**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER (RESIDENTIAL PROPERTY)**

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| **Case reference** | : | **LON/00AJ/HNA/2020/0100** |
| **HMCTS code** | : | **V:VIDEO** |
| **Property** | : | **Flats 27, 31, 32, 63, 49 and 114 Trentham Court, Victoria Road, Acton, W3 6BF** |
| **Appellant** | : | **Inventure 8 Investments Limited** |
| **Representative** | : | **Stevens & Bolton LLP** |
| **Respondent** | : | **London Borough of Ealing** |
| **Representative** | : | **Allison Forde, Head of Service – Property Regulation, Planning Enforcement & Environment Regulatory Services** |
| **Type of application** | : | **Appeal against a financial penalty - Section 249A & Schedule 13A to the Housing Act 2004** |
| **Tribunal** | : | **Judge Pittaway**<br>**Mr T Sennett FCIEH** |
| **Date of hearing** | : | **22 March 2021** |
| **Date of decision** | : | **20 April 2021** |

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## Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the tribunal at the hearing, the contents of which the tribunal has noted, were;

1. The appellants' bundle (94 pages)
2. The respondent's bundle (318 pages)
3. The respondent's supplementary statement (9 pages)
4. Mr Sadiq's skeleton argument (12 pages)

At the video hearing the the appellant was represented by Mr F Sadiq of counsel and the respondent was represented by Mr Hutchings of counsel. The tribunal heard evidence from Mr Paul Schreibke, Ms Linda de Cicimic and Ms Johanna Foley, and heard submissions from Mr Hutchings and Mr Sadiq. The hearing was also attended by Ms Wheedon and Mr Scudamore of Stevens & Bolton LLP, Mr B Samra, Ms H Robinson and Mr A Samra of London Borough of Ealing, and
Mr Chasey (of Oak Group) and Ms Skyrme (HMCTS) as observers.

In addition the tribunal were referred to the decisions in

*IR Management Services Limited v Salford CC* [2020] UKUT 81 (LC) (**'*Salford*"**)
*Thurrock Council v Palm View Estates* [2020] UKUT 0355 (LC) ('***Palm View Estates***')
*Rakusen v Jepsen*[2020] UKUT 298 (LC) (***'Rakusen***')

## Decision

1. The tribunal finds that the appellant's ignorance of the designation by the London Borough of Ealing (the '**Council**') of the area in which the properties is located as an area to which the selective licensing regime contained in Part 3 Housing Act 2004 (the '**2004 Act**') was not a reasonable excuse for the appellant having committed a criminal offence pursuant to s95(1) of the 2004 Act.
2. The tribunal finds, having regard to the Council's policy and the evidence that it heard, that the appropriate financial penalty to impose in respect of each flat is £2,700, giving a total penalty of £16,200.

## Application

3. By applications dated 24 August 2020 the Appellant seek to challenge the imposition by the Council of financial penalties of £10,200 in respect of each of the flats.

## Background

4. The flats are in a block of around 200 flats. All are described in the applications as one-bedroom flats except for Flat 63 which is described as having a combined living/ sleeping area, and Flat 114 which is described as a two-bedroom flat.

5. The appellant is a company registered in the British Virgin Islands, administered from Guernsey. The appellant has no employees. Its sole director, Oak Directors Limited, is a company which is also administered from Guernsey. Neither company is based in the United Kingdom, and neither has any staff or presence there.

6. The appellant is the registered proprietor of the six flats having acquired its leasehold interest on or about 21 June 2012. The flats are all let. The appellant stated that the flats are its only assets, and that it does not let or own any other property. The flats were managed until December 2019 by Oscar Knight Limited ( '**OKL**') under a contract with the appellant dated 17 August 2012.

7. On 25 July 2016 the respondent, in exercise of its powers under s80 Housing Act 2004 (the '**2004 Act**') designated that part of Ealing in which the flats are located as an area to which the selective licensing regime in Part 3 of the 2004 Act applied, the designation to come into force on 1 January 2017.

8. The appellant was notified by OKL on 18 September 2019 that the flats were subject to selective licensing. The council received the licence applications in December 2019 and the licences, which were issued by the respondent on 6 February 2020.

9. On 9 June 2020 the respondent served six Notices of Intent on the appellant stating that it proposed to impose a financial penalty of £10,200 in respect of each of the flats.

10. On 31 July 2020 the respondent served Final Notices on the appellant pursuant to para.6 Schedule 13A of the 2004 Act.

## Agreed matters

11. The council did not dispute the facts set out above as to the ownership of the properties.

12. The parties agreed that the flats required selective licences from 1 January 2017 and that until a valid application was made for the relevant selective licences an offence was committed under section 95(1) of the 2004 Act.

**Issues**

13. The issues for the tribunal to determine were

- Did the appellant have a reasonable excuse for having committed the offence under section 95(1) of the 2004 Act of controlling or managing a house that is required to be licensed under Part 3 of the 2004 Act but which was not so licensed?
- If the appellant did not have a reasonable excuse what was the appropriate level of penalty?

**Evidence**

14. The tribunal heard evidence from Ms de Cicimic, the Team Leader and Trust and Company Administrator at Oak Trust (Guernsey) Limited who assists with the administration of entities within her designated client portfolio and the assets which they hold, and who is an authorised signatory for Oak Directors Limited in relation to the properties. Her clients include the appellant. Ms de Cicimic gave evidence that her work includes liaising with the property manager of the properties owned by the appellant as to payment of rent, approving tenancy documents, requesting inspections and approving repairs to be undertaken by the local agent. She stated that she relied on the agent to advise her of issues arising in relation to the properties and that she was only made aware of the need for the selective licences on 16 October 2019, OKL having sent the e mail advising of the need of the licences to Stacey Gee, who had previously been OKL's primary contact. She had not seen the contract between the appellant and OKL, having only been involved with the properties since summer 2018, although she was aware of its existence.

15. The tribunal also heard evidence from Mr Schreibke, the mamnaging director of Oak Directors Limited. He explained that Oak Trust (Guernsey) Limited and Oak Directors Limited were both members of the Oak Group. He confirmed that Ms de Cicimic's authority to sign on behalf of Oak Directors Limited was limited. Mr Schreibke explained that he had only joined Oak Directors Limited in 2019 and had only become involved with the appellant in April 2020. He had no personal knowledge as to why the properties had remained unlicensed. His predecessor was Mr David Willis, who still works for the Oak Group. He did not know why he had not provided a witness statement. To the best of Mr Schreibke's knowledge no one at Oak had been aware of the need for the selective licences before September 2019.

Mr Schreibke confirmed that Oak Directors specialised in offshore companies and that it was involved with a a number of properties in the

United Kingdom, mainly in London. He accepted that Oak Directors Limited, as director of the appellant, was responsible for ensuring that the properties had any necessary licence but it had not been advised by OKL of that requirement.He accepted that the appellant/Oak Directors Limited had not asked OKL for advice on licensing. He would have expected the appellant's solicitors at the time of the purchase would have advised on the need for licensing, although not necessarily on possible future change in the requirement. In his opinion the agreement with OKL put the onus on OKL to advise the appellant of any change as a matter of good management. It had not been the appellant's intention to purchase properties that required HMO licences. He considered that this is why the agreement with OKL is silent on the issue of selective licensing.

16. Ms Foley gave evidence that when the appellant entered into the agreement with OKL selective licensing was not in place in the London Borough of Ealing, which in her view was why the agreement did not expressly refer to it.

17. On being questioned by the tribunal Ms Foley confirmed that she had not inspected the flats, which she believed were one or two bedroom flats in a tower block of twelve storeys. The council had no record of complaints from the tenants and had not had reason to take action against the landlord. Ms Foley confirmed that there were a large number of properties in the borough subject to selective licensing. The severity of any offence under s95(1) of the 2004 Act was determined by Ms Foley in consultation with the council's management team, although this starting point was not set out in the council's enforcement policy. Ms Foley said that the council looked at previous civil penalties in reaching its decision with a view to the collective decision achieving parity with previous decisions and reflected the Corporate Enforcement Policy (pp.256-282) and Addendum (pp.283-298) included in the bundle.

18. In her witness statement Ms Foley set out in detail how the council had calculated the penalty for each flat. In fixing the level of penalty the council considered
    - Severity of offence
    - Culpability and track record of the offender
    - Harm caused to the tenants
    - Punishment of the offender
    - Deterring the offender from repeating the offence
    - Deterring others from committing the offence
    - Removing any financial benefit from the offender

    <u>Severity of offence</u>

    Ms Foley confirmed that the usual assumed starting point for HMO licensing offences was 'M2' of the Matrix to the LB Ealing Enforcement Policy, at page 288 in the respondent's bundle, being a band range of £2,001 – £5,500. The

council had adopted a starting point of £4,000 for each flat. It had considered the following to be aggravating factors

- That selective licences were required from 1 January 2017
- That the appellant owned the flats as a professional investment portfolio
- The appellant had not acted proactively to prevent commissioning an offence
- The appellant had not undertaken continued diligence to ensure compliance with regulatory requirements.

The council had not considered that any mitigating factors existed. It considered that the management agreement with OKL placed responsibility for any obligation to licence the properties with the landlord, not OKL.

Culpability and track record of offender

In the council's opinion the appellant was 100% culpable, a professional investor and an off-shore company that took no responsibility for ensuring that its investments in UK complied with relevant statutory requirements. It therefore added 50% (£2000) to the base penalty which it reduced by £800 to reflect the mitigating factors of no previous convictions and that the appellant had sought to licence the flats as soon as it became aware of the requirement.

This increased the penalty to £5,200 per flat.

Harm caused to tenants

There was no evidence of harm so nothing was added to the penalty.

Punishment of offender

The council considered that because the appellant was a professional investment vehicle created solely for the purpose of owning and letting property, and that it had failed to comply with the statutory licensing provisions the base penalty should be increased by 60% (£2,400) per flat.

This increased the penalty per flat to £7,600.

Deterring the offender and others

The council stated that it considered the appellant to have a significant investment in the local housing market, that buy to let investors must be encouraged to undertake appropriate due diligence and governance and the penalty must be sufficient to deter the appellant from offending again. It also wanted the penalty to deter other investment landlords in the borough from committing similar offences. It therefore considered it appropriate, proportionate and justified to impose a further 60% uplift on the base penalty, increasing the penalty per flat to £10,000

Removal of financial benefit

A five year selective licence fee is £500 per flat. Apportioned between 1 January 2017 and 13 December 2019 this gave a fee of £200 per flat, increasing the penalty per flat to £10,200.

## Submissions

19. For the respondent Mr Hutchings accepted that ignorance of the law can be a reasonable excuse but that the appellant's ignorance in this case was not reasonable. The appellant, managed by a company specialising in managing off-shore companies, had operated without a licence for three years. The agreement with OKL did not put OKL under an obligation to advise the appellant of the need for a selective licence. He referred the tribunal to the form of management agreement entered into in respect of each flat (copied in the bundles) which set out in clauses 1-15 the specific obligations imposed on OKL. These do not include any obligations on OKL in respect of licensing and contain no advisory obligations. Nor do clauses 27-32, which deal with property management, repairs and other services. With specific reference to clause 33 of the agreement (which is set out below) the appellant had never instructed OKL to advise it if the property became subject to licensing to which it was not subject at the time the agreement was entered into, and the obligation to manage in accordance with the principles of good estate management should be read in the context of the specific obligations imposed by the earlier clauses of the agreement; it does not extend the scope of the agent's obligations. Mr Hutchings referred the tribunal to the obligations imposed on the landlord in clauses 34 and 35 in relation to licensing.

    Mr Hutchings submitted that there should be no distinction between a company operating within the UK and an off-shore company. That the appellant is a company registered in the British Virgin Islands, administered from Guernsey, does not provide it with a reasonable excuse not to investigate whether the flats required licences.

    As to the level of the penalty Mr Hutchings submitted that the council had correctly started from its policy of M2 being the starting point for calculating a penalty where failure to licence was at issue. It was common ground that the offence in question was moderate. As to the council's subsequent methodology the council considered the appellant to be considerably culpable, with no reasonable excuse. The Guernsey manager was aware of selective licensing in general terms and if it had been an obligation to be put on the manager it should have been stated in the agreement.

    Mr Hutchings submitted that the council's approach was not flawed. The appellant owned significant assets from which it enjoyed significant income during the three years the flats were unlicensed and that the council's approach was not irrational.

20. For the appellant Mr Sadiq submitted that the appellant had a defence under s95(4) of the 2004 in that it had a reasonable excuse for having committed the offence. He referred the tribunal to the decision in *Salford*, the burden of proving a reasonable excuse lies with the landlord, the standard of proof being the civil standard of 'on the balance of probabilities', and ignorance that the property is being used as an HMO is capable of amounting to a 'reasonable excuse'. Mr Sadiq also referred the tribunal to the decision in *Palm View Estates,* where it was stated that ignorance of the law itself (ie the need to apply for a licence) might amount to a reasonable excuse. The appellant is a BVI company, managed from Guernsey and was unaware of the flats having been designated for selective licensing.

    The appellant had engaged a professional agent to manage the flats who should have, but did not, inform the appellant that a licence was required. In Mr Sadiq's submission there was nothing in the agreement with the agent that placed a burden on the appellant to carry out regular checks to ensure that the properties were not subject to selective licensing. The principles of good management should be read in the context of the 2004 Act, under which the agent was also committing an offence. Where the agent was in the jurisdiction and its principle was not it must be within the principles of good management that the agent should inform the principal of the introduction of selective licensing. Clasues 34 and 35 should not be construed as being of general application. They had been drafted by the agent and should be construed *contra proferentem*. At the time the agreement was entered into there was no question of any of the flats requiring licensing. That the appellant was outside UK jurisdiction was not of itself a reasonable excuse, but in that context the agent should have appreciated that the principal was relying on his advice. The appellant had no complaint against the agent except in this regard. **.** In Mr Sadiq's submission the appellant had made out a reasonable excuse.

21. Mr Sadiq then considered the quantum of the penalties. He submitted that they should be calculated on the basis of the published policy, both the guidance published by the Secretary of State and the council's own policy, not fixed as a result of internal council consultation. He agreed that M2 was an appropriate starting point but there was much in the appellant's mitigation. No tenant had complained or been harmed. The only issue is that the flats did not have selective licences and the agent should have advised the appellant of the need for these. If this does not amount to a reasonable excude it should at least count in mitigation. The appellant was a small landlord, and there was no aggravating factor. He submitted that the starting point for the penalty should be at the low end of M2 and that mitigation might reduce it to the penalties contemplated by M1. He reminded the tribunal that the application is by way of a re-hearing so that Ms Foley's figures should be treated as no more than submissions.

22. Mr Hutchings submitted that the concurrent criminal liability of the agent does not give the landlord a reasonable excuse. The appellant was in breach of the requirement to have a licence and the offence is one of strict liability.

## Reasons for the tribunal's decision

23. The tribunal makes the determinations in this decision on the basis of the bundles before it at the hearing, the evidence heard at the hearing and the submissions by counsel on behalf of the appellant and respondent.

## Reasonable excuse

24. Section 95(1) of the 2004 Act provides that,
'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.'

Section 95(4) of the 2004 Act provides,
'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), or

(b)for failing to comply with the condition,

as the case may be.'

25. There was no evidence before the tribunal that the appellant was aware of the need for a selective licence before receipt of the e mail from OKL on 18 September 2019.

26. The tribunal has to determine objectively whether the appellant's ignorance of the need for selective licences and its belief that it had delegated all responsibility for the properties to OKL was a reasonable excuse.

27. Ignorance of the need for a selective licence may be a reasonable excuse to the offence but the tribunal does not find it was one in the case before it. The appellant claimed that it was entirely reliant on OKL but the agreement the appellant had entered into with OKL expressly excluded certain licensing obligations from its responsibility. This should have alerted a prudent landlord to the need to set up some means of informing itself of the licensing regime, and changes or additions to it, in the jurisdiction in which the properties were located.

28. The tribunal has considered in particular clauses 33 to 35 of the agreements between the appellant and OKL, referred to in evidence and in submissions.

Clause 33 of each management agreement states that OKL is

'To comply with all reasonable instructions of the Landlord relating to the management of the Property and to manage the Property on behalf of the landlord in accordance with the principles of good estate management'

Clause 34 provides
'Where it is identified that the property is an HMO, an administration charge of £150.00 + VAT will be due to cover the additional costs of administering and managing an HMO Property. Registration of the property and ensuring adequate HMO license, remains the obligation and responsibility of the Landlord. We suggest if you have any doubts as to whether the property could be considered an HMO that you refer to your local authority.'

Clause 35 provides, under the heading 'Important Information for the Landlord' that,
'It is the Landlord's responsibility to inform and if necessary gain approval from .....

- Their local borough/council to establish if the property is considered to be a house in multiple occupation and is subject to either a discretionary or mandatory licensing scheme.

29. The tribunal disagrees with Mr Sadiq's submission that there was nothing in the agreement with the agent that placed a burden on the appellant to carry out regular checks to ensure that the properties were not subject to selective licensing. From Ms de Cicimic's evidence it is clear that before the tenancies are entered into they are approved by her. While she was not an employee at the time the agreement with OKL was entered into, and in evidence she stated that she had not reviewed the agreement with OKL, the tribunal consider that it is reasonable to assume that it was likewise formally approved, and that therefore Oak had actual knowledge of the exclusion of the certain obligations from the responsibilities placed on OKL. Clause 35 makes it clear that there were certain areas for which the agent did not accept responsibility. That part of clause 35 set out above does not specifically refer to selective licensing but the whole of this clause should have alerted the appellant, and those responsible for managing it in Guernsey, that the agreements did not devolve entire responsibility for the properties to OKL. This should have alerted a prudent landlord as to the need to set up some means of informing itself of the licensing regime, and changes in it, in the jurisdiction in which the properties were located.

30. The tribunal finds that while it might have been a reasonable excuse for the appellant not to know of the need to licence the properties as soon as the selective licensing regime was introduced by the council it did not remain a reasonable excuse for the period of two years (not three as stated by Mr Hutchings) that the properties remained unlicensed. A prudent landlord would have taken steps to be kept informed of relevant regulations affecting its properties.

**Quantum of the financial penalties**

31. In ascertaining the level of penalty to be charged the tribunal should have regard to the council's policy. While not referred to in the hearing this approach is consistent with the Upper Tribunal decision in *Waltham Forest LBC v Marshall* [2020] 1 WLR 3187.

32. Unlike some other Local Housing Authorities' policies, the London Borough of Ealing's policy does not distinguish between the offences covered by its matrix. It was however common ground that the offence in question was a moderate one and the tribunal accept the matrix start point of M2 which gives a range of penalty of between £2,001 – £5,500. Neither the Enforcement Policy nor Addendum provide indications of level of financial penalty against particular offences, just the range. The tribunal also noted that in the Addendum document provided (at p.285) it is stated that 'Any penalty will be considered on a case by case basis and set at a level…proportionate considering…full circumstances of the case'.

- The council adopted a starting penalty of £4000 for each flat, stating that it did not consider that there were any mitigating circumstances. The tribunal does not agree. Although it does not consider that the appellant's ignorance of the need for a selective licence was a reasonable excuse for the offence it does consider that this ignorance, and the fact that the appellant had genuinely (but mistakenly) believed that the employment of a local agent abdicated it from all responsibility was a mitigating factor.

  Further, it was clear from Ms de Cicimic's evidence that, between receipt of the e mail from OKL advising the appellant of the need for the flats to be licensed and the relevant applications being made, that the appellant sought to make the applications promptly. There were delays, due to holidays and the need to obtain information but there was no deliberate delay by the appellants. The applications were made before the Notices of Intent and Final Notices, and this too is a mitigating factor.

  The tribunal is also mindful of the fact that no tenant had complained about the appellant, and note that the council did not consider it necessary to inspect the properties before issuing the penalties.

  The tribunal therefore finds that an appropriate starting penalty for each flat to be at the lower end of the range of the council's M2 range and places this at £2,500.

36. The council weighted its base penalty to reflect culpability and the track record of the offender by adding 50% (£2000) to the base penalty (which it reduced by £800 to reflect the mitigating factors of no previous convictions and that the appellant had sought to licence the flats as soon as it became aware of the requirement). It then again weighted the base penalty by 60% to punish the offender, and by a further 60% to deter the offender and others. All these weightings were justified, without reference to any council

policy before the tribunal, on the same grounds, effectively that the appellant was a professional investor and an off-shore company that took no responsibility for ensuring that its investments in UK complied with relevant statutory requirements.

37. The tribunal has had to consider these weightings without any evidence from the council as to the basis upon which they are calculated. The justification given by Ms Foley for increasing the base penalty is that which was used to fix the amount of the base penalty in the first place. The tribunal is concerned that as the justification for each increase is the same under each heading there appears to be double/triple-counting in these weightings, which does not seem justifiable in the absence of evidence that this is the agreed council policy. In fact, the approach taken appears, to the tribunal, to be contrary to the Principles of Good Enforcement referenced in the Council's Enforcement Policy at pp. 261/2. The weightings have the effect of moving the level of each penalty from the range of an offence that would be considered moderate to one which would be considered serious on the council matrix provided to the tribunal, but the parties are agreed that the offence is a moderate one.

38. Accordingly the tribunal does not consider that these weightings should be applied to the base penalty. Similarly it does not consider that there should be a reduction to reflect the prompt application for licences as this has already been taken into account as a mitigating factor in fixing the base penalty.

39. The tribunal accepts that continued failure to check that the flats required licences is an aggravating factor which should weight the base penalty. From the evidence before the tribunal it is clear that the appellant, whose only assets are these flats, should be regarded as a small landlord, and some allowance in the penalty should be made for this. In the absence of specific figures the tribunal has treated this potential weighting and mitigation as cancelling each other out, leaving the base penalty at £2,500 per flat.

40. The tribunal accepts the approach taken by the council on removing any financial benefit from the offender by adding an apportioned £200 out of the £500 five-year licence fee to each base penalty, increasing each penalty per flat to £2,700.

41. The total penalty payable by the appellant is £16,200.

**Name:** Judge Pittaway **Date:** 20 April 2021

## Rights of appeal

**By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.**

**If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.**

**The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.**

**If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.**

**The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.**

**If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).**