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Licensing the private rented sector

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

Kelvin Rutledge QC, Dean Underwood

Introduction

- Mandatory, additional and selective licensing under the Housing Act 2004
 - topical issues: consultation, fees, the licensable Part 3 house etc
 - recent case law
 - information exchange
- Don't turn off your phones!
- Take photos and tweet:
 - @deanunderwood01
- Any queries: kelvinr / deanu@cornerstonebarristers.com



What's it all about?

- Three separate licensing schemes: **mandatory**, **additional** and **selective licensing**
- Broadly, concerned with improving management and condition of privately rented accommodation in local authority areas
- Requires 'landlords' of privately rented accommodation:
 - in HMOs meeting prescribed, statutory descriptions;
 - in HMOs meeting a local authority-prescribed description in local-authority designated areas;
 - in other houses meeting a local authority-prescribed description in local authority-designated areas,

to obtain and comply with a **local authority licence** to let the accommodation

- The licence gives the local authority a degree of control, exercised by use of **licence conditions** and **penalties** for non-compliance
- Works in tandem with housing strategy and the **Housing Health and Safety Rating System**, **Empty Dwelling Management Orders** etc, also introduced by 2004 Act.

What's it all about?

"[The Bill will] help to create a fairer and better housing market and to protect the most vulnerable in housing. Together with other Government measures on housing and planning, it will make a major contribution to achieving the aims of the sustainable communities plan. The Bill is big in vision, scope and size.

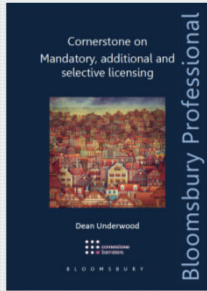
That is why we are determined to take action through the Bill to curb the activities of a rogue element by introducing much needed reforms to...the private rented sector...

[The Bill will] give local authorities new powers selectively to license private landlords in such areas of low housing demand, or in other areas where there is a particular problem, perhaps of antisocial behaviour, for which licensing could be part of the solution. Local authorities will be able to set new and higher standards of management in such properties."

Minister for Housing and Planning, Keith Hill MP, introducing the Bill for second reading
[Hansard, 12.01.04, C.531, 536-537]

What's it all about? ... 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 2019



Mandatory Licensing

Part 2, Housing Act 2004:
Licensing of houses in multiple occupation

Mandatory licensing in overview

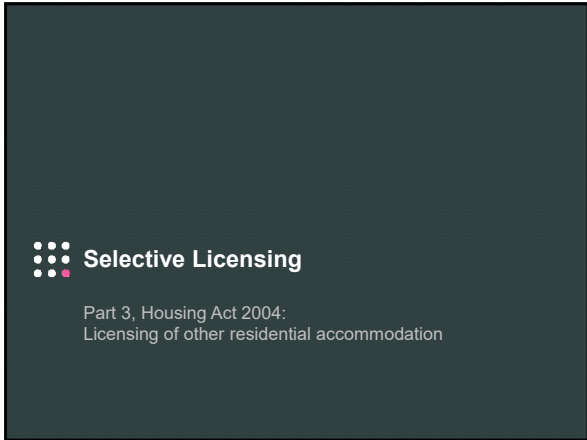
- Arguably, the most familiar licensing scheme – it is mandatory after all!
- In force for more than 12 years in England and Wales, since April 2006
- Governed by Part 2, Housing Act 2004
- Was, *until recently*, restricted to larger HMOs which:
 - are 3 or more storeys high
 - contain 5 or more people in 2 or more households and
 - contain shared facilities such as a kitchen, bathroom or toilet
- Scope of mandatory licensing recently extended by removing storey criterion
- Not quite that straightforward! ...and statutory exemptions apply
- Licence required if HMO not exempt; with criminal and civil sanctions in default


Additional Licensing

Part 2, Housing Act 2004:
Licensing of houses in multiple occupation

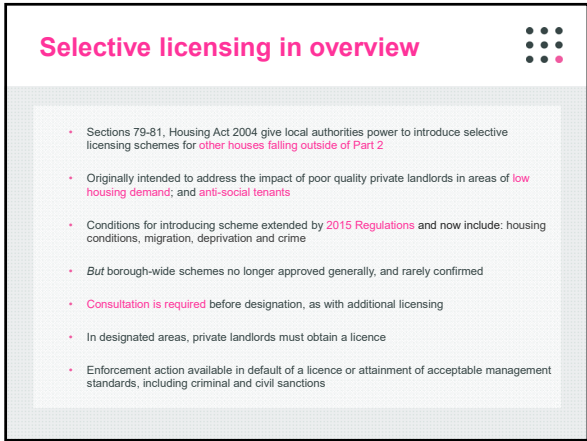
Additional licensing in overview


- Part 2, Housing Act 2004 gives local authorities power to introduce licensing schemes for HMOs *not* covered by mandatory licensing
- Intended to target *poorly managed* HMOs and those whose occupants are *causing problems* to others in the community
- Whether a HMO is included in a scheme depends on the local authority designation, e.g.
 - Newham LBC included all HMOs in a borough-wide scheme, subject to statutory exemptions
 - Hounslow LBC included only HMOs of 2 or more storeys, occupied by 4 or more people in two or more households
- *Consultation* required before designation; and either General Approval or Secretary of State confirmation of designation
- Licence required if HMO falls within the designation, with criminal and civil sanctions in default
- About 1/3 of London local authorities running additional licensing schemes



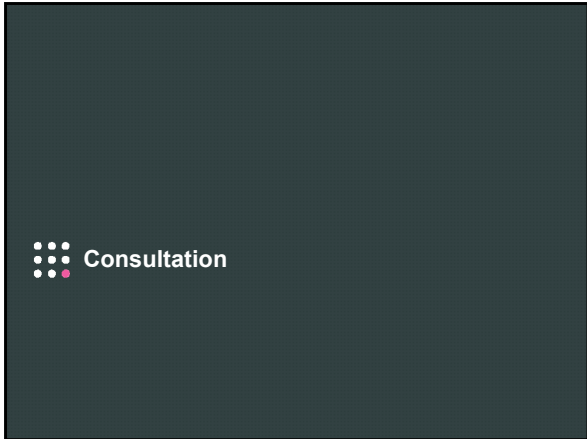
 **Selective Licensing**


Part 3, Housing Act 2004:
Licensing of other residential accommodation



Selective licensing in overview 

- Sections 79-81, Housing Act 2004 give local authorities power to introduce selective licensing schemes for **other houses falling outside of Part 2**
- Originally intended to address the impact of poor quality private landlords in areas of **low housing demand**; and **anti-social tenants**
- Conditions for introducing scheme extended by **2015 Regulations** and now include: housing conditions, migration, deprivation and crime
- *But* borough-wide schemes no longer approved generally, and rarely confirmed
- **Consultation is required** before designation, as with additional licensing
- In designated areas, private landlords must obtain a licence
- Enforcement action available in default of a licence or attainment of acceptable management standards, including criminal and civil sanctions



 **Consultation**

Consultation

- Remember the 4 *Sedley criteria*: *R v Brent LBC, ex parte Gunning* (1985) 84 LGR 168
 - consultation must occur at a time when proposals are still at a formative stage
 - sufficient reasons must be given, to allow intelligent consideration and response
 - adequate time must be allowed for consideration and response
 - responses must be conscientiously taken into account
- R (Peat) v Hyndburn District Council* [2011] EWHC 1739 (Admin)
 - Local authorities must identify with sufficient precision:
 - the proposed area(s) of designation;
 - details of the proposed licence conditions;
 - details of the proposed fee structure; and
 - the reasons for the introduction of selective licensing
 - Consultations about general principles will not be sufficient

Consultation

- R (ota Regas) v Enfield LBC* [2014] EWHC 4173 (Admin) [2015] HLR 14
 - cannot aggregate periods of 'listening and engagement' with periods of actual consultation
 - may need to consult outside of local authority area
- Don't lose heart: courts tend to be slow to intervene. See:
 - R (ota Rotherham Action Group Ltd) v Rotherham MBC* [2015] EWHC 1216 (Admin); [2015] HLR 34

Enforcement and Penalties

Enforcement and penalties

- **Failure to license** a property under Parts 2 and 3 is an offence: sections 72(1) and 95(1). Maximum fine was £20,000 but is now unlimited.
- A person having control of- or managing a **HMO** licensed under Part 2 commits an offence if he knowingly permits another to occupy the house and the house becomes **occupied by more persons or households** than is authorised: section 72(2).
- **Failure to comply with the licence conditions** is an offence: sections 72(3) and 95(2). Maximum was fine £5,000 per offence but is now unlimited.
- Defences limited: e.g. "reasonable excuse", sections 72(5) and 95(4)
- **Banning orders**: Chapter 2, Housing and Planning Act 2016
- **Revocation of licence** (e.g. person subject to banning order, or no longer fit and proper)
- **Rent repayment orders**: sections 73 and 96, and Chapter 4, Housing and Planning Act 2016
- **Restrictions** on tenancy termination: sections 75 and 98
- **Financial penalties** of up to £30,000: section 249A

Recent Developments

Extension of mandatory licensing

- Prime Minister's speech, May 2015, announced Government intention to, "crack down on unscrupulous landlords who cram houses full of illegal immigrants, by introducing a new mandatory licensing scheme."
- Paper, August 2015: *Tackling Rogue Landlords and Improving the Private Rented Sector*
- Consultation from November to December 2015:
 - *Extending mandatory licensing of Houses in Multiple Occupation (HMOs) and related reforms: a technical discussion document*
- Aim?
 - "... to make it easier for local authorities to raise standards in smaller HMOs where there is a need for improvement and identify the rogues who currently operate below the radar ..."
- Government response in October 2016 noted strong support for extending scope by:
 - removing storey criterion, so all HMOs occupied by 5 persons or more in more than one household are included; and including flats above and below business premises
- Further, intention to clarify by Regulations that the minimum room size of 6.5m² for sleeping accommodation applies to all HMOs

Extension of mandatory licensing

- Licensing of HMOs (Prescribed Description) (England) Order 2018
- In force from 1 October 2018
- Revokes 2006 Order
- A HMO is of a prescribed description for the purposes of mandatory licensing if it-
 - is occupied by 5 or more persons
 - is occupied by persons living in 2 or more separate households and
 - meets either the standard test, self-contained flat test or converted building test
- Transitional provisions apply:
 - Licences issued under Part 3 have effect as if issued under Part 2 in respect of HMOs (a) licensed under Part 3 before 1 October 2018 and (b) required to be licensed under Part 2 from that date

New floor area and waste conditions for HMOs

- Licensing of HMOs (Mandatory Conditions of Licences) (England) Regulations 2018
- Licences granted on or after 1 October 2018 under Part 2 must include conditions, requiring licence holder *inter alia* to ensure that the floor area of any bedroom used by-
 - one person aged over 10 years is not less than 6.51m²
 - two persons aged over 10 years is not less than 10.22m²
 - one person aged under 10 years is not less than 4.64m²and that no room with a floor area of less than 4.64m² is used as a bedroom
- Licences must also include conditions requiring licence holder to-
 - rectify unwitting breach within specified time, not exceeding 18 months, of notification by LHA
 - notify LHA of any room with a floor area of less than 4.64m²
- No part of floor area in relation to which ceiling height is less than 1.5m may be taken into account
- Those granted a first licence on or after 1 October 2018 are given time to comply
- New condition also requires licence holder to comply with LHA waste storage / disposal scheme

Recent cases: The relevance of planning

Waltham Forest LBC v Khan [2017] UKUT153 (LC)

Essential facts:	Held on appeal:
<ul style="list-style-type: none">• Borough-wide selective licensing scheme• K, professional landlord• Converted 2 properties into flats• No planning permission• Applied for a Part 3 licence• Licences granted for 1 year• K expected to regularise planning position within the year• On appeal, FTT held: planning compliance irrelevant to licensing• Licences extended to 5 years	<ul style="list-style-type: none">• FTT wrong to hold K's compliance with planning requirements irrelevant to licensing• In light of selective licensing aims, not possible to hold otherwise• Concerns of licensing and planning control overlapped• Legitimate for LHA to consider planning status when considering licence application and terms• Permissible to refuse to determine application until position regularised

Recent cases: The relevance of nearly-spent convictions
Waltham Forest LBC v Reid [2017] UKUT 396 (LC)


Essential facts:	Held on appeal:
<ul style="list-style-type: none"> Borough-wide selective licensing scheme R, landlord of various properties 5 convictions for failing to license them W's policy: <ul style="list-style-type: none"> Grant licence for 1 year only if applicant has relevant conviction Allow convictions to become spent and then review licence W granted R licences for 1 year and also reduced an existing licence to 1 year R appealed to FTT re length of licences FTT allowed R's appeal W appealed to UT 	<ul style="list-style-type: none"> When deciding length of Part 3 licence, LHAs are entitled to consider matters relevant to whether landlord is fit and proper person Extent to which such matters are relevant will depend on facts Example: continuing breach of housing law, or realistic prospect of repeated breach Any conviction resulting in fine is spent after 1 year W's policy by which any such conviction <i>automatically</i> led to a 1 year licence was unreasonable

Recent cases: Renewal fees and information - R (Gaskin) v Richmond upon Thames LBC (1) [2017] EWHC 3234 (Admin)


Essential facts:	Held on appeal:
<ul style="list-style-type: none"> G applied to renew 5 year licence for HMO with 7 units Application form required names of all occupiers, tenancy start and end dates and fee of £257 per unit, up front G replied 'Not relevant' and paid only £850 R served notice requiring G to provide information; and to pay full fee G failed to comply R prosecuted G for offences under s72(1) HA 2004 & s16 LG(MP)A 1976 G sought a judicial review of the fee charged and information required 	<ul style="list-style-type: none"> R entitled to take into account all costs incurred carrying out Part 2 functions Not unlawful to charge same fee for renewing a licence as for first licence R entitled to keep reserves in HMO licensing account to cover costs of administering and enforcing scheme R not entitled to occupants' names Licensing and Management of HMOs & Other Houses (MP)(Eng) Regs 2006 prescribed the <i>only</i> information R could lawfully require G had failed to pay the fee lawfully required and was liable to prosecution

Recent cases: Licence fees - R (Gaskin) v Richmond upon Thames LBC (2) [2017] EWHC 3234 (Admin)


- R (ota Hemming (t/a Simply Pleasure Ltd)) v Westminster CC* [2015] UKSC 25
- Provision of Services Regulations 2009 give effect to Council Directive 2006/123/EC - concerns provision of services in European internal market and procedures by which authorisation to carry out services granted
- Regulations 18(2) and (4):
 - procedures and formalities of authorisation scheme must not be dissuasive or unduly complicate or delay provision of service to which they relate;
 - fee charged for authorisation must be reasonable;
 - must be a proportionate relationship between fee and cost of authorisation procedures; and
 - fee cannot exceed a proportion of the cost of the authorisation procedures
- Type B fee (one up-front fee for all applicants, inc. costs of running scheme) struck down
- Type A split fee approved ... but is this permissible under Housing Act 2004?

Recent cases: Licence fees - *R (Gaskin) v Richmond upon Thames LBC (2)* [2017] EWHC 3234 (Admin) 

Essential facts:	Held on appeal:
<ul style="list-style-type: none"> G applied to renew 5 year licence for HMO with 7 units R charged fee of £257 per unit, including contribution to costs of carrying out Part 2 functions R required payment in full upon application, but G paid only £850 R served notice requiring G to pay full fee; G failed to comply R prosecuted G for offence under s72(1) HA 2004 G sought a judicial review alleging breach of Provision of Services Regulations 2009 	<ul style="list-style-type: none"> Owner of HMO is providing a 'service' for purpose of 2009 Regs Licensing provisions of HA 2004 were an 'authorisation scheme' within meaning of 2009 Regs R not entitled therefore to demand that G (or anyone else) pay licence fee in full upon application, because its fee was not limited to the cost of processing the application: <i>Hemming</i> applied R's fee infringed Reg.18(4) of the 2009 Regulations and was unlawful

Recent cases: The scope of selective licence conditions *Brown v Hyndburn BC* [2018] EWCA Civ 242 

Essential facts:	Held on appeal:
<ul style="list-style-type: none"> H's Part 3 licences included conditions requiring licence holder to: <ul style="list-style-type: none"> provide and maintain carbon monoxide detectors if gas supplied to property; and ensure property covered by valid electrical installation condition report and remedy any reported defects B appealed to FTT, claiming conditions went beyond those permitted by s.90(1) "for regulating the management, use or occupation" of the property FTT allowed the appeal and H appealed to UT 	<ul style="list-style-type: none"> By contrast with s67(1) under Part 2, s90(1) in Part 3 only allows licence conditions regulating the management, use or occupation of a property, not its condition or contents, facilities or equipment The distinction was deliberate "Management" connotes operational matters, i.e. what actually happens at the property, e.g. keeping fire escapes clear or ensuring rubbish is properly binned B did not have power to impose conditions requiring provision of carbon monoxide detector and electrical installation condition report

Recent cases: Cohesive living lives on *Nottingham City Council v Parr* [2018] UKSC 51 

Essential facts:	On appeal:
<ul style="list-style-type: none"> 2 houses let to students Limited floor space in loft rooms Licence prohibited use of rooms for sleeping FTT allowed appeal Houses had enough shared space to counter bedrooms' size and, living "cohesively" students would use that space Condition in one licence varied: use as bedroom only by full-time student living there for 10m maximum UT upheld that condition on appeal and applied it to second house CA allowed appeal in part only 	<ul style="list-style-type: none"> Condition regulating "occupation" of house, within meaning of s.67, was apt to regulate how or by whom it was occupied Mode of occupation, including "cohesive living", is relevant to suitability of HMO accommodation Conditions requiring bedrooms to be occupied by students was capable of achieving "cohesive living" and enforceable 10m limit on room use was irrational

Recent cases: *Taylor v Mina An Ltd* [2019] UKUT 249 (LC)

Essential facts	On appeal
<ul style="list-style-type: none">July 2016: T took tenancy at a licensed HMOOctober 2016: M purchased the HMOMay 2017: M applied for HMO licenceSeptember 2018: licence grantedT applied for rent repayment order for period from October 2016-September 2018FTT dismissed application: HMO was licensed because former owner's licence had not expired	<ul style="list-style-type: none">Licence is personal and cannot be transferred to another person: s.68(6)So, M could not rely on former owner's licence and had to apply for its ownFailure to do so = criminal offenceOf the position when a licence holder dies: s.68(7-8)Fact that former licence had not been revoked and continued in force was of no assistanceRemitted to FTT (but note: period of RRO will be less than claimed)

Through the Crystal Ball

What next in mandatory, additional and selective licensing?

The crystal ball

- What does the future hold?
- More additional and selective licensing schemes expected, see e.g. recent confirmation of Barking & Dagenham LBC borough-wide scheme, new scheme by Nottingham CC etc
- Easier to implement additional and selective licensing in small, targeted, geographical areas
- More difficult to implement borough-wide additional and selective licensing schemes
 - note the Guidance requirement for 'robust' evidence to justify any future borough-wide scheme
- Disputes concerning new conditions for selective licensing; and the proportionality of fee increases, designed to cover the scheme and enforcement costs?
- Blocks in common ownership: one licence for the block, or one for each flat within?

The crystal ball: Flats in common ownership - just one licence?



- Consider sections 79 and 99 HA 2004
- What is the Part 3 house requiring a Part 3 licence?
 - Does Part 3 *mandate* that it comprises all non-excluded flats in common ownership,
 - or does the LHA have a *choice* to license non-excluded dwellings either individually or collectively?
- No easy answer: *Tuitt v Waltham Forest LBC* [2017] EWHC (tbc) Admin
- Practice varies nationwide
- Issue remains unresolved so, watch this space!

Other cases to look out for ...



- *R (Mohamed) v Waltham Forest LBC*, Divisional Court, CO/1068/2019
 - What particulars of an offence must an informant provide when laying an information before the magistrates' court alleging s.72(1) offences?
 - For the purpose of limitation, is the offence created by s.72(1) a "continuing" offence, committed each day on which an HMO requiring a licence does not have one, or a "once and for all" offence, for which time begins to run on the first day?
- *Waltham Forest LBC v Marshall*, Upper Tribunal (LC), HA/29/2019
 - When considering an appeal against the amount of a financial penalty imposed under s.249A, is the FTT bound to follow the LHA's unchallenged enforcement policy, setting parameters for the appropriate penalty?

Useful sources of information



- [Housing Act 2004 Explanatory Notes](#)
- [Review of property conditions in the private rented sector](#), DCLG, February 2014
- [Selective licensing in the private rented sector: a guide for local authorities](#), DCLG, March 2015
- [Selective licensing of privately rented housing](#), House of Commons Library, March 2015
- [HMOs England and Wales](#), House of Commons Library, July 2017

Case study 1



Mr Smith owns a two storey house in London and wants to let it to a local family. His LHA has designated the borough as subject to selective licensing. Mr Smith, who has recently converted the loft in the house and extended it to the rear, applies for a licence under Part 3 of the 2004 Act.

The LHA asks him to pay a fee of £800 with his application, which includes the costs of processing it and a reasonable contribution towards the costs of performing its licensing functions. Mr Smith pays the fee. The LHA duly realises that Mr Smith should have obtained, but did not obtain, planning permission for the work on his property and states that it will grant him a licence, for 12 months only, so that (a) he can resolve the planning issue and (b) the LHA can review the propriety of his licence in 12 months' time.

It also notes that work undertaken on the property is sub-standard and imposes licence conditions, giving Mr Smith 12 months in which to effect works of repair and improvement, including structural and decorative work. It also notes that one of the rooms in the property is affected badly by rising dampness and imposes a condition prohibiting its use as a bedroom. Mr Smith accepts the licence, but then seeks advice

Case study 2



Mrs Brown owns a large house in Liverpool, which she would like to let out as bedsit accommodation. The house has five bedrooms ranged over 2 storeys and a kitchen and bathroom for the shared use of occupants. Three of the bedrooms are large doubles and two of them single rooms, each with a floor area of 5.61m².

The LHA has designated the borough as subject to additional licensing under Part 2 of the 2004 Act. Mrs Brown, who last let out the house 6 months ago, had obtained a licence from the LHA 5 years ago, but that licence has recently expired. She applies, therefore, to renew it.

The LHA asks Mrs Brown to pay £800 with her application, including £200 for processing the application and a £600 contribution towards the costs of running the licensing scheme, refundable if her application is rejected. It also requires her to provide the names and other personal details of all intended occupants.

Mrs Brown, however, declines to do so. After lengthy correspondence, the LHA decides to grant Mrs Brown a licence, but prohibits use of the smaller bedrooms, unless let and used with one of the larger bedrooms, and imposes a condition requiring Mrs Brown to provide the aforementioned names and details. Mrs Brown asks whether it would make any difference if she only let the rooms in the house to students, but gets no reply. She seeks advice ...



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