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Licensing the private rented sector:

Licences and licence conditions – Understanding the scope of local authority powers

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- Grant and administration of a licence under Part 2 or 3, Housing Act 2004 raises various, often recurrent legal issues:
 - In a block of commonly-owned flats, what is the Part 3 house requiring a licence?
 - How long does a licence remain in force?
 - What happens to a licence when the licensing designation expires?
 - What power does the LHA have to vary or revoke a licence?
 - What conditions must the LHA include in a licence, and what *can* it include?
 - What exactly do conditions regulating the “management” of a Part 3 house include?
- Focus of webinar?
 - Licence characteristics – duration, scope, content etc
 - LHA powers when granting and administering licences – nature and scope
- Any views expressed are for educational purposes only and are not advisory
- Any queries: dunderwood@cornerstonebarristers.com



Licences

Licence characteristics: Temporal considerations



- A licence (see generally ss.68 (Part 2) and 91 (Part 3)) -
 - May be granted before it is required, but cannot come into force *until* it is required
 - Query: How does this benefit LHAs and landlords?
 - Comes into force at the time specified in, or determined under, the licence
 - Unless previously determined because the licence holder dies or is revoked (see below), remains in force for the period so specified or determined
 - Query: What if the house ceases to be an HMO to which Part 2 applies, or a Part 3 house? See ss.68(5) and 91(5)
 - Must expire no later than 5 years after it was granted or, if granted before it was required, no later than 5 years after it comes into force
 - Query: Must a licence be co-terminous with a licensing designation?
 - Consider ss.68 and 91 generally, and FTT decision in *Iyawa v Newham LBC*

Licence characteristics: Other considerations



- A licence -
 - May not relate to more than one HMO or, as the case may be, Part 3 house
 - Query: How does that affect HMOs within HMOs, e.g. self-contained flats in s.257 HMOs and converted buildings
 - See e.g. s.257(5)
 - Block licences under Part 3:
 - Query: What is the licensable Part 3 house? Consider UT decision in *Northumberland Mews Ltd v Thanet DC* [2022] UKUT 179 (LC)
 - Query: What if the extent of the Part 3 house changes?
 - May not be transferred to another person
 - New owner, new licence: *Taylor v Mina An Ltd* [2019] UKUT 249 (LC)

Northumberland Mews Ltd v Thanet DC [2022] UKUT 179 (LC)

LHA discretion to determine the licensable Part 3 house



Essential facts

- NM was the freehold owner of a block of self-contained flats
- T penalised NM under s.249A, 2004 Act for managing Part 3 houses - five of the flats in the block - without a licence, contrary to s.95(1), 2004 Act
- NM appealed to the FTT against the decision to impose the penalties
- NM argued that it had not committed the offences, as T was required under Part 3 to license the block, not the individual flats
- FTT disagreed: each flat was a 'house' under s.99; and it was open to T to license them individually

Appeal dismissed

- UT endorsed T's construction of ss.79, 90, 91 (at [41]) that –
- “The essence of the Part 3 regime [...] is flexibility. The Act does not prescribe whether a block of flats owned by a single freeholder must be subject to one licence or several. That enables an appropriate response to nuanced circumstances, as we saw in *London Borough of Waltham Forest v Khan* , and to practical requirements, for example where a landlord wants to appoint different managers for different parts of the building. There cannot be only one right answer to the question "what is the Part 3 house" in a situation involving two or more dwellings within a building, nor is there only one possible offence that the landlord of such a building can be charged with.”

Taylor v Mina An Ltd [2019] UKUT 249 (LC); [2020] HLR 10

Licences are not transferable



Essential facts

- July 2016: T took a tenancy at a licensed HMO
- October 2016: M purchased the HMO
- May 2017: M applied for an HMO licence
- September 2018: licence granted
- T applied for a rent repayment order for the period from October 2016-September 2018
- FTT dismissed the application: HMO was licensed because the former owner's licence had not expired

On appeal: appeal allowed

- A licence is personal and cannot be transferred to another person: s.68(6)
- So, M could not rely on the former owner's licence and had to apply for its own
- Failure to do so = criminal offence
- cf the position when a licence holder dies: s.68(7-8), 91(7-8)
- The fact that the former licence had not been revoked and continued in force was of no assistance
- Application remitted to FTT

Licence characteristics: Death of the licence holder



- A licence ceases to be in force on the death of the licence holder (LH)
- But for three months from the date of LH's death, the HMO or house is treated as if, on that date, a temporary exemption notice (TEN) had been served
- The licence holder's personal representatives (PR) may, during that three month period, ask the LHA to extend the initial period of exemption for a further three months
- The LHA may serve on the PR a notice which, for a period of three months from the date on which the initial period ends, has the same effect as a TEN
- If the LHA decides not to do so, it must without delay serve the PR with a notice informing the PR of its decision, the reasons for it, the right to appeal and the period in which an appeal may be made
- The PR may appeal to the FTT against the decision, and the FTT may confirm or reverse it

Licences: Variation



- LHAs may (see generally ss.69 and 92) vary a licence in two circumstances –
 - with the agreement of the licence holder
 - if there has been a change of circumstances since the licence was granted
- Change of circumstances?
 - includes, by ss.69(1) and 92(1), any discovery of new information
 - likely includes a change in licence conditions to reflect changed circumstances
- LHAs may vary on own initiative, or application by licence holder or “relevant person”
- Procedure prescribed by Schedule 5: notice, consultation, representations, decision etc
- Variations made by agreement take effect when made; otherwise at the “operative time”
- Specific provisions apply if, upon variation, LHA is considering what maximum number of persons or households should occupy an HMO, or what standards applicable to occupation should apply (see s.69(3-4))

Licences: Revocation (discretionary)



- LHAs may (see ss.70 and 93) revoke a licence (a) with LH's agreement, or (b) unilaterally if -
 - LH or any other person commits a serious or repeated breach of a licence condition
 - LHA no longer considers that LH is fit and proper to be the LH
 - LHA no longer considers that the management of the house is being carried on by persons who are fit and proper
 - an HMO ceases to be an HMO to which Part 2 applies, or a house ceases to be a Part 3 house
 - a licence is granted under Part 2 in respect of a (formerly) Part 3 house
 - were the licence to expire at the time of revocation, LHA would, for a particular reason relating to the structure of the house, refuse to grant a licence to the LH on similar terms
- Power to prescribe more such circumstances in regulations not (yet) exercised
- LHAs may revoke on own initiative, or application by LH or "relevant person"
- Procedure prescribed by Schedule 5: notice, consultation, representations, decision etc
- Revocations made by agreement take effect when made; otherwise at the "operative time"

Licences: Revocation (mandatory)



- LHAs must (see ss.70A and 93A) revoke a licence if –
 - a banning order is made against the licence holder, under s.16, Housing and Planning Act 2016
 - a banning order is made against a person who (a) owns an estate or interest in the house or part of it or (b) is a lessor or licensor of the house, or part of it
- Procedure prescribed by Schedule 5: Note, no initial notice or consultation required
- Notice of LHA's decision to revoke a licence must state when the revocation takes effect
- Revocation cannot take effect earlier than the end of the period of seven days beginning with the date the notice (above) is served



Licence conditions

Mandatory licence conditions



- A licence must (see ss.67(3) and 90(4)) include the conditions prescribed by Schedule 4
- Common to Parts 2 and 3 –
 - Producing an annual gas safety certificate
 - Keeping electrical appliances and furniture in safe condition
 - (In England) ensuring the working order and safety of electrical installations
 - Ensuring the installation and working order of smoke alarms
 - (In England) Ensuring the installation and working order of carbon monoxide alarms
 - Supplying occupiers with written tenancy or licence agreements
- Under Part 2 (in England) –
 - Restricting the use of sleeping accommodation according to size and occupation
 - Requiring LH to declare rooms less than 4.64m² and to remedy any breach of the above
 - Requiring LH to comply with any LHA scheme for the storage and collection of waste
- Under Part 3
 - Requiring LH to demand references from prospective occupants

Discretionary licence conditions



- LHA discretion under Part 2 differs from that under Part 3. Critical distinction?
- Consider Part 2 s.67(1): A licence may include such conditions as the LHA 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
- Contrast Part 3 s.90(1): A licence may include such conditions as the LHA considers appropriate for regulating the management, use or occupation of the house concerned
- Note:
 - ss.67(2) and 90(2) enable LHAs to include, as appropriate, (a) conditions restricting or prohibiting the use or occupation of parts of a house and (b) conditions requiring reasonable and practicable steps to prevent or reduce ASB by occupiers or visitors
 - s.67(2) also enables LHAs to include conditions requiring the LH to (a) provide and maintain (and undertake works needed to provide) the facilities and equipment needed to meet prescribed standards for occupation of an HMO by a maximum number of persons (e.g. re fire safety) and (b) attend training in relation to any applicable code of practice under s.233 (re student accommodation)

Brown v Hyndburn BC [2018] EWCA Civ 242

Discretionary Part 3 conditions not concerned with condition and content



Essential facts:

- H granted a Part 3 licence which included conditions requiring (a) installation of a carbon monoxide monitor and (b) maintenance of electrical installations to minimum standard
- B argued before FTT that H had no power to include the conditions, or any conditions that would require LH to upgrade the property, or provide new facilities and equipment
- FTT held that conditions imposed went beyond the power conferred by s.90(1) to regulate “the management, use or occupation” of the house
- On appeal, UT construed s.90 more broadly and reinstated the conditions

Held: appeal allowed

- Unlike s.67(1), s.90(1) did not confer power on the LHA to include licence conditions regulating the “condition and contents” of a house, nor what “facilities and equipment” should be available in it [48-50]
- The purpose of the s.90(1) power was to enable LHAs to address the reasons for the designation, e.g. low housing demand, ASB, and there was a necessary link between the conditions for making a designation and the power to impose licence conditions under s.90(1) (though a direct and unequivocal link was not necessary) [54-57]
- s.90(5) emphasised the primacy of Part 1 for addressing housing hazards [65-66]

Management, use and occupation?



- See *Brown* per Underhill LJ at [85]:
 - The three terms use, occupation and management overlap but ...
 - Management = “operational matters – what actually happens at and to the property” e.g.
 - conditions to ensure rubbish is properly binned for collection
 - conditions to ensure fire escapes are kept clear
 - *possibly* conditions to ensure routine, non-structural maintenance such as re-glazing broken windows
- Management also includes e.g. conditions requiring training in e.g. tenancy management: *Berg v Burnley BC* [2020] UKUT 91 (LC)
- Use and occupation?
 - Arguably more straightforward
 - Includes conditions restricting or prohibiting the use or occupation of parts of a house
 - Query: conditions imposing minimum bedroom sizes, maximum occupation level?

Berg v Burnley BC [2020] UKUT 91 (LC)



Training requirements a legitimate Part 3 licence condition

Essential facts:

- Like s.67 HA 2004, s.90(1) HA 2004 empowers LHAs to include such conditions in licences as they consider appropriate “*for regulating the management, use or occupation of the house concerned*”
- On appeal by B, FTT varied conditions included in his licence, including one requiring him to “*attend one Landlord Development Day covering how to manage tenancies*” and “*any additional Property Management training courses that the [LHA] from time to time requires to be undertaken*”
- B appealed, arguing e.g. that the condition was contrary to the decision in *Brown v Hyndburn BC* [2018] EWCA Civ 242

Held: appeal dismissed

- So long as a condition relates to the management, use or occupation of a Part 3 house, it is permissible [25]
- “*On that basis the training condition sought to be imposed here is perfectly in order*” [26]
- The fact that s.67(2)(f), under Part 2, expressly empowers LHAs to include conditions requiring a licence holder or manager to attend a training course, and that s.90 does not do so, does not mean that LHAs cannot impose training conditions under Part 3, “*because of the breadth of the permissive wording*” in s.90(1) [27]
- Further, the condition was not disproportionate [33-36]



Questions



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