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Strict liability for operators of unlicensed HMOs

***R (Mohamed) v Waltham Forest LBC* [2020] EWHC 1083 (Admin)**

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Introduction

- An overview of the High Court's recent decision in *R (Mohamed) v Waltham Forest LBC, Secretary of State for Housing, Communities and Local Government intervening*; and *R (Mohamed) v Wimbledon Magistrates' Court, Waltham Forest LBC et al, Secretary of State for Housing, Communities and Local Government intervening* [2020] EWHC 1083 (Admin)

- Read the full decision here.

- Links to statutes, decisions and other materials are provided throughout, where available: simply click (or right-click) on the link

- Why is the decision important? It:-

  - explains the ingredients of the offence of managing or having control of a house in multiple occupation and the role a defendant's knowledge (or ignorance) of the facts of the offence may play;
  - considers whether the offence continues so long as the property remains unlicensed;
  - clarifies the time period within which a local housing authority must bring a prosecution;
  - clarifies what is required of local housing authorities when starting a prosecution.

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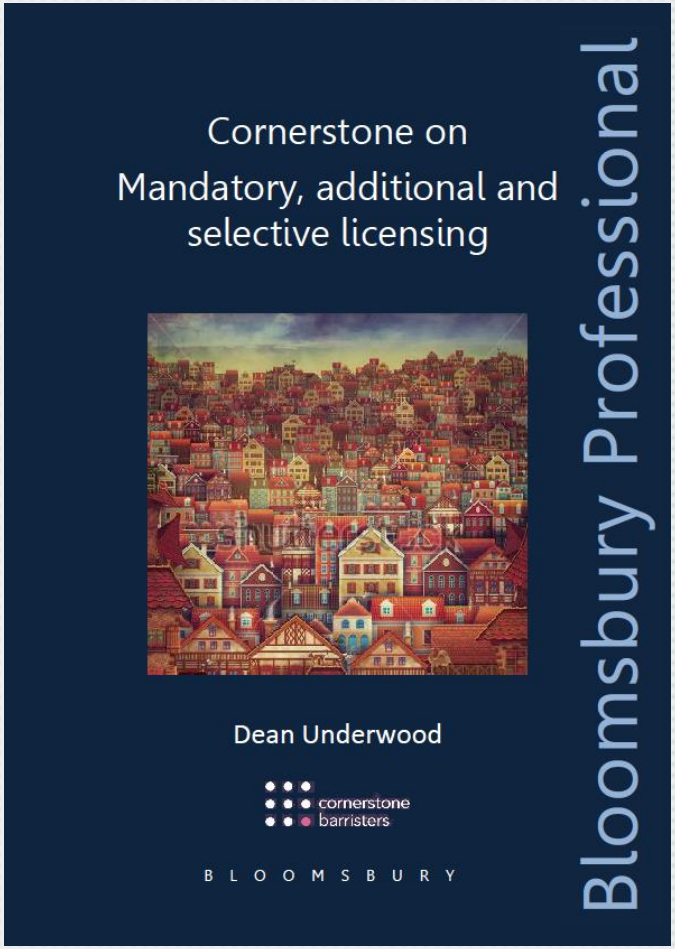

The material facts

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- Mr Mohamed and Ms Lahrie (“M” and “L”) are husband and wife and property developers, with a large portfolio of properties in Waltham Forest and elsewhere.

- 2015 / 2016: Waltham Forest LBC (“W”) became aware that various of their properties were occupied as houses in multiple occupation (“HMOs”), which were not licensed under the Housing Act 2004 (“HA 2004”). M and L did not, however, apply for licences.

- 2017: More than 6 months later, W began prosecutions against M and L in the Magistrates’ Court for failing to license the HMOs, contrary to s.72(1) Housing Act 2004 (“HA 2004”).

- Each schedule – or “information” – used to start the prosecutions was in a standard form, alleging an offence committed within 6 months of the date on which it was filed at court, e.g.:

  On 7 July 2016 you did manage or have control of the property at 24 Eastfield Road, London E17 3BA which was required to be licensed under Part 2 of the Housing Act 2004 but which was not so licensed CONTRARY TO section 72(1) of the Housing Act 2004

- August 2017: W later invited M to an interview on suspicion of a further such offence.

The material facts

- Late 2017: M and L brought a claim in the High Court for a judicial review ("JR") of W's decision to interview M, alleging that W had been wrong to treat s.72(1) as a strict liability offence, i.e. one of which M would (subject to any statutory defences) be guilty whether he intended it, knew about the facts of the offence, or otherwise.
- 2018: M and L then applied to the Magistrates' Court, asking it to treat W's prosecutions as a nullity, on the premise that -
  - W had not provided the court with, and the court did not have, enough information about their alleged offences to be able to begin the prosecutions lawfully; and
  - because the law obliged W to begin prosecutions for these offences within 6 months of them being committed, the prosecutions were out of time, and the court had no jurisdiction to try them.
- 2019: The Magistrates' Court dismissed M and L's application.
- 2019: M and L then brought a second claim for a JR in the High Court, alleging that the Magistrates' Court had been wrong to dismiss their application.
- 2020: The claims were joined for hearing together by a Divisional Court.

The issues

The issues

- The claims raised three principal issues for the court to determine:

  - Issue 1: Did section 72(1) HA 2004 create a strict liability offence, or was it necessary for W (and any other local authority prosecutor) to prove that the defendants *knew* they were managing or had control of unlicensed HMOs?

  - Issue 2: Did the 6-month time limit for beginning the prosecution of these offences begin when W first knew the offences had been committed, or did it run afresh from each day on which the HMOs remained unlicensed?

  - Issue 3: Did W provide the court with, and did the court have, enough information to begin the prosecutions lawfully; and would the prosecutions be a nullity if they had not had enough information?

The statutory offence

The statutory offence

- Section 72 HA 2004 (with the most relevant provisions in bold) provides:

  (1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

  (2) A person commits an offence if – (a) he is a person having control of or managing an HMO which is licensed under this Part, (b) he **knowingly** permits another person to occupy the house, and (c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

  (3) A person commits an offence if – (a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and (b) he fails to comply with any condition of the licence.

  (4) […]

  (5) In proceedings against a person for an offence under subsection (1), (2) or (3) 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), or (b) for permitting the person to occupy the house, or (c) for failing to comply with the condition ,as the case may be […]"

Key definitions

- Section 263 HA 2004 defines "*person having control*" and "*person managing*":

  (1) In this Act "person having control", in relation to premises, means […] the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

  (2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

  (3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises — (a) receives (whether directly or through an agent or trustee) rents or other payments from — (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and (ii)in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments; and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

Issue 1: A strict liability offence?

The argument in a nutshell

- A presumption at law : *mens rea* - i.e. a mental element – is required for the commission of an offence, i.e. that the defendant intended the offence, committed it knowingly, was reckless as to whether it occurred etc.
    - See e.g. - *R v Warner* [1969] 2 AC 256; *Sweet v Parsley* [1970] AC 132 at 149F-G; *Gammon v Attorney General of Hong Kong* [1985] AC 1 at 14B-D; *R v Muhamad* [2002] EWCA Crim 1856; [2003] QB 1031 at [7], [15] and [16]
- The presumption *can* be displaced, but only in very limited circumstances, i.e.
    - where the statute addresses issues of social concern, e.g. health and safety at work, or regulates certain activities for the public good, and
    - where strict liability will promote the aims of the statute by encouraging greater vigilance
- This was not such a case: section 72(1) created a serious, criminal offence for which the penalties and consequences were significant, so proof of a mental element was essential.
- So to prove the offence, they argued, W had to prove not just that (a) they were persons managing or having control of (b) an HMO which (c) required a licence and (d) was not so licensed, but also that (e) they *knew* they were managing or in control of a such an HMO.

The decision

- Properly interpreted, section 72(1) created a strict liability offence, which did *not* require proof of any mental element [40]. Why?
  - There was no such element in either section 72(1) or in the definition of persons having control etc [41].
  - A comparison with the section 72(2) offence – committed knowingly – was telling [42].
  - There was no presumption of *mens rea* when imposing a civil penalty for the same conduct – so it would be incongruous if criminal offence required proof of it [43].
  - The existence of the statutory defence of "reasonable excuse" in section 72(5) reduced the need for any such mental element [44].
  - The offence was typical of regulatory offences imposing strict liability [45].
  - Strict liability would promote the aims of HA 2004 by ensuring those managing or in control of HMOs applied for a licence, thereby promoting housing standards [46].
  - The court's conclusion was consistent with other decisions of the court and Upper Tribunal, including *IR Management Services v Salford CC* (see over) [47].
- But, ignorance of relevant facts *might* support a defence of "reasonable excuse" [44] [47].

IR Management Services v Salford CC [2020] UKUT 81 (LC)

Breach of HMO management regulations: a strict liability offence

Essential facts:

- On inspection of an HMO managed by IR, S identified breaches of Reg.4(4), Management of HMOs (England) Regulations 2006
- S penalised IR £25,000 for the related offence under s.234(3) HA 2004
- On appeal, IR's director maintained he did not know the house was an HMO, and so had a reasonable excuse under s.234(4)
- FTT: (1) held that IR had not proved, on the balance of probabilities, that it had a reasonable excuse; and (2) increased its penalty to £27,500

Held (here): appeal dismissed

- IR appealed on two grounds, one being that the FTT had applied the wrong burden and standard of proof under s.234(4)
- It argued: it had an evidential burden only; once it produced evidence supportive of the defence, S had the burden of proving, to the criminal standard, that IR had no such excuse, i.e. the absence of a reasonable excuse was an element of the offence
- Argument rejected: a failure to comply with the 2006 Regs. is a strict liability offence, the elements of which do not include the absence of a reasonable excuse [27]
- So, a prosecutor does *not* have to prove the absence of such an excuse; and the burden rests with the defendant to establish, to the civil standard, that a reasonable excuse exists [27]

Issue 2: A continuing offence?

The argument in a nutshell

- Section 127(1), Magistrates' Court Act 1980, entitled *Limitation of time*, provides:

  Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose.

- M and L argued that the section 72(1) offence was "*committed*" either (a) as soon as the elements of the offence were all present, or (b) at the latest, when the local authority knew the offence had been committed (in this case in 2015, or 2016) and, in either case, did not "continue" day to day thereafter, but was a "once and for all" offence.

- So, for the purpose of section 127, above, they argued, time had begun to run in 2015 or 2016 at the latest, and W had begun its prosecutions too late.

- The consequence, they argued : the prosecutions were time-barred, and the court had no jurisdiction to try them.

The decision

- At the hearing M and L conceded - in accordance with the court's decision in *Luton BC v Luton Altavon Ltd* (see over) - that section 72(1) created a "continuing" offence, for which time ran from each day on which an HMO that required a licence did not have one.

- Having done so, their argument that time ran from the date on which the local authority first knew the offence had been committed necessarily failed.

- As the court held:

> *If the prosecution prove the commission of an offence within six months of the date of the laying of the information the summons is in time. In our judgment the judge was right to refuse the application to dismiss the criminal proceedings on the basis that they were out of time.* [51]

- So, W had begun its prosecutions in time, as each information alleged an offence committed within 6 months of the date on which it had been laid.

Luton BC v Altavon Luton Ltd [2019] EWHC 2415 (Admin)

Failure to license an HMO is a continuing offence

Essential facts

- L laid informations on 15.11.17, alleging offences by A, under ss.72(1) and 234(3) HA 2004, on 16.05.17
- A argued:
  - L had known of the offences since April 2017, or 12 May latest
  - informations were not laid within the time prescribed by s.127 MCA 1980, i.e. "within 6 months from time when offence was committed, or matter of complaint arose"
- DJ Dodd agreed: offences were "*continuing*", but time ran from when L "*became aware of*" them, i.e. April

On appeal (here): appeal allowed

- Parties agreed about "*continuing*" nature of offences, not when time would begin to run [21]
- As for the former, "*we do not understand how it could sensibly be argued otherwise*" [21]
- As for the latter "*As these were continuing offences … the offending continued until 16 May 2017 when* [L] *visited*." (Nicola Davies LJ at [23])
- Held:
  - the informations laid by L were not time-barred [26]
  - appeal allowed [27]

Issue 3: The prosecution a nullity?

The argument in a nutshell

- W had provided the court with standard-form schedules of M and L's alleged offences (see the material facts slides above).
- M and L argued that this was not enough, because to issue summonses the court:

  […] *should at the very least ascertain: (1) whether the allegation is of an offence known to the law and if so* ***whether the essential ingredients of the offence are prima facie present****; (2) that the offence alleged is not "out of time"; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute.*

  R v West London Metropolitan Stipendiary Magistrate, ex parte Klahn [1979] 1 WLR 933

- How could the court have complied with that obligation, they argued, when e.g. W had not provided any information to explain why they were persons managing or having control of the HMOs, and the court could not have been satisfied that that ingredient of the offence was "*present*"?
- The consequence? W's alleged failure to provide the court with sufficient information, they argued, and the court's alleged failure to meet its obligations, rendered the prosecutions irregular and a nullity. The court had been wrong, therefore, to dismiss their application.

The decision

- W had provided the court with sufficient information to justify the issue of summonses:
  - Its schedules described the alleged offences in ordinary language and gave such particulars as were necessary to give reasonable information about the nature of them.
  - They included a statement of the offences in ordinary language, and identified the relevant legislation which created the offences.
  - The description of the conduct made it clear what was alleged.
  - M and L's real complaint was that W had not, at that stage, disclosed the evidence on which the prosecutions were based – but W was not required to do so [27].
- Further, at [28], the court held, had the information been insufficient to justify the issue of the summonses, the court would not have quashed the decision to issue the summonses, because further information had been provided to M and L in the course of the criminal proceedings in the Magistrates' Court, such that they could be fairly determined:

Nash v Birmingham Crown Court [2005] EWHC 338 (Admin)

The consequences

The consequences

- Without more, a person managing or having control of an unlicensed HMO will be guilty of an offence under section 72(1) HA 2004 even if they did not intend to commit the offence, or did not know the house was occupied as an HMO.
- A person who was, however, unaware that the house was occupied as an HMO – e.g. because they had let the house to an individual who, unbeknownst to them, had sublet it as an HMO - may rely on their ignorance to support a defence of “reasonable excuse” under section 72(5). Whether, in any case, that ignorance amounts to a reasonable excuse is an objective question for the court or tribunal.
- While ignorance of relevant facts may be relevant to such a defence, however, ignorance of the consequences of those facts will not be: ignorance of the law is not a defence.
- Local authorities are not bound to begin a prosecution for the section 72(1) offence within six months of discovering it: provided the HMO remains unlicensed, they need only begin proceedings within 6 months of the offence alleged in their information.
- The long-stop will, however, be 6 months from the date on which the HMO is licensed, within the meaning of HA 2004.

Any questions?

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