directly above the lounge so that it is important to ensure that the necessary fire protection is in place in the lounge ceiling/landing floor area.

3 HEARING

3.1 At the commencement of the hearing, we observed that a number of additional documents had been submitted and that passages from them, including the names of recipients had been obscured. We were concerned as to the admissibility of such documents. The parties explained that the documents had been supplied to the Appellants by the Respondent under the Freedom of Information Act and that they were content that they should be admitted in their redacted form.

3.2 Mr Matheson acted as spokesperson for the Appellants. He gave details about his background in fire safety detailing his experience and qualifications. He told us that he wished to be treated in accordance with the Act, but in his view the Respondent seemed more intent on doing what it wished to do. He told us that this was the Appellants' second appeal. They had been successful on a previous occasion because the Respondent had failed to adopt the correct procedure for inspections (RPT/HA04/HMO/1).

3.3 On the 8th September 2009, the Respondent issued to the Licensee a draft Licence subject to a number of Conditions (p35A). On the 14th September, the Licensee submitted representations objecting to certain Conditions (p34A). On the 15th October, the Council issued the Licence in its final form in all material aspects incorporating the same Conditions

as in the draft (p25A). It is against a number of those conditions that the Appellants now appeal.

3.4 There were 6 grounds of appeal:

(a) Conditions 9-12 (Waste) and Condition 20 (Garden)
(b) Condition 18 (Repairs)
(c) Appendix B (Ventilation)
(d) Appendix B (Separate WC)
(e) Appendix A (Risk Assessment)
(f) Appendix A (Fire Protection)

We shall deal with the Waste Conditions together as one item and the Garden Condition as a separate item. The two appeal points Appendix A both refer to fire precautions and we shall deal with them together.

3.5 Both parties submitted very full evidence and documentation in support. Their oral evidence in many respects followed along the same lines as the written evidence. We shall merely summarise therefore the principle points made by the parties rather than set out the evidence. The fact that we may not refer to any particular piece of evidence or document does not mean that we have overlooked it. We have considered all the documents submitted by both parties as well as the oral evidence.

4 WASTE - CONDITIONS 9, 10, 11 and 12

9. "The licence holder shall ensure that all tenants are fully aware of their responsibilities with respect to cleanliness of gardens, yards and forecourts"
10. "The licence holder shall provide suitable receptacles or facilities for the storage of waste prior to disposal. One refuse bin with a capacity of not less than 90 litres shall be provided for each 5 occupants"
11. "Any waste arising from building works at the property shall not be allowed to accumulate within the curtilage of the property or near to it. All such waste shall be removed to a suitably licensed refuse facility as soon as is reasonably practicable"
12. "Unwanted furniture, appliances and other items shall not be permitted to accumulate within the yards, gardens or forecourts of the property. Such items will be removed to a suitably licensed refuse facility as soon as is reasonably practicable. Landlords shall advise tenants of the Council's bulky household refuse collection service for such items"

4.1 As far as condition 9 was concerned, Mr Matheson submitted that:

(a) The Respondent cannot apply a blanket set of conditions. He drew our attention to the Public Register of Licensed Premises – HMO Licensing (Mandatory) and the three examples on pages 48A, 49A and 50A which showed that the same conditions were being applied to all three properties.

(b) Section 67 of the Act, which empowers the Respondent to attach conditions to a licence, has to be read in conjunction with section 64(3)(a). The latter relates only to the attachment of conditions to make the property suitable to enable it to be granted a licence. Therefore if the Property was suitable, as he submitted was the case, there was no power to attach further conditions.

(c) The issue was covered by regulation 10(e) of the Management Regulations. Regulation 10 states that "every occupier of the HMO must...(e) store and dispose of litter in accordance with the arrangements made by the manager under regulation 9". The condition is therefore unnecessary.

(d) In any event the tenants at the Property all sign a model agreement which covers the point.

4.2 With regard to conditions 10, 11 and 12, Mr Matheson informed us that he already complied with the condition 10. He had no argument with the size of the bin. Nevertheless, he considered that the conditions should not be included because:

(a) the issue was covered by the Management Regulations. Regulation 9 states that the manager of the property must ensure that there are sufficient bins and other receptacles available. There is therefore no need to include this condition. Any reference to the capacity of the bins could be included in guidance which could change. He recognised that he would have to accept any changes.

(b) the licensee would be held liable for any tenant default. He could be subject to 2 criminal charges for the one offence: breach of the regulations and breach of condition.

(c) the matters could also be dealt with as Hazards under Part 1 of the Act. Section 67(4)(a) of the Act requires the Respondent to proceed by way of Part 1 in preference to enforcement of a condition so there is no need for the conditions.

4.3 In answer to a question from the Tribunal, Mr Matheson explained that there were 2 bins in the garden, a large plastic bin and a smaller metal bin. There was also a plastic free standing flip top bin in the kitchen.

4.4 In reply to questions from Mr Grigg, Mr Matheson reasserted his view that the requirements of condition 10 could be included in operating guidance. He accepted that not all items in the conditions would necessarily constitute a hazard and that the regulations were not as precise as the conditions. He also accepted that the Council had a responsibility to watch over public amenities and that this was a 5 year issue.

4.5 Mr Grigg referred us to the terms of section 67 of the Act. He submitted that the Respondent could insert conditions into the licence even if they repeated what was in the regulations. It was clearer and easier for a Landlord if the capacity of the bin was stated. In his view the conditions were appropriate bearing in mind that the licence was for 5 years.

4.6 He called Mr Tudball who told us that he managed the licensing service. Most HMOs in Cardiff are in Cathays and Plas Newydd wards. 46% of all complaints received by the Respondent related to properties in these wards. This caused issues with the residents and Councillors. The conditions are included to deal with the problems.

4.7 Mr Tudball said that the Respondent was merely trying to be efficient and to create a framework which was reasonable. Use of the Part 1 powers would be on a piecemeal basis. They are difficult to use. The Respondent would need to carry out a hazard rating, serve a notice and check compliance. Residents wanted a speedy resolution to their problems. He appreciated that Mr Matheson was concerned about being prosecuted, but the Respondent does not use its powers at the drop of a hat. Conditions are there as a source of information for landlords.

4.8 In his view, section 67(1) of the Act gave the Respondent power to include conditions "regulating" the ongoing management of the Property. If Parliament had intended that the conditions could only relate matters relevant to section 64 of the Act, it would have used a different word such as "improving" or similar.

4.9 Questioned by Mr Matheson, he reiterated his view that section 67 of the Act permitted conditions relating to the on-going management of the Property and that the conditions which had been imposed related to that.

5 GARDEN – CONDITION 20

20 "All gardens, yards and forecourts, boundary walls and fences shall be kept free from vegetative growth, litter or other accumulations and shall be maintained in a clean and tidy condition."

5.1 Mr Matheson submitted that:

(a) It was not possible to comply with this condition. Access to the garden was through the house. The tenancy agreement provides for quiet enjoyment and access is only allowed on 24 hours' notice except in emergency. The landlords had only limited control. They did not know what the condition of the garden was. They went in every summer when the property was vacant.

(b) The issue was covered by the Management Regulations.

(c) Any breach could result in two charges: breach of the Management Regulations and breach of condition.

5.2 Mr Grigg referred Mr Matheson to Regulation 7(4) of the Management Regulations which states that the outbuildings, yards and forecourts in common use must be maintained in repair, clean condition and good order, any garden must be kept in a safe and tidy condition and the boundary walls, fences and railings kept and maintained in good and safe repair. Mr Matheson conceded that it was the Licensee's duty to abide by the regulations even though it was very difficult to do so. In his view they already complied.

5.2 Mr Tudball considered that introducing the condition drew the attention of the landlord to his/her responsibilities. He accepted, however, that Mr Matheson already knew. Nonetheless, in his view, it was reasonable to include this condition in all licences.

6 REPAIRS – CONDITION 18

18 "The licence holder shall ensure that all issues concerning repairs to the fabric of the building, appliances, equipment or furniture notified to him/her by tenants, Council officers or visitors to the property are undertaken within an appropriate time period."

6.1 Mr Matheson's objections were as follows:

(a) The expression "appropriate time period" was uncertain. The Licensee needed to know precisely what his responsibility was. In Kexgill (Middlesborough) Ltd –v- Middlesborough Borough Council (MAN/00EC/HML/2008/0001-5) (the Middlesborough Case) (p56A), the Northern Tribunal decided that the words 'as is considered necessary' lacked precision and deleted them. In M F & L Ltd –v- Shepway District Council (CHI/29UL/HIN/2009/0008) (the Folkestone Case)(p64aA), the Southern Tribunal held that the expression 'of sound construction' was "too general to allow the Applicant to know what is required." Further, in B T Fleet Ltd – v- McKenna ([2005] EWHC 387 (Admin))(p65A), Evans-Lombe J quashed an improvement notice on the grounds that it "did not properly enable the recipient to know what was wrong, why it was wrong and how the giver of the notice intended that what was wrong should be put right."

(b) Paragraphs 7 (Duty to maintain common parts, fixtures fittings and appliances) and 8 (Duty of manager to maintain living accommodation) were sufficient without the need for licence conditions. The conditions go beyond what is in the regulations. Guidelines could be published to deal with specific issues.

(c) Again, the Licensee could be prosecuted both for breach of the regulations and breach of condition, but the statutory defence that the repair was caused by the tenant would be unavailable to the Licensee if he were prosecuted for breach of condition.

6.2 Mr Grigg referred Mr Matheson to conditions 7.2 and 7.3 in the Middlesborough case where the Tribunal had accepted the use of the word 'reasonable'. To Mr Matheson, the issue was to know when he was breaking the law. The Appellants operated on the basis of a single tenancy agreement with 5 people who knew each other. In that way they were sure of getting good tenants. They had not experienced a change of tenants during a tenancy. The tenants paid individually, although the tenants decided who paid what. The Appellants had

no intention of changing their method of dealing with tenancies, although he conceded that the Council could not know that. No-one could say what would happen in 2 years' time. Mr Matheson conceded, however, that regulations 7 and 8 did not refer to the exterior of the building or the roof.

6.3 Mr Tudball stated that the Council was entitled to include this condition (see s67(1)(b) of the Act). Also, s67(2)(e) permitted conditions requiring that "the works are carried out within such period or periods as may be specified in , or determined under, the licence". It had considered including specific time scales, but this was not practical. It had consulted the local Association of Residential Lettings Agents. It had also considered adopting the phrase in the RICS guidance note "Rent Only Residential Management Code for Wales" (2005) where at paragraph 9.7 (p 88R) it states "You should deal promptly with Tenants' reports of disrepair...in a manner appropriate to their urgency." The Respondent would be willing to accept such a wording.

6.4 Mr Tudball pointed out that the defence of "reasonable excuse" was still available to the Appellants for breach of condition (s 72(5)(c)). If there was a problem, the Licensee could always speak to the Council. He also pointed out that if a rogue tenant broke a window, he would expect the landlord to repair it.

7 VENTILATION – APPENDIX B

"Provide and install an electrical extractor fan vented to outside air on intermittent operation"

7.1 Mr Matheson made the following points:

(a) The Property does not suffer from mould, damp or condensation. It is not necessary to require additional ventilation. The Respondent's interpretation of the regulations is wrong. Part F of Schedule 1 of the Building Regulations 2000 requires "adequate means of ventilation". Schedule 3, paragraph 3(ix) of the Licensing Regulations refers to "appropriate extractor fans, fire blankets and fire doors". The Respondent has a discretion. Neither regulation requires the installation of ventilation where it is unnecessary. Indeed, there are no statutory requirements for ventilation in rooms with gas cookers.

(b) There are circumstances where the use of outside vented extractor fans can be dangerous, e.g. where there is an open flued solid fuel appliance. The regulations must therefore admit the possibility that none is appropriate. This is supported by the fact that the Respondent did not regard it as "appropriate" to have a fire door between the kitchen and the lounge, so it did not insist on one.

(c) The Council's own Housing Enforcement Policy date March 2009 states the "No mechanical ventilation required unless a condensation problem is evident" (p102A).

(d) The kitchen appliances are tested annually. Safety checks do not include air quality checks. They have never been asked to test air quality. The Respondent could put in monitoring equipment if it thought there was a problem.

(e) Other Councils do not regard the installation of extractor fans as mandatory.

7.2 Miss Thomas explained that it was not sufficient simply to remove the moisture and cooking smells for which the recycling fan was appropriate. Here there was a gas hob with five people using the cooking arrangements independently. Although there was a window which would provide the necessary purge of dangerous gases, in her view tenants were more likely to switch on a fan rather than open a window. The licence was for 5 years. Miss Thomas said that a different kind of extractor fan may be appropriate if there were an open flued solid fuel appliance.

7.3 Mr Tudball explained that although the Table at page 100A was the one that went to the Council Executive, this was a mistake. The table reproduced at page 164R was the correct one which the Council officers use. It is a working document extracted from the legislation, albeit without the assistance of the legal department. The correct table dated "Jun 2009" states: "extractor fan to be provided..." He pointed out that there is no reference in paragraph 2 of Schedule 3 of the Licensing Regulations to extractor fans when referring to bathrooms, whereas there is in paragraph 3 when referring to kitchens.

8 SEPARATE WC AND WASH HAND BASIN – APPENDIX B

"Provide an additional separate WC. Provide an additional wash hand basin within the separate WC room"

8.1 Mr Matheson submitted:

(a) Paragraph 2 of Schedule 3 of the Licensing Regulations stated that where there were 5 or more occupiers, the property was required to have a separate toilet and bathroom. The Additional Regulations amended this provision to read that "there must be an adequate number of bathrooms, toilets and wash-hand basins..." Both parties accepted that it was no longer mandatory to have a separate WC but the Respondent still insisted upon it. The reason given was because other properties had been required to comply with the old regulations. It would therefore be inconsistent not to require some properties to have a separate WC (see letter dated 19th October 2009 – page 145A).

(b) The requirements also had to have regard to the "age and character of the HMO". The Property was 120 years' old. It would be difficult to install. It would need to be added at the back of the Property or put in part of the back bedroom on the first floor. The Council cannot apply a blanket condition.

(c) The Amenity and Space Standards dated 05/07/06 (page 148A) stated that a shared non-licensable HMO only required one WC per 5 persons whereas in the case of a licensable HMO the WC had to be in a separate "compartment". If one WC was adequate for 5 persons in a non licensable HMO, it must be adequate for 5 persons in a licensable HMO.

8.2 Mr Matheson also referred us to a release from the Chartered Institute of Environmental Health dated 27th July 2007 (p 151A) reporting the opinion of a Senior Environmental Health Officer with the Warwick District Council that it was very unsatisfactory that the Council had to review the requirements for a separate WC and consider amendments to licences. He also drew our attention to the case of Fuller –v-Nottingham City Council (BIR/00FY/HML/2008/0007)(p 152A) where the Council did not oppose an appeal against the condition requiring a WC in a separate compartment.

8.3 Cross examined by Mr Grigg, Mr Matheson confirmed that there had been no complaints when occupied by 5 people.

8.4 The Respondent accepted that the regulations had changed but where there were 5 unrelated parties occupying one house, a separate WC was needed, unlike in the case of a family. After all, if someone had a bath for half an hour, there was no WC available. It was not the Respondent's responsibility to suggest where the additional WC could go. However, it might be possible to place a Sanilav under the stairs, extend the Property at the back or provide a WC in the front bedroom. The Respondent applied this standard across the board. It had to be consistent. The Appellants had the option of having only 4 occupiers. After all this was not the largest of houses. In the Respondent's view the age of the Property was immaterial in this case.

8.5 Mr Tudball told us that he had made the decision that there should a separate WC. The law allowed the Respondent to make this requirement even though the Additional Regulations did not make it mandatory. The Respondent's new amenity standards required a separate WC. He could not justify different treatment for different landlords. Many had complied with the requirement. He happened to agree with the principle and would continue to apply the condition.

8.6 Concluding, Mr Matheson told us that his tenants had been either all male or all female with the exception of one year when the gender was mixed.

9 RISK ASSESSMENT AND FIRE PROTECTION – APPENDIX A

"The standard of fire resistance enclosing the protected (escape) route is to be 30 minutes. Fire separation between risk rooms and protected route must be 30 minutes."

9.1 Mr Matheson's points were as follows:

(a) Paragraph 5 of Schedule 3 of the Licensing Regulations states that "appropriate fire precaution facilities and equipment must be provided of such type, number and location as is considered necessary". In order to determine what is appropriate, it is necessary to consider the risk of fire breaking out and the likelihood of injury.

(b) The Act introduced a risk based system and the Respondent's inspection had to be carried out with this in mind.

(c) In Kexgill (Preston) Ltd –v- Preston City Council (MAN/30UK/HML/2007/0001) (the Preston case) (p 163A), the Northern Tribunal stated at paragraph 33 that considering appropriate fire precautions "necessarily implies a consideration of the risk of fire breaking out and the likelihood of injury to persons..."

(d) The Local Authorities Co-ordinators of Regulatory Services (LACORS) states in its guidance "Housing – Fire Safety" (p173A) that licensing conditions will reflect the housing health and safety rating system (HHSRS) instituted under the Act. The Respondent will need to know what the risks are before framing those conditions.

(e) At a meeting on the 30th January 2008, Mr Kevin Thompson from LACORS stated that the "guidance was all about risk assessment" (p176A).

(f) In a document dated 8th December 2008 published by the Chartered Institute of Environmental Health, it is stated that "the new approach to fire safety regulation is entirely risk-based and this requires a more analytical approach. There will often be more than one acceptable fire safety solution" (p178A).

(g) In a letter dated 19th October 2009, the Respondent has admitted that it did not carry out a fire safety risk assessment (p181A).

9.2 Mr Matheson conceded that it was for the "responsible person" to carry out the risk assessment. He had carried out a fire risk assessment when the Property had been bought even though it was not strictly necessary as the Property was going to be occupied as a single unit and there were no common areas. He considered that it was possible to have different views of risk assessment which may lead to different conclusions. He accepted that there was no obligation to inspect the Property before it was licensed. Some authorities such as Bristol did not; Cardiff did.

9.3 The Respondent accepted that it had not carried out a fire risk assessment but that it was under no obligation to do so. The responsibility lay on the responsible person, - landlord or manager. They had over 6,000 HMOs and did not have the resources or manpower to carry out a proper fire risk assessment in respect of each one. There were more detailed matters to be considered in a fire risk assessment. The inspection carried out by Miss Thomas was sufficient for licensing purposes.

9.4 During the course of the evidence, the both parties acknowledged that the LACORS guidance (in full at pages 169R to 210R) was the industry standard and accepted by Welsh local authorities. The principle issue to be determined was whether the Property was "low risk" or "normal risk". If the latter, then the Appellants conceded that 30 minutes fire protection was appropriate. If the former, the Appellants maintained that only 20 minutes fire protection was required.

9.5 The Appellants considered the Property to be "low risk" because:

(a) Paragraph 15.2 of the LACORS guidance states that "ideally, the recommended standard of fire resistance enclosing a protected route is 30 minutes for normal risk premises. However. subject to risk assessment, in lower risk properties (average single household occupancy or low risk shared houses)with automatic fire detection this may be relaxed" (p 178aR).

(b) Paragraph 9.7 of the LACORS guidance states again that "in all buildings a fully protected escape route (staircase) offering 30 minutes fire resistance is the ideal solution and it will usually be appropriate for all bedsit-type accommodation. However, in lower risk buildings (i.e. single household occupancy of up to four storeys and low risk shared houses), due to the lower risk and shorter travel distance to the final exit, this need not be insisted upon as long as all the following conditions are met:

- the stairs should lead directly to a final exit without passing through a risk room;
- the staircase enclosure should be of sound conventional construction throughout the route;
- all risk rooms should be fitted with sound, close-fitting doors of conventional construction (lightweight doors and doors with very thin panels should be avoided); and
- an appropriate system of automatic fire detection and warning is in place (see table C4)"(p176R).

(c) Paragraph 9.4 of the guidance explains that "some premises present a risk which can be regarded as 'low'. Examples may include premises with all of the following characteristics:

- a low occupancy level and all the occupants are able-bodied and capable of using the means of escape without assistance;
- very little chance of a fire occurring and few, if any, highly combustible or inflammable materials or other fuel for a fire;
- where fire cannot spread quickly throughout the property and will be quickly detected so people can make their escape; and
- where there is more than one acceptable escape route (p176R).

(d) In case study D5, the guidance adds a note relating to three storey shared houses only: "the ideal situation is for the escape route to be enclosed in 30 minutes fire resisting construction and FD30 fire doors. However in existing three-storey shared houses of low risk it may be possible to accept existing walls and partitions if 20 minutes fire resistance can be achieved. This is likely to be met if walls and partitions are of sound, conventional construction. Sound lath and plaster construction should meet this requirement. Doors onto the escape route may be acceptable if they are of sound, solid construction, are close fitting and self closing" (p191R).

(e) Paragraph 9.12 of the guidance states that "...if there are additional fire safety measures (an enhanced system of fire detection and warning, for example, ...)the premises may be considered lower risk and the travel distances and levels of protection may be adjusted accordingly where this lower risk is demonstrated."

(p176R). The level of fire detection in the Property was LD2 and not, as required LD3. It was close to being LD1.

(f) A member of the Respondent's staff had written notes (p269A) stating that "DOORS – FITTED WHERE REQUIRED, EXCEPT KITCHEN. PARTITIONS – OK. MOSTLY SOLID. SOME OTHER ½ HOUR". On the 28th March 2007, Mr James, a housing surveyor employed by the Respondent had written to the Licensee: "I would accept that, most of the means of escape from fire requirements have already been met and I would not expect extensive work to be required in this respect" (p 271A). In an e-mail dated 25th April 2007 Mr James wrote to Mr Andrew Leach (Fire Safety): "My overall impression was that the fire risk in this house is relatively low" (p286A).

(g) The Office of the Deputy Prime Minister issued a circular dated the 23rd January 2004 under the Fire Precautions Act 1971 (p286(a)A). At paragraph 4.8, the circular states that where a property has a normal provision in terms of fire safety systems in any particular occupancy type, then the general level of risk would be classified as "Medium Risk". However, where there is over provision, the risk could be classified as "Low Risk". The LACORS clarification document (p287A) states at paragraph 1 that "risk is a relative concept and something that will be influenced by a wide range of factors. Generally, factors influencing the level of risk include the size, layout and condition of the property, construction standards, the level of existing fire precautions, the number and type of occupants, standard of property management etc." In section 3, the document deals with three storey shared houses. On page 289A, "the guidance recognises that the ideal is 30 minutes fire protection" and refers to the Note in case study D5 (see above). It continues: "The alternative of stripping out all the partitions, ceilings and door and replacing them throughout cannot usually be justified on a risk assessment basis in such situations". Mr Matheson also drew our attention to the Enforcement Concordat published by the Cabinet Office (p183A) which stated that "we will take particular care to work with small businesses...so that they can meet their legal obligations without unnecessary expense, where practicable", an approach supported by the Statutory Code of Practice for Regulators published on the 17th December 2007 by the Department for Business Enterprise and Regulatory Reform (see p 190A) and adopted by the Respondent (p184A).

(h) The fire authority confirmed that the existing walls and doors met the lower risk standard (p343A) and that the property appears "to meet the standard contained in the draft national guidance". The Respondent did not agree (p 344A).

(i) The Appellants had obtained a report from 'hnl fire engineering' (p 360A) which concluded that as the available safe egress time exceeded the required safe egress time by 190 seconds, the fire protection "may be deemed satisfactory".

(j) In Mr Matheson's view, the fire alarm system required for the Property was a Grade D LD3 system (see Case Study D5, page 191R). The walls abutting the escape route were mainly lath and plaster and the doors were sound with intumescent strips, although he could not put his hand on his heart and say that these provided 20 minutes fire protection. He also confirmed that fire will attack the weakest point. The Appellants had installed an LD2 system. The Property therefore came within the conditions set out in note 8 in Case Study D5. The Property also came within the terms of the example in paragraph 9.4 of the LACORS guidance. He accepted that the Property did not have a second means of escape, but as a higher level of fire detection had been installed, the situation was covered by paragraph 9.12. Further, British Standard 5839-6:2004 recommended a Grade D LD2 system for a three storey shared house "where structural fire precautions are of a lower standard than those recommended" (p 356A).

(k) Mortality statistics showed that the student age group which rented the Property was the least likely to suffer harm (see, for example pp 193 to 210A). He referred us to a 1997 Research Report from the Department of Transport and Regions entitled 'Fire Risk in Houses in Multiple Occupation', which stated (p203A) that "the standards for 3 storey shared houses should be linked to the number and type of occupants and existence of any other special risk factors."

9.6 The Respondent made the following points in reply:

(a) The general principle is that there should be 30 minutes' fire protection.

(b) The Property is "normal risk". The example of a low risk property in paragraph 9.4 requires all conditions to be fulfilled. There is only one acceptable escape route from the upper floors and so the Property is not "low risk". Further, paragraph 19.2 of the guidance gives as examples as low risk properties, namely, "average single household occupancy or shared houses of no more than two storeys" (p170aR). Also, paragraph 9.12 states that where, for example, there is an enhanced system of fire detection "the premises **may** be considered 'lower risk'" (our emphasis) thereby giving the Respondent a discretion in the matter.

(c) There is no proof that the walls are sound. Lath and plaster may last 20 minutes, some may last only 18 minutes. The panelled pine doors are 33mm thick at the edge with thinner panels. These are not original doors or like the heavy doors in some old houses. Even small defects in a door can override its protection value. If the Respondent cannot be sure of the level of fire protection, it will put in a condition requiring 30 minutes. It had already given a concession on fire extinguishers and emergency lighting.

(d) The type of occupancy may change – e.g. students, asylum seekers. Conditions have to apply whoever is living there. Even accepting that there are students living there now, it is not possible to control tenant behaviour. One has removed the smoke alarm in his room. Their life style means more cooking, multiple electrical items in use at the same time, although there was no evidence of smoking. The Press Release dated 25th September 2007 (p237R) states that "over the past 5 years cigarettes, smoking materials and candles have been the cause of 1,500 injuries among 18-24 year olds. 55% of accidental fire deaths among this age group occur through carelessness in the kitchen when cooking and the handling of hot substances and misuse of electrical equipment. The Respondent also questioned whether 5 occupants constituted "low occupancy" when it was the threshold for licensing.

(e) In "Fire Risk in HMO's; A Summary Report" dated 1997 at paragraph 2.2.5 (p225aR), it comments that "HMOs of 3 or more storeys pose a relatively high risk and hence warrant priority for purposes of registration and enforcement...Whilst only 16% of HMO residents occupy buildings of 3 or more storeys, over 50% of HMO fire deaths occur in these HMOs." Risk increases in height – see the guidance issued by the Communities and Local Government Department (2006 Edition) on Fire Safety paragraph 2.1 (p300R).

(f) The hnl fire engineering report (p361A) makes assumptions which may not be borne out in fact. Occupiers could be drunk, listening to stereos or asleep.

(g) The Respondent was not convinced that a Grade D LD2 alarm system was an enhanced system. A Grade A system with a control panel would have shown that the smoke alarm in one room had been dismantled. It is a matter of semantics as to whether the Property has an enhanced or enlarged system. There is no water suppression system. Mains alarms have a 13% failure rate. If people need to get out quickly, they must have a protected route. The Respondent has concerns about the enhancement and feel justified in insisting on 30 minutes' fire protection. In an

appeal under the Building Act 1984, (45/3/149), the Secretary of State refused to relax Building Regulations requiring 30 minutes fire resisting construction for the protected stairway (p280R). If this was required for a single family home, it was reasonable for the Respondent to require the same for an HMO which had a higher risk. The Respondent also referred us to the Decision of this Tribunal in Morgan –v- City and County of Swansea Council (RPT/HA04/S11Imp/1)(p266R).

(h) The letter of 28th March 2007 does not set out what Mr James was going to do. He was being overly kind. He did not say that the Property was in order. The Respondent had started the process again and the conditions were based upon the inspection by Miss Thomas. It was not known under what circumstances the document at page 269A was prepared or who wrote it. It is not a note of an inspection.

(i) The Fire Service's letter of the 30th January 2008 (p343A) shows a difference in interpretation. The letter regards the doors as exceeding FD20, which is not accepted. The Fire Service had not followed up the Respondent's invitation to a site meeting to discuss the issue.

(j) Whilst it would be possible to follow the HHSRS route, the Respondent would have to follow the procedures. It had 598 licensed HMOs to administer. Landlords are requested to notify changes of circumstances, but a change in manner of occupancy may not require this. If Baby Bellings were put in the bedrooms, then this would be necessary. It is possible if there were a change between a cohesive group and a non-cohesive group, the Respondent ought to be notified.

(k) The Respondent has adopted the Government's Enforcement Concordat (p244R). The decision as to whether or not to take enforcement action or what action to take would depend on who the occupiers were. However, this would not affect the rating. The guides are prepared in order to achieve a level of consistency. The Respondent undertakes forums and open days. Its officers visit agents and attend meetings as part of the educative process.

(l) Nothing material was changed between the draft licence (p65R) and the final version (p72R) because matters had been looked at in detail over three years. Both parties knew what the issues were. The Respondent had already agreed to concessions. The reason why this application took so long was because it was complex and contentious.

9.7 In closing, both parties summarised their respective positions.

10 CONSIDERATION OF THE WASTE ISSUE – CONDITIONS 9, 10, 11 AND 12

10.1 We accept Mr Matheson's view that as a matter of principle, the Respondent must consider each case on its merits and must not simply apply a standard set of conditions to a licence. There was an individual application by Mr John relating to a single property. A "one size fits all" approach to licensing matters, whether they are HMO licences or public house licences, cannot be endorsed. Such a view was taken by the Northern Tribunal in the Preston case (p 163A), where the Tribunal commented at paragraph 32: "The Tribunal were concerned to note, however, that in this application the authority had sought to issue "one size fits all" conditions to the licence without taking into account the physical characteristics, fitting and fabric of the property..." The same view is also proposed in the consultation document "A guide to the licensing and management provisions in Parts 2, 3 and 4 of the Housing Act 2004" dated 27th January 2010 an extract of which was submitted as an additional document by the Appellants (pages 50aA to 50gA). At paragraph 234 the draft guide states: "every case must be considered on its merits and an LHA cannot simply apply a blanket set of

standards for all HMOs in its district, taking no account of the individual circumstances of the HMO in question".

10.2 However, as many of the properties which are subject to licensing are similar in their construction and design, it is almost inevitable that the conditions pertinent to one house will be relevant to many others. The mere fact that conditions are similar does not mean that the application has not received proper consideration. Indeed, the evidence in this case is that the Council gave individual consideration to Mr John's application. Some of the original terms put forward when Mr John first applied for a licence were altered (see page 54A highlighted by the Appellants), the LACORS requirement for fire extinguishers was not insisted upon (see figure D5 on page 191A) and the Respondent agreed to treat the kitchen and living room as a single room to remove the necessity for the Appellants putting in a fire door between the living area and the kitchen area. We do not regard the summary conditions set out in the public register as significant.

10.3 We have considered the effect of section 67 of the Act. Subsection (1) states that the licence may include such conditions as the local housing authority considers 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."

Subsection (2) lists six types of conditions which can be attached to the licence. They are wide ranging in effect, dealing with such things as the maintenance of facilities and equipment at the property and the prevention of anti-social behaviour.

10.4 In section 64(3)(a) of the Act, the expression "by the imposition of conditions" is limited to the task of making the "house...suitable for occupation". The management arrangements mentioned in section 64(3)(e) have to be satisfactory. There is no reference to the imposition of conditions so as to make them satisfactory.

10.5 In our view, Parliament did not intend that the local authority's powers to impose conditions to regulate the management, use and occupation of the Property and its condition and contents should be restricted solely to the issues laid down in section 64 of the Act. The conditions have to be "appropriate for regulating" matters, not for "licensing" There is nothing in section 67 which suggests that the conditions capable of being imposed are only those to give effect to section 64(3)(a). If that had been the Parliamentary intention, it would have been easy enough for section 67(1) to have begun with a phrase to the effect that "for the purposes of making the house suitable pursuant to section 64(3)(a) a licence may include..." Accordingly, we do not accept the Appellants' restrictive interpretation of section 67.

10.6 The Management Regulations impose an obligation upon the occupants to store and dispose of litter in accordance with the arrangements made by the manager of the property. Failure to comply with the regulations is an offence under section 234(3) of the Act. However, it is a defence under subsection (4) that the tenant had a reasonable excuse for not complying. It is not impossible to conceive of a situation where a tenant raises as a defence that he/she did not know or understand what the arrangements were and therefore could not comply with them. Condition 9 places the obligation on the licensee to inform the tenants of those arrangements. Failure to do so would be an offence under section 72(3) of the Act. In our view the regulation and the condition are dealing with the issue from different perspectives – the tenant has to comply with the regulation and the licensee with the condition. We do not, therefore, accept the Appellants' argument that regulation 10(e) of the Management Regulations covers the point.

10.7 The fact that the current model tenancy agreement with the tenants deals with the issue is no doubt laudable but as both parties acknowledge this licence is for 5 years and much can happen in that time: both tenants and agreements can change. In our view, this argument is irrelevant.

10.8 We accept the Respondent's argument that in those of areas in Cardiff where there is a high proportion of rented accommodation the appearance of waste on forecourts and indeed overflowing onto the pavements is a cause of much complaint. It is not unreasonable, in our view, for the Respondent to try to attach some condition(s) to a licence in an attempt to alleviate the problem. It is not a condition which is particularly onerous and from what Mr Matheson told us is something with which he already complies. Whilst a landlord will take the trouble to learn the rules and regulations relevant to his/her responsibilities, we have serious doubts that a tenant would be so diligent. A reminder in the tenancy agreement, or a notice at the Property would do no harm and could well prevent a problem from developing. In the circumstances we confirm clause 9.

10.9 Condition 10 is again one which Mr Matheson considered that he complies with. His principle objection is that this something already covered in the Management regulations. We can, however, understand the Respondent's approach. A single visit to the Property would easily determine if the manager was in breach. The Hazard route under Part 1 of the Act (the statute's preferred route) is cumbersome and no doubt costly for the Respondent. The Regulations route is probably no less difficult with its statutory defence and arguments as to the sufficiency and suitability of the waste receptacles. So much easier to threaten the manager with a breach of condition to concentrate the mind and produce a reasonably prompt response. However, that is not the aim of the legislation. Section 67(4) clearly emphasises that the priority is to encourage compliance by using the Hazard procedure rather than proceeding by way of breach of licence conditions.

10.10 In our view, this condition is over restrictive. The Management Regulations are adequate. They place the responsibility on the manager to provide "sufficient bins". We cannot see that it matters whether there is one refuse bin with a capacity of 90 litres or two of smaller capacity. Indeed with the advent of food waste recycling it may be appropriate for the manager to provide different kinds of bin. The manager must be allowed a certain degree of flexibility to adapt to the circumstances of the occupants. Accordingly we do not uphold the Respondent's decision in respect of Condition 10 and it is reversed.

10.11 Substantially the same arguments were put forward by the Appellants in respect of Conditions 11 and 12. With regard to Condition 11, it is unlikely that the tenants will be carrying out any building works. The accumulation of such waste is undoubtedly something which a prudent Council would wish to avoid and so the imposition of a Condition 11 appears to us to be both sensible and reasonable. It is true that regulation 9(b) of the Management Regulations requires the manager to make the necessary arrangements for the disposal of refuse and litter. However, in order to avoid the suggestion that the term "refuse and litter" in regulation 9(b) is to be read as "refuse and litter generated by the households occupying the HMO" (as in 9(a)), we consider it reasonable to include the condition for the sake of clarity. We agree with the Respondent's arguments and confirm Condition 11.

10.12 We accept that one of the problems for the Appellants is that they may be held liable under Condition 12 for the defaults of the tenants if the latter were to put their own unwanted items out on the forecourt. It may be that the tenants in such circumstances are in breach of regulation 10 of the Management Regulations. Whilst the Appellants may therefore be found to be liable for something caused by the occupier, it is important to note that the Condition is seeking to deal with a slightly different problem. Regulation 10 of the Management Regulations certainly puts an onus upon the occupier to abide by the manager's arrangements regarding litter, but Condition 12 is imposing a duty on the Licensee to ensure that the Property is managed properly. In other words, it places the responsibility on the Licensee to make sure that the occupier does what he/she is supposed to do. In our view, this is a legitimate use of a licence condition. The Respondent (and that really means the Council Tax payers of Cardiff) simply does not have the resources to chase

after the occupiers when it is the Licensees' responsibility to manage the Property. In the circumstances we confirm Condition 12.

10.13 The Appellants have referred to the use of the Respondent's part 1 powers and the requirement under s 67(4)(a) that the Respondent "must proceed on the basis that, in general, they should seek to identify remove or reduce...hazards...by the exercise of Part 1 functions and not by means of licence conditions". The critical words here are "in general". There may be circumstances where something may need to be addressed urgently, or there may be budget considerations which make the breach of licence route more appropriate. In such cases, it cannot have been Parliament's intention that the Respondent should have to adopt a more cumbersome, more expensive and possibly less effective procedure.

11 CONSIDERATION OF THE GARDEN ISSUE – CONDITION 20

11.1 Regulation 7(4) of the Management Regulations requires the manager of the Property to ensure that the outbuildings, yards and forecourts are maintained in repair, clean condition and good order, the garden has to be safe and tidy and the boundary walls , fences and railings kept in good repair so as not to be dangerous. Although the regulation does not refer to 'litter or other accumulations', as such, it requires the manager to ensure that the external areas are variously kept in repair, clean and in good order, or safe and tidy, or in good repair.

11.2 We do not accept Mr Matheson's point that the condition is impossible to comply with. Regular inspection is all that is necessary and the tenancy agreement will almost certainly contain the right to do this. In any event it is no more difficult to comply with this condition than it is to comply with the regulation.

11.3 Neither do we accept Mr Tudball's approach that the condition serves as a reminder to the Licensee. Mr Matheson is well aware of his responsibility in this regard and needs no reminder. As we have pointed out earlier, the Council must not adopt a "one size fits all" approach. In our view, the clause is unnecessary.

11.4 In any event, we are surprised to see that the clause prohibits "vegetative growth". This would, in our view, prevent the tenants from growing plants or vegetables –and possibly even a lawn. We do not uphold the Council's decision to include this condition and it is reversed.

12 CONSIDERSTION OF THE REPAIRS ISSUE – CONDITION 18

12.1 We are not sure how much confusion there genuinely was in Mr Matheson's mind as to the interpretation of the expression "within an appropriate period of time". We accept the Respondent's argument that the condition could not lay specific periods of time in which repairs need to be done as each period will depend upon the nature of the repair, availability of labour and materials and so on. Some generalised expression needs to be used as otherwise the condition would become over-burdened with unnecessary detail.

12.2 Section 67(2) uses the expression "so far as appropriate in the circumstances". The Licensing Regulations refer to "appropriate fire precaution facilities" at paragraph 5 of Schedule 3. The word "reasonable", used in 2 of the permitted conditions in the Middlesborough case, is another word where the interpretation depends upon the context. We do not think that this advances the argument.

12.3 Mr Matheson referred us to the manager's obligations under regulations 7 and 8 of the Management Regulations initially putting forward the view that the terms of the condition were covered by those regulations. When cross-examined by Mr Grigg, he conceded that the exterior and the roof of the building were not covered.

12.4 In our view it is a legitimate use of conditions to fill in the gaps in the legislation. It may well be that there is a possibility of two charges being preferred, but that can and does happen in many walks of life where a particular happening offends two or more statutes.

12.5 Mr Tudball referred us to the RICS guidance note (p88R) and indicated that the Respondent would be content if similar wording were applied. In our view that is a sensible suggestion. We therefore determine that Condition 18 shall be varied so as to read that all repairs notified shall be *"undertaken within a time scale appropriate to their urgency"*.

13 CONSIDERATION OF THE VENTILATION ISSUE – APPENDIX B

13.1 We find no evidence that the current arrangements for ventilation are inadequate for the kitchen/living room areas in general, but with the potential for high usage by the occupants of this area and taking into account that this licence endures for five years, we consider that supplemental extraction is required. We also accept Mr Tudball's explanation with regard to the 'confusion' concerning the Council's documents and that the correct table is that dated "Jun 2009" (p164R). Nonetheless, we consider that the Respondent needs to establish that the application of its policy is relevant in the particular circumstances of this case.

13.2 The Respondent has accepted that the kitchen and the lounge are to be regarded as a single room. In the lounge there is a chimney vent. There is a door into the hall and a doorway (but no door) into the kitchen. The nature of the lounge area is such that there is little in the way of air circulation, particularly as there is no window. In the kitchen, unless someone opens the back door or window, there is no air circulation except in the immediate area of the recycling fan. This is limited in its effect. There will be areas of the kitchen where there will be inadequate airflow. The recycling fan over the cooker will undoubtedly reduce the risk of condensation and fat in the air. The central heating boiler is sealed and will not therefore cause a problem, but the many and varied meals being cooked over longer periods of time than would be usual in a family situation, is bound to mean that there will be areas of stale air in those parts of both rooms where there is insufficient circulation.

13.3 In our view an extractor fan vented to outside air is highly desirable. We consider that the Respondent is rightly concerned about the issue and we determine that the Condition relating to the electrical extractor fan vented to outside air is reasonable. We therefore confirm this condition. We make no decision as to whether an appropriate number can be none.

14 CONSIDERATION OF THE SEPARATE WC AND WASH HAND BASIN ISSUE – APPENDIX B

14.1 When the Property was built, it was a four bedroom terraced family home in a residential suburb of Cardiff. It had a single bathroom with a toilet and this was no doubt adequate for decades. However, a family had a more structured environment than a group of independently minded students. Routines were established, bath times were known and the event of any disagreement, the matriarch or patriarch would determine priorities. We are now living in an age where even the standard three bedroom semi detached house is built with an en suite bathroom attached to the master bedroom and ground floor cloakrooms are the norm. Some two bedroom link houses have an en suite shower adjoining the main bedroom. Standards change and so do expectations.

14.2 The Respondent's Amenity Space Standard Table (p164R) is bound to reflect what people expect in a property. Whatever criticisms the Appellants may have concerning the mix up of the Standards – and those criticisms are no doubt justified – the central issue here is whether it is reasonable for the Council to insist upon a separate WC. The fact that its own standards policy requires it is not, in our view, sufficient. The Respondent must give individual consideration to each application.

14.3 The Appellants are right to point out that the requirement is no longer mandatory. The toilet facilities have to be adequate in number, according to the Additional Regulations, having regard to the age and character of the Property. It is common ground that the Property is over 100 years' old, but we do not find it to be of exceptional character. It is one of a long terrace of similar properties. There are innumerable others of similar age and design in Cardiff. There are no particular characteristics which would prevent the creation of an additional toilet.

14.4 We do not accept Mr Tudball's assertion that he cannot justify different treatment for different landlords. Each case stands or falls on its own merits. After all, the whole point of regulation 12(8) of the Additional Regulations was to relax the strictness of paragraph 2(2) of Schedule 3 of the Licensing Regulations. The Respondent cannot ignore the new regime simply because it happens to agree with the old one. The Respondent must apply the new test. It may well come up with the same answer, but it must consider all the issues and determine accordingly.

14.5 To a large extent, this is a question of judgment. Here there is a likelihood of 5 students living in close proximity, sharing one kitchen, a windowless lounge and a single combined bathroom and WC. It does not take much imagination to realize that there will be occasional disagreements. The fewer potential flashpoints the better. The possibility of one occupant spending half an hour in the bath whilst one or more of the others is anxiously waiting to use the toilet is not far-fetched. We do not consider a single combined bathroom/WC to be adequate.

14.6 The question next to be considered is whether it is reasonable to require the additional WC to be constructed having regard to the age and character of the Property. A number of suggestions were made during the evidence. Whilst they all involve unwelcome expense from the point of view of the Appellants, we do not think that either the age or character of the Property will have any bearing on the ability of the Appellants to comply with this condition. In the circumstances, we confirm this condition.

15 CONSIDERATION OF RISK ASSESSMENT AND FIRE PROTECTION – APPENDIX A

15.1 We understand that as a fire safety professional Mr Matheson will have set himself high standards when it comes to such matters as fire risk assessments. It is common ground that the Respondent carried out an inspection in order to assess the Property from a number of perspectives. It did not carry a detailed fire risk assessment in the way that Mr Matheson did when he and his colleagues bought the Property. The Respondent has neither the manpower nor the resources to carry out this task. However, the legislation does not require this. Indeed, some local authorities do not inspect the property at all.

15.2 On balance, we take the Respondent's view. The Regulatory Reform (Fire Safety) Order 2005 clearly places the legal responsibility for fire safety upon the "responsible person". The inspection carried out by the Respondent, preparatory to the framing of licensing conditions, has to take in a variety of different factors, not simply fire protection. With the number of properties to be considered, it would be an enormous task for the Respondent to undertake the sort of assessment proposed by the Appellants. Indeed, as we have heard, Bristol does not even inspect the properties. We do not therefore accept the Appellant's argument on this point.

15.3 As far as the level of risk is concerned, we are of the opinion that when it comes to fire safety, there can be no compromises. Lives are at stake. If the Respondent allowed a level of precaution less than that recommended in the guidance and there were to be a tragedy, the Respondent and its officers would rightly be criticised and may find themselves the subject of enquiry or civil claims. It was therefore with some surprise that we heard Mr Matheson respond to a question about the existing walls and doors at the Property that he

could not put his hand on his heart and say that there was 20 minutes' fire protection in place. Indeed, having inspected the Property and seen the pine doors for ourselves, we have serious doubts that they would provide even 20 minutes' fire protection. As Mr Matheson said, fire attacks the weakest point and even if the lath and plaster walls could provide 20 minutes' fire protection, the doors might not have sufficient resistance.

15.4 Many of the paragraphs quoted in the LACORS guidance begin on the premise that the basic principle is for 30 minutes' fire protection. It is only where certain conditions are fulfilled that the guidance considers that a local authority might exercise its discretion. There is no obligation upon the Respondent to do so and we anticipate that it would require some compelling arguments before such a course of action would be adopted. Paragraph 9.7 of the guidance, for example, says that the property must have "all of the following characteristics". One of these is "more than one acceptable escape route". It is common ground that this condition is not fulfilled. In our judgment the Respondent is correct in its interpretation of the guidance. We appreciate that it is not a legal document such as a deed or a statute, so the same rules of interpretation may not be appropriate, but the final two conditions are conjoined with the word "and" making it abundantly clear that the author intended that the whole package of conditions must apply before such a property can be termed "low risk".

15.5 Paragraph 9.7 of the guidance when referring to "low risk shared houses" (which strongly suggests that not all shared houses are low risk) again uses the expression "all the following conditions". It refers to the staircase enclosure being of "sound conventional construction" as well as the rooms being fitted with "sound close fitting doors of conventional construction". Again the final two conditions are conjoined with "and". As we have mentioned above, we have no evidence that the walls and doors are indeed sound even to 20 minutes. The same expression – "sound conventional construction" is used in case study D5. Indeed, paragraph 21.6 of the guidance states that "solid timber doors and panelled doors of sound construction may be adequate..." casting doubt upon the efficacy of other less robust types of door.

15.6 Mr Matheson has sought to persuade us that the fire detection system is enhanced so as to bring it under paragraph 9.12 of the guidance which refers to properties where "lower risk is demonstrated". The provision of a Grade D LD2 system at the Property could well be regarded as enhanced. Mr Tudball raises the question whether installing an LD2 system instead of an LD3 system is providing an enhanced system or an enlarged system. We make no decision upon that, but suffice to say the disconnection of a smoke alarm in one of the bedrooms was something of an embarrassment to the Appellants as this could have the effect of prejudicing the LD2 standard.

15.7 We appreciate that all the current occupiers are young and able bodied. It may indeed be the Appellant's intention to continue to provide accommodation for students. However, when the Respondent considers licensing a property, it has to take into account other possibilities as the licence lasts for 5 years. The Respondent has to take into account the possibility that future tenants may include the elderly or asylum seekers or even those with some sort of disability. The fire precautions have to suitable for a wide range of occupant, not merely students. We appreciate that shared HMOs are statistically less likely to pose a fire risk than other types of accommodation and that the traditional student age group is less vulnerable than other age groups. However, this misses the point. The licence is granted in respect of the Property and not the particular occupants.

15.8 We note that the Appellants have issues concerning the mixed messages coming from the Respondent. We regard this as unsatisfactory as it leads the applicant into believing that the Property only requires minor adjustments for it to be licensed. It does not, in our view, affect the final outcome of the application. The officers "on the ground" often have a difficult role as they are liaising with the landlord or agent with whom he/she has to

maintain a good relationship. Feed-back from higher officials may be "air-brushed" (to use the modern expression) to make it more palatable, but this can lead to suspicion and dismay as is the case here. Ultimately, the decision is not that of the individual officer, but a decision of the authority and the opinion of an individual officer may well not carry the argument when a particular issue is determined. We do not regard this point as having any significance when it comes to deciding on the merits or otherwise of the condition.

15.9 Neither do we place any value upon the differing interpretations of the Respondent and the Fire Authority. Similarly, the examples of other local authority practices are interesting, but not helpful. Again, the 'hnl' report was not based on an inspection and we do not attach any weight to it. All these arguments put forward by the Appellants are somewhat undermined by Mr Matheson's admission that he could not, in effect, guarantee that the existing walls and doors were able to provide even 20 minutes' fire protection. The LACORS clarification document takes the matter no further. Can the expense of additional fire protection be justified bearing in mind that the Appellants have already replaced some walls? Unfortunately, the escape route cannot be guaranteed. In such circumstances, the expense is bound to be justified. The Enforcement Concordats do not assist. Obviously, when it comes to enforcement of conditions, it is better to encourage compliance than to prosecute and if a less expensive but equally effective method achieving the same result can be devised, that is the better way forward. Here, we are considering the conditions in the first place. These are the standards against which the issue of enforcement will be considered.

15.10 We determine the issue on the basis of the evidence which we will assess in the light of our own knowledge and experience. 30 minutes' fire protection is the norm. Anything less than that is discretionary. If, for example, 20 minutes' protection is to be considered, all of the conditions and characteristics set out in the LACORS guidance must be met. Even then, it is still a matter of discretion.

15.11 In our judgment, for the reasons set out above, the Appellants have failed to satisfy us that the Property is "low risk". We therefore confirm this condition.

16 DECISION SUMMARY

16.1 *9. "The licence holder shall ensure that all tenants are fully aware of their responsibilities with respect to cleanliness of gardens, yards and forecourts"*
- CONDITION CONFIRMED.

16.2 *10. "The licence holder shall provide suitable receptacles or facilities for the storage of waste prior to disposal. One refuse bin with a capacity of not less than 90 litres shall be provided for each 5 occupants"*
- CONDITION REVERSED

16.3 *11. "Any waste arising from building works at the property shall not be allowed to accumulate within the curtilage of the property or near to it. All such waste shall be removed to a suitably licensed refuse facility as soon as is reasonably practicable"*
– CONDITION CONFIRMED

16.4 *12. "Unwanted furniture, appliances and other items shall not be permitted to accumulate within the yards, gardens or forecourts of the property. Such items will be removed to a suitably licensed refuse facility as soon as is reasonably practicable. Landlords shall advise tenants of the Council's bulky household refuse collection service for such items"*
– CONDITION CONFIRMED

16.5 *18 "The licence holder shall ensure that all issues concerning repairs to the fabric of the building, appliances, equipment or furniture notified to him/her by tenants, Council officers or visitors to the property are undertaken within an appropriate time period."*
- CONDITION VARIED to read:
18 "The licence holder shall ensure that all issues concerning repairs to the fabric of the building, appliances, equipment or furniture notified to him/her by tenants, Council officers or visitors to the property are undertaken within a time scale appropriate to their urgency".

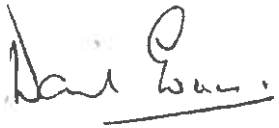
16.6 *20 "All gardens, yards and forecourts, boundary walls and fences shall be kept free from vegetative growth, litter or other accumulations and shall be maintained in a clean and tidy condition."*
– CONDITION REVERSED

16.7 *Appendix A "The standard of fire resistance enclosing the protected (escape) route is to be 30 minutes. Fire separation between risk rooms and protected route must be 30 minutes."*
– CONDITION CONFRIMED

16.8 *Appendix B "Provide and install an electrical extractor fan vented to outside air on intermittent operation"*
- CONDITION CONFIRMED

16.9 *Appendix B "Provide an additional separate WC. Provide an additional wash hand basin within the separate WC room"*
– CONDITION CONFIRMED

DATED the May 2010



CHAIRMAN