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**Licensing the private rented sector:**

**Licence applications and fees - Commonly encountered issues**

Dean Underwood, Barrister



- 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](mailto: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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