



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

Case Reference : **MAN/00BY/HNA/2020/0030**

Properties : **5, Drayton Road, Walton
Liverpool L4 6TS**

Applicants : **Leslie Mark Barton**

Respondent : **Liverpool City Council
(represented by J Wildridge of Counsel))**

Type of Application : **Appeals against 2 financial penalties imposed
under Section 249A Housing Act 2004**

Tribunal Member : **Mr J R Rimmer
Mr J Faulkner**

Date of Decision : **19th March 2021**

Order : **(1) the decision to impose a financial penalty
in respect of 5, Drayton Road , Walton is
upheld, but the amount of the penalty
shall be £3,375.00.**

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A. Application

1. The Tribunal has received an application under paragraph 10 of Schedule 13 to the Housing Act 2004 (“the Act”) against a decision of Liverpool City Council to impose a financial penalty against the Applicant under section 249A of the Act.
2. The penalty relates to an offence that the Council determined had been committed by the Applicant in relation to operating an unlicensed dwelling house within an area of selective licensing under the regime established by the Act.
3. The Tribunal has sent a copy of the application to the Respondent.
4. Directions were given by the Deputy Regional Judge of the Tribunal for the further conduct of this matter.
5. Those directions have been complied with sufficiently for the Tribunal to be able to determine the application.

B Background

6. The Applicant is the owner of a house at 5, Drayton Road in area of Liverpool known locally as Walton Village and therefore within the area designated by the City Council under its powers to impose selective licensing requirements to further its duty to ensure the maintenance and improvement of housing standards within the City.
7. There would appear to be common agreement between the parties that when the selective licensing scheme envisaged by the Act was adopted by the Council, and applied city-wide in 2015, the Applicant failed to apply for the relevant licence for that property. It came to the Council’s attention in 2019 that there was no relevant licence in place and, following correspondence with the Applicant, the Respondent embarked upon the process of establishing whether it was appropriate to impose a financial penalty for offence of operating, or controlling a dwelling in respect of which no licence was in force. Such a penalty may only be applied where relevant housing offences have been committed.
8. The Applicant does not accept that an offence has been committed. He accepts that a considerable period of time passed between the first correspondence from the Council in 2019 and the eventual granting of a

licence in February 2020. H avers that this delay was caused by his inability to understand and use the scheme developed by the Council for receiving applications and the subsequent processing of them.

- 9 The Council eventually determined that it was appropriate to impose a penalty of £3,825.00 in the circumstances of the case, having gone through the process of assessing the nature of the offences, applying its relevant policy, notifying the Applicant and considering representations upon the amount before reaching the final determination. Initially a penalty of £4,725.00 was identified as appropriate, but reduced this following representations from the Applicant and the granting of the licence in February 2020.

- 10 It is appropriate at this stage to set out the various statutory and regulatory provisions that the Tribunal needed to take into account in coming to its decision.

In relation to the commission of a relevant offence and imposition of a financial penalty

- 11 Section 249A of the Act provides;
 - (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 (licencing of houses...)
 - (3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

- 12 Section 95 of the 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 but is not so licenced
 - (2) ...
 - (3) In proceedings for an offence under subsection (1) it is a defence that at the material time
 - (a)...
 - (b) an application for a licence had been duly made in respect of the house under section 87 and that application was still effective
 - (4) In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse-
 - (a) For having control or managing the house in the circumstances mentioned in subsection (1)
 - (b) ...
 - (7) For the purposes of subsection (3) an...application is effective at a particular time if at that time it has not been withdrawn and either-

- (a) The authority have not decided whether or not to serve a temporary exemption notice, or... grant a licence in pursuance of the application or
- (b) (if a license is refused either the time to appeal that decision has expired, or an appeal has been unsuccessful.

13 Paragraph 10 of Schedule 13A of the Act provides

- (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 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 penalty of more than the local housing authority could have imposed.

The appeal

- 14 It is useful to consider the Respondent's case against the Applicant first as the process towards the imposition of a financial penalty depends upon a finding, to the criminal standard of proof, that the applicant has committed a relevant offence.
- 15 The offence in question in this case is that under section 95(1) above and to establish its case in that respect the Council relies upon the following facts:
 - (1) At the inception of the licensing scheme in 2015 the Council wrote to many landlords directly, one of which was the Applicant as his tenant of 5, Drayton Road at that time was in receipt of housing benefit. It also provided extensive local publicity for the scheme.
 - (2) Notwithstanding that initial contact, no further contact was made with the Applicant until the lack of a licence was brought to the Council's attention in 2019.
 - (3) The council sent what is referred to in the statement of case as "an unlicensed letter", presumably meaning a letter concerning the lack of a licence, on 25th April 2019, re-informing the Applicant of the licensing requirements.
 - (4) No licence having been obtained by 14th August 2020, an officer of the Council, Valerie Gibson, began the process of investigation into the continued absence of a licence.

- (5) On 16th October 2019 the Applicant was sent a statutory notice under the Housing Act 2004 requesting copies of the current tenancy agreement and gas safety certificate.
 - (6) These were supplied on 12th November 2019.
 - (7) A completed paper application for a licence dated 12th January 2020 was received on 31st January 2020 and the appropriate licence fee was paid on 19th February 2020.
 - (8) The timescale of events is, in the Respondent's view, evidence of managing a relevant house whilst failing to hold a licence a licence for the period from 4th April 2019 to 10th February 2020 and that this evidence is sufficient to prove the offence under section 95(1) of the Act beyond reasonable doubt.
- 16 The Applicant recounts at some length the difficulties he encountered in attempting to put in motion an application for a licence and the experiences that met in his attempts to deal with queries in that regard through the central telephone contact point for the Council, there being no direct dial number for the licensing department.
- 17 The Tribunal interprets all that the Applicant states in the following ways:
- (1) I did my best in the circumstances to try to apply for a licence and was eventually able to obtain from the Respondent a form for making a paper application after I had failed on several occasions to be successful through the online process.
 - (2) Please treat that as being a reasonable excuse for controlling or operating a tenanted property without a licence whilst I tried to obtain one to the best of my ability.
 - (3) I am otherwise a good landlord, as evidenced by my provision of a tenancy agreement and gas safety certificate when asked and the lack of complaint about the standard of accommodation provided at 5, Drayton Road.
 - (4) If, notwithstanding the above, I am found to have committed an offence, the penalty is too great when compared with the extent of my wrongdoing.

The Hearing

- 18 In view of the corona virus protocols in place at the time of the hearing on 10th February 2021 the Tribunal dispensed with a pre-hearing inspection (which would not have been particularly pertinent to this case) and conducted the hearing by remote means. There were some initial difficulties in ensuring all attendees were able to join the process and see and hear sufficiently, but these were overcome in due course. Mr Barton was only able to join the hearing by telephone, but was able to take a full part in the proceedings until its conclusion.

- 19 The Tribunal took Mr Barton through the case that he had presented in his application to bring out those points raised above. It acted in this manner to seek to avoid any situation where the Applicant might otherwise incriminate himself, in the absence of any professional assistance on his part, as these are criminal proceedings to the extent that the foundation of the respondent's case for imposing a financial penalty upon the Applicant is the commission of the relevant offence under section 95(1).
- 20 The Tribunal was able to deal firstly with the commission, or otherwise, of the offence. The Applicant was adamant that in the circumstances of his ability to deal with the application process he had done all that he could to apply for a licence by way of a paper application, having failed in a number of attempts to apply by electronic means.
- 21 The Respondent. Through Ms Wildridge, was satisfied that the delay between April 2019, the date of the latest tenancy of the property, and February 2020, when the licence was finally paid for, was sufficient to establish the offence. It was not until 31st January 2020 that a completed application was received by the Council and the actions of the Applicant prior to that time did not enable him to rely on the defences provided by sections 95(3) and (4) (set out in paragraph 12, above).
- 22 Mr Barton accepted that the Tribunal should also move on to consider the financial penalty imposed, in the event that the Tribunal was satisfied beyond reasonable doubt that an offence had been committed.
- 23 The Applicant was quite clear in his view that the extent of the fine, upon a person of previous good character and with no previous convictions in an amount of £3825.00 was excessive. The Tribunal would add that there appears to be no previous complaint as to any other possible housing offences on the Applicant's part, nor any complaint as to the standard of his housing provision. In his view the penalty was out of all proportion to amounts generally imposed for far worse criminal offending.
- 24 Ms Wildridge referred at length to the policy devised by Liverpool City Council in relation to the imposition of financial penalties and the matrix established within it to provide a reasoned assessment of a relevant financial penalty based upon the level of culpability on the part of the offender and the likely harm resulting from the offence in question.
- 25 The Tribunal is satisfied that it should not seek to depart, without good cause, from a policy that has been arrived at by due democratic process and agrees with Ms Wildridge that the Tribunal should be guided in that regard by the decision of the Upper Tribunal in *Waltham London Borough Council v Marshall* ("Marshall").

- 26 Accordingly, the Council, having determined a medium level of culpability attributable to the Applicant's actions and a low level of harm from the offending the matrix provided an entry point of £4,500.00 and a range of £3750.00 to £5250.00 for the level of financial penalty appropriate to the offence, that range being influenced by aggravating and mitigating factors outlined in the policy. The policy is set out in full in the bundle of documents at page 29 onwards and the matrix is at page 38. Page 39 then sets out a non-exhaustive list of aggravating and mitigating factors that may be relevant to the assessment.
- 27 The Tribunal also heard at some length from the Applicant as to his current financial situation so far as his ownership of 3 tenanted properties and his tax liability were concerned.

Determination

- 28 Following the conclusion of the hearing the Tribunal reconvened later on 10th March to consider all that it had read in the submissions of it and heard at the hearing.
- 29 The Tribunal is satisfied that the offence of controlling or managing an unlicensed dwelling is made out beyond reasonable doubt. The Tribunal accepts at face value what the Applicant says about difficulties he had in using the electronic means of making application for a licence, but emphatically does not accept that this excuses an inordinate delay in eventually submitting a completed application. At each stage there appears to be an inexplicable and unjustified delay in making progress with the application, exemplified even at the end of the process with the application dated 12th January, not received until 31st January and not paid for until 10th February.
- 30 The Tribunal moved on to consider the appropriate penalty according to the assessment made by the Council of medium culpability and low harm. The Tribunal notes that the Council's policy sets a series of steps, or a staircase, at some point upon which the offender's behaviour is placed. It is not a graph that produces a line referable to the x axis of culpability and the y axis of harm. The Tribunal makes this point as it is of the view that the culpability of the Applicant is on the very boundary between low and medium. It feels able to distinguish between that identified in "Marshall" where the Applicant took longer to join in the application process and, in the Tribunal's view, from a background likely to indicate a clearer understanding of what was required.
- 31 To come to what it believes to be an appropriate outcome the Tribunal accepts a situation in which there is medium culpability and low harm, thus a starting point on the matrix of £4,500.00.

- 32 It then finds there are no aggravating features. There are however considerable mitigating features attaching to the Applicant, according to the non-exhaustive list within the policy. In particular:
- 1) No previous convictions or cautions.
 - 2) No relevant civil penalties (at all).
 - 3) A good record of maintaining the property.
 - 4) A one-off event (but bearing in mind only one of his properties is within the city).
 - 5) No particular suggestion that the offending is motivated by the financial gain of avoiding the cost of a licence, which is eventually paid for.
 - 6) Steps are eventually taken to remedy the problem.
- 33 The Tribunal would note particularly that it does not regard the Applicant's actions in this case as being indicative of prolonged offending, nor does it regard his attitude to attendance at the interview proposed by the Respondent's officers as anything other than a choice the applicant is entitled to make.
- 34 Against that background the Tribunal notes that the policy allows for an adjustment from the starting point that in some cases might justify moving outside the identified category range. This is identified at the top of page 40 of the bundle.
- 35 The Tribunal would consider that the mitigating factors here allow for a reduction of 25% from the starting point: in other words, a reduction from £4,500.00 to £3,375.00 that takes the penalty beyond what would normally be the range for the level of culpability and harm found, but allowed within the policy. The Tribunal is also satisfied that such an amount adequately reflects any economic gain to the Applicant whilst letting an unlicensed property and is also a penalty appropriate to the perceived means of the Applicant. It also takes the view that the penalty adequately reflects the aims and purposes of the policy that has been properly determined by the Council, balanced against the Tribunal's view of the Applicant's conduct.

Judge J R Rimmer