

1. The Applicant's appeal against the financial penalty is dismissed.

APPLICATION

2. The Applicant issued an appeal to the Tribunal dated 30th May 2019 against a financial penalty of £5000 imposed upon him by the Respondent pursuant to s249A Housing Act 2004 ("the Act") in relation to 69 Albion Street, Burnley, BB11 4QD ("the Property"). he had previously sent an appeal in by email on the 28th May 2019.

BACKGROUND

3. The Respondent is the local housing authority for the Trinity area of Burnley in which the Property is situated. The Trinity area was designated a selective licensing area under s80 of the Act on 15th January 2014, coming into force on 15th January 2014, and coming to an end on the 15th January 2019.
4. The Respondent served a final notice under s249A and Schedule 13 A of the Act on the Applicant dated 1 May 2019 stating
 - (a) That the Property was occupied under a single tenancy throughout the period commencing 20th October 2017 and ending on 15th January 2019 ("the Relevant Period") in circumstances where a licence was required under Part 3 of the Act.
 - (b) That the Applicant was the owner and person managing the Property (as defined by s263(3) of the Act throughout the Relevant Period.
 - (c) The Respondent declared itself satisfied beyond reasonable doubt that the Applicant's conduct amounted to an offence under section 95(1) of the Act.
 - (d) The Respondent assessed the offence as falling within Band 2 of the Banding Levels set out in the Council's "Policy and Matrix for the use of Civil Penalties" because they stated:
 - i. It is of Low Harm as it has a low risk of an adverse effect on individuals;
 - ii. It is of Medium Culpability (Negligent Act) where the offender has failed to take reasonable care to prevent the offence from being committed.

APPEAL

5. The Applicant has a right of appeal to the tribunal under Schedule 13 of the Act. The appeal must be brought within 28 days of the Notice. The appeal is held by way of rehearing of the Respondent's decision to impose the penalty, and the issues for the Tribunal to consider will be:
 - i. Whether the tribunal is satisfied, beyond reasonable doubt, that the Respondent's conduct amounts to a "relevant housing offence" in respect of premises in England (s249(1) and (2) of the Act
 - ii. Whether the Respondent has complied with all the necessary requirements and procedures relating to the imposition of the financial penalty (s249A and paragraphs 1 to 8 of Schedule 13A of the Act).
 - iii. If the appeal relates to more than one financial penalty imposed on the Applicant, whether or not they are in respect of the same conduct, and /or
 - iv. Whether the financial penalty is set at an appropriate level, having regard to any relevant factors, which may include, for example:
 - a. the offender's means;
 - b. the severity of the offence;
 - c. the culpability and track record of the offender;
 - d. the harm (if any) caused to a tenant of the Property
 - e. the need to punish the offender, to deter repetition of the offence, and or to deter others from committing similar offences; and/or
 - f. the need to remove any financial benefit the offender may have obtained as a result of committing the offence.
6. Directions were made by a Judge of the First Tier Tribunal (Property Chamber) on 18 July 2019.
7. The Respondent was directed to provide a bundle of specified documentation for use at the determination by 26 August 2019.
8. The Applicant was directed to provide a bundle of specified documentation for use at the determination within 21 days of receipt of the Respondent's bundle.

9. The Respondent was afforded the opportunity to send a brief supplementary reply to the Applicant dealing with any new issues raised by the Applicant within 14 days of receipt of the Applicant's bundle.
10. The determination was to take place in October/November 2019 on the basis of written submissions and evidence alone as requested by both parties.

THE LEGISLATION

11. the Legislation is contained in s249A and Schedule 13 A of the Act which read as follows:

s249A Financial penalties for certain housing offences in England

- (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—
 - (a) section 30 (failure to comply with improvement notice),
 - (b) section 72 (licensing of HMOs),
 - (c) section 95 (licensing of houses under Part 3),
 - (d) section 139(7) (failure to comply with overcrowding notice), or
 - (e) section 234 (management regulations in respect of HMOs).
- (3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.
- (4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.
- (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.

Schedule 13

Notice of intent

- 1 Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").

2 (1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—

(a) at any time when the conduct is continuing, or

(b) within the period of 6 months beginning with the last day on which the conduct occurs.

(3) For the purposes of this paragraph a person's conduct includes a failure to act.

3 The notice of intent must set out—

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the financial penalty, and

(c) information about the right to make representations under paragraph 4.

Right to make representations

4 (1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given (“the period for representations”).

Final notice

5 After the end of the period for representations the local housing authority must—

(a) decide whether to impose a financial penalty on the person, and

(b) if it decides to impose a financial penalty, decide the amount of the penalty.

6 If the authority decides to impose a financial penalty on the person, it must give the person a notice (a “final notice”) imposing that penalty.

7 The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.

8 The final notice must set out—

(a) the amount of the financial penalty,

- (b) the reasons for imposing the penalty,
- (c) information about how to pay the penalty,
- (d) the period for payment of the penalty,
- (e) information about rights of appeal, and
- (f) the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

9 (1) A local housing authority may at any time—

- (a) withdraw a notice of intent or final notice, or
- (b) reduce the amount specified in a notice of intent or final notice.

(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given.

Appeals

10 (1) A person to whom a final notice is given may appeal to the First-tier Tribunal against—

- (a) the decision to impose the penalty, or
- (b) the amount of the penalty.

(2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(3) An appeal under this paragraph—

- (a) is to be a re-hearing of the local housing authority's decision, but
- (b) may be determined having regard to matters of which the authority was unaware.

(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed.

In this paragraph “chief finance officer” has the same meaning as in section 5 of the Local Government and Housing Act 1989.

Guidance

12 A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions under this Schedule or section 249A.

THE GROUNDS OF APPEAL

12. The Applicant stated that at the relevant time, he was not the owner and manager of the Property.
13. He stated that he had entered into a “delayed completion agreement” to sell the property, having exchanged contracts with a completion date set “sometime in the future”. He had furthermore signed a management agreement handing over all management responsibilities to a Mr. Rishiyan Ravindrakumaran. He stated that the licence was taken out of his name, and Mr. Ravindrakumaran was responsible for applying for a new one, and that this had happened with many other properties that the Applicant owned and had entered into similar arrangements with.
14. The Applicant states that he took back responsibility for the Property in September 2018, due to Mr. Ravindrakumaran’s failure to adhere to the terms of the management agreement he said that he received no communication from the Respondent that he has to reapply for a licence. He said that had he received notification he would have applied for a licence and historically he had always done so.
15. The hard copy of the Appeal form was submitted in paper format on the 30th May 2019 in excess of 30 days from the date of notice, but allowing for postal service, in time for the purpose of the Appeal. In any event the Applicant had indicated an intention to appeal by email to the Tribunal on the 28th May 2019.

THE EVIDENCE AND SUBMISSIONS

THE CASE FOR THE RESPONDENT LOCAL AUTHORITY

16. The Respondent filed a bundle under cover of a letter dated 20th August 2019.
17. At pages 139 - 141 the Respondent made comments on the application. The Respondent stated that they had refused to grant a licence of the Property to the Applicant and Mr. Ravindrakumaran on the 20th October 2017. The proposed manager and licence holder was not a fit and proper person, nor were the management arrangements for the Property satisfactory.
18. The Respondent had emailed the Applicant on the 1 August 2017 in relation to another property he owned, 37 Reed Street Burnley which had a similar management agreement in place with a third party. It was outlined that he remained the person managing the Property.
19. It was accepted by the Respondent that the Applicant had previously submitted applications and paid the necessary fees for other properties in his ownership, in relation to the Property, the Respondent had proposed to refuse to grant a licence for it on the 11th July 2016 on the grounds of unsatisfactory management arrangements. On 24th August 2017 following a change in management arrangements the Respondent again proposed to refuse to grant a licence for the Property due to unsatisfactory management arrangements. On 20th October 2017 the Applicant was sent notice of the decision to refuse to grant a licence for the Property, relating to the application made by Mr. Ravindrakumaran.
20. The Respondent took into account when determining the level of culpability the Applicant's previous compliance, however it was still considered that there had been negligence and a failure to take reasonable care to prevent the offence being committed. The Respondent's policy is that the starting point for each band will be the mid-point, but in this case it was determined that the penalty be set at the start of Band 2 and the penalty was therefore reduced accordingly.
21. The Respondent filed a statement by Michelle Hall explaining the designation of the Selective Licensing area on 15th October 2013 in detail.
22. The Respondent had previously outlined to the Applicant the need to have the Property licensed, but no further manager was appointed following the refusal and no further application for a licence was received. No further application for a licence was submitted in September 2018, which was when the Applicant stated he took back control of the Property.

23. The Applicant was said to be the owner and manager (as defined by s263(3) of the Act during the Offence Period. The Applicant produced Land Registry Entries which confirmed ownership was with the Applicant for the period.
24. The Respondent stated that no licence had been issued during the Offence Period, and therefore between 20th October 2017 and 15th January 2019 the Applicant was a person managing the Property, which was required to be licensed but was not so licensed. The Offence was a relevant offence for the purposes of s249A of the Act.
25. The Applicant has not been convicted of the Offence, and there were no ongoing criminal proceedings against him in relation to it.
26. There is no evidence the Applicant has previously failed to comply with relevant legislation, and there are no previous convictions or civil penalties recorded against him in relation to any such failure.
27. The Respondent had assessed the Offence as falling within Band 2 of their Banding Levels set out in their "Policy and Matrix for the Use of Civil Penalties" because:
- (a) It was of low harm as it had a low risk of an adverse effect on individuals including vulnerable persons disadvantaged by any failing
 - (b) There was Medium Culpability as there had been a failure to take reasonable care to prevent committal of the offence.
 - (c) the proposed penalty was high enough to help ensure it had a real economic impact on the Applicant to demonstrate the consequences of non-compliance
 - (d) the proposed penalty would deter the Applicant from repetition and deter others from committing the offence
 - (e) the penalty would remove any financial benefit as a result of committing the offence, as the annual rental income for the Property is £5512.
 - (f) the Respondent gave the Applicant notice of intent on 19th March 2019
 - (g) the Applicant had made representations, which the Respondent considered before issuing the penalty notice.

THE CASE FOR THE APPLICANT LANDLORD

28. The Applicant stated that he had entered into a contract to sell the Property at an unspecified date to Mr. Ravindrakumaran. A copy of a contract for sale for the Property dated 19th April 2016 and signed by the Applicant was

provided to the Tribunal No completion date was entered on the contract, and it was conceded that the transaction had not completed during the Relevant Period and has not been completed to date.

29. The Applicant stated that he had entered into a management agreement for the Property with Mr. Ravindrakumaran. A copy of a management agreement dated 19th April 2016 signed by Mr. Ravindrakumaran only was provided.
30. The Applicant stated that he had granted a Power of Attorney to Mr. Ravindrakumaran. A copy of a Power of Attorney dated 19th April 2016 signed by the Applicant (only) was provided to the Tribunal. The Power of Attorney gave Mr. Ravindrakumaran powers in relation to the Property, was described throughout the deed by the Applicant as “my property”, and referred to collection of rents owing to “us” under the tenancy.
31. The Applicant stated that he had taken back control of the Property in September 2018, when Mr. Ravindrakumaran “gave notice” on it. He said he was not notified that he would need to apply for a licence and consequently asserted that the Respondent had not followed the correct procedure- as an owner should not be expected to apply for a notice on a proactive basis without any notification from the Respondent. He therefore accepted he was responsible for the licence from September 2018, but did not believe that the correct procedures were followed as he was not noticed of the requirement for the application for the licence.

DETERMINATION

32. The Tribunal has jurisdiction to hear an appeal against a final notice given under paragraph 10 of Schedule 13A to the Act.
33. The appeal may be made against the decision to impose the penalty, or the amount of the penalty.
34. The appeal is by way of a re-hearing of the local housing authority’s decision, but may be determined by the Tribunal having regard to matters of which the authority was unaware. The Tribunal may confirm, vary or cancel the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than the local housing authority could have imposed.
35. The four questions for the Tribunal to determine in the light of this Appeal are as follows:
36. Firstly, whether the offence has been committed, and the Respondent has followed the statutory procedure in imposing the financial penalty. The Tribunal was satisfied on the evidence that there was a breach of s95 of the

Act, and that the Respondent had served notice of intent and a final notice in accordance with S249A of the Act.

37. Secondly, whether the Applicant was at the Relevant Period the person managing the Property pursuant to s263(3) of the Act. S263(3) reads as follows:

s263(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.

38. It seems clear from the documentation provided that the Applicant was at all material times the person managing the property, both before, and after September 2018. Notwithstanding a contract for sale at a non-determinable date in the future, he remained the legal owner. He remained entitled to receive the rents, and indeed the Power of Attorney made it clear that the rents were still considered at least partially his. In any event the effect of s263(3)(b) would still classify him as the owner/manager despite an agreement with Mr. Ravindrakumaran which enabled the latter to receive the rents. In his application, the Applicant positively asserted that the licence had been taken out of his name. In fact, the Applicant had never had a licence for the Property in his name (pages 43 to 47 of the bundle).

39. Thirdly, whether the Respondent did not follow correct procedure by not notifying the Applicant of his obligation to licence the Property. The Tribunal rejects the Applicant’s assertion that the Respondent should have told him to apply for a licence. As the owner of a number of properties in the selective licensing area he was well aware of his obligations. The Respondent had told him on the 1st August 2017 that he remained under an obligation to obtain a

licence in relation to 37 Reed Street Burnley even though he had a third-party manager.

40. Fourthly, the Tribunal must further consider whether the financial penalty imposed by the Respondent is appropriate, in the light of guidance from the DCLG and the Respondent's own policy and matrix.
41. The Tribunal considered that in the light of the issues found at the Property it would have been open to the Respondent to consider harm to tenants and there was perhaps more than neglect in terms of the Respondent having his own application for a licence, and that of his agent rejected over a significant period of time. However the Tribunal is also mindful of the amount of the financial penalty being in line with the annual rent and consequently the amount is considered a suitable deterrent to the Applicant and to others, and the Tribunal will not interfere with the penalty imposed, which will remain at £5,000.

John Murray
Judge

28 October 2019