FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAM/HNA/2022/0005**
HMCTS code (paper, video, audio)	**:**	**V: CVP REMOTE**
Property	**:**	**Flat 6, 2 Alexandra Grove, London. N4 2LG ("the Property")**
Appellant/applicants	**:**	**Lawrence Pemble & Jessica Herman**
Representative	**:**	**Leslie Herman**
Respondents	**:**	**London Borough of Hackney**
Representative	**:**	**Matthew Feldman of Counsel**
Type of Application	**:**	**Appeal against a financial penalty** - Section 249A & Schedule 13A to the Housing Act 2004
Tribunal Members		**Judge Professor Robert Abbey and Mr Andrew Lewicki BSc (Hons) FRICS C.Build E FCABE (Professional Member)**
Date of Hearing	**:**	**13 June 2022**
Date of Decision	**:**	**17 June 2022**

DECISION

- This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice Cloud Video Platform with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and because all issues could be determined in a remote hearing. The documents that were referred to are in two bundles of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it a pair of non-paper-based digital trial bundles of documents prepared by the applicant and the respondent, in accordance with previous directions. Both parties submitted late evidence and the Tribunal in an effort to be fair to the applicant and respondent equally allowed all such late evidence.

Decision

1. The decision by the respondent to impose a financial penalty is upheld in the total sum of £6000 being an amount reduced from the original amount of £7500. For the reasons set out below the Tribunal has determined that the financial penalty of £7500 should be subject to a reduction of 20%.
2. In the light of the above, the appeal by the appellant against the imposition of a financial penalty by the respondent under section 249A and schedule 13A of the Housing Act 2004 is therefore allowed in part.

Introduction

3. This is the hearing of the applicant's application regarding **Flat 6, 2 Alexandra Grove, London. N4 2LG (**"the Property"), pursuant to Schedule 13A of the Housing Act 2004 ("the 2004 Act"), to appeal against a financial penalty imposed by the respondent under s249A of the 2004 Act. A financial penalty of £7,500 has been imposed on the applicants by the respondent in a Notice dated 21 October 2021 for having control of a property which was not licensed and therefore committing an offence under section 95(1) of the Housing Act 2004.The applicant is the long leaseholder of the property and the respondent is the local authority responsible for the locality in which the property is situate.

The Hearing

4. The appeal was set down for hearing on 13th June 2022 when the applicant was represented by Mr L Herman. Mr Matthew Feldman of Counsel appeared for the respondent. This hearing is a re-hearing of the local authority decision, see paragraph 10(3)(a) of Schedule 13A to the 2004 Act. The Tribunal is therefore to consider whether to impose a

financial penalty afresh, and is not limited to a review of the decision made by the respondent.

5. The imposition of the financial penalty was imposed on the basis that the Applicant committed an offence under s.95(1) of the 2004 Act by being a person in control of a property which was required to be licensed under Part 3 of the 2004 Act but was not so licensed. The applicant is the leaseholder under a long lease of 125 years of the Property.

6. In regard to this dispute and at all material times the applicants admitted they had failed to hold a selective licence (under Part 3 of the 2004 Act) and so the Property was not licensed. This was notwithstanding that Hackney had a borough wards scheme in place for selective licences from 1 October 2018. As a result of the above an offence was committed under s.95(1) of the 2004 Act.

7. Accordingly, the dispute was not about the existence of a licence but rather about the quantum, the amount of the penalty and whether the applicant had a reasonable excuse for not licensing the property.

8. The appellant/applicants appeal on four grounds, namely that: -

   1) there is a reasonable excuse due to mitigating factors;

   2) the Local Authority failed to comply properly with their legal duties and due process;

   3) the imposition of a financial penalty is unreasonable because it is premature and over-zealous; and

   4) the level of penalty is unfair, unjust and excessive.

9. On the other hand, the respondent considers that the financial penalty should remain as imposed and was firmly of the view that it had conformed with its policies in place for cases of this kind. It was asserted by the local authority that, contrary to the applicants' contentions, the respondent has properly complied with its legal duties and due process both in relation to the imposition of a financial penalty and the level of penalty. As the respondent has an enforcement policy in place the Tribunal must take that as its starting point and implement that policy, (see *Marshall v Waltham Forest London Borough Council* [2020] UKUT 35 (LC) at §52 and §74.)

10. Pursuant to a Final Notice dated 15 December 2021, the respondent offered the applicants a 40% overall discount to the financial penalty of £7,500, reducing the same to £4,500, on the basis that the Applicants had taken early action to licence the property (20%), and provided that the penalty was paid within 28 days (20%). The financial penalty was not paid within 28 days, or at all. The applicants chose to appeal, hence this application before this Tribunal.

11. At the hearing the Tribunal heard evidence on behalf of the respondent from Angela Reynolds who is a Private Sector Housing Officer in the Private Sector Housing Service of Hackney Council along with her line manager Emanuel Mfunn. No witness statements were supplied by the applicants who simply relied upon the submissions made by Mr Herman. Ms Reynold's evidence was that : -

> *"For the purpose of Selective licensing in the Brownswood Ward of London Borough Of Hackney. I personally conducted a doorstep survey on 01.07.2021 at approx 14.47pm in respect of Flat 6, 2 Alexandra Grove, N4 2LG. The London Borough of Hackney records indicated at the time of the visit there had been no selective licence application submitted for Flat 6, 2 Alexandra Grove, N4 2LG, as a rented accommodation situated within the ward of Brownswood. I carried out a land registry search and Lawrence Pemble & Jessica Herman are registered as the owners. I then proceeded to issue a Licence warning letter dated 21.10.21, followed by a letter of Notice of Intent dated 25.10.21 intending to impose a financial penalty of 7,500 for Failure to Licence under Selective Licensing Scheme Housing Act 2004 (Sec. 95). A final Notice letter was issued on 15.12.2021….*".

Decision and Reasons

12. From the evidence before it and the admission mentioned above, the Tribunal was satisfied that the applicant was in breach of the requirements of the London Borough of Hackney selective licencing scheme.

13. The applicant says she was not aware of the scheme. Ignorance of the law is no defence. The applicant should have completed a more robust process of due diligence before creating the tenancy to check what legal requirements there were for landlords in this London Borough. The Tribunal was told by the respondent that details of the scheme were widely advertised when the scheme was created and that comprehensive details were on the Council website along with an online application form. This assertion therefore fails to assist the applicant in mitigating the penalty.

14. At the hearing much was made about how the respondent had not communicated with the applicant prior to the issue of the penalty notice documentation. The Tribunal considered all the evidence before it in this regard and was firmly of the view that all the documentation was properly communicated and served by the respondent on the applicant and there is nothing in this regard that might assist the applicant.

15. The respondent accepted that the applicant was not a "rogue landlord" and had maintained the property in a proper and acceptable condition. Certainly, the tenant in occupation had not made any complaints about the tenancy or the property to the local authority that had been brought to the attention of this Tribunal.

16. The applicants emphasised that at the time the scheme was put in place they were not at that time landlords and so would not have been concerned with the scheme particulars. Whilst this may be the case it does not exonerate the applicants from making reasonable enquiries when they did become a lessor to ascertain if there were any statutory obligations on them in their new role as landlords, such as compliance with a licensing scheme. The applicants also made the point that the scheme only applied to a limited number of wards in the Borough (3 out of 21 in Hackney). However, it was apparent to the Tribunal that the extent of the scheme was really immaterial. If your property fell within the scheme area there was a clear obligation upon you to licence a property that was let to tenants such as was the case for this property and these applicants.

17. The respondent observed that the applicants contend that they failed to obtain a selective licence due to a lack of awareness, and that they are both law-abiding individuals. However, again as observed by the respondents, such contentions are not capable of amounting to a 'reasonable excuse' and afford no defence to this matter. By the time of this offence, the selective licensing scheme had been in place for nearly three years having been started in October 2018. As has been stated above ignorance of the law is no defence and even if the applicants were excellent landlords there was a statutory obligation to obtain a licence. None was in place and the absolute nature of this offence means that this is an offence under the Housing legislation which brings with it financial implications.

18. The applicants also put forward two further reasons for the appeal, the imposition of the financial penalty is unreasonable because it is premature and over-zealous. In response to that the respondent asserted that the imposition of the financial penalty was neither unreasonable because it was premature, nor over-zealous alleged by the applicants. The respondent said that the selective licensing scheme for this property had been in place since 1 October 2018 having been widely advertised in advance, and on the applicants' own account, they had had three separate private rentals at the property. The applicants accept that they had not complied with the scheme. The respondents said, and the Tribunal agrees that it is wholly unrealistic to suggest that the appropriate action in the circumstances would have been for the respondent to issue an 'information update' instead of escalation to a financial penalty as contended for by the Applicants. The policy of the respondent was to proceed on information about an unlicensed

property to issue a notice. This is what they did and they cannot be criticised for complying with their own policy and agreed procedures

19. In that regard the applicants went to great lengths to try to demonstrate that the Local Authority had failed to comply properly with their legal duties and due process. Nothing the applicants said in this regard persuaded the Tribunal that this was so. Indeed, the applicant spent a long time analysing central government recommendations. But it was the respondent's policy and penalty matrix that gave rise to this financial penalty and this Tribunal was satisfied that the local authority had complied with its own policy.

20. Finally, the Tribunal considered the level of the penalty. The applicant says the level of the penalty is excessive as they tried at all times to co-operate with the respondent. The respondent says it has a policy and a fee matrix that dictates how and why a financial penalty might be imposed and at what level. As has been noted previously as the respondent has an enforcement policy in place the Tribunal must take that as its starting point and implement that policy, (see *Marshall v Waltham Forest London Borough Council* [2020] UKUT 35 (LC) at §52 and §74.).

21. As for the calculation of the penalty, within the respondent's Notice of Intent dated 25 October 2021, it was indicated that the culpability of the offence had been assessed as low, but the severity had been assessed as moderate. These various factors, culpability/harm and severity are from the penalty matrix and formed the core for the structure of the fee level. Additionally, the rental income generated for a one-bedroom property such as this one was assessed in the region of £1,450, and the applicants were also informed of the possible discount of 20% applicable on the basis of an expression of a willingness to settle. Notwithstanding the assertion by the applicants that the penalty was unjust, unfair and excessive as set out in the Grounds of Appeal, it was apparent to the Tribunal that the starting point for the financial penalty of £7,500 was appropriate for a low culpability but medium level harm case.

22. The respondent's "Guide to Applying the Civil Penalty Fee Matrix" provides that:

> "*Failure to licence a property under a Selective Licensing Scheme will usually be regarded as a moderate matter and therefore meriting a Band 2 penalty of £7,500 CPN charge average as a starting point (see Table 1) unless there are mitigating factors to reduce or aggravating factors to increase the proposed CPN charge.....*"

23. Accordingly, the respondents have simply followed their matrix, their policy as to the level of the penalty imposed in this case. It is clear that within the Final Notice dated 15 December 2021, and as set out above, the respondent offered the applicants a 40% discount, reducing the final amount to £4,500 provided it was paid within 28 days of the Final Notice but this was not accepted by the applicants who chose to advance this appeal instead as they had the right to do. In any event, the respondent took into account the applicants' representations/mitigating factors set out in their letter dated 29 October 2021 when making the decision to offer a discount. In this context the Tribunal noted that the Respondent contended at the time of the hearing that on the basis that the applicants took early action to licence the property, a 20% discount would be appropriate, so that the financial penalty imposed should be reduced to £6,000.

24. Accordingly, we consider that the amount set by the respondent in the sum of £7500 to be a reasonable amount for an offence of this type, since the local authority scored the amount of the financial penalty in accordance with the provisions of the matrix. However, the Tribunal considers that the discount of 20% to £6000 was to be applied as it was apparent that the applicants had responded quickly to licence the property once they became aware of the requirement to do so

25. Consequently, in the light of the above, the appeal by the appellant/applicants against the imposition of the financial penalty levied by the respondent under section 249A and schedule 13A of the Housing Act 2004 is allowed in part to reduce the financial penalty from £7500 down to the discounted level of £6000.

26. Rights of appeal are set out in the annex to this decision and relevant statutory extracts can be found in an appendix below.

Name:	Judge Professor Robert Abbey	**Date:**	17 June 2022

Annex

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).

Appendix

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—

(a)section 30 (failure to comply with improvement notice),

(b)section 72 (licensing of HMOs),

(c)section 95 (licensing of houses under Part 3),

(d)section 139(7) (failure to comply with overcrowding notice), or

(e)section 234 (management regulations in respect of HMOs).

(3)Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4)The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5)The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—

(a)the person has been convicted of the offence in respect of that conduct, or

(b)criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6)Schedule 13A deals with—

(a)the procedure for imposing financial penalties,

(b)appeals against financial penalties,

(c)enforcement of financial penalties, and

(d)guidance in respect of financial penalties.

(7)The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8)The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

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

Schedule 13A

Notice of intent

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

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

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

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

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

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

3The notice of intent must set out—

(a)the amount of the proposed financial penalty,

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

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

Right to make representations

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

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

Final notice

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

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

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

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

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

8The final notice must set out—

(a)the amount of the financial penalty,

(b)the reasons for imposing the penalty,

(c)information about how to pay the penalty,

(d)the period for payment of the penalty,

(e)information about rights of appeal, and

(f)the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

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

(a)withdraw a notice of intent or final notice, or

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

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

Appeals

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

(a)the decision to impose the penalty, or

(b)the amount of the penalty.

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

(3)An appeal under this paragraph—

(a)is to be a re-hearing of the local housing authority's decision, but

(b)may be determined having regard to matters of which the authority was unaware.

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

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

Recovery of financial penalty

11(1)This paragraph applies if a person fails to pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.

(2)The local housing authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3)In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a)signed by the chief finance officer of the local housing authority which imposed the penalty, and

(b)states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

(4)A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

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

Guidance

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