

UPPER TRIBUNAL (LANDS CHAMBER)



Neutral Citation Number: [2017] UKUT 153 (LC)
Case Nos: HA/26/2016
HA/30/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – SELECTIVE LICENCING – Part 3, Housing Act 2004 – residential premises converted without planning permission – whether relevant to decision on licence application – appeals allowed

BETWEEN:

LONDON BOROUGH OF WALTHAM FOREST

Appellant

- and -

MOHAMMAD AFZAL KHAN

Respondent

**Flats 1-6, 682-684 High Road
Leytonstone
London E11**

**Second floor flats, 34 Eldon Road,
London E17**

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, Strand, London WC2A 2LL

on

16 March 2017

Ashley Underwood QC, on behalf of the appellant
Mr Khan in person

© CROWN COPYRIGHT 2017

The following cases are referred to in this decision:

London Borough of Brent v Reynolds [2001] EWCA Civ 1843

Sagnata Investments Ltd v Norwich Corporation [1971] 2 QB 614

Introduction

1. Part 3 of the Housing Act 2004 provides for the selective licensing by local housing authorities of private sector housing in an area which may be as large as the whole of the local housing authority's district. In general, where an area has been designated as subject to selective licensing no house in that area which has not been licensed may lawfully be occupied under a tenancy or licence.
2. The issue in these appeals is whether a local housing authority which has designated an area as subject to selective licensing may have regard to the planning status of a house when considering an application for a Part 3 licence.
3. Each appeal concerns converted flats created without the benefit of planning permission by the respondent, Mr Khan, who subsequently applied to the local housing authority for a Part 3 licence for those flats. In each case the London Borough of Waltham Forest granted a licence for a period of 1 year only with the intention that during that period the planning status of the flats should be regularised. In each case on appeal to the First-tier Tribunal (Property Chamber) ("the FTT") the period of the licence was increased to 5 years on the grounds that the respondents' compliance with planning requirements was irrelevant to the question of licensing. The local housing authority now appeals against the FTT's decisions.

The relevant statutory provisions

4. The power to designate an area as subject to selective licensing is conferred on local housing authorities by section 80(1) of the Act.
5. The circumstances which must exist before a designation can be made shed some light on the purpose of the selective licensing regime. Before making a designation an authority must consider that certain general conditions are satisfied in relation to an area.
6. The first set of general conditions, described in section 80(3), are that the area is, or is likely to become, an area of "low housing demand" and that making a designation will contribute to the improvement of the social or economic conditions in the area. Waltham Forest is not such an area.
7. The second set of general conditions, which were relied on by the appellant when it introduced its Borough wide selective licensing scheme on 24 June 2014, are provided by section 80(6). The authority must be satisfied of all three of the following conditions: first, that the area is experiencing a significant and persistent problem caused by anti-social behaviour; second, that some private sector landlords who have let premises in the area are failing to take action which it would be appropriate for them to take to combat the problem; and third that, when combined with other measures, making a designation will lead to a reduction in or elimination of the problem.

8. Mr Ashley Underwood QC, who appeared on behalf of the appellant, suggested that the general object of any designation under Part 3 was to “bring an area up” and to improve housing standards in the private rented sector. While in very broad terms that may be a fair description of the purpose of the legislation, Parliament obviously considered that the substantial restrictions which designation places on the freedom of residential landlords to let their property are only justified where, and to the extent that, the specific conditions in sections 80(3) or (6) are encountered.

9. A designation cannot come into force unless under section 82 it is confirmed by the appropriate national authority (in England the Secretary of State) or is of a class to which general approval has been given. On 10 March 2010 the Secretary of State gave a general approval for the designation of any area by a local housing authority in England conditional only on a period of consultation with those likely to be affected by the designation. This approval remained in force when the appellant introduced its own Borough wide selective licensing scheme on 24 June 2014.

10. A designation under Part 3 must specify the time at which it will cease to have effect, which must be not later than five years after it comes into force (section 84(1)-(2)). The Waltham Forest designation was for five years from 1 April 2015.

11. For the purpose of Part 3 a “house” is a building or part of a building containing one or more dwellings (section 99). It follows that each flat in a house converted into a number of separate flats is itself a house for the purpose Part 3. A house occupied under one or more tenancies or licences granted by a private landlord which is in an area designated under section 80 is referred to as a “Part 3 house” (sections 79(2), 85(5)).

12. By section 85(1), every Part 3 house must be licensed unless it falls within certain exceptions which do not apply in this case. A licence under Part 3 authorises occupation of the house under a tenancy or licence (section 85(2)). A licence is personal to the licence holder and may not be transferred to another person (section 91(6)).

13. Section 87 to 90 deal with applications for licences, the granting or refusal of licences and the imposition of licence conditions. Application must be made to the local housing authority, which may charge a fee (section 87(1), (3)). The fee charged by Waltham Forest was originally £500 for each house but has subsequently been increased to £650.

14. Where an application is made to an authority under section 87 the authority must either grant or refuse a licence. Amongst other matters specified in section 87(3) of which the authority must first be satisfied before it grants a licence is that the proposed licence holder is a fit and proper person to hold the licence and that the proposed management arrangements are satisfactory. When deciding whether a person is fit and proper the authority must have regard to evidence including any evidence that the person has “contravened any provision of the law relating to housing or of landlord and tenant law” (section 89(2)). No mention is made of the relevance of any contravention of planning law.

15. If it is satisfied that the conditions in section 87(3) are met the authority “may grant a licence” (section 87(2)); it is therefore clear that the authority has a discretion to refuse a licence even when the specified conditions are satisfied. In this appeal the appellant has not suggested that Mr Khan is not a fit and proper person and has withdrawn any previous suggestion to that effect which may have been made to the FTT; nor does it suggest that there are any problems concerning the management arrangements at the houses in question.

16. A licence may include such conditions as the local housing authority consider appropriate for regulating the management, use or occupation of the house (section 90(1)).

17. A licence comes into force on the date specified in or determined under the licence and continues for the period specified (section 91(3)). That period must not end more than five years after the date on which the licence was granted or came into force (section 91(4)).

18. A licence may be revoked under section 93. There is no general discretion to revoke, but only where conditions relating either to the licence holder or another person, or to the house itself are met. None of the conditions of revocation specified in section 93 is concerned with the planning status of the house.

19. The consequences of a failure to comply with the requirements of Part 3 are draconian. It is an offence for a person to have control of a house which is required to be licensed under Part 3 but is not so licensed (section 95(1)) although it is a defence if an application for a licence has been made but not yet determined. Amounts paid in respect of rent or other periodical payments under a licence or tenancy of such a house may be recovered by means of a rent repayment order (section 96(4)). No notice of seeking possession may be given under section 21 of the Housing Act 1988 to terminate a shorthold tenancy of a house required to be licensed for so long as it is unlicensed (section 98(1)).

20. A right of appeal is available to the first-tier tribunal against a decision to grant a licence and the appeal may ‘in particular, relate to any of the terms of the licence’ (paragraph 31(2) of Schedule 5). In accordance with paragraph 34 of Schedule 5 such appeals are determined “by way of re-hearing” but the FTT may have regard to matters of which the authority was unaware when it made its own decision.

21. The reference in paragraph 34 of Schedule 5 to a “re-hearing” requires some explanation, since the decision to refuse a licence or to grant one on terms with which the applicant is dissatisfied was an administrative decision which is unlikely to have been made at a hearing of any sort. In this context the direction that an appeal against such a decision is to be by way of re-hearing means that the FTT must make its own decision on the application for a licence, and is not simply to ask itself whether the decision made by the local housing authority was open to on the material it considered. The FTT must therefore exercise its own discretion whether to grant a licence and on what terms. Having undertaken that exercise the FTT is then empowered by paragraph 34 to ‘confirm, reverse or vary the decision of the local housing authority.’

22. A further appeal lies to this Tribunal under section 11, Tribunals Courts and Enforcement Act 2007 against a decision of the FTT under paragraph 34 of Schedule 5 to the 2004 Act. Such an appeal is an appeal on a point of law only and is conducted on a different basis from the re-hearing to be undertaken by the FTT. Since the decision in question concerns the exercise of a statutory discretion over the terms of a licence, the issue for this Tribunal is whether the decision making tribunal, properly directing itself on the law and taking proper account of the relevant facts, and ignoring irrelevant facts, could have exercised its discretion in the manner in which it has done.

The facts

23. The designation of the appellant's entire borough for the purpose of Part 3 entailed licensing about 26,000 rented homes. I was told that about 20,000 applications have now been processed of which about 200 have been granted for a term of one year and the remainder for the full term of the selective licensing scheme.

24. The appellant has adopted guidance for its own staff engaged in the determination of licence applications. The guidance notes that in the event that there are no "contra-indications" relating to the applicant or the property, the appellant's policy is normally to grant a licence for the full five-year term of the licensing scheme (i.e. until 31 March 2020). Otherwise it will normally grant a new licence for a term of one year. The policy is explained as follows:

'The grant of a shorter licence ... will in all cases reflect concern that the Council has regarding a "person" and/or a property to the extent that a full-term licence is not appropriate. The shorter licence period will penalise the landlord since a new licence application will need to be made at its expiry after one year. However, the grant of a licence will enable the address to be legally rented, allowing the landlord to remedy the issue that gave rise to the reduced-term licence...'

25. The policy document also directly addresses the issue of planning permission. It suggests that 'it would be perverse to offer a full term licence in a situation, for example, where an address arranged as self-contained flats...is in breach of planning regulations. The grant of a short-term property licence in such cases will enable the landlord to regularise the use of the address...' It was explained by Mr Underwood QC that this statement reflected the view of Waltham Forest that for its housing standards officers to grant a licence authorising the letting of a dwelling which could not lawfully be used for any residential purpose because planning permission had not been obtained for such a use would indeed be perverse.

26. Mr Khan describes himself as a well established professional landlord with property in London, Cambridge and Manchester, including 172 residential units in Waltham Forest. Since 1 April 2015 all of those properties have been subject to selective licensing by the appellant under Part 3 of the 2004 Act.

27. Mr Khan's property portfolio includes a former warehouse at the rear of 682-684 High Road, Leytonstone which he has owned since 1998. At some stage after 1998 Mr Khan converted the warehouse into six flats without first obtaining planning permission; he then let the flats. It is Mr

Khan's case that the conversion was completed before 2002. In support of that assertion he relies on a letter from a development control officer in the appellant's environmental services, planning and development department dated 28 February 2002 in which it is said that the appellant had received a report that property at 680 and 680A High Road had been converted into a total of seven flats. Whether this is the same building as the warehouse at the rear of 682-684 High Road is not clear.

28. In May 2015 Mr Khan sought licences under Part 3 for six flats at the rear of 682-684 High Road and it was at that stage that the lack of planning permission became apparent (unless, that is, it had already been known to the appellant in 2002).

29. The appellant and Mr Khan entered into discussions about regularising the planning position but, as at November 2015, no resolution had been achieved. On 19th November 2015, the appellant granted a licence for one year from that date. Mr Khan's other properties (except those at 34 Eldon Road which are also subject to appeal) all had the benefit of five year licences.

30. Mr Khan appealed to the First-Tier Tribunal under paragraph 31(1)(b) of Schedule 5 to the 2004 Act. On 28 June 2016 the FTT decided that the licence should be varied to provide for a term of five years from 19 November 2015 and ordered the appellant to reimburse Mr Khan's hearing fees.

31. Mr Khan is also the owner of a terraced house at 34 Eldon Road which is currently subdivided into six self contained flats. Four of those flats have been in existence for a considerable time (although they too appear to have been created without the benefit of planning permission, as in 2004 a certificate of lawfulness was granted by the appellant under section 191, Town and Country Planning Act 1990). Two further attic flats have subsequently been created by Mr Khan, again without planning permission.

32. In June 2015 Mr Khan applied for Part 3 licences in respect of all six of his flats at 34 Eldon Road. On 2 March 2016, the appellant informed him that it was minded to grant a one-year licence for the second-floor flats, explaining that 'It has been found that the property listed above does not have planning permission and we have referred this to planning enforcement for further investigation and for that reason we are proposing to issue a 1 year licence. This is to allow time for these issues to be resolved with planning. Once the year has expired you will need to reapply for a licence should you still be renting the property and all the planning issues have been resolved.'

33. Mr Khan protested that planning considerations were not relevant to Part 3 licensing but on 28 April 2016 the appellant granted one-year licences for the second-floor flats. After that decision had been taken there were further exchanges between the parties over the planning status of the flats, but no agreement was reached. On 5 October 2016 Mr Khan applied for a certificate of lawfulness asserting that the flats had been in use since 2009. On 24 October the appellant retaliated by serving an enforcement notice requiring that the use be discontinued. Mr Khan has appealed against that notice and a planning inspector is to consider his appeal later this year.

34. Mr Khan also appealed to the FTT against the terms of the Eldon Road licences. On 31 August 2016 the FTT decided that the licence should be varied to provide for a term expiring on 31 March 2020 and directed the appellant to refund Mr Khan's tribunal fees.

The reasons given by the FTT

35. Although the outcome of the appeals to the FTT was substantially the same, the reasons given in each decision were different.

High Road

36. The FTT dealt first with a suggestion made by the appellant's representative that the breaches of planning control indicated that Mr Khan was not a fit and proper person to hold a Part 3 licence. The FTT rightly regarded this submission as inconsistent with the appellant's decision to grant licences to Mr Khan for any of his properties. It considered that while "blatant disregard for planning" could be taken into account on the issue of fitness "what the legislation does not provide for is a halfway house where a local authority which has concerns about the suitability of a licence holder is given a short licence to provide their fitness to hold a licence." I agree, and Mr Underwood made it clear in his submissions that the appellant does not now suggest that Mr Khan is not a fit and proper person to hold a licence.

37. At paragraph 24 of its decision in the High Road appeal the FTT asked itself "whether [Waltham Forest] exercised its discretion reasonably in limiting the licence to a 1-year period." As the FTT was re-hearing the application for a licence (rather than reviewing Waltham Forest's decision) that was the wrong question, but Mr Underwood has not put his case in that way.

38. The FTT gave five reasons for its decision that the appropriate licence period was five years.

- (1) It appeared likely that the issue of planning would be resolved by way of a Certificate of Lawfulness.
- (2) If not, the authority had power to revoke the licence.
- (3) There were tenants in occupation and Mr Khan would be put to expense if he had to re-apply for a licence.
- (4) The authority's internal guidance said that 'a one year licence may be deemed appropriate if there has been no planning consent for the property to have been built' but in this case the flats for which consent had not been obtained were in a converted property.
- (5) The legislation is silent on the issue of planning and it does not appear to be a pre-requisite that a property must have lawful use before it can be licensed.

Eldon Road

39. The basis of the FTT's decision to extend the period of the Part 3 licences to five years for the Eldon Road flats was encapsulated in its observation that "the granting of licences of a shorter duration in this case makes no sense." It pointed out that planning regulation has its own enforcement procedures which would run their own course (the FTT was aware of the intention of the appellant to serve an enforcement notice and of Mr Khan to seek a certificate of lawfulness). The FTT considered that it was clear that the appellant wished to penalise Mr Khan for his failure to obtain planning permission, which was not the object of selective licensing and not a proper reason for restricting the term of a licence. After one year, the planning issue would probably remain unresolved, and the appellant will have no grounds on which to refuse another licence.

Submissions

40. In each case the FTT proceeded on the basis that the planning status of the house for which a licence was applied for under Part 3 should not be taken into account when considering the terms on which such a licence could be granted. Each tribunal accepted the submission repeated to me by Mr Khan that planning considerations were not relevant to Part 3 licensing.

41. On behalf of Waltham Forest Mr Underwood QC submitted that the discretion to grant a licence was unqualified by the legislation but that it was clear in the context of a statutory scheme designed to improve the condition and management of rented properties that it was proper for an authority to have regard to the absence of planning permission for use of the subject premises as residential property. If the authority had refused licences altogether it would have put Mr Khan in a very difficult position, in that he would have committed a criminal offence by being in control of unlicensed Part 3 houses, but would have had no right to seek possession of those houses in order to bring the tenancies to an end. If Waltham Forest had ignored the absence of planning permission and had granted licences for the maximum five years period it would then have faced the prospect of taking enforcement action against a use in breach of planning control which it had itself licensed under its Part 3 powers. In those circumstances it was not irrational for the authority to allow a shorter period within which Mr Khan could regularise the planning status of the properties by obtaining planning permission or satisfying the authority that the breaches had occurred sufficiently long ago that enforcement was no longer an option. If he could not do either of those things the authority would then be able to refuse to renew the Part 3 licence when Mr Khan next applied. The FTT had been wrong to assume that the planning situation would be resolved and had left the authority in the position that it may have to use expensive and time-consuming enforcement powers to counteract the grant of the licence.

42. Mr Underwood also submitted that the FTT in the High Road appeal had been wrong to suggest that the licence could be revoked if the planning situation was not regularised so that it presented no obstacle to a full five year licence. Revocation was only permissible under section 93(2) for reasons connected to the licence holder where there had been a serious breach of a condition of the licence, or repeated breaches; under section 93(3) it was permissible only if a house ceased to be a Part 3 house, or became licensed under Part 2, or for some particular reason relating to the structure of the house. The power to include condition contained in section 90 was restricted to those which an authority considered "appropriate for regulating the management, use or occupation of the house concerned. That power was not wide enough to embrace a condition that a licence-holder obtain planning permission. In any event, the licences granted by the FTT for the six flats in

the converted High Road warehouse did not include any such condition so the suggestion that the licence could be revoked was fallacious.

43. Mr Underwood also submitted that the suggestion by the FTT in the Eldon Road case that Waltham Forest wished to penalise Mr Khan was manifestly false and based on a misreading of the guidance given to staff. The statement that “the shorter licence period will penalise the landlord since a new licence application will need to be made at its expiry after one year” had to be read with the next sentence: “However, the grant of a licence will enable the address to be legally rented . . .” Read in context the guidance simply reflected the relative advantages and disadvantages for a landlord who was granted a shorter licence because of a planning problem, and could not possibly be read as evidence of some desire to punish that landlord.

Discussion and conclusions

44. I agree with the general observations of the FTT in both appeals that Part 3 licensing should not be seen as an alternative to the use by a local housing authority which is also a local planning authority of its powers of enforcement under the Town and Country Planning Act. But that does not mean that where a building has been converted to residential use, or an existing residential use has been intensified, in either case in breach of planning control, those circumstances are irrelevant to the decision whether to grant a licence or to its terms.

45. In the case of the Waltham Forest licensing scheme, the designation was made in the light of the authority’s conclusion that the general condition in section 80(6) of the Act were satisfied, that is that the area designated was experiencing a significant and persistent problem caused by anti-social behaviour, which some private sector landlords were failing to take appropriate action to combat and which the designation would contribute to reducing. In my judgment it cannot possibly be said that, in the light of that objective, the issue whether a house has been built or occupied in breach of planning control is irrelevant.

46. Inappropriate or over-intensive uses of land, especially in a densely populated urban area, are an obvious manifestation of anti-social behaviour in themselves and create conditions in which anti-social behaviour is liable to be a significant problem. Planning control is directed in large measure at ensuring that new or additional uses of land do not have an unacceptably adverse impact on existing users. Where consideration of the impact which the occupation of a new house will have on its neighbours has been by-passed, because the house has been built or converted without planning consent, important safeguards against anti-social behaviour will have been evaded. To that extent the concerns of planning control and the concerns of licensing under Part 3 of the 2004 Act overlap.

47. It is therefore unnecessary and unrealistic, in my judgment, to regard planning control and Part 3 licensing as unconnected policy spheres in which local authorities should exercise their powers in blinkers. I am satisfied that it is legitimate for a local housing authority to have regard to the planning status of a house when deciding whether or not to grant a licence and when considering the terms of a licence. It would be permissible for an authority to refuse to determine an application until it was satisfied that planning permission had been granted or could no longer be required. It would

be equally permissible, where an authority was satisfied that enforcement action was appropriate, for it to refuse to grant a Part 3 licence, but as Waltham Forest points out that would make it difficult for a landlord to recover possession of the house and would expose him to prosecution for an offence which he would be unable to avoid by his own actions. The solution adopted by Waltham Forest of granting a licence for a short period to allow the planning status of the house to be resolved was, in those circumstances, a rational and pragmatic course which I accept was well within its powers.

48. Nor would it be satisfactory to place the onus on the local authority to establish a breach of planning control in costly and time consuming enforcement proceedings when the landlord's requirement of a Part 3 licence provides an opportunity to require that he take the initiative of demonstrating that he does not need, or alternatively is entitled to, planning permission. The authority has a discretion over the duration of each licence it grants, and there is no automatic entitlement to a period of five years. Where there are grounds to believe that the applicant requires but does not have planning permission the grant of a shorter period is a legitimate means of procuring that an unlawful use (which itself may exacerbate anti-social behaviour) is discontinued or regularised.

49. I am therefore satisfied that both FTTs were in error in regarding the issue of planning status as irrelevant to the terms of a Part 3 licence. I also agree with Mr Underwood's submission that the reasoning of the FTT in the High Road appeal was flawed to the extent that it relied on the power of a housing authority to revoke a Part 3 licence. Moreover, although it would be wrong for a local housing authority to use its Part 3 powers with the intention of punishing a landlord for a breach of planning control, there is nothing in Waltham Forest's guidance to its staff that could reasonably be interpreted as reflecting such an intention, as the FTT in the Eldon Road appeal appears to have believed.

50. For those reasons I set aside the decisions of the FTT in each of the appeals.

51. I was urged by Mr Underwood that if I set aside the decisions I should restore the original licences and should not either remit the appeal to the FTT for further consideration or substitute a decision of my own. He pointed out that Parliament had intended that the local housing authority should be the primary decision maker and in those circumstances it would be appropriate to leave Mr Khan to make a new application for further licences which Waltham Forest could determine in the light of all the information now in its possession.

52. In my judgment it would not be legitimate simply to restore the original licences without any independent consideration of their terms. Mr Khan appealed against those terms and was entitled to a re-determination of his original licence application which took into account all relevant factors. He has not yet had that re-determination.

53. Nor would it be appropriate for me to substitute a decision of my own without giving both parties an opportunity to present evidence and argument in the light of the facts which are now known. That would require a further hearing.

54. Were I to make a further decision I would wish to have regard to Waltham Forest's policy on the duration of licences, not because the Tribunal would be bound to give effect to it but because the authority has much greater knowledge and experience of housing conditions in its area than the Tribunal and because its judgment therefore merits proper consideration. In *London Borough of Brent v Reynolds* [2001] EWCA Civ 1843, the Court of Appeal gave guidance, in the context of an HMO registration scheme under Part XI of the Housing Act 1985 (now replaced by Part 2 of the Housing Act 2004) on the respective roles of the local housing authority and (then) the County Court (now the FTT) on an appeal. In paragraph 16 of his judgment, with which the other members of the Court of Appeal agreed, Buxton LJ considered the nature of the appeal to the county court, saying this:

“... the appeal was a complete rehearing. Accordingly, the judge hears evidence and makes up his own mind on the facts; and his task is to make his own decision on the application, in place of that made by the LHA, and not merely to act as a court of review of that LHA decision. That said, however, the county court's jurisdiction is subject to the very significant condition that the court should pay great attention to any views expressed by the LHA, and should be slow to disagree with it. That principle is to be found in the judgments of the majority of this court in *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 QB 614 ...”

That principle still applies, although as the FTT has its own special expertise in this field, it is justified in feeling more confident than the county court in reaching a conclusion which differs from that of the local housing authority, despite giving appropriate weight to its views.

55. In the context of this case I consider that the better course is that the licences for each of the appeal houses should continue until two months after the date of this decision. That will allow Mr Khan sufficient time to make new applications and thereby avoid committing an offence by being in charge of unlicensed Part 3 houses. It will also allow Waltham Forest to make a decision on those applications with all of the information now at its disposal.

56. The licences will therefore continue in the same terms until 12 June 2017.

Martin Rodger QC
Deputy Chamber President
12 April 2017