UPPER TRIBUNAL (LANDS CHAMBER)

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Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – what is a house that is required to be licensed under Part 3 of the Housing Act 2004 – can a flat be a Part 3 house – scope of a licence under Part 3 – the offence created by section 95(1) of the Housing Act 2004

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

Appellant

NORTHUMBERLAND MEWS LIMITED

-and-

THANET DISTRICT COUNCIL

Respondent

Re: 10, 12, 17, 19 and 21 William Meadows House,
3-4 Dalby Square,
Margate,
Kent,
CT9 2ER

Judge Elizabeth Cooke

Heard on 5 July 2022

Decision Date: 14 July 2022

Mr Tom Morris for the appellant, instructed by Winckworth Sherwood LLP
Mr Ranjit Bhose QC for the respondent, instructed by the respondent's legal department

The following cases are referred to in this decision:

Dickenson v Fletcher (1873) LR 9 CP 1
London Borough of Waltham Forest v Khan [2017] UKUT] 153 (LC)

Introduction

1. This is an appeal about the selective licensing regime in Part 3 of the Housing Act 2004. Northumberland Mews Limited appeals the decision of the First-tier Tribunal to uphold five financial penalties imposed upon it by the respondent local housing authority, Thanet District Council, in respect of five flats in a building of which it owned the freehold, which it was managing when they should have been licensed and were not. The penalties were of £10,000 for each flat. The appellant says that it was not lawful to impose five separate penalties and that it committed only one offence under Part 3, because the only "Part 3 house" was the whole building. The maximum penalty for such an offence is £30,000, and of course as things stand the appellant has to pay £50,000.

2. The appellant was represented by Mr Tom Morris, and the respondent housing authority by Mr Ranjit Bhose QC, and I am grateful to them both.

The statutory regime

3. The Housing Act 2004 established two regimes for the licensing of rented accommodation, in Part 2 for houses in multiple occupation and in Part 3 which provides for the selective licensing of other residential accommodation.

Selective licensing

4. Part 3 begins with section 79:

> "(1) This Part provides for houses to be licensed by local housing authorities where–
>
> (a) they are houses to which this Part applies (see subsection (2)), and
>
> (b) they are required to be licensed under this Part (see section 85(1)).
>
> (2) This Part applies to a house if–
>
> (a) it is in an area that is for the time being designated under section 80 as subject to selective licensing, and
>
> (b) the whole of it is occupied either–
>
> (i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4), or
>
> (ii) under two or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence under subsection (3) or (4).

Subsections (3) and (4) provide that an exempt tenancy or licence is one granted by a social housing provider or a social landlord, or a tenancy or licence designated by order; the details do not concern us but the fact that some tenancies are exempt does. And it is worth noting that the relevant order designates as exempt a wide range of tenancies and licences: see the Selective Licensing of Houses (Specified Exemptions) (England) Order 2006.

5. So for a house to be required to be licensed, three conditions must be met. First, it must be in an area designated by the local housing authority as subject to selective licensing under section 80, which sets out the conditions for designation (not in issue in this appeal). Second, it must be "occupied" (I come back to that word later) in the way set out in section 79(2)(b)(i) or (ii). Third, it must be required to be licensed under section 85(1).

6. Section 85 reads so far as relevant as follows:

> "(1) Every Part 3 house must be licensed under this Part unless–
>
> (a) it is an HMO to which Part 2 applies (see section 55(2)), or
>
> (b) a temporary exemption notice is in force in relation to it under section 86, or
>
> (c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.
>
> (2) A licence under this Part is a licence authorising occupation of the house concerned under one or more tenancies or licences within section 79(2)(b).
>
> …
>
> (5) In this Part, unless the context otherwise requires–
>
> (a) references to a Part 3 house are to a house to which this Part applies (see section 79(2)) …

7. This appeal is about what is a "Part 3 house" in any given situation; a Part 3 house is required to be licensed if it falls within section 85(1). And that brings us back to the crucial term "house".

8. A "house" is defined in section 99 which states:

> "In this Part–
>
> *"dwelling"* means a building or part of a building occupied or intended to be occupied as a separate dwelling;
>
> *"house"* means a building or part of a building consisting of one or more dwellings;

and references to a house include (where the context permits) any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it)."

9. It will be seen that a house is a building or part of a building, consisting of one or more dwellings (section 99), and that a Part 3 house is one that is in a designated area (section 79(2)(a)), the whole of which is "occupied" as specified in section 79(2)(b).

10. That would appear to mean, and has been taken by many local authorities to mean, that all of the following can be a Part 3 house which may be required to be licensed under section 85(1):

- a flat (part of a building consisting of one dwelling)
- part of a building consisting of several flats (being part of a building consisting of more than one dwelling).
- a building consisting of several flats (being a building consisting of more than one dwelling)

11. Accordingly it has been the practice of local authorities to grant licences under Part 3 both in relation to houses consisting of several flats owned and managed by a single landlord, and in relation to individual flats where more than one flat in the same building is owned and managed by the same landlord, and in relation to groups of two or more flats. That flexible practice was the background to the Tribunal's decision in *London Borough of Waltham Forest v Khan* [2017] UKUT] 153 (LC), where Mr Khan owned six flats in a building and the local housing authority granted Part 3 licences in respect of each of four of the flats for five years, and further Part 3 licences for only one year in respect of two of the flats because they appeared to have been created without planning permission, in order for the planning issue to be resolved. The Tribunal (the Deputy President, Martin Rodger QC) found that the planning status of the property was a relevant consideration in the grant of licences. The practice of granting licences relating to more than one flat, and of granting more than one licence to the same landlord in relation to different parts of the building, was not called into question in that appeal, but it is in this one.

Other aspects of licensing practice

12. Section 87 of the 2004 Act provides that an application for a licence under Part 3 is to be made to the local housing authority, which may charge a fee. Section 88 provides that the authority must either refuse or grant the licence; they may grant it if they are satisfied that the proposed licence holder is a fit and proper person to hold the licence, and that the proposed manager is the person having control of the house or an agent or employee of that person.

13. Section 91 sets out a number of general requirements about licences, of which the following are relevant to the present appeal:

"(1) A licence may not relate to more than one Part 3 house.

(2) A licence may be granted before the time when it is required by virtue of this Part but, if so, the licence cannot come into force until that time.

(3) A licence–

(a) comes into force at the time that is specified in or determined under the licence for this purpose, and

(b) unless previously terminated by subsection (7) or revoked under [section 93 or 93A]1, continues in force for the period that is so specified or determined. …

(5) Subsection (3)(b) applies even if, at any time during that period, the house concerned subsequently ceases to be a Part 3 house or becomes an HMO to which Part 2 applies (see section 55(2))."

14. Section 92 makes provision for the variation of licences, as follows:

"(1) The local housing authority may vary a licence–

(a) if they do so with the agreement of the licence holder, or

(b) if they consider that there has been a change of circumstances since the time when the licence was granted.

For this purpose *"change of circumstances"* includes any discovery of new information.

The offence created by section 95(1)

15. The appeal concerns the offence created by section 95(1) of the 2004 Act:

"(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed."

16. Section 263 states that the "person having control" in relation to premises means the person who receives the rack-rent of the premises, or would receive it if it were let at a rack-rent. So a freeholder who has let a house or flat on an assured shorthold tenancy is in control of it; if the freeholder grants a long lease of the premises at a peppercorn rent then he or she is no longer in control of it because only the long leaseholder is in a position to let it at a rack-rent.

17. Section 263 also defines the "person managing" premises, as an owner or lessee who receives rent from the occupiers of a Part 3 house, or would receive it but for an arrangement for another person to receive it. Where the freeholder grants a long lease of the premises and the lessee then sub-lets, the freeholder is not managing the premises because he or she is not entitled to rent from the occupiers.

18. A person who commits the offence created by section 95(1) may be prosecuted; alternatively the local housing authority may require them to pay a financial penalty under section 249A(1) of the 2004 Act. In addition (to prosecution or to a financial penalty) a landlord who commits the offence may be subject to a rent repayment order pursuant to section 41 of the Housing and Planning Act 2016.

19. Paragraph 10 of Schedule 13A gives the FTT jurisdiction to hear appeals from financial penalties imposed by local housing authorities, and the present appeal is from a decision of the FTT exercising that jurisdiction.

The facts, and the FTT's decision

20. William Meadows House in Margate, Kent, is a mid-terrace period house converted into 22 flats, in an area which between 2011 and 20 April 2021 was designated by the respondent as a selective licensing area. In February 2020 the appellant acquired the freehold of the building; some of the flats were already tenanted, and the appellant itself granted tenancies of some of the flats. The appellant's predecessor in title had held a licence for the building. The director of the appellant did not realise that licences are not transferable; no application was made for a licence by the appellant until March 2021, and a licence was issued on 23 April 2021.

21. Meanwhile the local housing authority had contacted the appellant pointing out the requirement for a licence. Notices of Intent to impose a financial penalty were sent to the appellant in respect of five of the flats (flats 10, 12, 17, 19 and 21) in January 2021 on the basis that the appellant was committing the section 95(1) offence as the person managing those flats. A Final Notice in respect of each of those flats, imposing a financial penalty of £10,000 in each case, was issued on 16 March 2021.

22. The respondent's explanation (given to the FTT) for the imposition of five penalties was that it had only been able to gain access to five of the flats and that therefore it was only in respect of the five flats that it had the information it needed to establish that they were Part 3 houses and that the offence was being committed. It did not know, for example, which of the other flats were occupied, nor whether any of the flats was held on an exempt tenancy or licence.

23. The appellant appealed to the First-tier Tribunal pursuant to paragraph 10 of Schedule 13 to the 2004 Act. A defence of reasonable excuse failed, and there is no appeal from that. But the appellant also argued that it was not open to the local housing authority to impose five financial penalties; the only Part 3 house which was required to be licensed – and which indeed had been licensed before the appellant's acquisition, and was eventually licensed on the appellant's application - was the building, not the individual flats. A licence cannot relate

to more than one house, according to section 91(1), and therefore where the building itself was a Part 3 house the individual flats could not be Part 3 houses.

24. That argument did not find favour with the FTT. It found that the "plain and ordinary meaning" of section 99 of the 2004 Act is that a flat falls within the definition of a house for the purposes of Part 3. It added that section 91(1) of the 2004 Act "may well prevent the grant of a licence for the whole house" (paragraph 44), although it took the view that "different considerations may apply to whether a licence may be granted to a person in respect of premises and whether a person commits an offence in relation to premises."

The appeal

25. The appellant appeals with permission from this Tribunal, on the ground that the flats are not Part 3 houses and that the only offence it committed was in relation to the whole house. Its thesis is that in any given case an individual can only commit one offence in relation to a building because there is only ever one Part 3 house so far as that person is concerned, whether it be the whole or part of the building.

26. The respondent's position is that while the decision of the FTT as regards these five financial penalties was correct, that does not mean that section 91(1) renders it unlawful to licence the whole building. The scheme is flexible, and a licence can be granted to the freeholder of a building in respect of the whole building or of part of it, or of a single flat within it.

27. The FTT's decision was of course simply that the financial penalties were upheld. Its comment about the effect of section 91(1) was *obiter*, not part of its decision and of no legal effect, and its comment is not the subject of this appeal. Nevertheless it is important that in deciding the appeal I explain whether or not that *obiter* comment was correct. It was not, for the reasons given below, although the appeal fails and the decision of the FTT about the five penalties is upheld.

The appellant's case on the appeal

The appellant's construction of a "Part 3 house"

28. The appellant's starting point is that if an individual flat in William Meadows House is a Part 3 house, then the consequence of section 91(1) is that it is unlawful to grant a licence for the whole building, because that would be a licence relating to 22 Part 3 houses. That, Mr Morris argues, is an unacceptable conclusion because the legislation makes it clear that Parliament intended it to be possible to licence the whole building. Section 99 refers to "a building consisting of one or more dwellings", and section 79(b)(ii) is about a house occupied under two or more tenancies or licences in respect of different dwellings within it. Local housing authorities commonly licence whole buildings consisting of flats, and guidance published by this respondent (albeit in connection with an earlier designation) advised the owner of a building divided into flats (whether converted or purpose-built) to make a single application for a licence for the whole property. This makes obvious administrative sense.

29. Therefore the FTT's decision, which brings with it such an unacceptable consequence, must be wrong.

30. Moreover, the idea that the whole of a building, or one flat within it, or any group of flats within it may be a Part 3 house offends the principle against doubtful criminalisation, set out in the eighth edition of *Bennion, Bailey and Norbury on Statutory Interpretation* at paragraph 24.6:

> "It is a clear principle of legal policy that a person should not be penalised except under clear law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account."

31. The learned authors go on to observe that the "the legislature is presumed to intend that a person on whom a hardship is inflicted should be given a fair warning", and cite Brett J in *Dickenson v Fletcher* (1873) LR 9 CP 1 at 7:

> "Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty."

32. Therefore, Mr Morris argues, a situation where a landlord is at risk of committing an unknown number of offences – relating to one flat, the whole building, or to any combination of the 22 flats – is unacceptable. Faced with a choice between that and a construction of the statute that has the appellant committing one offence only, the Tribunal should favour the latter. The appellant says that there must be, for any landlord, one Part 3 house and one offence; and the Part 3 house to which the section 95(1) offence relates must be the only one in respect of which a licence could be granted. Put another way, the number of offences committed must correspond with the number of Part 3 houses required to be licensed and the number of licences that can be issued.

33. Moreover, for the local housing authority to decide in each case what is the Part 3 house – a flat, a group of flats or the whole building – is an unacceptably broad discretion and would lead to arbitrary outcomes.

34. Mr Morris therefore argues that the correct approach to Part 3 is to appreciate that the definition of a house in section 99 is not determinative of what is a Part 3 house; instead section 99 provides the "raw material" from which housing authorities and landlords can "construct a Part 3 house in every given case, using the tools provided by the other sections of the Act" (I quote from Mr Morris' skeleton). But this is not to be done by an arbitrary exercise of discretion by the local housing authority, nor is it a matter of choice for the landlord. Section 91(1) is of critical importance and takes away that potential choice by determining the answer. The FTT thought that the answer was that the Part 3 house was the smallest possible unit, the flat. But that is unacceptable for the reasons explained. Instead, the Part 3 house to be constructed must be the largest possible unit, or combination of dwellings, in a given case that can satisfy the requirement in section 79(2)(b)(ii). If it is possible to licence the whole of a building comprising flats, then that is the Part 3 house; no

smaller part of that building can be a Part 3 house (because that would run headlong into section 91(1)). If one of the flats in the building is subject to an exempt tenancy or licence, or is subject to an intermediate lease, then that is to be excluded, and the Part 3 house is the remaining part of the building.

35. Obviously flats that are initially not within the Part 3 house may come to be part of it later. Where a landlord owns a block of 10 flats but two are let on long leases and then sub-let, the Part 3 house is only the other eight flats which the landlord lets to occupiers. If later the other two flats fall into possession, on Mr Morris' case the Part 3 house is now the whole building. He argues that the power to vary a licence in section 92 of the 2004 Act would enable the licence to be extended to cover all ten flats; alternatively the landlord could obtain a new licence for the whole.

The appellant's argument about occupation

36. It will be recalled that in the present case the local housing authority did not know how much of the building was occupied at the time when it served its Notices of Intent (see paragraph 21 above); and section 79(2) applies Part 3 to a house if "the whole of it is occupied…". Mr Morris argues that the word "occupied" in this context means "occupied or intended to be occupied". He says that it must do, because that is how section 99 defines a dwelling, and section 79 cannot cut down what section 99 has set up. Parliament's intention was that houses are to be licensed if they are intended to be occupied. Where a house consists of a number of flats, it is not the case that it must be licensed only when the final flat is let.

37. Mr Morris argues that the requirement is not that the whole of the building is actually occupied, but that it is entirely occupied by two or more non-exempt tenancies. That is consistent with the idea that a house includes the garden and outbuildings (see section 99), which are common parts and not "occupied" under any of the flat tenancies. If a building consists of three flats, two of which are occupied under non-exempt tenancies or licences but the third of which is unlet, then the whole building is the Part 3 house that is required to be licensed. And that means that the identity of the Part 3 house is stable and does not change every time a new licence or tenancy is granted. The difficulty that the respondent thought it had in this case does not arise; it did not need to know whether all the flats are occupied.

38. Mr Morris says that this explains why section 95(1) provides that a person commits the offence once the licensing requirement is engaged, which means that a licence must be acquired before tenants or licensees are allowed into occupation; Parliament intended a licence to be acquired where the building was intended to be occupied, and not just where it was actually occupied.

39. Mr Morris also argues that if section 79(2) is construed literally then if a whole block were licensed and one flat became vacant then the block would cease to be a Part 3 house.

The appellant's construction of the section 95(1) offence

40. The other reason why part of a building may not fall within a Part 3 house is that it is occupied under an exempt tenancy or licence. The respondent in this case did not know

whether any of the flats was so occupied and in many cases the local housing authority will not know. Moreover, although in the present case the respondent knew that the appellant owned the freehold of the building, in other cases it may be aware that a person is in control of or managing part of a building but may have no way of knowing whether that person is in control of or managing the whole. Mr Morris accepts that that means that the local housing authority will not know the extent of the Part 3 house in respect of which the offence in section 95(1) is being committed. It knows, however, that there is a Part 3 house and that therefore an offence is being committed. And the offender knows the extent of the house and the exact nature of the offence and therefore is not subjected to doubtful penalisation. Similarly, the tenant of a flat who applies for a rent repayment order does not need to know how many flats his landlord is in control of or managing; the applicant knows that there is a Part 3 house and that an offence is being committed if his or her own flat is unlicensed, and the landlord knows, even if he or she does not disclose, the extent of the Part 3 house.

The respondent's arguments and the Tribunal's conclusion

41. It is central to the respondent's case that although the FTT's decision was correct, it does not have the consequence that the FTT thought it has as a result of section 91(1). The essence of the Part 3 regime, according to Mr Bhose, is flexibility. The Act does not prescribe whether a block of flats owned by a single freeholder must be subject to one licence or several. That enables an appropriate response to nuanced circumstances, as we saw in *London Borough of Waltham Forest v Khan*, and to practical requirements, for example where a landlord wants to appoint different managers for different parts of the building. There cannot be only one right answer to the question "what is the Part 3 house" in a situation involving two or more dwellings within a building, nor is there only one possible offence that the landlord of such a building can be charged with. Therefore section 91(1) cannot bear the weight placed upon it by Mr Morris.

42. Section 91(1) is worth repeating:

> "A licence may not relate to more than one Part 3 house."

43. For Mr Morris that means that a licence cannot be granted in respect of premises which could form more than one house. I take the view that that cannot be what it means, because the consequences that flow from that construction are unacceptable. If that is what it means then either the only possible subject for a licence is the smallest possible unit, as the FTT thought might be the case and as Mr Morris says is the result of the FTTs decision, or the licence must relate to the largest possible unit in relation to an individual, as Mr Morris argues. Either way the flexibility that the Act obviously intended is lost, and thousands of licences already granted are in fact invalid (licences of individual flats on Mr Morris' construction, and licences of blocks if the FTT's *obiter* comment is right).

44. Mr Bhose argues that section 91(1) means that a licence must relate to premises that constitute a single Part 3 house. It cannot relate to premises that cannot be a single Part 3 house, such as two separate buildings, or two flats in a building that are several floors apart and so cannot be said to be "part" or "a part" of a building.

45. I accept that construction. I do not decide, because it is not relevant to this appeal, whether or not two flats that are several floors apart can constitute "part" of a building. But the meaning of section 91(1) can only be that the premises to which a licence relates must be a single Part 3 house – whether a flat, or a number of flats comprising part of a building, or the whole building. Any other construction leads to a loss of the flexibility that is crucial to the scheme, and flies in the face of the clear drafting of the statute by importing a complicated requirement to identify the smallest or largest possible unit that could be a Part 3 house in any given case.

46. Once the meaning of section 91(1) is resolved in that way, it is clear that the FTT's decision did not lead to unacceptable consequences, and nothing stands in the way of its conclusion – that each of the five financial penalties related to a Part 3 house because each flat was a Part 3 house that required to be licensed. Each was in a designated area, part of a building consisting of one dwelling, (meaning part of a building occupied as a separate dwelling) (section 99), and the whole of each flat was occupied under a single non-exempt tenancy (section 79(2)(a)), and section 85 required it to be licensed.

47. It is true that the appellant could, had the respondent so chosen and had it had the requisite information, have been penalised for an offence in respect of the whole house or of any group of flats comprising part of it. It cannot know in advance how many offences he is committing. Nor can many who embark upon criminal conduct, since the outcome in terms of charges on an indictment will depend upon circumstances outside their control relating to the behaviour of others, the availability of evidence and so on. I do not think that the principle against doubtful criminalisation is engaged, because there is no doubt that the appellant is committing a criminal offence; the principle does not require that a statute be construed so that a person commits as few offences as possible.

48. I could stop there. Mr Morris' construction of Part 3 fails because section 91(1) does not give rise to any difficulty with the FTT's conclusion – despite what the FTT itself thought, and because the principle against doubtful criminalisation does not invalidate the flexible scheme that arises from a plain reading of Part 3. The appeal fails.

49. But it is worth noting the great difficulties that would arise from Mr Morris' argument.

50. First, the argument that premises must be licensed when they are intended to be occupied is an impossible reading of the plain words of section 79. There is no contradiction between section 99, which defines houses, and section 79 which tells us to which houses Part 3 applies. And the argument makes no practical sense because, as Mr Bhose points out, there is no reason why Parliament would have required empty premises to be licensed. The licence is for the protection of the occupier, and if there is none then there is no reason why the applicant should be put to the trouble and expense of applying, nor why the local housing authority should undertake the work of granting a licence. Moreover, the appellant's argument appears to require a single house to be licensed once it is intended to be let, just as much as it would require the single empty flat in a block to be let, or the 19 empty flats when just one has been renovated. Far from explaining section 95(1) (see paragraph 38 above), the appellant's construction would mean that the section 95(1) offence is committed when there is an intention to let, which is impracticable and pointless.

51. The statute requires a licence where premises are occupied as set out in section 79(2), but it caters for changing circumstances. Section 91(2) enables a licence to be obtained before premises are occupied and required to be licensed, so as to avoid commission of the offence once the premises are occupied. Section 91(5) ensures that a licence remains valid even if one flat in a licensed block becomes vacant (which resolves the point summarised at paragraph 39 above). A landlord who renovates one flat at a time and lets them one by one may get a licence for each as they are occupied, or may apply for a licence for the whole building once all the flats are let; there is no need for the landlord to apply to have the licence for one flat extended as the Part 3 house grows (and I make no decision as to whether section 92 could be used to extend the premises covered by the licence).

52. So a licence is required when, as section 79(2)(b) says, the whole of the house (be it a building, part of a building, or a flat) is occupied as there specified. That means that the Part 3 house if defined as Mr Morris argues will fluctuate over time. That is not entirely fatal to his argument (because of his suggestion that the local housing authority does not need to know the extent of the Part 3 house when it prosecutes or imposes a financial penalty). But other considerations are.

53. One is that if a landlord has a licence for one flat in a building comprising two flats, where he lets that flat on a shorthold tenancy and the other on an exempt tenancy, if the second flat unexpectedly ceases to be exempt then the licence for the first flat becomes invalid because it does not relate to a Part 3 house. If a landlord licences five flats in a building, not realising that he needs a licence for one or more other flats there, the licence he obtains is invalid, because there is only one Part 3 house and it is not licensed. Therefore Mr Morris' construction requires the local housing authority to make enquiries of the landlord and perhaps of others in relation to the whole building in order to find out whether it can grant a valid licence in response to the application. The statute does not require such an enquiry, and it would be impracticable for the local housing authority to achieve it; it requires the local housing authority only to consider the application before it and to determine, using the statutory definition, whether the premises to which the application relate is a single Part 3 house, and then to follow the process set out in section 88 and following. If the premises is a Part 3 house, the licence can be granted and no detective work is required. The reality is as Mr Bhose QC describes: the Act anticipates that different people will make different applications for licences at different times for buildings, parts of buildings and individual flats. The role of the authority is not to carry out an audit of the building but to look at the application before it. Its licensing powers are flexible, to cater for the wide variety of factual circumstances that it will encounter.

54. I have already mentioned that the appellant's construction of the Act leaves landlords with no choice about what to licence. If a landlord wanted to appoint two different managers for different floors it would have to sub-let to a manager who would then apply itself for a licence for part of the building, to which there are obvious objections because the manager is unlikely to want a landlord's responsibilities, or the landlord would have to make the arrangements it wants by delegation, which might be inconvenient. There would also be no choice for local housing authorities, and the sensible arrangement made in *London Borough of Waltham Forest v Khan* would be impossible.

55. Another difficulty is that if there is only ever one Part 3 house for an individual, it will be necessary for local authorities to take decisions about prosecution and about financial penalties when they do not know the extent of the Part 3 house (see paragraph 40 above). One obvious disadvantage of that is that the extent of the harm caused by the offence would be unknown. Mr Morris argued that this was immaterial because the number of people at risk would not make a great deal of difference to the penalty; but I am not convinced that that is a satisfactory answer to the problem.

56. More generally I do not think that the statute enables or requires a local housing authority to prosecute a landlord, or to impose a civil penalty, in relation to a Part 3 house the extent of which is not known to the local housing authority or to the court or to the FTT as the case may be. All those persons need to be able to consider and respond to the Part 3 house to which the evidence relates (without considering whether any different house could have been or would have been the subject of a licence if one had been applied for); it makes no sense for their decisions to have an unknown impact upon unknown components of a Part 3 house of whose extent they are unaware.

57. Inevitably therefore the local housing authority has a discretion in deciding what offences to prosecute. If it makes an irrational decision it can be challenged. But it has to have discretion and flexibility because it must respond to individual circumstances and because it must be able to act on the information available to it, as it does when granting a licence and as it did when imposing financial penalties in this case. The flexibility inherent in the scheme is crucial to it.

Conclusion

58. The appeal fails and the FTT's decision to impose five financial penalties stands.

Judge Elizabeth Cooke

14 July 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law

in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.