FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CH/HNA/2020/0072 and MAN/00CH/HNA/2020/0073 FVP**
Property	:	**9 Westminster Street Gateshead, NE8 4QE**
First Applicant	:	**Andrew Craig Property Management LLP**
Second Applicant	:	**Mr Ian Craig**
Respondent	:	**Gateshead Council**
Type of Application	:	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal Members	:	**Judge W.L. Brown, Mr I R Harris MBE FRICS, Mr J Fraser MRICS.**
Date of Decision	:	**22 June 2022**

DECISION

DECISION The appeal is successful and the Tribunal varies the Penalty Charge imposed on the First Applicant to £2,885.13 and on the Second Applicant to £4,520.72 .

Hearing

Hearings took place on 17 September and 1 November 2021. These were remote hearings by video which was not objected to by the parties. The Applicants attended, represented by Mr M Brien, Counsel. Their witnesses were Ms D Brown, Manager of the First Applicant and Ms S Craig, employee then partner of the First Applicant. The Respondent was represented by Mr R Currie, Solicitor and its witnesses were Ms R Crosby, Senior Environmental Health Officer, Ms A Tankerville (Assistant Manager) and Ms C Cole, Technical Officer.

Ms R Burns, Legal Officer, attended as an observer. With the consent of the parties, the form of the hearings was by video using the Tribunal video platform.

A face to face hearing was not held because it was not practicable and all relevant issues could be determined in a remote hearing. The documents that we were referred to are in bundles from each party, the contents of which we have recorded. (The parties were content with the process).

The Tribunal subsequently completed its deliberations.

Introduction

1. The Applicants made application (the "Application") dated 30 November 2020 to the Tribunal appealing financial penalty imposed by the Respondent in the sum of £3,418.27 on the First Applicant and £5,564.28 on the Second Applicant (the "Penalties") made under section 249A of the Housing Act 2004 (the "Act"), set out in Final Notices served 2 November 2020. The Second Applicant is sole owner of the Property, the First Applicant is his managing agent.

2. The Housing and Planning Act 2016 introduced Civil Penalties as an alternative to prosecution for certain offences under the Act. The maximum penalty is £30,000. Local housing authorities are expected to develop their own policy on when to prosecute and when to issue a civil penalty and should decide which option it wishes to pursue on a case-by-case basis in line with that policy. The amount of the penalty is to be determined by the local housing authority in each case, which determination is subject to the right of appeal to the Tribunal.

3. The procedures for imposing financial penalties and appeals against them are set out in Schedule 13A of the Act. The appeal is by way of a re-hearing of the Respondent's decision, as the relevant local housing authority, to impose the penalty. Statutory guidance under section 23(10) and Schedules 1 and 9 of the

Housing and Planning Act 2016 was issued in April 2018 by Ministry of Housing, Communities and Local Government (the "Guidance"). Local housing authorities must have regard to this guidance in the exercise of their functions in respect of civil penalties. The Guidance provides that in determining an appropriate level of penalty, local housing authorities should have regard to the Guidance at paragraph 3.5 which sets out the factors to take into account when deciding on the appropriate level of penalty. Only one penalty can be imposed in respect of the same offence. The actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the landlord's previous record of offending. While the Tribunal is not bound by it, it will have regard to the MHCLG Guidance.

4. Initial directions were made by the Tribunal on 21 April 2021.

5. The Tribunal found from the evidence in the papers that the Property is one of a pair of Tyneside flats.

Facts and Law

6. The Applicants' Grounds of Appeal were drafted by Counsel, their Response document by Solicitors, and they were represented by Counsel at the hearings. The Applicant has an in-house legal team, which acted on its behalf. The parties' cases were clearly identified in their documents and various witness statements. The Tribunal also received oral submissions from the parties. In consequence it is not intended to record here all of the parties' arguments, but only persuasive evidence found by the Tribunal relevant to its determinations where there were matters of substance not agreed by the parties.

7. The Tribunal found no dispute about the chronology of events (although not regarding all related facts) leading up to the issuing of Notices of Intention to issue Financial Penalty Charges under s249A of the Housing Act 200. The Property was occupied by a tenant, Mr Joe Solomons, from 31 March 2019 under an assured shorthold tenancy and continuing during the period to which this appeal relates. The Property fell within the scope of Section 79(2)(1) and (b)(i) of Act to which Part 3 licensing powers applied and an application for a licence was required under Section 85(1). The Property is situated within the boundaries of the licensing scheme, running from 30 April 2018 and applicable throughout the period to which this appeal relates. The basis for the issuing of the Penalties was the alleged offences by the Applicants under Section 95 of the Act in having control or managing a property which is required to be licensed. The Applicants did not deny that the Property was affected by the selective licensing regime, nor that the requisite licence for the period at issue was not in place.

8. The Respondent determined to impose on the Applicants a financial penalty under Section 249A of the Act which states:

"*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*."

The "relevant housing offence" alleged is that under Section 95 (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.*"

9. Further, Section 95 (1) provides that it is an offence to have control or manage a property requiring the appropriate licence.

Sub-section (3) states "*In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—*
.....
(b) an application for a licence had been duly made in respect of the house under section 87,

and that notification or application was still effective…"

10. The Tribunal understands that in accordance with the decision of the Upper Tribunal in London Borough of Waltham Forest v Allan Marshall [2020] UKUT 0035 (LC) UTLC the Tribunal is carrying out a rehearing not a review, but is starting from the decision-maker's policy (i.e. that of the local authority) and has to pay proper attention to the Respondent's decision and the reasoning behind it.

Evidence, submissions and determinations

11. The Tribunal received documentary and oral evidence on all aspects of the appeal, including the basis of the calculation of the penalty and submissions on its quantum. The Applicants first raised a fundamental objection to the Penalties on the basis that section 249A was not satisfied because application for a licence had been made (a defence under section 95(3)(b) and as such there was a reasonable excuse defence under section 95(4)(b)).

12. Ms Brown's evidence was that on 27 March 2019, before there was occupation of the Property by the tenant, application was made. No copy of the application had been retained, but the First Applicant's post book recorded correspondence sent that day to the Respondent. It was noted that on 30 April 2018 Application for the same type of licence as that at issue had been made by the Second Applicant for 3 other properties on the same street and were granted. No application was needed for the Property then as it was unoccupied at that time and works on it were being undertaken.

13. Ms Brown's evidence was that only parts of the application form (sections 5 – 7) had been sent on 27 March 2019, however; because of a regular relationship with the Respondent it would not be unusual to do so and it was expected that if the Respondent had any queries (and to request the relevant fee) it would contact the First Applicant.

14. The Respondent had no record of receipt of such correspondence.

15. On a balance of probabilities the Tribunal found that the post book entry carried little weight, as it offered no description of the content of the envelope.

However, pertinent to this point is that the Tribunal found that no application had in any event been duly made, as required. We found Ms Brown credible about the documents she said she had submitted and we found that they were deficient as to content, being partial and without the relevant fee. We determined that no application could be found to have been made on or about 27 March 2019. She also advised that the First Applicant had no procedure in place to chase up response to applications such as the one at issue – and the evidence of the Respondent that previous applications for the 3 other properties on Westminster Street had been processed within its 12 week estimate was not used as a trigger for the First Applicant to enquire about the application it alleged to have made for the Property. While there may have been previous informal contacts about applications, where the Respondent has rung Ms Brown about queries, given the potential criminal offence outcome for not being licensed the Tribunal found that the level of diligence ought to have been greater than mere assumption that the alleged application for the Property had been received and that there was no need to check up on it. The First Applicant also accepted that on 6 June 2019 it had informed the Council Tax department of the Respondent about the occupier, but had not gone on to contact the licensing department. We determined that no defence for either Applicant was made out based upon submission of an application and given our findings nor was there a reasonable excuse defence arising on the facts, because simply posting an application (albeit a defective one) was found not to be taking all reasonable steps to avoid the commission of an offence.

16. As to the Second Applicant, the First Applicant accepted that it had no record of any instruction from him to submit an appropriate application. Mr Ian Craig accepted that he did not enquire about a licence being in place. He understood that he would pay the fee for an application, but had received no request to do so at the relevant time. The law on this matter does not provide an excuse for simply delegating responsibility for property management to an agent. He was an experienced landlord, used to holding licences, as borne out by the other properties let out by him on Westminster Street by him. Despite describing himself as a landlord who took his responsibilities seriously, he had in place no system to check a licence was in place for the Property. He stated that he believed from a conversation with Ms Brown in March 2019 that the application had been made, but the absence of request for payment from him, which had been the process for previous applications, was one reason why he should have thought to enquire. We found he had no defence based on reasonable excuse. We found both Applicants had failed to take reasonable care to ensure compliance with the licensing scheme affecting the Property.

17. In consequence of our findings we determined that the Respondent could be satisfied beyond reasonable doubt that the conduct of both Applicants amounted to an offence under section 95. Prima facie there is the commission of a relevant housing offence because the Property was subject to compulsory selective licensing and was rented out in the absence of an appropriate licence. The Tribunal was satisfied with the Respondent's evidence that the First Applicant was a person managing or having control of the Property and that the Second Applicant also had control of it. The Respondent would be justified in imposing a sanction. The Respondent's decision to issue a penalty charge

rather than prosecuting is to the benefit of the Applicants in avoiding a conviction.

18. It was common between the parties that the Respondent informed both Applicants on 6 November 2019 that the Property was unlicensed; an application for a licence was duly made and subsequently granted on 16 March 2020.

19. On the question of the penalties, the Respondent set out its process at length in its Statement of Case (paragraph 176 onwards). The Tribunal does not intend to recite that method because the Applicants did not argue that it was an inappropriate process. The question for the Tribunal posed by the Applicants was whether the category of culpability had been attributed by the Respondent at the appropriate level – "negligent", rather than "low". The Applicants argued the incident was a one-off and was simply a failure to follow up on the application believed to have been submitted, the existence of the tenant had not been concealed and the subsequent application for a licence had been successful.

20. The Tribunal found that the period recorded by the Respondent in which the offence was occurring (31 weeks between 30 March 2019 and 6 November 2019) was based on accurate facts. From previous experience of licensing of properties in Westminster Street, owned by the Second Applicant and managed by the First Applicant, the Applicants both were familiar with their obligations. There had been engagement with the Respondent about the refurbishment works of the Property. The Second Applicant had operated tenanted properties for more than 30 years, the First Applicant was a long-standing agent of repute, collecting the rent on the Property, deducting its fee and paying the remainder to Mr Ian Craig. We noted that on the Respondent's table of culpability, "low" means "little or no fault of landlord". We accept that the error in this case may be described as an oversight, but it was the Respondent which identified the absence of the licence, without which the period of offence could have been longer. The evidence also demonstrated that Ms Brown alone had responsibility for the licensing applications for the Second Respondent, with no apparent fall-back or overseer in place at the First Applicant, which a prudent managing agent would have, bearing in mind the potential criminal consequence for omission to comply with licensing responsibilities. We found that the First Applicant failed to take reasonable care and therefore we found that the category of culpability should be "negligent" regarding each penalty. Harm and severity of the offence was agreed by the parties at "low". Therefore the starting point for the penalty for the First Applicant is £3,000.

21. As part of the calculation process, the Respondent had to take account of mitigating and aggravating factors (again described in detail in the Respondent's Statement of Case). Following issue of its prescribed Notice of Intention to charge a penalty the Respondent received detailed representations from the Applicants' Solicitors. In addition to matters presented directly as evidence in the proceedings these also were taken into account by the Tribunal when considering issues relevant to the penalty, broadly described as conduct matters.

22. Regarding the First Applicant, this was this first occasion on which it had been subject to enforcement action of this nature. We agreed with the Respondent's formula that this results in a reduction of 5 "points" from the starting point (for mitigation. Those points convert to £166.67 using the Respondent's process).

23. We found a further mitigating point (as did the Respondent) from the acceptance by the First Applicant that no licence was in place, when informed by the Respondent, and taking prompt action to ensure an application was submitted (later granted) – a further 5 "points" (£166.67) of credit.

24. Further we had no doubt that remorse had been expressed by the First Respondent, Ms Brown's expressions were of horror that her oversight may have lead to the current situation were found by us to be genuine and not exaggerated. While challenging the basis of the penalty we found that the First Respondent had done so in a proportionate way, given its perspective of the facts and acknowledged the contrary position of the Respondent, thereby permitting the Tribunal to find that a further 5 points (£166.67) of mitigation within the Respondent's list within its procedure, for expressing genuine remorse for committing the offence.

23. As to aggravating factors, regarding the First Applicant the Respondent took account of it having appeared on its "Priority Landlord List" in February 2017. The Tribunal disagreed that this was relevant in the circumstances for the penalty calculation. We found that the agent had not been made aware of it going onto such a list (based upon complaints from tenants, which were demonstrated to be based upon inaccurate information supplied by the tenants), had no opportunity to make representations about its inclusion, nor given information about potential relevance. Inclusion is not referred to in the Respondent's policy or guidance as being a reason which may lead to a finding of an aggravating factor. We determined that no sum should be added for this matter.

24. However, we found from the unchallenged evidence of the Respondent that the First Applicant had been connected as managing agent to two breaches of licensing conditions in January 2018 regarding separate properties in Axwell Terrace. We agreed with the Respondent that this was an aggravating factor for which 5 "points" (equivalent to £100.00 using the Respondent's process) should be attributed.

25. The Applicants alleged that the Respondent incorrectly applied the Secretary of State's Guidance directing that any financial benefit the offender may have obtained as a result of committing the offence should be removed.

26. The principal benefit to the First Respondent was its commission earned for managing the Property during the 31 weeks when it was occupied unlicensed. The management contract relevant to the Property provided in evidence between the Applicants showed commission as 5% plus VAT. During the PACE interview in this case undertaken by the Respondent with Ms Brown for the First Applicant it was indicated the percentage had been amended to 10% (of

rent). In oral evidence Ms Craig stated that the percentage was 5% and we found that sum was more likely than not to be accurate, not the higher amount. The calculation of fee income was £134.14, receipt of which was not denied by the First Applicant. The Tribunal found no persuasive reason not to adjust this as being relevant benefit which the Guidance aimed to address; we therefore added it to the calculation.

27. Recovery of the Respondent's fixed costs in connection with the penalty process of £150 was found by the Tribunal to be reasonable, both as to payability, arising from the offence and as to amount, being reasonable.

28. Therefore, we determined that the financial penalty against the First Applicant should be £2,884.13, comprising:

Starting point	£3,000.00
less mitigating factors	£400.01
add aggravating factor	£100.00
add income benefit	£134.14
add cost	£150.00
Total	£2,885.13

29. As to the Second Applicant, we found as set out in paragraph 20, but we took account of this being an isolated incident of breach of licensing rules. His evidence, which was not opposed, was that he is engaged principally in other business activities to the letting of residential properties. While delegation of responsibility to his managing agent is not of itself a defence, we found little fault on the part of the Second Applicant, despite him failing to exercise reasonable care. The agency relationship with the First Respondent has been long-standing and there was no evidence presented of poor past performance such as to alert him of the need to be on extra guard for errors. He had been told by Ms Brown that application had been made in March 2019 and he simply did not realise he had not been asked for the fee shortly thereafter. We found contrary to the Respondent that his culpability was "low", meaning a starting point for the penalty of £2,000. Harm and severity of the offence was agreed by the parties at "low".

30. The effect is to change the amounts attributable to "points" for mitigating and aggravating factors (£125 for the former, £75 for each of the latter).

31. As to mitigation, this was the first offence for the Second Applicant, who also accepted his omission and took steps (through his agent) to ensure the appropriate application was eventually made and granted. Therefore we credit £250 for two mitigating factors. We found no other mitigating factors applicable.

32. One aggravating factor was identified to us – failure to provide responses to requests for information sent by the Respondent direct to the Second Respondent regarding licensing conditions referable to 5,7,9 and 11 Westminster Street effective during a previous licensing period, between 2016 and 2017. The information requested concerned safety matters such as gas and

electrical inspections. The point presented was not denied and the Tribunal found in line with the Respondent that this amounted to one aggravating factor.

33. The evidence of rent income was £86.44 per week, net of management fee of 5%, was £82.12 per week, received for 31 weeks. We found no persuasive evidence presented to us to suggest a basis for not attributing that entire amount (£2,545.72) as benefit which should not be allowed to accrue to the Second Applicant. We also added the Respondent's cost, for the reasons set out above.

33. Therefore, we determined that the financial penalty against the Second Applicant should be £4,520.72, comprising:

Starting point	£2,000.00
less mitigating factors	£250.00
add aggravating factor	£75.00
add income benefit	£2,545.72
add cost	£150.00
Total	£4,520.72

34. We record that in line with the Respondent we did not feel that the financial status of either Applicant were relevant circumstances which ought to cause adjustments in the calculations.

35. On the question of penalties being imposed on both Applicants, we took account of the Statutory Guidance – 'Civil Penalties under the Housing and Planning Act 2016' at paras 2.5 and 2.6, contemplating civil penalties on both the landlord and agent as an alternative to prosecution and in respect of the same offence.

36. The parties were permitted to make written submissions after the hearings on the effect of the case of Sutton v Norwich City Council [2021] EWCA Civ 20, raised by Counsel for the Applicants. It was presented as authority for the proposition that the Tribunal ought to take into account the totality of the penalties ie – that we should add the penalties of each Applicant together to decide whether the total penalty is proportionate, and also that the Tribunal ought to avoid 'double punishment' - because of the close relationship between the Applicants. Our view of the implication of the case is in line with that of the Respondent; it reinforces the Waltham Forest case (see paragraph 10). Sutton concerns penalties on directors and their company and a risk of double punishment. The Tribunal reviewed the Respondent's policy on financial penalties and gave considerable weight to the Respondent's decision, taking account of the Applicants' cases on why we should conclude differently on the amount of the penalty – as we have done. In addition, Mr Ian Criag is not an officer of the First Applicant and nor were we presented with any evidence of mutual financial relationship, other than through the business operation of letting and managing let properties they conduct as separate parties. Therefore we concluded that the Sutton case had no material bearing such as to alter the outcomes we have set out above.

37. We record that as required by the Guidance and the Respondent's own procedure we looked overall at the level of each penalty. We were satisfied that no exercise of discretion was appropriate so as to change the above determinations.

38. The Tribunal therefore has varied the penalties as set out in paragraphs 28 and 33.

L Brown.
Tribunal Judge
22 June 2022