When is a 'Part 3 house' not a house?

Richard Hanstock illustrates the problems surrounding selective licensing schemes and discusses a recent unreported decision

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'Although selective licensing is sometimes colloquially referred to as "landlord licensing", the licensable unit is not the landlord but the property that is to be let out.'

An ever-greater number of local authorities have adopted selective licensing schemes, requiring residential landlords in certain areas to submit to compulsory registration and inspection. Once an area designation has been made, the requirements apply across the private rented sector, as much to landlords of small-scale investment properties as to those owning large build-to-rent schemes.

Selective licensing is on statutory footing but is subject to local designation and implementation. While localism can be a strength in the maintenance of sustainable communities, fundamental inconsistencies have emerged as between local authorities' interpretations of the empowering statute. The focus of this article is a confusion over the unit that falls to be licensed, reflected in the emerging practice of several authorities to require licences on a per-dwelling basis, rather than per 'house'. This leads to significant uncertainty and increased costs for landlords seeking to understand and to observe their legal obligations.

The statutory scheme

The seat of selective licensing is Part 3 of the Housing Act 2004. Local authorities may designate any part of their areas as subject to selective licensing where they are concerned about any of a range of social evils, including low housing demand, poor housing conditions and anti-social behaviour. Once a scheme is in effect, all private-sector landlords in that area (with only limited exceptions) must obtain licences and comply with the scheme.

Before an area designation may be made, the consent of the Secretary of State is required; however, a controversial blanket consent was issued in April 2010, essentially removing case-by-case scrutiny of the evidence base for adoption (otherwise than through the local authority's own processes and by way of judicial review). In April 2015, this general approval was replaced with a more limited version, requiring case-by-case authorisation for any scheme that would cover more than 20% of the authority's geographical area or affect more than 20% of the private rented housing in its district (the so-called '20/20 rule').

Authorities issue selective licences where they are satisfied with the condition of the property and with the arrangements put in place for its management. In particular, the authority will consider whether the landlord and any property manager are 'fit and proper persons' to occupy those roles. Failure to obtain a licence is a criminal offence, and landlords of unlicensed properties are also prevented from serving valid s21 notices. Licences are issued subject to conditions, generally relating to the proper management of the premises. The ultimate objective appears to be that 'rogue' landlords are either compelled to improve their operations or are driven out of the designated area.

The effectiveness of such schemes remains open to debate, and is likely to vary from locality to locality. Much will depend, I suggest, on the quality of the evidence base that leads to the designation and the ongoing operation of the scheme. Effectiveness is beyond the scope of this article, but an eye to the statutory purposes is helpful in interpreting the legislation itself.

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Application fees are locally set, and are themselves a source of controversy. They can amount to several hundred pounds for each licence, which are issued for periods of no more than five years. Cynics argue that such fees are little more than taxation on landlords, though lawyers will be aware that this is not a revenue-generating statute. Fuelling this cynicism is uncertainty regarding the number of applications that each landlord has to make, driven by the issue of interpretation that arose in *London Borough of Waltham Forest v Tuitt* [2016], discussed below.

The licensable unit

Although selective licensing is sometimes colloquially referred to as 'landlord licensing', the licensable unit is not the landlord but the property that is to be let out. Section 79 of the 2004 Act 'provides for houses to be licensed by local housing authorities', and s85 provides that every 'Part 3 house' must be licensed. Although the characteristics of the landlord are relevant to the decision whether to issue a licence, the analysis for present purposes focuses on the property and its extent.

Section 99 of the 2004 Act defines a 'house' as 'a building or part of a building consisting of one or more dwellings'; a 'dwelling' in turn is 'a building or part of a building occupied or intended to be occupied as a separate dwelling'. It follows that a 'Part 3 house' is a building, or part of a building, consisting of one or more dwellings.

Though this is a rather clumsy definition, it provides an innate scalability of the licensable unit that I suggest was designed to fit a vast range of permutations of modern property ownership, from a single house to a mixed-use block in multiple ownership.

To illustrate this point, consider Landlords A, B, C and D, each in a selective licensing area:

- Landlord A owns a detached house, which is let under an assured shorthold tenancy (AST).
- Landlord B owns a mid-terrace house that has been converted into two self-contained flats, each let under separate ASTs.
- Landlord C owns a block of 20 self-contained flats, each let under ASTs.
- Landlord D owns ten flats within a block of 50, letting each under ASTs.

Landlord A is straightforward from a licensing perspective: a single building comprising a lone dwelling would plainly require a single licence. However, Landlords B, C and D all own multiple dwellings: they are likely to be treated differently by different authorities applying the same legislation. Some issue a single licence; others require multiple licences, one for each dwelling.

This difference in treatment is highly problematic, not least because s91(1) provides that '[a] licence may not relate to more than one Part 3 house'. If multiple licences are issued in respect of what is, properly analysed, a single Part 3 house, those licences would appear to offend the s91(1) prohibition, with potentially significant ramifications for the issuing authority, which could include liability to refund licence fees charged for unnecessary applications.

Multiple dwellings

Problems arise where a single landlord owns multiple dwellings within the same building. Authorities that issue licences on a per-dwelling basis typically require separate applications for each dwelling, each attracting its own separate application fee. Those authorities that issue a single licence covering multiple dwellings instead process a single application, attracting a single fee. For example, Landlord B (above) would be charged two licence fees, one for each dwelling; Landlord C would be charged 20 fees for 20 licences; Landlord D would be charged ten fees, and so on.

Support for the argument that a single licence may span multiple dwellings can also be found elsewhere in Sch 2 to SI 2006/373, which envisages that an application under s87 of the 2004 Act may describe 'a house converted into and comprising only of self contained flats', 'a purpose built block of flats' or some 'other' configuration, requiring applicants to specify 'the number of separate letting units' therein.

Although there is no direct authority on the point in relation to selective licensing, it will come as no surprise that the concept of the 'house' has been litigated in relation to predecessor Housing Acts. In *Okereke v Brent LBC* [1967], Davies LJ (at 57C) considered that the word 'house' in s15(1) of the 1961 Housing Act should be given a broad, general meaning, finding a single 'house' across the entirety of a building that had been converted into three flats across the basement, ground floor and first floors, with a vacant second floor unfit for occupation. Similarly, in *Stanley v Ealing LBC (No. 2)* [2003] it was held that 11 dwellings across three separate parts of a building, including a structurally independent side extension, could also be a single 'house'.

It follows that there is nothing in the natural or legal meaning of the word 'house' that compels the issuing of selective licences on an exclusively per-dwelling basis, particularly in light of the statutory definition of 'house' at s99, which expressly encompasses multiple dwellings. Where multiple dwellings in the same building are owned by the same landlord, nothing of substance to further the statutory purpose of raising standards in the private rented sector is achieved by licensing dwellings separately rather than together – only, it seems, additional fee income for the housing authority.

Waltham Forest

The local housing authority in *Waltham Forest* took a per-dwelling approach. The landlord faced prosecution for failing to obtain selective licences for his property, a mid-terrace house that had been converted into four flats. The authority visited the property and gathered evidence that three of those flats were privately let; it was later conceded that all four flats were so let. The authority prosecuted Mr Tuitt for three offences, one for each of the three flats they identified. The defence argued that there was no case to answer on the allegations as drafted, which described 'Flat 1', 'Flat 2' and 'Flat 3', whereas on a proper analysis a single offence had been committed in relation to a single Part 3 house.

In response, the authority argued that anything other than a per-dwelling approach to licensing would be unworkable. Partly, this was said to be because the extent of the Part 3 house could vary from time to time if it encompassed multiple dwellings, based on the occupation or otherwise of the dwellings it comprised: for example, if the landlord decided not to let one of the four flats to the private sector, the Part 3 house would no longer extend to the whole of the property but only to the three remaining flats, and the status of the licence would therefore be in question.

The counter-argument for the defence was based on redundancies of language that flow from a radical per-dwelling approach, particularly in those parts of s99 that envisage a house comprising multiple dwellings. It is generally to be assumed that Parliament intended to use all of the words it includes in a statute; surplusage is not lightly to be assumed (*Stone v Yeovil Corporation* [1876] at 701; *Ryanair Ltd v HMRC* [2014]). As to unworkability, which might otherwise divert the courts away from a literal interpretation, there is a statutory mechanism at s92 of the 2004 Act to vary the licence, which does not appear to debar the variation from time to time of the scope of the licensable unit.

At first instance, the district judge accepted the prosecution argument that the statute could only be read in such a way as to permit the issuing of licences on a per-dwelling basis. On appeal by way of case stated, the prosecution abandoned this argument, and instead argued that the local authority had the power to choose in multiple-dwelling cases whether it would be more appropriate to issue single or multiple licences.

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Consequently, it was apparent that neither side supported the reasoning of the district judge that led to the convictions, which would in any event require proof of the fact that an election had taken place, which had not been evidenced below. The appeal was therefore conceded, the convictions were quashed by the High Court and the matter was not remitted to the magistrates' court. It must follow that in quashing the convictions, the High Court agreed that the district judge had been wrong so to hold, but it was not necessary for it to rule on the outstanding issue of whether the authority was empowered to choose to issue multiple licences rather than just one. It follows that as yet there is no binding authority on that point.

A power to choose?

There are various problems with the averred power of election, which due to the concession on the appeal (above) has yet to be resolved by the courts.

- First, there is no express statutory basis for the conferring upon the local authority a power of election, to determine the scope of the Part 3 house in each case; the power was said to be implicit from the wording of the statute. The preferable approach, in my view, is that it is the Act, not the local authority, that defines the scope of a Part 3 house.
- Second, there is no obvious route of appeal against such a decision, save presumably by way of judicial review; yet, the first a landlord is likely to find out that an election has been made is (as with Mr Tuitt) when they are being prosecuted for failing to obtain licences. I am not aware of any local authority that 'builds in' to its processes such a power of election.
- Third, it is not at all clear what factors would govern the exercise of such a power of election – which may itself offend the Services Directive which requires, among other things, transparency in the criteria under which authorisations are granted – nor indeed for the views of the landlord to be taken into account.

For all these reasons, my preferred approach is to consider the extent of the licensable unit – the Part 3 house – as being fixed in law, sensitive to the facts of each case, and not subject to an overriding discretion on the part of the local authority on a case-by-case basis. It would follow that Mr Tuitt, and others like him, required only a single licence, not several.

'Part' of a 'building'

Further sources of uncertainty arise from the definitions of 'part' and 'building', as follows:

- Must a 'part of a building' be a contiguous part, or might it

encompass non-contiguous configurations, such as a basement flat and a penthouse flat?

- Must a 'building' be an independent physical structure, or could it extend to multiple blocks within a single development?

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It is to be noted that a per-dwelling approach would provide certainty in these cases, at the expense of redundancy in language and administrative duplication decried above. In my view, it is legally possible to resolve each of these uncertainties without doing violence to the wording of the statute. The correct approach in my view would be to determine the number of licences required by reference to the extent to which the flats in question form 'part of a building'.

Returning to the bullet-point illustrations above, it will be recalled that Landlord D owns ten separate flats in a larger block. It was argued in the previous section that Landlord D would require a single licence, on the basis that those ten flats form part of a building comprising several dwellings. If by reason of their relative positions within the building those flats do not form a contiguous part – in that they are not immediately adjacent to one another, or do not share adjoining walls – should this lead to a difference in treatment? In my view, there is no justification for requiring the 'part' of a building to be a contiguous part, as this would lead to a seemingly arbitrary difference in treatment based solely on the relative position of the separate dwellings.

To this mix could be added Landlord E, who owns 20 flats across three blocks comprising part of a 100-flat development scheme. The flats within the scheme all share landscaped private amenity space, parking facilities, concierge facilities and so on; Block 1 houses a shared swimming pool and gymnasium, for access to which all tenants pay a service charge. Block 1 is connected by a high-level walkway to Block 2, whereas Block 3 is not physically connected to the other two. Landlord E owns and lets flats in each block.

Clearly, those flats across separate blocks cannot form a contiguous part of a single building, as there is physical separation between the three blocks. However, if contiguousness is not a necessary component of the definition of 'part of a building', perhaps it can also be argued that those 20 flats across the three blocks also form 'part of a building', on the basis of an expansive interpretation of the word 'building'.

Perhaps surprisingly given its natural meaning, such an expansive approach to the extent of a 'building' is not unprecedented. In *Long Acre Securities Ltd v Karet* [2005] at 77-78, in the context of first-refusal notices under Part I of the Landlord and Tenant Act 1987, the High Court interpreted the word 'building' as being capable of encompassing multiple structures. Supporting this reasoning was the fact that appurtenant premises, although physically independent, are included within the statutory definition of 'building' – an approach replicated in in the 2004 Act at ss99 and 146. In essence, the court found that the question whether several blocks comprise part of a single building is a matter of fact and degree.

In *Long Acre*, an estate comprised four separate structures (containing residential flats and commercial units), sharing a single appurtenant accessway, car parking areas, a central yard or forecourt, paths, roadways and an amenity space. These appurtenant areas were all managed together and were used in common by all the residential occupiers. A challenge to the validity of an s5 notice on this basis was dismissed. At 71:

> In my judgment, however, the term 'building', as used in the Act, must have been intended by Parliament to include more than one structure in some, albeit limited, circumstances. The question arises as to what precise circumstances. For example, one could imagine that two structures with a shared access might sensibly be regarded as one building for the purposes of the Act.

The court wrestled with the statutory language, before resolving at 74:

> Thus, the Act can only make sense, if the word 'building' is construed to mean (I accept somewhat awkwardly) either a single building or one or more buildings, where the occupants of the qualifying flats in each of those buildings share the use of the same appurtenant premises. I have used the term 'appurtenant premises' as it is used in section 4(4) of the Act for simplicity. If this is the correct construction of the Act, then it is true that many 'building schemes', as Long Acre has called them, will fall within the definition I have attempted. But in my view, although there is some statutory warrant for my approach, there is none for the suggestion in the *30 Upperton Gardens* case [1990] 2 EGLR 232 that the word 'building' should be construed in a formal way as including all 'building schemes'. There will, in practice, be some building schemes where the buildings are far removed from one another, and share no appurtenant premises. In such a case, I cannot see how section 5(3) can be construed as allowing a valid section 5 notice to be served in respect of a single transaction including two such buildings.

The court continued (at 75) that the interpretation was supported by the purpose of the first-refusals legislation:

> I have considered carefully whether my approach is at odds with the Court of Appeal's decision in *Kay Green's case* [1996] 1 WLR 1587. I am satisfied that I am not bound by *Kay Green's case* to decide that the word 'building' in the Act means a single structure in all circumstances. [...] I think I must accept that my decision is inconsistent with some of the reasoning in *Kay Green's case*, though I do not think it conflicts with the *ratio decidendi*. I am satisfied, however, that if I were to follow the reasoning in *Kay Green's case*, so as to hold that the notice in this case was invalid, I would be cutting directly across the purpose of the legislation. I would be making the Act unworkable in the kind of case epitomized in *30 Upperton Gardens* [1990] 2 EGLR 232 and in this case. For these reasons, and not without some hesitation, I have concluded that the decision I have reached as to the construction of the Act is open to me, having considered the four authorities I have referred to as a whole.

It follows that if the three blocks housing Landlord E's flats can be described as comprising a single integrated development – one hallmark of which would be the extent to which they share appurtenant facilities – a single licence could be required even though those flats are within separate physical structures.

Consider the walkway between Blocks 1 and 2: does that physical connection render them a single 'building', or is a test of structural independence more appropriate? Returning to *Stanley*, it will be recalled that parts of a structurally independent side extension formed part of a single 'house'. If the word 'building' can be expansively interpreted in line with the position in first-refusal notices under the 1987 Act, it may well be possible to conceive of the flats in Blocks 1-3 as comprising a single Part 3 house in Landlord E's case.

Summary and conclusion

Despite the growing popularity of selective licensing among housing authorities, there has been surprisingly little authority dealing with the fundamental question of what unit in fact falls to be licensed. Landlords and their lawyers should be alive to the possibility of challenging any determination that multiple licences are required, as well as taking care to ensure that any licences they do obtain cover the full extent of their portfolios. Housing authorities would be well advised urgently to review their selective licensing processes, else face claims for judicial review and frustration in their efforts to enforce their licensing scheme, with potentially wide-ranging consequences. Judging from the public registers of licences issued, a great many landlords could potentially be due refunds of licence fees levied in circumstances in which, properly analysed, only a single licence should have been granted. ■

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London Borough of Waltham Forest v Tuitt
(2016) unreported, Thames Magistrate Court, 11 November
Long Acre Securities Ltd v Karet
[2005] Ch 61
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