FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/29UN/HNA/2021/0005-9
Properties	**:**	10, 12, 17, 19, 21 William Meadows House, 3-4 Dalby Square, Margate, Kent CT9 2ER
Applicants	**:**	Northumberland Mews Ltd
Representative	**:**	Mr Tom Morris, instructed by Winckworth Sherwood LLP
Respondents	**:**	Thanet District Council
Representative	**:**	Mr Paul Tapsell. Instructed by Thanet DC
Type of Application	**:**	Appeal against a financial penalty – s.249A Housing Act 2004
Tribunal Members	**:**	Judge M Loveday Mr T Sennett MA FCIEH Mr P Smith FRICS
Date and venue of hearing	**:**	30 November 2021 (remote hearing)
Date of Decision	**:**	14 January 2022

DETERMINATION

Decision

1. These are five linked appeals against financial penalties under s.249A of the Housing Act 2004 ("the Act"). The penalties were imposed for offences of managing unlicensed premises under s.95(1) of the Act.

Background

2. The Applicant is the freehold owner of William Meadows House, 3-4 Dalby Square, Margate, Kent CT9 2ER. Although the Tribunal did not inspect the premises, it is common ground that they comprise a mid-terrace period house on basement and four upper floors that has been converted into some 22 flats. The appeals relate to the following five flats:

   Flat 10 1 bedroom 1st floor flat (rear)
   Flat 12 2-bedroom 1st floor flat (front)
   Flat 17 1 bedroom 3rd floor flat (front)
   Flat 19 2-bedroom 3rd floor flat (front)
   Flat 21 1 bedroom 4th floor flat (rear)

   The penalties were each imposed by the Respondent Housing Authority by notices dated 16 March 2021.

3. The appeal notice was dated 24 March 2021, at which time the Applicant was unrepresented. Directions were given on 13 August 2021, and the Applicant served an informal statement of case prepared by one of its directors in accordance with those directions. The Respondent filed a statement of case on 16 September 2021, and the Applicant responded on 20 September 2021. A hearing was originally listed for 22 October 2021, but at a late stage the Applicant instructed solicitors. As a result, on 19 October 2021 the Tribunal stood out the hearing and gave permission for the Applicant to file an amended statement of case raising (in particular) the new issue of law set out below. The amended statement of case dated 18 October 2021 (settled by counsel) and the Respondent's

amended statement of case dated 5 November 2021 therefore formed the basis of the re-arranged remote hearing on 30 November 2021.

4. At the hearing, the Applicant was represented by Mr Tom Morris of counsel, who called evidence from the Applicant's director Mr Thomas Guy. The Respondent was represented by Mr Paul Tapsell of counsel, who called evidence from two council officers, Ms Bethan Thistle and Mr Richard Hopkins. The Tribunal is grateful to both counsel for their helpful and economic oral submissions and their detailed written skeleton arguments.

The evidence

Ms Thistle

5. Ms Bethan Thistle is a Senior Licensing Officer and qualified Environmental Housing Officer who has worked for the Respondent for the last 8 years. She mainly relied on the contents of the Respondent's statement of case dated 16 September 2021, which she signed with a statement of truth.

6. In 2011, the Respondent designated parts of the electoral wards of Margate Central and Cliftonville West as a selective licencing area. That designation lasted until 20 April 2016, when the scheme was extended to 20 April 2021. All privately rented premises within the relevant area (including William Meadows House) required a licence

7. Ms Thistle dealt with the Respondent's dealings with Mr Guy, who in his personal capacity owned c.37 private rented dwellings within the currently designated selective licensing area. Ms Thistle had met Mr Guy on 8 November 2013 to discuss licensing of those properties. Following that meeting, Mr Guy made licensing applications for his own premises, and Ms Thistle's evidence was that the front page of those licences clearly stated that selective licenses were not transferable. After the new scheme

was adopted in 2016, Mr Guy made further applications in relation to c.25 flats.

8. Ms Thistle explained the Respondent's approach to payment of licence fees. A fee was payable for each licence application and licences were usually granted for a period of five years. However, the council offered an alternative payment method for landlords with portfolios of 15 or more properties. Such landlords were given an opportunity to pay 25% of all licence fees on initial application on the proviso that the remaining 75% would be paid within 12 months. If a landlord chose to take advantage of the alternative payment method, the licences would only be granted for a period of one year, to help ensure the outstanding amounts were paid. Once the remaining 75% was received, the licences would be varied to extend them for an extra four years, so they were valid for a total of five years. In fact, although Mr Guy took advantage of this scheme, and in September 2017 paid 25% of the fees for his multiple licences, the Respondent did not receive the balance of the 75% licence fees. As a result, Mr Guy was only granted 1-year licences for his personal portfolio.

9. The Applicant has been the registered freehold proprietor of William Meadows House since 11 February 2020. On 24 July 2020, the Respondent wrote letters to the Applicant stating that it was actively enforcing the licensing policy, pointing out that an offence had been committed, and asking for further information. On 27 August 2020, the Respondent sent further letters asking the Applicant to apply for a selective licence. On 22 January 2021, the Respondent served Notices of Intent stating that it intended to impose penalties of £10,000 for each flat. In each case, the letters and notices were addressed to the Applicant's registered office at 3 Lloyd Road Broadstairs Kent CT10 1HY, and the Applicant produced certificates of posting for these letters.

10. Ms Thistle stated that on Monday 25 January 2021 she received a telephone call from Mr Guy. Mr Guy confirmed he had received the Notices of Intent in respect of properties at William Meadows House. He explained to her that the Applicant purchased the property in February 2020. During the conversation Mr Guy also confirmed he had received letters sent to the Applicant in respect of selective licensing but confirmed he had not acted on them. He stated the selective licencing designation was due to expire in April 2021, but Ms Thistle reminded him that an application was still required in respect of any rental property in the designated area up until April 2021. Ms Thistle then explained to Mr Guy that the Applicant had the right to make written representations against the proposal to impose a financial penalty.

11. Ms Thistle completed *pro forma* Financial Penalty Proposal Forms, assessing the appropriate penalty at £10,000 for each of the five flats. Ms Thistle's evidence was that when completing the *pro formas*, she applied the Respondent's 2019 Financial Penalty policy (see below). Ms Thistle also produced office copy entries for the freehold title and copies of each of the other documents referred to above for the Tribunal. On 16 March 2021, the Respondent served final notices under s.249A of the Act n relation to the five flats.

12. In cross-examination, Ms Thistle was asked why the Respondent had only imposed financial penalties on some of the 22 flats. She confirmed penalties were only made where the Council was able to gain access to a flat. Since she had been unable to get into the other flats in the block, the penalties were limited to the five flats where access was achieved.

13. Ms Thistle was asked about the telephone conversation with Mr Guy in early 2021 referred to above. She remembered the call, but she did not believe Mr Guy said he thought there was already a licence in place for William Meadows House. If he had said that, Ms Thistle would have explained that licenses were not transferable. Ms Thistle was re-examined

on the point by the Respondent's counsel, and confirmed the call took place after the Notices of Intent were sent in January 2021.

14. When questioned by the Tribunal, Ms Thistle stated that although she had not produced a copy of any of the licence application forms, from memory she could say they clearly stated on the front of the licence that a licence was not transferable. Ms Thistle was also asked about her assessment of the level of penalty. When addressing the question of culpability, Ms Thistle had considered (but rejected) a score of "Very High" or "Medium".

15. Since the penalty was imposed, the Applicant had applied for a licence and the Respondent issued one with effect from 1 April 2021 – although no copy of that licence was produced. However, the Council did generally allow a single licence to cover two or more flats in a block. Essentially, it charged a single fee for licensing the first flat, and then a reduced rate for second and subsequent flats. But the licence itself would identify the flats – in this case William Meadows House would state "Flats 1-22 William Meadows House".

Mr Hopkins

16. Mr Richard Hopkins is the Respondent's Private Sector Housing manager, and Ms Thistle's line manager. He is a member of the Chartered institute of Environmental Health and a Chartered Environmental Health Practitioner with 25 years' experience. He signed the *pro forma* Financial Penalty Proposal Forms and the Notices of Intent, and effectively he corroborated Ms Thistle's evidence.

17. In cross-examination, Mr Hopkins accepted that many local authorities operated their licensing schemes on the basis of one licence per flat. But most of the rental properties in Cliftonville were rentals of an entire house – and flats were comparatively rare in this particular designated area. When the scheme was introduced, the Council looked at s.79 of the Act and consulted. As a result of that consultation, it became clear that

landlords were not overly keen on making numerous applications for licenses for individual flats. Where a single application could be made and there was a reduction in administration, it therefore seemed sensible to allow multiple applications on the same form. This was the scheme that was adopted, although in reality it covered only a small percentage of properties in the area. If a landlord still wanted to apply for an individual licence for a single private flat, it could still do so. However, when deciding to impose a penalty, the procedure was different. The Council had to investigate to a criminal standard and apply the statute. It determined that each of the 5 flats was an individual "house" which was not licenced. Since there was no reasonable excuse for controlling each of the 5 unlicensed "houses", the Respondent served five Notices of Intent.

18. In response to questions from the Tribunal, Mr Hopkins stated that Thanet's licence for a block of flats looked very different to a single licence for a house. It looked more like an HMO licence, with a schedule of properties attached, with flat numbers and a description.

Mr Guy

19. Mr Guy is a director of the Applicant. He relied in part on the contents of the Statement of Case which he signed in August 2021. He stated that when the Applicant bought the property in 2020, the vendors Chelsea Portfolio Ltd and their agents Homewise Management informed him "that the building was licensed". The premises were in poor condition. The Applicant had undertaken extensive works to the front elevation, amounting to £19,000. At the start of 2021, Mr Guy was contacted by the company accountant and told they had received notices that the Respondent was imposing financial penalties in respect of five flats. There was then "contact" with Ms Thistle by "via email and telephone". Mr Guy stated that "our point was that there was no reason to get a licence on 5 flats when [the Applicant only] needed one for all 22". The Applicant was quoted £5,700 for a licence, but it "could not apply for a license as no payment schemes were in place permitting this and the council would

not allow it." Once funds were available to the Applicant, it applied for the licence, and this was eventually granted with effect from 1 April 2021. There was a large commercial loan on the building (£1,100,000) and a further 'bounce back' loan of £50,000 to be repaid.

20. Mr Guy also confirmed the evidence in the amended Statement of Case (which was supported by a statement of truth dated 21 October 2021). This document necessarily mainly dealt with legal submissions. But Mr Guy gave evidence that after acquiring William Meadows House, the Applicant "granted tenancies of individual flats within" the block. The company "wrongly believed" that the licence obtained by its predecessor in title "was transferable to the Applicant". The cost of internal works was given as £150,000, excluding the £19,000 referred to above.

21. In cross-examination, Mr Guy stated that when the Applicant acquired the premises in 2020, he was aware it was subject to selective licensing because it fell within a selective licensing area. He had had previous meetings with the Council about selective licensing – in particular, he recalled a meeting with Ms Thistle about his personally owned properties in around November 2013. They had to come to an agreement about fees. He had held various selective licences over the years from 2011-13 and then from 2013 onwards under the current scheme, paying 25% down and 75% balance after a year. He accepted the licenses stated "on their face" that they were not transferable. After buying the property, Mr Guy had no discussions with the Council about new licenses because the property had an existing licence on it. At that time, he was not aware a licence was not transferable. But he now knew it was not transferable. The building was initially full of illegal occupiers, so the Applicant had had to empty the whole building.

22. As to the "contact" with Ms Thistle by "via email and telephone", he had spoken to her on Friday 22 January 2021. Before that, the Council may well have sent emails and letters to the company's registered office, but he had not received them. After the Applicant received the Notices of In-

tent in January 2021, he phoned Ms Thistle. She explained that a licence was needed, and the Applicant completely agreed with this. Between then and March 2021, discussions continued about the fees which were due, but the Respondent refused to accept 25% on account or other payment terms. The Applicant did not have the full £5,700 licence fee. After the conversation, the application forms were completed, the fees paid, and the flats were licensed with effect from 1 April 2021. Mr Guy accepted that when speaking to Ms Thistle on 25 January 2021, he made no representations at all about the Notices of Intent.

23. Mr Guy explained the rental position with the flats at William Meadows House. He initially charged £450-£500pw for a 2-bedroom flat and £350pw for a 1-bedroom flat. He accepted this meant in cash terms, the licence fees were less than a week's gross rental income. But there were substantial loans on the building plus the cost of works. 19 flats were now occupied, although rents had since risen to £575pw for a 1-bedroom flat and £650pw for a 2-bedroom flat. At the date of purchase, the Applicant did not ask the vendors for a copy of the licence. The Applicant was a member of the National Landlords Association and received its newsletter and advice.

24. The Tribunal asked Mr Guy about the apparently contradictory answers that the previous licences stated "on their face" that they were not transferable, but that he believed (at least until January-March 2021) that the licence in this case was transferable. He explained that since the tribunal application was made, he had gone back and read the old licences, and they did indeed say on their face that they were not transferable. But he had not seen this wording on the old licences until he went back and re-read them.

Findings of fact

25. It can be seen from the above that very little of the evidence was disputed. As to the points that were in issue, the Tribunal finds:

(a) The Tribunal prefers Ms Thistle's evidence that the telephone conversation between Mr Guy and Ms Thistle in early 2021, it took place on Monday, 25 January 2021. More significantly, it prefers the evidence (at para 10 above) about what was said. Ms Thistle's account of the conversation was far more detailed, was essentially consistent with the Notices of Intent served a few days before, and she gave her evidence confidently. By contrast, Mr Guy's evidence was essentially improbable. Had he stated that the Applicant believed there was an existing licence, it is likely Ms Thistle would have immediately explained that licences were not transferable – as she did on other occasions.

(b) Although the Tribunal would have preferred to see copies of earlier licences granted to Mr Guy personally, and to the Applicant's predecessors in title relating to William Meadows House, there was essentially no dispute between the parties that all the Respondent's licences carried warnings on the first page that they were not transferable.

(c) The letters of 24 July 2020 and 27 August 2020 were properly posted to the Applicant's registered office, which were the offices of the Applicant's accountants. There is no evidence they were not received by the accountants, so we find that they were so delivered. However, we accept the evidence of Mr Guy that he personally did not see the two letters. The Tribunal does not know whether the breakdown in communications was as a result of the accountants not forwarding the letters, or whether they were forwarded to someone other than Mr Guy, or that they were lost in the post etc. But in any event, that communication breakdown occurred after the letters were received at the registered office.

The legislation

26. The selective licensing scheme appears in Pt.3 of the 2004 Act. For an area to be designated for selective licensing, s.80(1) requires that a number of conditions must be met. The chosen area must be, or be likely

to become, an area of "low housing demand" and the designation must contribute to the improvement of the social or economic conditions in the area.

27. Section 79(1) provides for "houses to be licensed by local housing authorities where … (a) they are houses to which this Part applies" and "(b) they are required to be licensed under this Part …" Section 79(2) provides that:

> "(2) This Part applies to a house if–
> (a) it is in an area that is for the time being designated under section 80 as subject to selective licensing, and
> (b) the whole of it is occupied either–
> (i) under a single tenancy or licence … or
> (ii) under two or more tenancies or licenses in respect of different dwellings contained in it …".

Section 85(1) has a general requirement that "every Part 3 house must be licensed". The offence itself is at s.95(1):

> "(1) 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 91 contains general requirements about the licences, which include the following:

> "(1) A licence may not relate to more than one Part 3 house.
> (2) A licence may be granted before the time when it is required by virtue of this Part but, if so, the licence cannot come into force until that time.
> (3) A licence—
> (a) comes into force at the time that is specified in or determined under the licence for this purpose, and
> (b) unless previously terminated by subsection (7) or revoked under section 93, continues in force for the period that is so specified or determined.
> (4) That period must not end more than 5 years after—
> (a) the date on which the licence was granted, or
> (b) if the licence was granted as mentioned in subsection (2), the date when the licence comes into force.
> …
> (6) A licence may not be transferred to another person.
> (7) A licence may not relate to more than one Part 3 house."

The relevant definitions are set out in s.99:

> "**99. Meaning of "house" etc**
> In this Part–
>
> 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling;
> 'house' means a building or part of a building consisting of one or more dwellings;
>
> and references to a house include (where the context permits) any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it)."

As to the person having control, etc, this is dealt with in s.263:

> **"263 Meaning of "person having control" and "person managing" etc.**
>
> (1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) 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) ...
>
> (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.
>
> ...
>
> (5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it."

> **"249A 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—
> ...
> (c) section 95 (licensing of houses under Part 3),
> (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.
> (7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

Sch.13A provides for appeals against financial penalties to the Tribunal. In the event of such an appeal, it is provided by para 10(3) of Sch.13A that the appeal:

> "(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".

Can a flat be a "house"?

28. As explained above, this is an appeal against five separate penalties for individual flats. The Applicant contends that its conduct did not amount to a relevant housing offence, because the individual flats in respect of which notices were served were not "*houses"* within the meaning of the Act. This raises an important point of principle relating to blocks of flats, namely the meaning of the word "house" in s.95(1) of the Act. It should be said that although the Respondent argued the flats at William Meadows House each constituted a separate "house", neither counsel suggested that any one of the penalties could be upheld if the Respondent was wrong about this. In other words, the parties appeared to agree that (if determined in favour of the Applicant) the issue of law was capable of providing a complete defence to all five penalties.

The Applicant's case

29. The Applicant essentially advanced three propositions.

30. First, the purpose of Pt.3 of the Act was to enable local housing authorities to protect the health of occupiers of housing in their areas and to combat anti-social behaviour. It was no part of the purpose of Pt.3 of the Act to provide local housing authorities with a source of revenue.

31. Secondly, s.99 was ambiguous. The ambiguity was resolved by reading the provision so that a "house" meant either:

(a) "a building … containing one or more dwellings", or

(b) "part of a building containing one or more dwellings".

The disjunctive "or" was of huge importance. It showed the draftsman intended to make clear that a "house" could not be both of those things at once. In other words, if "part of a building" met the definition of a "house", then the building itself could not also be a "house". Likewise, if a single "dwelling" within a "building" satisfied the definition, then the whole "building" could not be a "house". A "house" could consist of "one or more dwellings", but the language did not allow for a "house" to consist of more than one "house".

32. This analysis was supported by the language of the offence and the offender in s.95(1). The offender was "a person having control of or managing a house". The "person having control" was "the person who receives the rack-rent of the premises … or who would so receive it if the premises were let at a rack-rent": see s.263(1) of the Act. The "person managing" meant an "owner or lessee [who] … Receives (whether directly or through an agent or trustee) rents or other payments from … persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises". Counsel referred to the decisions of the Upper Tribunal in Hastings BC v Braer Developments Ltd [2015] UKUT 0145 (LC)[1], and Urban Lettings (London) Ltd v Haringey LBC

[1] Concerning the validity of an Improvement Notice under s.11 of the Act.

[2015] UKUT 0104 (LC)[2]. In particular, in Braeer, the Deputy President stated at [47] that:

> "47. … The regime established by Part 1 of the 2004 Act is intended to protect the occupiers of residential property, and targets the person receiving the rent paid by the occupier, or the most appropriate owner of the property, as the recipient of improvement notices. In this case those persons are the lessees."

33. The Applicant submitted that an offence was committed in the following circumstances:

(a) Where a single person ("A") owned the freehold/leasehold interest in a building (which was therefore a "house"), and it contained flats which were let on short lets or licenses, that person controlled or managed the building. If the building as a whole was unlicenced, A committed an offence.

(b) Where A granted long leases of a single dwelling for a peppercorn ground rent to "B" (or a headlease of multiple dwellings to "C"), A would no longer be entitled to receive the rack-rent for the flats. B and C would be the persons having control of and managing part of the building. If the building was in an area of selective licensing, and neither B nor C obtained a licence, A would plainly not commit an offence. But B and C would commit an offence.

Counsel argued that if the definition of "house" was limited to a "building", then in (b), no-one would commit an offence even though the whole building would satisfy the definition of "house". That is because there would be no-one having control of or managing the whole of the building, and because B and C would each be a person having control of or managing only 'part' of a building.

34. It was submitted that in light of this, the interpretation of section 99 must involve what the Applicant described as a "top-down" exercise, and not a "bottom-up approach". The proper approach was to start with the

[2] Concerning a Rent Repayment Order for an unlicensed HMO.

"building". If there was a person who met the definition of person having control of or managing the building, then that building alone would be a "house", and it would not be possible for any smaller part of it also to be a "house". William Meadows House was such a "house", not the individual flats within it.

35. Thirdly, the Respondent's contention effectively meant that both a building containing flats and the flats themselves could both be a "house". This was legally unstainable, since a licence could not relate to more than one "house": see s.91(1) of the Act. Moreover, different housing authorities might take a different view as to whether a flat or a block of flats was a "house". The application of the statutory definition would thus depend on an entirely arbitrary exercise of discretion by housing officers. The Act created an offence, and the well-known principle against doubtful penalisation applied: see for example, Bennion on Statutory Interpretation (7th Ed.) at 27.1.

The Respondent's case

36. It is meant as no disrespect to the Respondent to say that its argument was far shorter. It contended that a single flat could be a house within the definition at s.99 because a flat was "part of a building". If the whole of that flat was "occupied … under a single tenancy or licence", it had to be licensed under s.79(2)(b)(i) of the Act. An offence was committed under s.95(1) where the flat constituting such a "house" was subject to a selective licensing regime, and the relevant person in control had not licensed it.

37. In his closing submissions, Mr Tapsell relied on the definition of the of the person in control of the house who committed the offence set out in s.263 of the Act. He summarised the policy behind the penalty provisions in s.263(1) and (3) as one of "follow the money". Mr Tapsell also suggested the Council's policy in respect of the grant of licences was consistent with s.91(1) of the Act. He relied upon various absurdities which

he said would arise from the Applicant's approach:

(a) A private landlord letting say 22 flats in different buildings would continue to be subject to 22 potential offences, whereas a private landlord owning a similar number of flats in a single building would only be liable for one offence.

(b) In buildings containing self-contained flats, where the freehold is subject to a number of leasehold interests that are owned and let out by different private landlords, the enforcement of selective licensing would not be possible.

(c) A private landlord letting a leasehold flat in a building containing other flats would not be able to apply for a selective licence for their property if a self-contained flat cannot be a "house".

(d) Counsel described a building under the control of a non-responsive private landlord which contained only a small number of flats. If evidence of private letting was obtained for one flat alone, one could not enforce the licensing regime in relation to the other flats.

The Tribunal's decision

38. Although the rival approaches to the meaning of the legislation have been characterised as "top down" and "bottom up", the Tribunal finds these labels are of limited assistance in this instance and are only likely to obscure the process of interpretation. However, it is plainly necessary to consider the meaning of the various provisions by reference to the stages necessary to establish whether an offence has been committed under s.95(1) of the Act.

39. The starting point is plainly s.95(1) itself. This comprises three elements:

(a) The offence is committed by "a person having control of or managing" relevant premises.

(b) The relevant premises must be a "house which is required to be

licenced" under s.85(1).

(c) The relevant premises must "not [be] licenced".

40. As far as the first element of s.95(1) is concerned, the offender must be a person having control or managing the house[3]. As Mr Tapsell stressed, the person having control of or managing a house is defined in s.263 by reference to the right to receipt of a rack rent. The draftsman therefore focussed on at least the potential for profit-making (as the Respondent put it, the financial penalties in the Act "followed the money"). In the case of blocks of flats, this would suggest an offender would generally be the immediate landlord of an individual flat or flats, rather than any headlessee or freeholder.

41. For present purposes, the main issue is with the second element. Is each of the five flats at William Meadows House a "house which is required to be licenced" under s.85(1)? The licensing requirement in s.85(1) applies to a "Part 3 house", which is defined by 85(5)(a) as "a house to which this part applies". When one turns to s.99, a flat is plainly "part of a building". A flat also "consists of one … dwelling", because it is a "part of a building occupied or intended to be occupied as a separate dwelling". *Prima facie* a flat therefore falls within the definition of a "house" in s.99. The plain and ordinary meaning of s.99 is therefore that each flat at William Meadows House is a "house" for the purposes of Pt.3 of the Act.

42. The Tribunal finds there are three other considerations which support this conclusion:

(a) It is true that in layman's terms, a "flat" (in the sense of a unit of residential accommodation severed horizontally from another)

[3] The other major significance of being a "person having control" or "managing" a Pt.3 house is that this person is usually (but not always) the licence holder: see s.89.

might not ordinarily be described as a "house" (in the sense of a residential structure with a roof and elevations). But under housing legislation, it is not unusual to find the term "house" used in relation to a flat. Indeed, this is expressly the position with HMOs under Pt.2 of the Act: see s.254. There is therefore no reason why a s.99 "house" is also not apt to include what a layman would ordinarily describe as a "flat" or maisonette.

(b) The only textbook commentary that the Tribunal is aware of expressly states that:

> "House means a building or part of a building consisting of one or more dwellings. Accordingly, a self-contained flat may be a house as may a number of flats situated above commercial premises. References to a house include (where the context permits) references to any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, the house or any part of it.": Encyclopedia of Housing Law and Practice at [1-4182.185].

(c) The Tribunal accepts the first of the absurdity arguments suggested by Mr Tapsell. It cannot be right that a private landlord letting multiple flats in different buildings would continue to be subject to multiple penalties, whilst a similar landlord owning a similar number of flats in a single building would be liable for only one offence.

(d) Neither of the two authorities relied upon by the Applicant relate to Pt.3. of the Act. But both tend to support the Respondent's "follow the money" analysis.

43. The Applicant's arguments were attractively put, but ultimately the Tribunal cannot agree with them. The word "or" in the s.99 definition of "house" is disjunctive, but that does not take things any further. The word is simply included to show that a "house" can comprise something other than an entire building. Neither is there any tension between the two references to "part of a building". The "part" of the building comprising the "house" may of course be more extensive than the part comprising the dwelling". For example, a single floor of a building may be a

"house" containing several separate flats or "dwellings".

44. More fundamentally, the Tribunal does not agree that the Respondent's analysis provides for any possible overlap or uncertainty. It may well be that both a house containing flats, and the flats themselves might at the same time be "houses" as defined by s.99. But the Tribunal considers this is the reason for s.91(7). This prevents the grant of a licence relating to more than one Part.3 house. In a block containing flats, each of which is a Pt.3 house, s.91(7) may well prevent the grant of a licence for the whole house. It may well therefore be that the Respondent's concessionary scheme, which permits single licences covering multiple premises, may offend against s.91(7) - but that is not relevant to question whether an offence has been committed under s.95(1). This is because the basis of the offence is that no licence is in place for the relevant premises. The only consideration is whether those premises are a "house" (as defined by the statute) for which a licence is required.

45. Moreover, there is no overlap in offences. Any possible such overlap is removed by s. s.263, which effectively provides for one offence per property which is let. The person who commits an offence must always be the person in receipt of the rack rent etc., which in the case of a block of flats, means a landlord of a flat – not the block owner. The offence is therefore tied to the premises which are let, which (in the case of a block containing several flats) will usually mean a flat, not the block.

46. It follows from this that a literal interpretation of the penalty regime does not offend against the principle against doubtful penalisation. But if it did, the Tribunal would tend to prefer the meaning of the legislation to correspond with an offence being committed by those in control of each individual flat within a block. That result is perhaps closer to the policy objectives stated in the two cases referred to by the Applicant.

47. Finally, it is irrelevant (i) whether the Applicant's predecessor in title held a single or multiple licences for William Meadows House or (ii)

whether the Respondent has issued the Applicant with a single licence or multiple licences. Even had the Tribunal been shown these licences, they would not have helped decide whether there was a house which was unlicenced. As explained, different considerations may apply to whether one a licence may be granted to a person in respect of premises and whether a person commits an offence in relation to premises. In this case it is not disputed that during the relevant period there was no valid licence for the block or the flats at William Meadows House.

48. The Tribunal therefore rejects the main legal argument advanced by the Applicant. Each flat was a "house" for the purposes of s.95(1) of the Act.

Reasonable excuse

49. Under s.95(4), it is a defence that the Applicant had a reasonable excuse for having control of or managing the house in the circumstances mentioned in s.95(1). The relevant principles were set out by the Upper Tribunal in Sutton and another v Norwich City Council [2020] UKUT 90 (LC) at [215] to [221]. The Tribunal must apply the civil standard of proof. Lack of knowledge or belief can be a relevant factor to consider when determining whether or not someone has a reasonable excuse, but this must be an honest belief. Additionally, there have to be reasonable grounds for the holding of that belief. In connection with the similar defence under s.30 of the 2004 Act, the Upper Tribunal stated as follows:

> "219. Knowledge on the part of the manager that a building is a section 257 HMO, or that the 2007 Regulations exist, is not a condition of the obligations imposed by them. Nor is such knowledge an element of the offence of breaching the Regulations. The offence is one of strict liability, subject to the defence of reasonable excuse.
> ...
> 221. It is possible to conceive of circumstances in which a lack of knowledge of the facts which caused a house to be an HMO might provide a reasonable excuse for non-compliance with the 2007 Regulations. For example, in *IR Management Services Ltd v Salford City Council,* to which we have already referred, the manager's defence was that he had been unaware that the HMO was occupied by more than one household, and so he did not take the additional steps required by the relevant regulations; that defence failed on the facts, but if the manager's evidence had been accepted it might have succeeded. This is not that sort of case. FLAL was aware of all

> the facts which caused Max House to be a section 257 HMO; its defence is that it was unaware of the consequences of those facts. The maxim that ignorance of the law is no defence is a familiar one. Just like a private individual, a company cannot fall back on its own omission to inform itself of its responsibilities as a "reasonable excuse" for its failure to comply with them."

The Tribunal also notes that under s.249A(9) of the Act, for the purposes of ascertaining whether the Applicant's conduct amounts to an offence under s.95, that conduct may include "a failure to act". The "reasonable excuse" defence must therefore be read in the light of that provision. Moreover:

(a) It should always be remembered that the offence to which the defence of having a reasonable excuse relates is intended to create an offence of strict liability.

(b) The offence itself is not framed in terms of failure to apply for a licence. The prohibited activity is controlling premises without a licence and the reasonable excuse must therefore relate to controlling the premises without a licence. This is not necessarily the same thing as having a reasonable excuse for not applying for a licence.

50. In succinct closing submissions, Mr Morris relied on the following matters:

(a) At the time of the offending conduct, the Applicant's director Mr Guy believed there was a licence in place. He therefore believed there was no need to apply for a licence. Mr Guy himself accepted that his previous licences stated on their face that they were not transferable, but Mr Guy had not read those words at the relevant time.

(b) The Notices of Intent were given on 22 January 2021, which effectively crystallised the offence. The offence was as stated in the Notices of Intent and conduct after that point became irrelevant.

(c) If it was permissible to look at conduct after 22 January 2021, the Applicant's conduct from that point was reasonable. Once the er-

ror was pointed out to Mr Guy, the Applicant acted promptly and applied for a licence.

The Tribunal's decision

51. The Tribunal has no hesitation in rejecting the defence of reasonable excuse. The Applicant was aware of all the facts which caused the flats at William Meadows House to be licensable; its defence is that between 11 February 2020 and 22 January 2021, it was unaware of the consequences of those facts.

52. As to ignorance of s.91(6), the statutory provision could not be clearer, and expresses in plain English that "A licence may not be transferred to another person". The maxim that ignorance of the law is no defence is a familiar one. Just like a private individual, a company cannot fall back on its own omissions as a "reasonable excuse": Sutton (supra) at [221]. Mr Guy accepted he was an experienced landlord, and that he had longstanding experience of this very licensing area. Mr Guy had had previous licences, which he admitted stated clearly on their face that licenses were not transferable. Mr Guy admitted he did not read those licences and did not seek a copy of the relevant licence for these particular premises when the Applicant bought them. Mr Guy also had access to advice through a reputable landlord association. The Applicant therefore had ready access to information about the correct legal position regarding the transfer of licences. The suggestion Mr Guy had not read the previous licences, sought a copy of the existing licence or asked for advice from others may well be excuses, but they cannot possibly amount to "reasonable" ones.

53. In some cases, it might well be a reasonable excuse for an offender to be excused from committing an offence because it relied on misleading advice from a professional adviser or the local housing authority itself. But there was no suggestion that in this case the Applicant was given mis-

leading advice about the licensing regime by its legal advisers or by Council officers.

54. Accordingly, the Tribunal finds the Applicant had no reasonable excuse for having control of or managing each flat without a licence between 11 February 2020 and 22 January 2021.

55. As to events after 22 January 2021, the Tribunal accepts the offence "crystallised" when the Notices of Intent were given and that the Applicant's conduct after that date is not directly relevant to whether the statutory defence is made out. But conduct after 22 January 2021 may be relevant to mitigation or aggravation of the offence and/or the level of penalty imposed. The Tribunal has already set out its findings of fact in relation to the conversation on 25 January 2021 (see para 25(a) above). After that, the Applicant contends it acted promptly to put a licence in place, and this came into effect on 1 April 2021. Mr Guy's evidence was the 2-month delay was due to lack of funds to pay the full £5,700 licence fee. But it is clear from the level of rental income that the Applicant received a substantial weekly income from William Meadows House alone – even if this was the only finance available to the Applicant (which seems unlikely). The Tribunal does not therefore find this a particularly convincing or indeed a reasonable excuse for not obtaining a licence until 1 April 2021.

Level of penalty

56. Para 12 of Sch.13A to the Act requires a local housing authority to have regard to any guidance given by the Secretary of State about the exercise of its functions under Sch.13A or s.249A. Such guidance is to be found in "*Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities*", which was re-issued in April 2018. Para 3.5 says that housing authorities "should develop their own policy on determining the appropriate level of civil penalty in a particular case" and lists several factors to be considered:

- Severity of the offence
- Culpability and track record of the offender
- The harm caused to the tenant
- Punishment of the offender
- Deter the offender from repeating the offence
- Deter others from committing similar offences
- Remove any financial benefit the offender may have obtained as a result of committing the offence

57. At the hearing, counsel agreed that the proper approach was for the Tribunal to apply the Respondent's local policy adopted in its "*Private Sector Housing Policy for imposing financial penalties under the Housing Act 2004 and Housing and Planning Act 2016* (1 April 2019)". The approach to such policies was summarised by Judge Cooke in Marshall v Waltham Forest LBC [2020] UKUT 35 (LC); [2020] 1 WLR 3187, a case which involved appeals against penalties imposed under section 249A of the 2004 Act. At [54], the judge stated:

> "The court is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed."

Judge Cooke also considered the weight to be attached to the local housing authority's decision in any appeal at [62]:

> "the court is to afford considerable weight to the local authority's decision but may vary it if it disagrees with the local authority's conclusion".

58. The 2019 policy sets out a conventional approach to assessment similar to that adopted by other local housing authorities. The first stage is to determine the starting point for the financial penalty by considering (a) the severity of the offence, (b) culpability, (c) track record, (c) portfolio size and (d) risk of harm. This was then reviewed in

the light of considerations such as hardship etc., to determine whether the penalty should be adjusted. Each factors is assigned a value within formulae set out in the Policy.

59. The officers who gave evidence produced copies of the "Financial Penalty Proposal Forms" for each of the five flats. These were initially completed on 21 January 2021, and signed by the Respondent's Director of Service on 11 March 2021. The forms were effectively 'score sheets', showing how officers applied each of the criteria in the 2019 policy to arrive at the financial penalty of £10,000 per flat.

60. There was no suggestion the Tribunal should depart from the Respondent's 2019 policy (an argument Judge Cooke suggested might quite properly be advanced). Instead, counsel for the Applicant helpfully indicated that its challenge was limited to the Culpability 'score' in the Financial Penalty Proposal Forms. Both counsel agreed the Tribunal need therefore only reconsider this element of the assessment, before applying the remaining agreed elements of the assessment to arrive at the appropriate financial penalty. Although the Tribunal is of course re-determining the level of penalty, this plainly shortened the issues that had to be considered afresh in relation to that issue.

61. In relation to "Culpability", the relevant part of the 2019 policy is at paras 27-31:

> "Culpability
>
> 27. Culpability is a key factor in determining the severity of an offence. Therefore, the level of any penalty will initially be set by calculating the culpability category, which then determines the culpability premium. There are four culpability categories, namely:
> - Very High;
> - High;
> - Medium;
> - Low.

Very High
28. This category applies to offences where the offender has deliberately breached or flagrantly disregarded the law. This category is subject to a 100% culpability premium.

High
29. This category applies to offences where the offender had foresight of a potential offence, but through wilful blindness, decided not to take appropriate and/or timely action. This category is subject to a 80% culpability premium.

Medium
30. This category applies to offences committed through an act or omission that a person exercising reasonable care would not commit. Any person or other legal entity operating as a landlord or agent in the private rented sector is running a business and is expected to be aware of their legal obligations. This category is subject to a 60% culpability premium.

Low
31. This category applies to offences where there was fault on the part of the offender, but significant efforts had been made to secure compliance with the law, but those efforts were not sufficient. This category may also apply to situations where there was no warning of a potential offence. This category is subject to a 40% culpability premium."

Mr Morris argued that the offence fell within the "Medium" category, which would produce a penalty of £7,500 for each flat. The offence was committed through an omission which did not amount to "wilful blindness" etc. Mr Tapsell suggested the appropriate category was "High", as found by the Respondent's officers which produced the penalty of £10,000. The reasoning for this assessment in the Financial Penalty Proposal Forms was that:

> "the private sector landlord has failed to apply for a selected licence despite being given opportunities to apply for a selective licence prior to the offence date. The private sector landlord had foresight of a potential offence but through wilful blindness, decided not to take appropriate action."

The Tribunal's decision

27. When considering paras 27-31 of the Respondent's policy the Tribunal is acutely aware that the policy document should not be subjected to

the same kind of textual analysis one might undertake when interpreting a statute or a contract. The policy is intended as practical guidance for officers and the public. But if one can discern any key distinction between paras 29 and 30 of the policy, it is the element of wilfulness. The word "wilful" appears in para 29 and the reference in para 30 to "a person exercising reasonable care" is clearly intended to distinguish the "Medium" category from that kind of wilful behaviour. But even within para 29, it is stressed that a "legal entity operating as a landlord or agent in the private rented sector is running a business and is expected to be aware of their legal obligations".

28. The Tribunal makes one comment about the reasons given by the officers in assessing the appropriate category. The Tribunal has found (para 25(c) above) that the letters of 24 July and 27 August 2020 were not received by Mr Guy. Culpability is not therefore to be assessed in the light of the two reminders sent in the summer of 2020.

29. However, the Tribunal ultimately finds the offence sits more easily within the "High" category of culpability. The offences were not something which a person exercising reasonable care would commit and are better characterised as wilful blindness. The reasons are as follows:

    (a) The Applicant is a substantial professional landlord, with sufficient financial resources to obtain proper advice (whether legal advice or advice from a competent landlord association). Knowledge of the licensing system is a key part of its business. A reasonable landlord of the Applicant's size would make appropriate enquiries about licensing requirements. The Applicant did not.

    (b) The Applicant was well aware the premises were in an area which required licensing – and Mr Guy himself had licences for his properties. Again, a reasonable landlord active in this selective licensing area would make reasonable enquiries about its licensing requirements. The Applicant did not.

(c) The suggestion Mr Guy did not read the licenses for other premises can only really be described as negligent or careless. Licenses are important documents with serious potential legal consequences.

(d) Similarly, Mr Guy stated that he relied on the existing licence for the premises, but accepted the Applicant did not seek a copy when it bought the premises. Given that the Applicant's case was that it believed the existing licence covered the building, failure to obtain a copy of the licence is again wilful blindness. That licence would of course (by common agreement) have stated on its face that it was not transferable.

62. It follows from this that culpability falls within the "High" category in para 29 of the 2019 policy. If the Tribunal applies this finding to the penalty matrix, it produces a financial penalty of £10,000 for each offence.

Conclusions

63. The Tribunal rejects the legal argument that financial penalties may not be imposed in relation to the individual flats at William Meadows House. Each flat is a "house" for the purposes of s.95(1) of the Housing Act 2004.

64. The Tribunal finds that the Applicant's defence that he had a reasonable excuse under s.95(4) of the Act is not made out.

65. The appropriate financial penalty for each offence is £10,000.

Judge Mark Loveday
14 January 2022

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.