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Licensing the private rented sector:

Licence applications and fees - Commonly encountered issues

Dean Underwood, Barrister

Introduction

- Specifying application requirements and setting application fees under Parts 2 and 3, Housing Act 2004 – a complex and often vexed process raising numerous legal issues e.g.
    - What application requirements may a LHA specify?
    - When is an application duly made?
    - What happens if the LHA does not determine an application within a reasonable time?
    - What fee structure should the LHA adopt?
    - What costs can LHAs lawfully take into consideration when setting fees?
- Focus of webinar?
    - Specific, commonly-encountered issues (e.g. above)
    - Not a general topic overview, though some overview given
    - Views expressed for educational, not advisory, purposes
- Any queries: dunderwood@cornerstonebarristers.com

Applications

Application requirements – A wide but not unfettered discretion

- Sections 63 (Part 2) and 87 (Part 3) - Wide discretion to specify application requirements, including a discretion to fix and require payment of a fee
- Discretion not unfettered
  - Principles of public and administrative law
  - Generally-applicable statutory duties e.g. Public Sector Equality Duty, Equality Act 2010
  - General 2004 Act duties (see ss 55, 61, 79, 85) to -
    - make such arrangements as necessary to secure the effective implementation of Part 2 and 3 licensing regimes
    - take all reasonable steps to secure that licence applications are made
    - ensure that applications and other issues are determined within a reasonable time
  - Regulations made by Secretary of State or Welsh Assembly (see below)
  - Provision of Services Regulations 2009: *R (Gaskin) v Richmond upon Thames LBC* [2018] EWHC 1996 (Admin) (see below)

Regulations under the 2004 Act

- Prescribed requirements:
  - Licensing and Management of HMOs and Other Houses (Miscellaneous Provisions) (England / Wales) Regulations 2006
- Requirements differ according to whether property is in England or Wales and, if in England, whether application is a "renewal" application
- But, generally, prescribed requirements are intended to ensure –
  - LHAs have sufficient and accurate information about e.g. the property, applicants, owners, managers, occupiers etc to determine the application
  - those affected by it (e.g. owners, occupiers, mortgagees etc) are aware of it
- Regulations for Wales do not distinguish between "renewal" applications and others
- By contrast, information required of “renewal” applicants in England is limited, and LHAs may not lawfully require more: *R (Gaskin) v Richmond upon Thames LBC* [2017] EWHC 3234 (Admin)

Provision of Services Regulations 2009

- *R (Gaskin) v Richmond upon Thames LBC* [2018] EWHC 1996 (Admin)
  - Letting and managing property for profit is a "*service*"
  - LHAs who regulate them are "*competent authorities*"
  - Licensing provisions of Part 2 (and by extension, Part 3) are an "*authorisation scheme*"
- Result?
  - Reg.18 prevented LHA from requiring "Part B" fee payment at point of application
- Wider (potential) implications?
  - Reg.18: Requirements should be clear, easily accessible, made public, and should not be dissuasive nor unduly complicate or delay the letting of property
    - Need for application streamlining, to avoid unnecessary duplication, delay etc?
  - Regs.19-20: Enhanced duty to ensure the determination of applications in a reasonable time; and tacit consent in default
    - Need for "*different arrangements*" for "*overriding reasons of public interest*"

Application requirements and the “duly made” application

- Sections 63 (Part 2) and 87 (Part 3):
  - Licence applications “must be made in accordance with such requirements as the [LHA] may specify”
  - LHA “may, in particular require the application to be accompanied by a fee […]”
- Sections 72(4) (Part 2) and 95(3) (Part 3):
  - “In proceedings against a person for an offence under subsection (1) *it is a defence that, at the material time* […] *an application for a licence had been duly made* in respect of the house under section [63/87], and that […] application was still effective.”
- “*Duly made*”?
  - No authority under 2004 Act, but consider *Middlesex CC v Minister of Local Government and Planning* [1953] 1 QB 12, per Somervell LJ at 18
  - “[…] in my view the words "duly made " […] mean "made within the time fixed“. They may mean other things, the prescribed form and so on, if there is one, but they undoubtedly, in my opinion, mean that.”

Fees and fee structures

Fee-setting – A wide but (again) not unfettered discretion

- Sections 63 (Part 2) and 87 (Part 3):
  - LHAs "may, in particular require the application to be accompanied by a fee […]"
  - When fixing fees, LHAs may (subject to regulations, below) take into account
    - all costs incurred when carrying out functions under Part 2 or, as may be, 3
    - all costs incurred carrying out functions under Chapter 1, Part 4 (management orders) in relation to HMOs or, as may be, Part 3 houses, so far as the costs are not recoverable under that Chapter
- Fee-setting discretion is wide but, again, not unfettered is and subject to -
  - Principles of public and administrative law generally
  - Regulations made by Secretary of State or Welsh Assembly (see below)
  - Provision of Services Regulations 2009 (see below)
- Further, LHAs may not set fees so as to make a profit: *R (Gaskin) v Richmond upon Thames LBC* [2017] EWHC 3234 (Admin) at [32]

Regulations under the 2004 Act

- Secretary of State and Welsh Assembly have regulated, but only to specify cases in which fees are to be refunded
    - Regulation 7, Licensing and Management of HMOs and Other Houses (Miscellaneous Provisions) (England / Wales) Regulations 2006
- LHAs must refund in full any fee paid in respect of an application as soon as reasonably practicable after they learn that, at the time the fee was paid:
    - a house was not, in the case of an application under Part 2, an HMO or, as the case may be, an HMO that was required to be licensed, or
    - in the case of an application under Part 3, the house was not required to be licensed under Part 2 or Part 3 of the 2004 Act
- LHA is obliged to refund applicant whether or not, pursuant to the application, it granted a licence for the HMO or house when it was not required to be licensed

Costs that may be taken into account

- Discretion exists to – broadly – take into account costs of exercising functions under (a) Part 2 or, as the case may be, Part 3 and (b) Chapter 1 of Part 4 to 2004 Act

- Arguably, discretion is wide enough to enable LHAs to take into account costs of e.g. –

  - satisfying themselves that conditions for a licensing designation are met (ss.56, 80)
  - consulting about a proposed designation (ss.56, 80)
  - in England, where necessary, seeking Ministerial confirmation (ss.58, 82)
  - fulfilling their general duties, e.g. to secure the effective implementation of licensing
  - granting and refusing temporary exemption notices (ss.62, 86)
  - satisfying themselves that the conditions for the grant of a licence are met (ss.64, 88)
  - varying and revoking licences (ss.69-70A, 92-93A)
  - reviewing the operation of licensing designations (ss.60, 84)
  - investigating, prosecuting and penalising offences under Parts 2 and 3 (ss.72, 95)
  - applying for and obtaining rent repayment orders under sections 73 and 96 ….. **BUT**

- Not all such costs can be taken into account when fixing fee charged upon application …..

Provision of Services Regulations 2009

- *R (Gaskin) v Richmond upon Thames LBC* [2018] EWHC 1996 (Admin), applying *R (Hemming, t/a Simply Pleasure Ltd) v Westminster CC* [2018] AC 650 (ECJ)
  - LHAs may not, upon application, require the applicant to pay a fee which exceeds, or takes account of costs other than, the costs of processing the application
  - Otherwise, fee will be disproportionate to, and will exceed the costs of, the "*procedures and formalities under the scheme*" to which reg.18, 2009 Regulations refers
- Consequence? A two-part fee structure:
  - first part - a reasonable charge, at the point of application, proportionate to and not exceeding the cost of processing the application
  - second part - a further and proportionate charge payable upon granting an application, comprising of a contribution towards the balance of the costs incurred by the LHA in carrying out its relevant functions under Part 2 or, as the case may be, Part 3 of the 2004 Act, and Chapter 1 of Part 4.
- Costs of processing application – of the "*procedures and formalities*"?

Questions

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