cornerstone barristers

Licensing the private rented sector:

Prosecutions and financial penalties – Top tips for successful enforcement

Dean Underwood, Barrister

Introduction

- Housing Act 2004 creates a number of licensing offences and enacts a suite of provisions to enable LHAs to investigate and enforce the Act's licensing schemes:
  - Entering and inspecting premises
  - Obtaining information
  - Applying for and assisting with rent repayment orders
  - Imposing financial penalties for licensing and other offences
  - Prosecuting licensing offences
- Focus of this webinar?
  - Offences and enforcement in overview
  - Key investigative powers
  - Financial penalties
  - Prosecutions
- Any views expressed are for educational purposes and are not advisory
- Any queries: dunderwood@cornerstonebarristers.com

Offences and enforcement in overview

Enforcement in overview

- Key offences:
  - Having control of or managing an unlicensed HMO or house: ss.72(1) and 95(1)
  - Knowingly permitting a Part 2 HMO to be occupied by more persons or households than is authorised: s.72(2)
  - Failing to comply with a licence condition or conditions: ss.72(3) and 95(2)
  - Failing to comply with HMO management regulations: s.234(3) (not a licensing offence)
- Defences limited: e.g. “reasonable excuse” under ss.72(5), 95(4) and 234(4)
- Key enforcement powers
  - Prosecution: Offences punishable on summary conviction by an unlimited fine
  - Financial penalties of up to £30,000 per offence: s.249A, 2004 Act
  - Rent repayment orders in the FTT: ss.73 and 96, and Housing and Planning Act 2016
  - Banning orders: Housing and Planning Act 2016
  - Rogue landlord database: Housing and Planning Act 2016
  - Revocation of licence (as person may no longer be fit and proper): 2004 Act
  - Restrictions on tenancy termination: ss.75 and 98, 2004 Act

R (Mohamed) v Waltham Forest LBC [2020] EWHC 1083 (Admin)

Failure to license HMO a continuing and strict liability offence

Essential facts:

- In 2017, W prosecuted M for failing to license HMOs, contrary to s.72(1) HA 2004; and invited M to interview on suspicion of a further such offence
- M sought a JR of W's decision to interview him, alleging W had been wrong to treat s.72(1) as a strict liability offence
- M later sought a JR of the Magistrates' Court refusal to treat the summonses as a nullity, on the premise that:
  - W had not provided, and the court did not have, enough information about the offences to issue summonses lawfully;
  - W had not laid informations in time as (i) s.72(1) did not create a continuing offence and (ii) W had known about the offences in 2015/2016

Held:

- s.72(1) created an offence of strict liability: W did not have to prove that M knew he was managing or in control of an HMO [40] [48]
- Lack of knowledge that a house was occupied as an HMO *might* be relevant to a "reasonable excuse" defence under s.72(5) [44] [48]
- M conceded that s.72(1) created a continuing offence, but argued that time ran once the LHA knew the HMO required a licence
- Argument rejected: if W proved the commission of an offence within 6 months of laying its information, the summons would be in time [51]
- W's informations, identifying the elements of the s.72(1) offence, with relevant names, addresses and dates, provided the court with sufficient information to issue summonses [25] [27]

IR Management Services v Salford CC [2020] UKUT 81 (LC)

Breach of HMO management regulations: a strict liability offence

Essential facts:

- On inspection of an HMO managed by IR, S identified breaches of Reg.4(4), Management of HMOs (England) Regulations 2006
- S penalised IR £25,000 for the related offence under s.234(3) HA 2004
- On appeal, IR's director maintained he did not know the house was an HMO, and so had a reasonable excuse under s.234(4)
- FTT: (1) held that IR had not proved, on the balance of probabilities, that it had a reasonable excuse; and (2) increased its penalty to £27,500

Held: appeal dismissed

- IR appealed on two grounds, one being that the FTT had applied the wrong burden and standard of proof under s.234(4)
- It argued: it had an evidential burden only; once it produced evidence supportive of the defence, S had the burden of proving, to the criminal standard, that IR had no such excuse, i.e. the absence of a reasonable excuse was an element of the offence
- Argument rejected: a failure to comply with the 2006 Regs. is a strict liability offence, the elements of which do not include the absence of a reasonable excuse [27]
- So, a prosecutor does *not* have to prove the absence of such an excuse; and the burden rests with the defendant to establish, to the civil standard, that a reasonable excuse exists [27]

Key investigative powers

Key investigative powers

- Power to obtain particulars of persons interested in land
  - s.16, Local Government (Miscellaneous Provisions) Act 1976
- Power to require documents to be produced: s.235, 2004 Act
  - Documents “reasonably required … for any purpose connected with the exercise of any of the [LHA]’s functions under … Parts 1 to 4, or for the purpose of investigating whether any offence has been committed under those Parts …”
  - See related offences under s.236, 2004 Act
- Power to use information obtained for other statutory purposes: s.237, 2004 Act
  - In summary, for Housing Benefit and Council Tax purposes
- Powers of entry: s.239, 2004 Act
  - See related power to obtain a warrant of entry (s.240), and related offence (s.241)

Prosecutions

Prosecuting 2004 Act offences: Key facts

- Key licensing and HMO management offences (ss.72(1), 95(1), 234(3)) are strict liability offences: see *Mohamed* and *IR Management Services* above
    - Consequences for a prosecuting authority?
- By contrast, the HMO overcrowding offence requires proof of *mens rea*
- All offences under ss.72, 95 and 234 are -
    - enforceable in the Magistrates' Court only
    - punishable on summary conviction by an unlimited fine
- Time to investigate and lay an information is limited: s.127(1), Magistrates' Courts Act 1980
- Decision to prosecute is determined in accordance with *Code for Crown Prosecutors*
- Criminal procedural rules apply: Criminal Procedure Rules 2020
    - Note in particular the restrictions on hearsay and bad character evidence
- Generally costs recoverable from defendant on conviction; payable from central funds if not

Limitation

- Section 127(1), Magistrates' Courts Act 1980

  127.— Limitation of time.

  (1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose.

- Note that the limitation period will begin to run in respect of s.72(1) and 95(1) offences if e.g.
  - the HMO or house ceases to be an HMO or house to which Part 2 or, as the case may be, Part 3 applies, e.g. because a designation comes to an end
  - the HMO or house no longer requires a licence for some other reason, e.g. because a Temporary Exemption Notice is in force
  - an application to license it is "duly made"

Deciding to prosecute

- Code for Crown Prosecutors

  "Prosecutors must only start or continue a prosecution when the case has passed both stages of the Full Code Test […] (i) the evidential stage; […] (ii) the public interest stage."

- The evidential stage

  "Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be."

- The public interest (PI) stage

  "In every case where there is sufficient evidence to justify a prosecution or to offer an out-of-court disposal, prosecutors must go on to consider whether a prosecution is required in the public interest."

- PI requires consideration of various factors including: seriousness of the offence, level of culpability, harm caused, offender's age and maturity, community impact, proportionality etc

Sentencing

- No sentencing guideline specific to 2004 Act licensing offences, so courts generally follow the General Guideline's ten-step approach, where relevant
  - Step 1: Assess the seriousness of the offence by reference to culpability and harm, and reach a provisional sentence taking account of (a) the statutory maximum, (b) relevant Court of Appeal judgments (e.g. *Sutton v Norwich CC* [2021] EWCA Civ 20), (c) definitive sentencing guidelines for analogous offences
    - Consider the relevance of the LHA's enforcement policy, penalties matrix and guidance
  - Step 2: Identify relevant aggravating and mitigating factors and whether they should result in an upward or downward adjustment of the provisional sentence
  - Step 3: Consider any factors which may warrant a reduction for assisting the prosecution
  - Step 4: Take account of any potential reduction for a guilty plea (see Reduction in Sentence for a Guilty Plea guideline)
  - Steps 5 and 6 concern prescribed, dangerous offence and offenders of particular concern and are not relevant
  - Step 7: If sentencing for more than one offence, consider whether the total sentence is just and proportionate to the overall offending behaviour
  - Step 8: Consider whether to make compensation or other ancillary orders, e.g. victim surcharge
  - Step 9: Give reasons for the sentence
  - Step 10 concerns time spent on bail and is not relevant

Waltham Forest LBC v Mohamed and Lahrie [2021] EWMC

A fine record for licensing offences

Essential facts

- M and L were directors of numerous property letting and management companies in WF and owned a portfolio of about 600 properties in London, including houses and 200+ flats in Waltham Forest.
- M and L let six of the houses to the directors of lettings agencies, knowing that they would be let and occupied as HMOs.
- M and L sought to license the houses under Part 3 HA 2004 rather than Part 2, asserting that they were each let to a single household, while charging a rent commensurate with their letting as HMOs.
- WF investigated and prosecuted M and L for offences under s.72(1) HA 2004. M and L pleaded not guilty, only admitting guilt after they were convicted.

Held:

- DJ found that M and L's offences were planned, sophisticated, and intended to benefit them financially, by enabling them to let houses at a high rent while avoiding licensing costs and obligations. They involved a high level of culpability.
- While M and L had lately accepted responsibility, they did not do so at the start, and put WF through 5 years' litigation.
- Further, while the houses were well-appointed, some were overcrowded; and the offences risked an erosion of public confidence in WF's licensing designation and the statutory licensing scheme. They involved a medium level of harm.
- Fines: £126,500 for M; £60,500 for L

Tips for successful prosecution

- Ensure sufficient evidence to prove *each* element of the offence
  - Evidence of control or management for ss.72(1) and 95(1) offences often overlooked
- Calculate and keep an eye on limitation
- Take care when settling the information
- Provide the court with sufficient information to issue the summons
  - See e.g. *R v West London Metropolitan Stipendiary Magistrate, ex parte Klahn* [1979] 1 WLR 933, as discussed in *Mohamed* above
- Identify hearsay and bad character evidence and make any necessary applications early
  - Do not delay until trial!
- Keep track of witnesses and summons the unreliable
- Anticipate and prepare for potential defences, and invite the court to record their limits
- Don’t forget a costs schedule!

Financial penalties

Fundamentals of the statutory power

- Financial penalty? In broad terms: a fine levied by a local housing authority ("LHA") in England on an individual or organisation as an alternative to prosecution for certain housing-related offences under the 2004 Act.
- Introduced by amendments made to the 2004 Act by the Housing and Planning Act 2016
  - Insertion of section 249A and Schedule 13A in particular
- Power to impose penalties came into force on 6 April 2017 and applies to offences committed on or after that date, not beforehand: *Regulation 4(f), SI 2017/281*
- LHA may impose a financial penalty on a person if it is satisfied, beyond reasonable doubt, that the person's conduct amounts to a prescribed offence in respect of premises in England: *section 249A(1), 2004 Act*
- A person's conduct includes a failure to act: *section 249A(9), 2004 Act*

The prescribed offences

- By section 249A(2), the offences for which a LHA may impose a penalty are:
  - failing to comply with an improvement notice, under section 30, 2004 Act;
  - managing or having control of an unlicensed HMO, under section 72(1);
  - permitting an HMO to be occupied by more than the authorised number of households or persons, under section 72(2);
  - failing to comply with an HMO licence condition, under section 72(3);
  - managing or having control of an unlicensed Part 3 house, under section 95(1);
  - failing to comply with a licence condition in respect of a Part 3 house, under section 95(2);
  - failing to comply with an overcrowding notice in respect of an HMO that is not required to be licensed under Part 2 of the 2004 Act, under section 139(7); and
  - failing to comply with regulations made under section 234 of the 2004 Act relating to the management of HMOs.

Exercising the power to penalise: proof and policy

- LHAs must satisfy themselves, before taking formal action, that there would be a realistic prospect of conviction – i.e. proving the offence to the criminal standard of proof - if they were to prosecute the offence in the Magistrates' Court.

- Statutory guidance recommends that LHAs consult the CPS Code for Crown Prosecutors, to determine whether they would have sufficient evidence to secure a conviction in the Magistrates' Court.

- Further, LHAs are expected to develop and document their own policies to determine when to prosecute and when to impose a penalty; and to decide which option to take on a case-by-case basis, in accordance with that policy.

- Prosecution, the guidance suggests, may be - but is not necessarily - the most appropriate option where an offence is particularly serious or the offender has a history of committing similar offences.

- See: *Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (DCLG, April 2018), section 3

Limitations on the statutory power

- LHAs' power to impose a penalty is circumscribed in several important respects.
- First, a LHA may not impose a financial penalty in respect of conduct constituting an offence:
  - if the person has already been convicted of the offence in respect of that conduct, or
  - criminal proceedings for the offence have been instituted in respect of the conduct and the proceedings have not been concluded: *section 249A(5), 2004 Act*
- Secondly, a LHA may impose only one financial penalty on a person in respect of the same conduct: *section 249A(3), 2004 Act*.
  - Where more than one person has committed the same offence, however – for example, where neither the person managing nor the person having control of a licensable HMO has applied for a licence authorising its occupation – a LHA may impose a penalty on each of them as an alternative to prosecution..
- Thirdly, the amount of the penalty must not exceed £30,000: *section 249A(4), 2004 Act*.

Notice of intent to impose a penalty: content and response

- Before imposing a financial penalty, the LHA must give notice of its proposal to do so – a 'notice of intent': *Schedule 13A, 2004 Act, paragraph 1*
- The notice must set out:
  - the amount of the proposed financial penalty;
  - the LHA's reasons for proposing to impose the penalty; and
  - information about the right to make representations under paragraph 4 of Schedule 13A to the 2004 Act.

  Schedule 13A, 2004 Act, paragraph 3
- Failure to comply with the statutory formality requirements, or to provide the recipient with sufficient reasons, will not necessarily invalidate the notice:

  Waltham Forest LBC v Younis [2019] UKUT 0362 (LC)
- A person served with such a notice may make written representations to the LHA about its proposal to impose a financial penalty, but must do so within a period of 28 days, beginning with the day after that on which the notice was given.

  Schedule 13A, 2004 Act, paragraph 4

Waltham Forest LBC v Younis [2019] UKUT 0362 (LC)

Sufficiency of reasons in notices of intended financial penalties

Essential facts

- Notice of intent to impose a financial penalty ("NIP") must set out: the amount of the penalty; the reasons for imposing it; and info. about the right to make representations (Sched.13A, para.3, HA 2004)
- W served notice on Y for breaching a condition of his Part 3 licence, contrary to s.95(2) HA 2004
- W did not elucidate but exhibited statements detailing the offence, and referred Y to its online enforcement policy
- Y later appealed against W's final penalty notice, arguing that the NIP was insufficiently reasoned and invalid
- FFT found W's reasons insufficient, the notice invalid and allowed Y's appeal in full

Held: W's appeal allowed

- NIP must provide a sufficient account of a LHA's reasons to enable the recipient to understand what conduct or omission amounts to the offence [50]
- W had done so: there was no reason why a LHA's reasons could not be set out in more than one document [51-52]
- Still, a "*concise statement of the facts"* of the offence *"would be preferable*" [58]
- A mere link to an online policy would not be enough to explain the penalty amount [57], but W had provided enough info. with its NIP
- Insufficiency of reasons will not invariably invalidate a NIP [74]. Even if W's reasons had been defective, Y had not been prejudiced [76]

Notice of intent to impose a penalty: time limits

- Notice must be given before the end of the period of 6 months beginning with the first day on which the LHA has sufficient evidence of the conduct to which the penalty relates: *Schedule 13A, 2004 Act, paragraph 2(1)*
    - Note: the language differs from that limiting the period for beginning prosecutions in the Magistrates' Court under section 127(1), Magistrates' Court Act 1980
    - Query: when will the LHA have "sufficient evidence"?
- If, however, on that day:
    - the person continues to engage in the conduct; and
    - the conduct continues beyond the end of that day,

  the LHA may give notice of its intent at any time when the conduct is continuing or within the period of 6 months beginning with the last day on which the conduct occurs: *Schedule 13A, 2004 Act, paragraph 2(2)*
- For this purpose, again, a person's conduct includes a failure to act: *Schedule 13A, paragraph 2(3)*

Final notice of a LHA's penalty decision

- Once the period for representations has ended, the LHA must decide whether to impose a penalty and, if it decides to do so, its amount: *Schedule 13A, 2004 Act, paragraph 5*
- In that case, it must then serve a further notice - a 'final notice' - imposing the penalty and requiring it to be paid within a period of 28 days, beginning with the day after that on which the notice is given: *Schedule 13A, 2004 Act, paragraphs 6 and 7*
- The notice must also set out:
  - the amount of the penalty,
  - the LHA's reasons for imposing it,
  - information about how to pay the penalty,
  - the period for payment of the penalty (above),
  - information about the person's rights of appeal, and
  - the consequences of failing to comply with the notice.

  Schedule 13A, 2004 Act, paragraph 8
- Note: The LHA may at any time withdraw a notice of intent or a final notice, or reduce the amount specified in either such notice. To do so, it must give notice in writing: *Schedule 13A, 2004 Act, paragraph 9*

Determining the penalty amount

- Presently, LHAs may impose a penalty not exceeding £30,000 for each prescribed offence committed: section 249A(4), 2004 Act
    - Note: the Secretary of State is given power, under section 249A(8), to amend the prescribed maximum to reflect changes in the value of money.
- There is no statutorily prescribed minimum.
- LHAs are expected to have a documented policy to determine the appropriate amount of a penalty in any given case.
- Generally, statutory guidance suggests, the amount imposed should reflect the gravity of the offence committed, as well as the offender's history of offending. The maximum amount of £30,000 should, it is suggested, be reserved for the very worst offenders.
- See *Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (DCLG, April 2018), paragraph 3.5

Determining the penalty amount: relevant factors

- The Secretary of State recommends that LHAs consider the following factors to ensure that the penalty is fixed at an appropriate level:
  - The severity of the offence.
  - The offender's culpability and track record.
  - The harm caused to the tenant.
  - Punishment of the offender
  - Deterring the offender from repeating the offence
  - Deterring others from committing similar offences
  - Removing any financial benefit to the offender
- LHAs will also need to consider the resources of the person on whom they intend to impose a penalty and, to that end, assess the offender's assets and income.
- *See Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities* (DCLG, April 2018), paragraphs 3.4 to 3.5
- This list should not be treated as exhaustive; and care should be taken not to penalise a recipient twice for offences arising from the same conduct: *Sutton v Norwich CC* [2020] UKUT 90 (LC) at [243]

Sutton v Norwich CC [2021] EWCA Civ 20

Avoiding the double punishment of company directors etc

Essential facts:

- N imposed financial penalties on S and the company of which he was a director, F, totalling c.£236k each.
- Penalties for (a) failing to comply with improvement notices (s.30(1) HA 2004), and (b) breaching the Licensing and Management of HMOs (Additional Provisions) (England) Regulations 2007 (s.234(3) HA 2004).
- S and F appealed on grounds including that: (a) they did not know the house was an HMO, (b) they had relied on reputable professionals to carry out works at the house, so had a reasonable excuse under ss.30(4) and 234(4), and (c) by penalising both the company *and* its directors, the directors had in effect been punished twice.

Held on transfer to the UT:

- s.234(3) creates a strict liability offence, subject to a reasonable excuse defence. [219] Once the facts of the offence were proved, S and F had to prove, to the civil standard, that they had a reasonable excuse. [214-215]
- Whether an excuse is reasonable or not is an objective question for the tribunal. [216]
- Lack of knowledge of facts that caused a house to be an HMO (e.g. that it was occupied by more than one household) *might*, in principle, provide a reasonable excuse; lack of knowledge of the *consequences* of the facts will not. [221]
- The penalties imposed on the company and directors were excessive and should have been fixed having regard to not only the statutory maximum, but each with regard to the penalty imposed on the other. [251] …….

Sutton v Norwich CC [2021] EWCA Civ 20

Avoiding the double punishment of company directors etc

- Held, on the director's appeal against the amount of the penalties: appeal dismissed
  - There was no rule that, where both a company and a director were penalised, the right course would be to first ask what penalty the offence merited, and then to apportion that figure between company and the director.
  - There was similarly no rule as to how the penalty imposed on a company should relate to the penalty imposed on a director. That would depend on the facts.
  - There was a need, nonetheless, to beware of double punishment: an individual with an interest in a company (e.g. directors who are shareholders) could be worse off to the extent of some or all of a penalty imposed on a company; and that had to be borne in mind when deciding what penalty to impose on the individual. The Upper Tribunal had been aware of that need. [38-45]
  - While there was a £30,000 cap on the penalty that could be imposed on one person in respect of an offence, there was no bar on the aggregate of penalties imposed on two or more persons exceeding £30,000. In principle, penalties of £30,000 could be imposed on both company and director. [46]
  - The Upper Tribunal had not erred in its assessment of the individual penalties.

Ancillary consequences

- LHAs may include the details of a person who receives two or more financial penalties in a twelve month period in the database of rogue landlords and property agents that it is required to maintain under Chapter 3 of Part 2 to the 2016 Act.

  Section 30(2), 2016 Act

- While not obliged to do so, LHAs are strongly encouraged to make such use of the database as it, “will help ensure that other local housing authorities are made aware that formal action has been taken against the landlord”.

  Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities (DCLG, April 2018), paragraph 7.4

- Further, LHAs may take any such penalties into account when considering whether a person is fit and proper to hold a licence under Part 2 or Part 3 of the 2004 Act.

  Sections 66(2) and 89(2), 2004 Act

Recovery and use of penalties

- If a person fails to pay a financial penalty, or any part of it, the LHA may enforce it in the County Court. In that case, the penalty, or such part of it as is unpaid, may be recovered as if it were payable under an order of the Court: *Schedule 13A, 2004 Act, paragraph 11*
- In such proceedings, a certificate which:
  - is signed by the LHA's chief finance officer; and
  - states that the amount due has not been received by a date specified in the certificate,

  will be conclusive proof of that fact; and will be treated as being signed by the LHA's chief finance officer unless the contrary is proved: *Schedule 13A, 2004 Act, paragraph 11*
- A LHA may apply any financial penalties recovered under section 249A of the 2004 Act to meet its costs and expenses - whether administrative or legal – incurred in, or associated with, carrying out any of its enforcement functions in relation to the private rented sector.
- Any amount not so applied must be paid into the Consolidated Fund.

Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017, Regulation 4

Appeals to the First-tier Tribunal

- A person to whom a final notice is given may appeal to the First-tier Tribunal against either the LHA's decision to impose the penalty or the amount of the penalty: *Schedule 13A, 2004 Act, paragraph 10*

- An appellant must provide the Tribunal with notice of any appeal "within 28 days after the date on which notice of the decision to which the appeal relates was sent to the appellant": *Rule 27, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013*

- The Tribunal has power to extend the time prescribed by Rule 27, above, under Rule 6:

  Pearson v Bradford MDC [2019] UKUT 0291 (LC)

- When considering an application to extend time, a tribunal's approach should be similar to the 3-stage CPR approach, i.e. per *Denton v T H White Ltd* [2014] EWCA Civ 906 at para.24 [21-23]:

  Haziri v Havering LBC [2019] UKUT 330 (LC); [2020] LLR 112

- In the event of an appeal, the LHA's final notice is suspended until the appeal is finally determined or withdrawn: *Schedule 13A, 2004 Act, paragraph 10*

Pearson v Bradford MDC [2019] UKUT 0291 (LC)

Extending time for FTT appeals

Essential Facts

- B imposed a financial penalty on P, under s.249A HA 2004, for failing to license an HMO, contrary to s.72(1)
- Final notice of the penalty, dated 7.11.18, informed P that he had 28 days to appeal (see r.27, Tribunal Procedure (FTT) (PC) Rules 2013)
- P appealed, but not until 25.01.19
- FTT struck out the appeal, on the basis that (a) it was out of time and (b) P had offered no good reason for delay – he had "*been busy*" over Christmas
- P appealed

Held: Appeal dismissed

- FTT had a discretion to extend time for P's appeal (see rr.27 and 6(3)(a) of the 2013 Rules)
- It had an unfettered discretion to extend time under r.6(3)(a)
- The UT would only interfere with an exercise of FTT discretion on procedural matters if it "*has exceeded the bounds of a reasonable exercise of discretion*" [5]
- The FTT had not taken a wrong approach and no good reason had been offered for the delay

Haziri v Havering LBC [2019] UKUT 330 (LC); [2020] LLR 112

Extending time for FTT appeals

- **Essential Facts**
- HLBC imposed penalties on H for failing to license an HMO, contrary to s.72(1), and for breaches of HMO management regulations, contrary to s.234(3)
- H appealed, but did so 10 days late, after the 28-day limitation period had expired
- FTT refused to extend time and H appealed
- **Held: appeal dismissed**
- UT "*should not interfere with a discretionary case management decision by an FTT judge who has applied correct principles and taken into account matters which should be taken into account and not taken into account irrelevant matters unless …*
- *… it is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the FTT judge.*" [20]
- A tribunal's approach to procedural non-compliance should be similar to the 3-stage CPR approach, i.e. per *Denton v T H White Ltd* [2014] EWCA Civ 906 at para.24 [21-23]
- "*It is* […] *vital* […] *that this Tribunal uphold robust fair case management decisions by FTT judges*" [24]
- "[…] *the proper focus is not on the underlying merits of the dispute.*" [26]
- Further, delay is a relative concept: "*A delay of 10 days in doing something which is required to be done in 28 days is capable of being regarded as significant.*" [28]

First-tier Tribunal hearings and disposal

- An appeal in respect of a financial penalty is a re-hearing of the LHA's decision but may be determined having regard to matters of which the LHA was unaware: *Schedule 13A, 2004 Act, paragraph 10*

> "*On a rehearing an appellant is entitled to expect that the F-tT will make up its own mind. In doing so it is not required to adopt the approach advocated by Mr Madden of starting with a blank sheet of paper, and it is entitled to have regard to the views of the local housing authority whose decision is under appeal.*"
>
> *Clark v Manchester CC* [2015] UKUT 0129 (LC) at [41]

- The proceedings are civil in nature, decided according to Tribunal rules, and applying the same approach to procedure as the F-tT ordinarily applies, *not* by importing criminal procedure rules: *Waltham Forest LBC v Younis* [2019] UKUT 0362 (LC) at [48]
- The Tribunal may determine the appeal by confirming, varying or cancelling the LHA's final notice.
- It may not, however, vary the final notice so as to impose a larger financial penalty than the LHA could have imposed, i.e. £30,000: *Schedule 13A, 2004 Act, paragraph 10*

Waltham Forest LBC v Marshall and Ustek [2020] UKUT 35 (LC)

Respect due to financial penalty policies

Essential facts:

- W imposed financial penalties on M and U, under s.249A HA 2004, for failing to license flats under their control, contrary to s.95(1)
- W calculated penalties according to its licensing enforcement policy and, principally, the seriousness of the offence, categorised in six bands in a Civil Penalties Matrix
- M's offence fell within Band 2, U's within Band 4; and M and U were penalised accordingly: £5000 and £12,000 respectively
- On appeal, the FTT reduced M's penalty to £1000 (equivalent to a low penalty for a Band 1 offence) and U's to £4000 (equivalent to a high penalty for a Band 1 offence)

Held: W's appeals allowed

- FTT may not entertain challenges to a LHA's policy: only Admin. Court may do so [52-53]
- FTT must start from the LHA's policy and consider any arguments that it should depart from it
- The appellant bears the burden of persuading it to do so [54]
- FTT must look at the policy's objectives and ask whether they will still be met if it departs from the policy [54]; and consider the need for consistency between offenders – the very rationale for having a policy [85]
- Further, FTT must "*afford considerable weight*" -"*special weight*"- to the LHA's decision [61-62]
- FTT had paid only lip service to W's policy and decisions: W's "*generous*" penalties reinstated [85-92] [97-101]

Tips for successful penalty imposition

- Publish a coherent policy, inclusive of a penalties matrix and related guidance
  - Emphasise its role in achieving LHA's licensing objectives and ensuring consistency of approach in the use of penalties
  - Provide sufficient guidance to enable the FTT to adopt a consistent approach
- Ensure sufficient evidence to prove *each* element of the offence, e.g. designation, control
- Calculate and keep an eye on limitation
  - See paragraph 2, Schedule 13A, 2004 Act (above)
- Take care when settling notice of intent and final notice – *Younis* might not always save you!
- Keep track of witnesses and, upon an appeal, summons the unreliable
  - See e.g. rule 20, Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
- Anticipate and prepare for potential defences
- Don't forget LHA to reduce and FTT power to vary penalty amount

Prosecution or penalty?

Prosecution or penalty?

Key advantages and disadvantages

Prosecution:

- Onus on LHA to bring proceedings
- Strict limitation period
- Criminal procedure rules apply
- Defendant generally not obliged to file or serve a statement of case or evidence
- Fine for each licensing and management offence unlimited
- Fine not payable to LHA
- Costs recoverable upon conviction

Penalty:

- Onus on offender to bring proceedings
- More “accommodating” limitation period
- More “accommodating” Tribunal procedure rules apply
- Appellant required to file and serve a statement of case and any evidence on which s/he relies
- Penalty amount limited to £30,000 for each offence
- LHA may apply penalty proceeds to offset licensing and other PRS related costs
- Costs generally not recoverable

Questions

Dean Underwood
Cornerstone Barristers
2-3 Gray's Inn Square
London WC1R 5JH
DX: LDE 316 Chancery Lane
T: 020 7242 4986
E: dunderwood@cornerstonebarristers.com

cornerstone barristers

Licensing the private rented sector:

Prosecutions and financial penalties: Top tips for successful enforcement

Dean Underwood, Barrister