UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

HOUSING – CIVIL PENALTY ORDER – defence of reasonable excuse – ignorance of the law – duties of conveyancing solicitor – relevance of local authority policy – FTT to conduct a re-hearing not a review

BETWEEN:

THE BOROUGH COUNCIL OF GATESHEAD

Appellant

-and-

CITY ESTATE HOLDINGS LIMITED

Respondent

Re: 115 and 117 Westbourne Avenue,
Gateshead,
NE8 4NQ

Upper Tribunal Judge Elizabeth Cooke

Remote hearing on 2 February 2023
Decision Date: 7 February 2023

Mr Thomas Parsons-Munn for the appellant, instructed by its legal department
Mr Nicholas Leviseur for the respondent, instructed by DWF Law LLP

The following cases are referred to in this decision:

Aytan v Moore and others [2022] UKUT 27 (LC)
IR Management Services Limited v Salford City Council [2020] UKUT 81 (LC)
Thurrock Council v Daoudi [2020] UKUT 209 (LC)

Introduction

1. This is an appeal by the Borough Council of Gateshead against the decision of the First-tier Tribunal to cancel civil penalties imposed by the appellant on the respondent, City Estate Holdings Limited, for the offence of managing or being in control of two properties that were required to be licensed under the appellant's selective licensing scheme and were not licensed.

2. The appellant was represented by Mr Thomas Parsons-Munn and the respondent by Mr Nicholas Leviseur, both of counsel, and I am grateful to them both.

The legal background

3. Part 3 of the Housing Act 2004 provides for selective licensing of areas designated for that purpose by the local housing authority, so that a licence is required when the house is let even if it is not a house in multiple occupation.

4. Section 95(1) of the 2004 Act provides:

> "(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 … but is not so licensed.
>
> …
>
> (4) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse–
>
> > (a) for having control of or managing the house in the circumstances mentioned in subsection (1)…"

5. Section 249A of the 2004 Act provides, so far as relevant:

> "(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.
>
> (2) In this section *"relevant housing offence"* means an offence under—
>
> > (c) section 95 (licensing of houses under Part 3)…
>
> (5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—
>
> > (a) the person has been convicted of the offence in respect of that conduct, or

(b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded."

6. The local housing authority therefore has a choice; it may prosecute a person who has committed the offence under section 95 or it may impose a financial penalty, but not both. The requirement to be met before the imposition of a financial penalty is that the authority must be satisfied to the criminal standard of proof – beyond reasonable doubt - that the offence has been committed.

7. Section 95(5), as we have seen, provides a defence of reasonable excuse. A person who relies upon that defence must demonstrate to the civil standard of proof – on the balance of probabilities – that he has that defence (*IR Management Services Limited v Salford City Council* [2020] UKUT 81 (LC)) .

The factual background and the FTT's decision

8. The respondent is a company owned by Mr Michael Kosmas for the purpose of buying and letting properties; he is the sole director and shareholder. In April 2020 the respondent bought 115 and 117 Westbourne Avenue, Gateshead. It renovated them, and then in July 2020 115 was let to tenants, and 117 in August.

9. The two houses are in an area designated by the appellant in October 2018 as an area of selective licensing, and therefore the respondent should have had a licence. The appellant became aware of the situation when the tenants registered for council tax; on 20 November it contacted Mr Kosmas by telephone and wrote to him on 23 November 2020. On 26 November 2020 the respondent applied for a licence for each property, and licences were granted in December 2020.

10. Mr Kosmas was interviewed by the appellant under caution about offences under section 95 of the 2004 Act in February 2021. Notices of Intention to impose a financial penalty were served in March 2021; Mr Kosmas made representations, and in July 2021 Final Notices were served imposing financial penalties, of £4,871.26 in respect of 215 and of £4,353.40 in respect of 117. The respondent appealed those penalties to the FTT. On an appeal, the FTT must make its own decision rather than reviewing that of the local housing authority (paragraph 10(3) of Schedule 13A to the 2004 Act).

11. It is not in dispute that from August 2020 until the application for a licence was made (from which point no offence is committed) the respondent was managing or in control of properties that were required to be licensed under Part 3 of the Housing Act 2004. But on behalf of the respondent it is said that it had the defence of reasonable excuse and so was not committing an offence.

12. Mr Kosmas made a statement in advance of his interview under caution, in which he said that the respondent had the defence of reasonable excuse because no information was given about the selective licensing designation by the seller's solicitor. The properties were bought at auction, and so an information pack for prospective purchasers was provided by

Irwin Mitchell who acted for the seller. It included a local land charges search on form Con 29. That form provides in all cases a set of standard enquiries; there are additional questions that can be asked of the local authority on payment of a further fee; one such question is about licensing requirements, headed "Houses in multiple occupation" but whose text makes clear that the question is whether any additional HMO licensing requirements or selective requirements were in place for the property. Irwin Mitchell did not ask that question so there was no information about licensing in the seller's pack.

13. The respondent's application notice to the FTT likewise stated that it had a reasonable excuse because it relied upon the seller's legal pack.

14. Mr Kosmas represented the respondent before the FTT and gave evidence. The FTT said that he "described himself as a professional landlord but acknowledged that he was unlikely to be able to keep up with the changing regulations applicable to rented property". He said that he had been unaware of the existence of selective licensing schemes outside the regulation of houses in multiple occupation. In arguing for a defence of reasonable excuse he relied not only upon the failure of the seller's solicitors to provide information about the licensing requirement but also on the failure of the respondents own solicitors, MS Law, Manchester, to do so. MS Law had acted for the respondent in previous property purchases, and on this occasion were engaged to carry out a local land charges search before the auction. The question about licensing requirements was not asked.

15. Having recounted that evidence, at its paragraph 22 the FTT recorded the comment of the housing authority's representative that the solicitors would not be expected to obtain information about licensing unless specifically instructed. The FTT said:

> "The tribunal does not accept this. [MS Law] knew that the properties would be purchased for renovation and letting. They could have discovered online in a matter of minutes that both houses fell within a selective licensing area, a point very relevant for the Applicant and one which Mr Kosmas could properly have expected to be included in his solicitor's pre-auction report on the properties."

16. The FTT also heard evidence from the appellant's housing officer who produced the appellant's enforcement policy and explained the process she followed in deciding whether to prosecute or to impose a financial penalty. The appellant's enforcement policy details as one would expect various levels of informal and formal enforcement processes, ranging from advice to warning letters to prosecution; it says:

> "Once we have established that action needs to be taken to resolve an issue, wherever possible an informal approach will be adopted … However in certain cases there will be no alternative but to take formal action."

17. The housing officer explained that the appellant had taken the view that there was sufficient evidence of an offence to justify formal action, and that prosecution or financial penalty was appropriate rather than a caution because the properties had been let without a licence for several months. A checklist was used to assess whether prosecution or civil penalty was appropriate, looking at factors such as whether there were hazards at the

property or vulnerable tenants, whether this was a repeat offence, whether the landlord had more than three properties and so on. The outcome of the checklist favoured a civil penalty.

18. The FTT set out its findings in its paragraphs 30 to 33. It found that "despite its published policy of taking informal action wherever possible … the only alternative to prosecution or a civil penalty considered by the [housing authority] was a caution" and that therefore the housing officer did not follow the appellant's published guidance. It found that that Mr Kosmas was unaware of licensing requirements other than for houses in multiple occupation before the appellant's call in November 2020. It found that it had been "entirely reasonable" for him to rely on his professional advisers to report to him on the properties that he was buying but that he was not informed by the of the need for a licence; and that the respondent therefore had the defence of reasonable excuse. It concluded:

> "33. [City Estate Holdings Limited] is a reputable landlord whose investment in housing should be – and indeed was – encouraged by the grant of a selective landlord licence. In accordance with the [housing authority]'s published policy, even if [City Estate Holdings Limited] had been unable to rely on a statutory defence the imposition of a civil penalty would have been unnecessary to achieve the objects of the licensing regulations."

19. The FTT granted permission to appeal on three grounds: that the FTT had erred in finding that the respondent had the defence of reasonable excuse; that the FTT erred in holding that the appellant's failure to follow its own policy was a reason for not imposing a penalty; and that the FTT was wrong to regard the respondent's status as "a reputable landlord" as a reason not to impose a penalty.

The arguments in the appeal: ground 1

20. At the hearing before the Tribunal Mr Parsons-Munn observed that this is the crux of the appeal; if the respondent did have the defence of reasonable excuse then the other grounds are superfluous.

21. He further observed that it is well-established that ignorance is not itself a defence. In *Thurrock Council v Daoudi* [2020] UKUT 209 (LC) the Tribunal (the Deputy President, Martin Rodger KC) said at paragraph 26 that a landlord might have a reasonable excuse for not appreciating that a property required a licence but that "it would be necessary for the landlord to have taken reasonable steps to keep informed". In *Aytan v Moore and others* [2022] UKUT 27 (LC) the Tribunal (Judge Cooke and Judge McGrath) said:

> "… a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely upon the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why he landlord could not inform themselves of the licensing

requirements without relying upon an agent, for example because the landlord lived abroad."

22. Mr Parsons-Munn argued that the FTT gave no consideration to whether the respondent ought itself to have undertaken the necessary enquiries. What it did conclude, however, was that that was MS Law's responsibility, despite the firm having had no instructions to make enquiries about licensing requirements. To say that that nevertheless came within the scope of their instructions, said Mr Parsons-Munn, is to flirt with the law of negligence; it is an issue that cannot be determined without expert evidence of what instructions to act in a conveyancing matter require a solicitor to do without express instruction, and it was not open to the FTT make that assessment itself without any evidence.

23. Mr Leviseur's submissions focused on the solicitors' duty. He conceded that the vendor's solicitor was under no duty to inform prospective purchasers at auction about the licensing requirement, but he maintained that MS Law should have done so and that it fell within the scope of their instruction to act in the conveyancing transaction. Just as solicitors in Derbyshire will include a mining search without being specifically instructed by their client to do so, so these solicitors acting for a client that it knew was in the buy-to-let business should have investigated the licensing position. Mr Kosmas who (as the FTT accepted) had never heard of selective licensing and so was not in a position to give a specific instruction.

24. Mr Leviseur also argued that the optional enquiry on form Con 29 is unhelpfully headed "Houses in Multiple Occupation" and asked rhetorically: if an enquiry had been made, what answer would have been given? I do not think that there is any reason to suppose that an inaccurate answer would have been given. The point is that no enquiry was made, and that no evidence was produced to show that MS Law was under a duty to make it. The FTT's surmise about the scope of conveyancing instructions was without any evidential foundation.

25. It was open to the respondent to instruct his solicitors to find out and advise him on the regulatory position about letting the property, without Mr Kosmas being aware either of the selective licensing regime or of the workings of form Con 29, but it has never been the respondent's case that any such instructions were given. Equally the respondent could, through Mr Kosmas, have researched the regulatory and licensing position itself; or it could have instructed a letting agent to do so. It did none of those things. As a result there is no basis upon which the respondent can establish the defence of reasonable excuse.

Ground 2

26. I can deal with this briefly. As I mentioned above the FTT in hearing an appeal from a financial penalty is to make its own decision, not to review that of the local housing authority.

27. The question before the FTT is therefore not whether the local housing authority in imposing the penalty followed its own policy. The FTT is not conducting a review of the local housing authority's decision. As it happens I see nothing whatsoever in the local

housing authority's actions in this case that was inconsistent with its policy, and indeed Mr Leviseur very fairly conceded that the policy does not prevent the appellant from taking formal enforcement action. However, Mr Leviseur also and equally fairly conceded that the extent to which the policy was followed was relevant only insofar as the FTT was, incorrectly, reviewing the appellant's decision; it is irrelevant to the FTT's own decision-making process.

28. Ground 2 clearly succeeds.

Ground 3

29. Ground 3 also succeeds. In *Thurrock Council v Daoudi* the FTT had imposed no penalty on the landlord because he had applied for a licence after being made aware of the need for one. The Deputy President said at paragraph 31 "I do not see how eventually doing what the law requires can justify a decision to impose no penalty at all, although it has a bearing on the level of punishment." If the respondent in the present appeal is a good landlord as the FTT said at its paragraph 33 then that goes to mitigation when the level of penalty is considered, but it does not amount to the sort of exceptional circumstance that might justify a decision not to impose a financial penalty where it is proved beyond reasonable doubt that the offence has been committed and the respondent has failed to establish the defence of reasonable excuse.

Conclusion and disposal

30. The appeal succeeds on all three grounds, and the Tribunal substitutes its own decision that a financial penalty should be imposed. It remains to decide the amount of that penalty. Mr Parsons-Munn asked the Tribunal to make that determination, but it was not possible to do so because Mr Leviseur was without instructions on that aspect of the appeal and because in any event some evidence of the respondent's financial circumstances might be required. Accordingly the matter is remitted to the FTT for a decision by a different panel on the level of penalty. It may be that a further decision is not needed because the parties will be able to reach agreement, but if they do not then it will be for the appellant to ask the FTT for directions.

Upper Tribunal Judge Elizabeth Cooke

7 February 2023

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.