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Recent developments in mandatory, additional and selective licensing under the Housing Act 2004

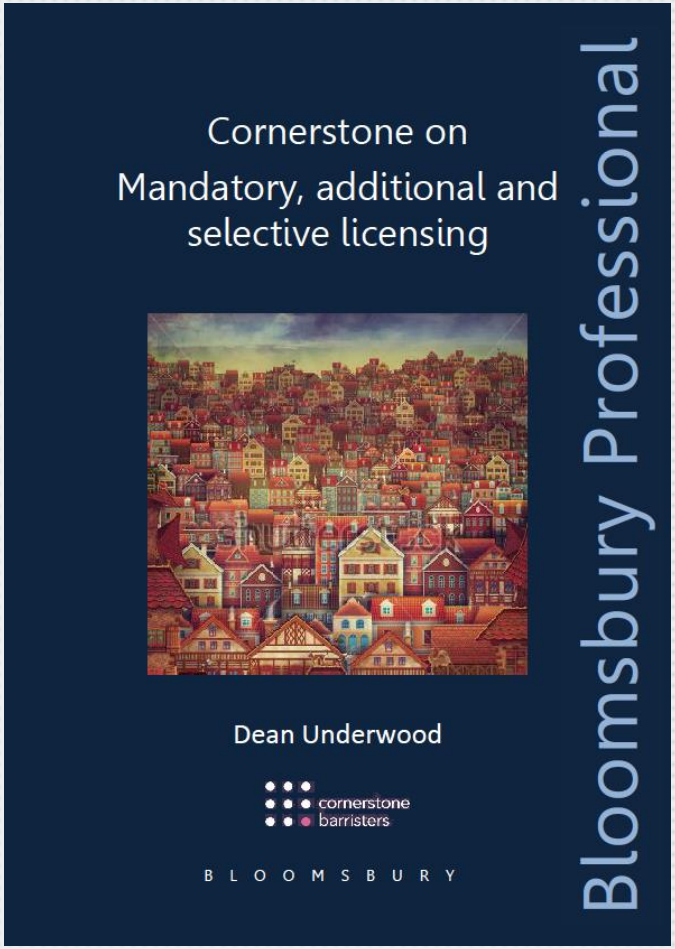
Dean Underwood, Barrister

Introduction

- Recent developments in mandatory, additional and selective licensing under the Housing Act 2004 -
  - assumes a basic knowledge of 2004 Act licensing
  - provides a summary of developments in 2004 Act licensing in the last 12 months
  - focuses on recent and most significant case law
    - *Hussain v Waltham Forest LBC* [2019] UKUT 339 (LC); [2020] HLR 14
    - *Waltham Forest LBC v (1) Marshall (2) Ustek* [2020] UKUT 35 (LC)
    - *IR Management Services Ltd v Salford CC* [2020] UKUT 81 (LC)
    - *R (Mohamed) v Waltham Forest LBC et al* [2020] EWHC 1083 (Admin)
- Links to statutes, decisions and other materials are provided throughout, where available: simply click (or right-click) on the link
- See also the helpful article by Cornerstone Barristers colleague, Tara O'Leary, here
- Any queries: deanu@cornerstonebarristers.com

A shameless plug …

- A new book for your shelves …
- Cornerstone on Mandatory, Additional and Selective Licensing
- Published by Bloomsbury Professional
- Part of the ‘Cornerstone on …’ series
- Expected 2020



New guidance in the wake of COVID-19

COVID-19 and the enforcement of standards in rented properties: non-statutory guidance for LHAs

- Non-statutory guidance (here) for local authorities ("LHAs") on enforcing standards in rented properties during the COVID-19 outbreak
- LHAs not required to have regard to it, but the guidance is "*intended to provide a recommended approach for* [LHAs]"
- Recognises that local authorities and landlords may both find it harder to comply with legal obligations ….
- … but recognises that those obligations, and LHA powers, still exist …
- … and recommends "*a pragmatic approach to enforcement that ensures tenants are kept safe and landlords are supported*", "*basing all decisions on an assessment of risk*"
- LHAs are advised to update policies about e.g. when and how officers undertake inspections, and how they will respond if unable to gain access (de-prioritising lower-risk hazards, video-link assessments etc)
- Further: "[…] *local authorities should only take the enforcement action that they determine is necessary*" and "[…] *consider suspending all non-urgent pro-active work where there is not a duty to carry this out* […] *and prioritising reactive work* […]"

COVID-19 and the enforcement of standards in rented properties: non-statutory guidance for LHAs

- And on licensing in particular …

- "*For mandatory* [HMO] *licensing and non-mandatory schemes (selective licensing and additional [HMO] licensing) which are already in place, local authorities should:*

  - *Contact landlords who are waiting for licences to be determined to explain potential delays.*
  - *Take individual landlords' circumstances into account where licence fee payments may have been delayed due to the current situation.*
  - *Prioritise high-risk licensable properties if this is necessary to protect vulnerable tenants and target imminent risks to health.*
  - *Continue as usual for non-mandatory licensing schemes which are already in place but, as with all enforcement, take a pragmatic and common-sense approach to enforcement action.*

- *Where local authorities are in the process of introducing non-mandatory licensing schemes, but these are not yet in force, they should consider: • Pausing these at an appropriate point, in line with the advice on proactive and reactive work.*"

Coronavirus (COVID-19) Guidance for Landlords and Tenants

- Non-statutory guidance (here) for landlords and tenants in the private rented sector, covering rent and disrepair issues, court proceedings and licensing
- Among other guidance …
- "*Someone in my House in Multiple Occupation has the virus, am I obliged to remove them or find my tenants another place to stay?* […]
  - *Nobody can be removed from their home because of the virus.*
  - *Landlords are not obliged to provide alternative accommodation for tenants if others in the property contract the virus.*"
- "*My property is in an area subject to selective or additional licensing. What is going to happen to it?*
  - *Government is encouraging local authorities to take a common-sense, pragmatic approach to enforcement during these unprecedented circumstances.*
  - *This includes considering pausing the introduction of non-mandatory licensing schemes where this will allow limited resources to be focused where they are most needed.*"

High Court and Upper Tribunal licensing decisions

Luton BC v Altavon Luton Ltd [2019] EWHC 2415 (Admin)

Failure to license an HMO is a continuing offence

Essential facts

- L laid informations on 15.11.17, alleging offences by A, under ss.72(1) and 234(3) HA 2004, on 16.05.17
- A argued:
  - L had known of the offences since April 2017, or 12 May latest
  - informations were not laid within the time prescribed by s.127 MCA 1980, i.e. "within 6 months from time when offence was committed, or matter of complaint arose"
- DJ Dodd agreed: offences were "*continuing*", but time ran from when L "*became aware of*" them, i.e. April

On appeal (here): appeal allowed

- Parties agreed about "*continuing*" nature of offences, not when time would begin to run [21]
- As for the former, "*we do not understand how it could sensibly be argued otherwise*" [21]
- As for the latter "*As these were continuing offences … the offending continued until 16 May 2017 when* [L] *visited*." (Nicola Davies LJ at [23])
- Held:
  - the informations laid by L were not time-barred [26]
  - appeal allowed [27]

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 (here): 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)
- The fact that the former licence had not been revoked and continued in force was of no assistance
- Application remitted to FTT (but note: period of RRO will be less than claimed)

AA Homes & Housing v Croydon LBC [2019] UKUT B1 (LC)

One flat or several? The licensable Part 3 house

Essential facts

- C imposed financial penalties on A and another ("B"), under s.249A HA 2004, for failing to license a flat, contrary to s.95(1)
- A and B admitted the offence and appealed against the penalty amounts only
- FTT reduced one penalty, not the other, and gave permission to appeal (on presently immaterial grounds)
- A and B sought permission to appeal on 6 new grounds, one (Ground 2) averring that the flat did not need a licence because, together, ss.79 and 85 required the LHA to license two or more flats together, if they were in the same building, contiguous and under common ownership

Held (here): permission refused

- "*I am unable to understand this argument as a matter of statutory construction. A flat is a "part of a building" (section 99). If it is the subject of a tenancy agreement, as this one was, it is a house to which Part 3 applies (section 79). It is clearly possible for the building, instead, to be licensed, on the basis that it is let on two or more tenancies in respect of separate dwellings; but the fact that it is possible for the* [LHA] *to issue a licence for the whole block does not mean that it is not permissible for it to license individual flats. If Parliament had intended the construction for which [A] argues it would have had to say so. I regard this ground of appeal as unarguable* […]"
- Caution: being a permission decision only, this decision is not authoritative

Hussain v Waltham Forest LBC [2019] UKUT 339 (LC)

Reliance on spent convictions?

Essential Facts

- W refused and revoked licences under Parts 2 and 3 HA 2004, relying on conduct amounting to offences of which H and her husband had been convicted respectively under s.238 HA 2004 and the Forgery and Counterfeiting Act 1981
- H appealed to the FTT and applied to strike out all references to that conduct, on the premise that the convictions had become spent after one year under s.4, Rehabilitation of Offenders Act 1974, and W should not have had regard to them
- Application transferred to the Upper Tribunal

Held (here): application dismissed

- s.4 of the 1974 Act enabled the FTT to receive and take account of evidence and submissions dealing with relevant conduct of a rehabilitated person. That included conduct treated as an offence in criminal law, which had resulted in a now-spent conviction; and W had not erred in taking that conduct into account [88] [135]
- Further, when deciding to refuse or revoke a licence, LHAs could require evidence about spent convictions if justice could not otherwise be done [145]
- Similarly, the FTT could admit evidence about spent convictions, if the LHA could discharge the burden of proving that justice could not otherwise be done [136-137] [167] [170]

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]

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 (here): 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]

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 (here)

Held (here): 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]

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 (here): 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]

Sutton v Norwich CC [2020] UKUT 90 (LC)

Ignorance of relevant facts *may* provide a reasonable excuse

Essential facts:

- N imposed financial penalties on S and the company of which he was a director, F, totalling c.£236k each
- Penalties were imposed for (a) failing to comply with improvement notices, contrary to s.30(1) HA 2004, and (b) breaching the Licensing and Management of HMOs (Additional Provisions) (England) Regulations 2007, contrary to s.234(3)
- S and F appealed on numerous grounds including (for present purposes) that (a) they had not been aware the house was an HMO, and (b) they had relied on reputable professionals to prepare, supervise and carry out works at the house, so had a reasonable excuse under ss.30(4) and 234(4) respectively

Held (here) on transfer to the UT:

- s.234(3) creates a strict liability offence, subject to reasonable excuse defence [219]
- Once facts amounting to the offence were made out, it was for S and F 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 the house was occupied by more than one household) *might*, in principle, provide a reasonable excuse for non-compliance with the 2007 Regs; lack of knowledge of the *consequences* of the facts will not [221]
- On the facts, reliance on professionals to undertake works at the HMO could not provide a reasonable excuse [223-234]

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 (here):

- 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]

Developments in court and tribunal procedure

Court and Tribunal guidance in the wake of COVID-19

- A flurry of guidance from the tribunals and courts about procedure in light of the COVID-19 pandemic.
- Guidance relevant to all jurisdictions - civil (including tribunals), crime, family – is updated regularly and is available here
- More specifically:
  - First-tier Tribunal (Property Chamber): Guidance for users during COVID-19 pandemic (here)
  - Presidential guidance on the conduct of proceedings in the Upper Tribunal, Lands Chamber during the Covid-19 pandemic (here)
  - Note on listings in Magistrates' Courts – COVID-19 (here)

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 (here): 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 (here): 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]

cornerstone barristers

Ask us more questions:

events@cornerstonebarristers.com

For instructions and enquiries:

elliotl@cornerstonebarristers.com

dang@cornerstonebarristers.com

samc@cornerstonebarristers.com

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