

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – selective licensing scheme – differences between sections 67 and 90 of the Housing Act 2004 – requirement to attend a training course

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

BETWEEN:

GEOFFREY HUGH LEWIS BERG

Appellant

and

BURNLEY BOROUGH COUNCIL

Respondent

**Re: 14 Dall Street,
Burnley,
Lancashire, BB11 3LB**

Judge Elizabeth Cooke
Determination on written representations

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The following case is referred to in this decision:

Brown v Hyndburn Borough Council [2018] EWCA Civ 242

Introduction

1. The appellant, Mr Berg, is the landlord of a property in Burnley. It is a two-bedroomed mid-terrace house. He holds a licence under a selective licensing scheme brought into force by the respondent, Burnley Borough Council, in 2016 for five years pursuant to Part 3 of the Housing Act 2004 (“the 2004 Act”). The appeal is from a decision of the First-tier Tribunal (“the FTT”) which varied a number of conditions attached to the licence. The appeal relates to one of those conditions only, which the appellant says the respondent is not entitled to impose.
2. The appeal has been determined on the Tribunal’s written representations procedure. The appellant has not been legally represented; the respondent was represented by its own legal department; I am grateful to both parties for their very helpful written submissions.
3. I have decided that the condition in question is a legitimate one and the decision of the FTT is upheld. In the paragraphs that follow I set out the disputed licence condition and the legal background, before considering the parties’ arguments and explaining my conclusion.

The disputed condition

4. The appellant challenges condition 13 in his licence, and I refer to it as “the training condition”. It reads as follows:

“The Licence Holder and/or their agent where an agent has been appointed to manage the property) must attend one Landlord Development Day covering how to manage tenancies whilst the licence is in force and must undertake any additional Property Management training courses that the Authority from time to time requires to be undertaken. Alternatively demonstrate to the Local Authority that similar, relevant training has been undertaken within the preceding 12 months.”

The law

Selective licensing schemes and licence conditions under section 90 of the 2004 Act.

5. Part 3 of the Housing Act 2004 enables local authorities to impose selective licensing schemes requiring landlords in designated areas to hold a licence. Section 80 sets out the circumstances in which such a scheme may be imposed, for example where the area is one of low housing demand or is experiencing problems caused by anti-social behaviour. Section 95 provides that a person commits an offence if has control of or manages a house which is required to be licensed under a selective licensing scheme and is not so licensed.
6. Section 90 enables the local authority to attach conditions to a licence:

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

(2) Those conditions may, in particular, include (so far as appropriate in the circumstances)—

(a) conditions imposing restrictions or prohibitions on the use or occupation of particular parts of the house by persons occupying it;

(b) conditions requiring the taking of reasonable and practicable steps to prevent or reduce anti-social behaviour by persons occupying or visiting the house.

(3) A licence may also include—

(a) conditions requiring facilities and equipment to be made available in the house for the purpose of meeting standards prescribed for the purposes of this section by regulations made by the appropriate national authority;

(b) conditions requiring such facilities and equipment to be kept in repair and proper working order;

(c) conditions requiring, in the case of any works needed in order for any such facilities or equipment to be made available or to meet any such standards, that the works are carried out within such period or periods as may be specified in, or determined under, the licence.

(4) A licence must include the conditions required by Schedule 4.

7. Subsection (1) enables the local authority to impose conditions “for regulating the management, use or occupation of the house concerned”, and subsection (2) gives two examples. Those example conditions do not have to be imposed; the conditions “may” include them. And being examples, they do not exhaust the range of conditions that may be imposed “for regulating the management, use or occupation of the house concerned”.
8. Subsection (3), however, enables the local authority to impose, in addition to those conditions enabled by subsections (1) and (2), three further types of condition. They are about requirements for facilities and equipment to be made available and kept in repair for the purpose of meeting standards to be prescribed in regulations. As I understand it no such regulations have been made. These conditions are ones that may “also” be imposed; they are not presented as examples for conditions imposed “for regulating the management, use or occupation of the house concerned”.
9. Subsection (4), by contrast, makes certain conditions obligatory; they are set out in Schedule 4 and include requirements about electricity, gas and smoke alarms and also a requirement

for the licensee to demand references from prospective tenants. They are not relevant to this appeal.

10. The licence issued to the appellant contained over 30 conditions, and a number of them were in dispute before the FTT but, as I said above, only the training condition is the subject of this appeal.

HMO licences and the conditions that may be attached to them

11. Part 2 of the 2004 Act is about the licensing of houses in multiple occupation (“HMOs”). They are required to be licensed and, again, it is a criminal offence to be in control of or to manage an HMO which is required to be licensed and is not. Section 67 is about conditions:

“(1) A licence may include such conditions as the local housing authority consider appropriate for regulating all or any of the following—

- (a) the management, use and occupation of the house concerned, and
- (b) its condition and contents.

(2) Those conditions may, in particular, include (so far as appropriate in the circumstances)—

- (a) conditions imposing restrictions or prohibitions on the use or occupation of particular parts of the house by persons occupying it;
- (b) conditions requiring the taking of reasonable and practicable steps to prevent or reduce anti-social behaviour by persons occupying or visiting the house;
- (c) conditions requiring facilities and equipment to be made available in the house for the purpose of meeting standards prescribed under section 65;
- (d) conditions requiring such facilities and equipment to be kept in repair and proper working order;
- (e) conditions requiring, in the case of any works needed in order for any such facilities or equipment to be made available or to meet any such standards, that the works are carried out within such period or periods as may be specified in, or determined under, the licence;
- (f) conditions requiring the licence holder or the manager of the house to attend training courses in relation to any applicable code of practice approved under section 233.

(3) A licence must include the conditions required by Schedule 4.

12. Like section 90(1), section 67(1) enables the local authority to impose conditions. In section 90, however, two types of condition are specified; they can be for regulating “(a) the management, use or occupation of the house concerned”, or for regulating “(b) its condition and contents.” Subsection (2) gives two examples of such conditions. Examples (a) and (b) are the same as those set out in section 90(2)(a) and (b). Examples (c), (d) and (e) are about facilities and equipment, in similar terms to section 90(3)(a), (b) and (c) (although the latter, it will be recalled are *not* presented as examples of a general type of condition).
13. It follows, therefore, that a local authority may impose conditions relating to the condition and contents of the HMO (section 67 (1)), and that the examples of such conditions listed at section 67(2)(c), (d) and (e) are not the only such conditions that may be imposed.
14. The further example condition at section 67(2)(f) has no counterpart in section 90. It is about training courses, but specifically about courses relating to a code of practice approved under section 233. Section 233 enables the approval of codes of practice about the management of HMOs; codes of practice are local, and there is none in operation in Burnley.
15. Paragraph 31(1) of Schedule 5 to the 2004 Act enables an applicant for a licence, and others, to appeal to the FTT against a decision by the local housing authority to refuse or grant a licence, and an appeal against the grant of a licence may relate to any of the terms of the licence. Hence the appellant’s appeal first to the FTT and now to this Tribunal.

The grounds of appeal

16. The appellant says that the training condition, set out at paragraph 4 above, should not be imposed (a) because it is contrary to the principles on which the Court of Appeal decided *Brown v Hyndburn Borough Council* [2018] EWCA Civ 242, and (b) because Parliament cannot have intended that it would be possible to impose upon landlords in selective licensing schemes a condition that is more onerous than the more limited type of training course that can be imposed on an HMO licence. The appellant argues that HMO licence conditions should be more onerous than those attached to selective licence scheme licences since HMOs are bigger and more complex to manage than the typical property subject to selective licensing.
17. So I have to look in turn at the decision in *Brown v Hyndburn* and then at the appellant’s argument about the scope and proportionality of the condition.

The decision in Brown v Hyndburn

18. The appellant points out that the Court of Appeal in *Brown v Hyndburn* was concerned to give “authoritative guidance on the scope of the powers of local authorities under section 90 of the 2004 Act” (Hildyard J at paragraph 2). Although the case related to the condition and contents of the property, it has wider relevance, and the Court of Appeal stated clearly that

the differences in wording between sections 67 and 90 are deliberate and are determinative in relation to the scope of a local authority's power to impose conditions. So far, I agree with the appellant's observations.

19. The appellant observes that whereas section 67 refers to training courses, section 90 does not. The differences between the two sections are deliberate and it cannot have been Parliament's intention that the respondent should be able, on the authority of section 90, to require a landlord to attend a training course.
20. I am not persuaded that that conclusion follows from the decision in *Brown v Hyndburn*. To see why, we have to look at that decision in more detail.
21. Mr Brown held a licence under a selective licensing scheme, and the Hyndburn Borough Council had attached conditions to it. Mr Brown appealed two conditions, one requiring him to provide a carbon monoxide detector in the property and one requiring him to ensure that the premises were covered by a valid Electrical Installation Condition Report ("EICR"). The FTT deleted the condition requiring an EICR and modified the other condition so that it no longer required the installation of a carbon monoxide detector but imposed a requirement about the condition of the detector if one was provided. This Tribunal reinstated the local authority's conditions. The Court of Appeal allowed Mr Brown's appeal and restored the order of the FTT, on the basis that section 90 did not enable the local authority to require the provision of a particular item of equipment nor to require a particular certificate to be obtained.
22. The Court of Appeal reasoned that section 90(1) enables the local authority to impose conditions "for regulating the management, use or occupation of the house concerned", and subsection (2) gives two examples of such conditions. There is no general power in section 90, as there is in section 67, to impose conditions about the condition and contents of the property, to which the two conditions in dispute clearly related. The only conditions that could be imposed relating to the condition and content of the property were the three set out at subsection (3). The conditions in dispute did not fall within any of the ones specified in subsection (3) and therefore were not permissible under section 90.
23. The result would have been different under section 67, because section 67(1) contains a general provision at subsection (1) enabling the imposition of conditions relating to the condition and contents of the property and follows that with examples in subsection (2).
24. The respondent in this case says that *Brown v Hyndburn* is not relevant because it relates to the condition and contents of the property. That is to put it too narrowly. What *Brown v Hyndburn* does is to reveal the difference between the general power to impose conditions relating to the condition and contents of the property in section 67, and the much more constrained ability in section 90.
25. Once that is understood, then the implications for conditions relating to the management, use and occupation of the house concerned are clear: both sections make a general provision enabling conditions that relate to the management, use and occupation of the property and

follow that up with examples. Accordingly, so long as the condition relates to the management etc of the property it is permissible.

26. On that basis the training condition sought to be imposed here is perfectly in order.
27. What, then, is the purpose of the inclusion of the express reference to an apparently more limited type of training course in section 67(2)(f)? Does that inclusion indicate that other forms of training course are excluded? I think not because of the breadth of the wording of section 67(1). Does the presence of sub-section (2)(f) in section 67 mean that training courses in general cannot be required under section 90? Again, I think not because of the breadth of the permissive wording in section 90(1).
28. The significance of section 67(2)(f) can be understood when we consider the significance of all the examples given in that sub-section and in section 90(2). The examples may have a number of purposes; they may alert the local authority to what they might want to do, and they may alert prospective licensees to what to expect. But what they undoubtedly do is to eliminate the possibility of a licensee arguing that a requirement matching one of those examples does not fall within the general enabling provision of subsection (1). If a local authority attaches a condition that prohibits the occupation of the attic, for example, it is not open to the licensee to say that that is not a condition relating to the management, use and occupation of the house; nor can he argue that the local authority cannot impose a condition requiring reasonable steps to be taken to reduce anti-social behaviour.
29. Any other condition, not listed as an example in the section, may be vulnerable to argument that it is not within the enabling provision.
30. The training condition in this case explicitly relates to management. The required course is a one “covering how to manage tenancies” and there may be an “additional Property Management training course”. The appellant has not sought to argue that the training condition does not fall within the wording of section 90(1) and could not plausibly do so, although he has questioned its usefulness.
31. The respondent has also argued that the training condition falls within section 90(2)(a) relating to the prevention of anti-social behaviour. That was not a point that seems to have been raised before the FTT; if it had been it would have needed to be supported by some factual evidence about the content of the course. Since it was not raised at first instance I am not going to consider it further since it seems to me clear that a course “covering how to manage tenancies” falls squarely within the enabling provision of section 90(1).
32. So far as the provisions of section 90 are concerned, the condition is permissible.

The scope and proportionality of the condition

33. The appellant also argues that the requirement is disproportionate. All that licensees of HMOs have to do is to undertake the type of course described in section 67(2)(f). The course required in the present case is said to be wider and more onerous and is not appropriate to

landlords under a selective licensing scheme which tends to encompass landlords of smaller properties, who do not need the same level of management skills, and who moreover are not making a great deal of profit. The appellant observes that management of rented properties might be improved if licences required the licensee must have a university degree, but that that would clearly be disproportionate.

34. Although I see the force in this argument, I am not persuaded by it. The respondent has observed that many landlords in its area are not aware of their legal responsibilities, and that that is a problem that has contributed to low housing demand and a prevalence of anti-social behaviour. The respondent also points out that the course is delivered by a qualified trainer with extensive knowledge of letting in the private rented sector. Perhaps most tellingly, the respondent points out that in the Danesborough area of the borough it recently found that 78% of properties did not have a valid gas safety certificate.
35. I do not think that the condition is disproportionate or beyond the scope of conditions that was envisaged by Parliament under section 90. As a matter of fact it is simply not known whether a hypothetical course falling within section 67(2)(f) would be more onerous than the course that the appellant has to attend pursuant to the training condition. Even if it was, I am not persuaded that that would be a valid ground of challenge provided that the type of course required fell within the enabling provision at section 90(1), as this one clearly does. It is not an irrelevant condition nor one that is outside a range of sensible provisions (as would be the requirement that all licensees have a degree).
36. Accordingly I am not persuaded that the training condition is disproportionate, either in itself or when compared with the type of course referred to in section 67(2)(f).

Conclusion

37. The appeal fails and the decision of the FTT is upheld.

A handwritten signature in black ink, appearing to read 'Elizabeth Cooke', is written over a faint rectangular stamp.

Judge Elizabeth Cooke
18 March 2020