GRAY'S INN SQUARE

HMOs: enforcement and civil penalties

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Introduction

- Enforcing breaches under Parts 1, 2 and 3

- Prosecution
- Financial Penalties

- Lessons from Gaskin and other cases

Prosecution and civil penalties

- Various offences under Parts 1, 2 and 3.
- Pt 1
- s.30 Failure to comply with an improvement notice – *i.e.* commence and complete remedial action for each hazard.
- s.32 Using or permitting use of premises in contravention of prohibition order.
- Pt 2
- s.72 Operating unlicensed HMO or allowing more than the maximum number to occupy or breach of licence condition.
- s.139 Overcrowding notice; s.234 Breach of management regs.
- Pt 3
- s.95 Operating unlicensed house or breach of licence condition.

Financial penalties – s.249A

- Does not apply to breach of prohibition order (s.32).
- Maximum penalty - £30,000.
- Only one penalty may be imposed
- on a person
- in respect of the same conduct.
- Guidance interprets this (para.1.11) as:
- "Only one penalty can be imposed in respect of the same offence"

Financial Penalties

- Guidance on ensuring penalties are set at a high enough level to
- have a “real economic impact” on landlords (para.3.5(d))
- deter the landlord from re-offending (para.3.5(e))
- deter others from offending (para.3.5(f))

- A number of local authorities are imposing very high penalties, at or near the maximum, in reliance on these recommendations.

Defences/grounds for appeal

- On prosecution, it is likely to be a defence that the notice, licensing scheme etc was unlawful (see *e.g. Boddington v British Transport Police* (1998).
- So if the licensing scheme is unlawful, a prosecution will fail (*e.g. Gaskin v Richmond upon Thames* (2017 and 2018)
- Likewise if a licence condition is invalid (*Brown v Hyndburn BC* (2018)
- Multiple improvement notices?

Defences/Grounds of Appeal

- The amount of the penalty.
- Charging landlord and agent the same amount
- Overall proportionality and totality
- Working out the landlord's means, and the benefit
- Real economic impact and deterrence/seriousness of the offence and harm.
- What would a court have done?
- The local authority as prosecutor, judge and beneficiary.

Gaskin 1 (2017)

- *R (Gaskin) v Richmond upon Thames LBC* [2017] EWHC 3234 (Admin) @ [36]-[37]
- The authority's power to specify requirements under s.63 is subject to Secretary of State's regulations which may "specify the information which is to be supplied in connection with applications" (s.63(5), (6)(c)).
- The Court held that this language meant that only the items of information listed in the Regulations could be made mandatory by the local housing authority.
- An authority could ask for other information on a voluntary basis, so long as it was made clear that the information did not have to be provided.

Gaskin 1

- Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006/373 (as amended) prescribes, in Reg.7 and Sch.2 what information is to be supplied.
- Application forms which purport to demand information going beyond what the Secretary of State has prescribed might be unlawful, if it is not made clear that provision of the additional information is voluntary .
- The form of Sch.2 has not been amended since 2007.

Gaskin 2

- *R (Gaskin) v Richmond upon Thames LBC* [2018] EWHC 1996 (Admin).

- [71] We therefore conclude that…by letting and managing private residential accommodation for profit, Mr Gaskin is properly to be regarded as providing a "service" for the purposes of the Services Directive. It further follows that the Council is a "competent authority" running an "authorisation scheme" within the meaning of the Services Directive and the Services Regulations.

Impact of *Gaskin 2*

- A licensing authority is not permitted to charge an upfront fee covering more than the costs of operating the "authorisation scheme" itself *i.e.* the costs of dealing with the application.

- In *R (Hemming t/a Simply Pleasure) v Westminster CC* [2015] UKSC 25, the Supreme Court and the CJEU confirmed that a two-stage fee was lawful, covering the costs of the application at stage 1 and a further fee for possession of a licence (covering managing the scheme and enforcement etc) payable once the application process has concluded.

Two-stage fees in principle

- Does that reasoning apply to additional and selective licensing?
- Section 63(3), 2004 Act says that
- (3) The authority may, in particular, require the application to be accompanied by a fee fixed by the authority.
- Does “accompanied by” mean “given at the same time as”?
- No necessary temporal ingredient
- Fees supplied later can be accepted
- In *Hemming* itself, the A/G interpreted the licensing legislation to require a fee with the application.

Two-stage fees in principle

- Can two-stage fees be demanded under Parts 2 and 3? If not, *Gaskin* is unaffected.
- But in *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446, the Court of Appeal considered what the courts should do to construe legislation consistently with EU law.
- It held that the obligation to do so is broad and far-reaching, and is not applied like conventional rules of interpreting legislation.
- It permits the implication of words necessary to comply with EU law. The precise form of words does not matter, except that it should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed'.

Brown v Hyndburn BC (2018)

- Under Part 2, 2004 Act, an authority have power to include licence conditions (i) relating to the management, use or occupation of the HMO and (ii) relating to the HMO's condition and contents;
- Under Part 3, s.90(1) only allows conditions to be imposed in respect of the management, use or occupation of a house.
- Parliament had made a deliberate distinction between the two types of condition, so there was not power under Part 3 impose conditions requiring the provision of new equipment.

Brown v Hyndburn BC

- In the context of Part 3, the purpose for which licensing powers are conferred is to enable the authority to address the problems which justified the designation of a selective licensing area.
- That purpose limits an authority's powers to impose conditions.
- There is a clear difference between routine, non-structural maintenance that probably falls within "management" and improvements to the fabric of the property.
- But where is the dividing line?

Issues for consideration

- Health checks to ensure the legality of the licensing scheme
- Are licence conditions or notices lawful
- Have fees been adjusted in the light of Gaskin, not merely to two stages but where stage one reflects the costs of processing the application only.
- Has any civil penalty been properly imposed and does the amount of the penalty reflect the overall gravity of the conduct? Is there double counting? Has the same conduct been penalised more than once?

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