UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

HOUSING – CIVIL PENALTY – selective licencing – local housing authority's policy always to try to resolve issues informally before resorting to enforcement action – property managed by agent on behalf of landlord resident abroad – landlord unaware of need for licensing – whether policy applied – whether penalty consistent with policy – ss.95, 249A, Housing Act 2004 – appeal allowed

AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MS IRENE CHINAGOLUM EKWEOZOH

Appellant

-and-

LONDON BOROUGH OF REDBRIDGE

Respondent

Re: 153 City View,
Centreway Apartments,
Ilford

Martin Rodger QC, Deputy Chamber President

Hearing conducted by remote digital platform

13 July 2021

The appellant in person
Dean Underwood, instructed by the Borough Solicitor, London Borough of Redbridge for the respondent

The following cases are referred to in this decision:

Sutton v Norwich City Council [2021] EWCA Civ 20; [2021] 1WLR 1691

London Borough of Waltham Forest v Marshall [2020] UKUT 35 (LC)

Introduction

1. This appeal is brought by a landlord, Ms Irene Ekweozoh, against a decision of the First-tier Tribunal (Property Chamber) (the FTT) given on 26 October 2020, on her appeal against a financial penalty imposed on her by the respondent, the London Borough of Redbridge, in respect of the letting without a licence of a flat in Ilford contrary to section 95, Housing Act 2004. The FTT dismissed the appeal and confirmed the financial penalty of £2,500.

2. The appellant was granted permission to appeal on two grounds. The first concerns the suggested failure of the FTT and of the respondent to follow the respondent's own enforcement policy which required informal action to resolve non-compliance with licensing requirements before resort could be had to formal enforcement action including the imposition of a financial penalty. The second ground of appeal challenges the FTT's acceptance of the amount of the penalty as having failed properly to apply the financial penalty matrix adopted by the respondent in its enforcement policy document.

3. The appellant lives in Canada, and the hearing of the appeal took place using the CVP digital platform. She had instructed solicitors to appear on her behalf before the FTT but she acted without legal representation in the appeal. At the time of the appeal she was receiving hospital treatment and presented her appeal from her hospital room. The respondent was represented by Mr Dean Underwood.

The FTT's jurisdiction and the approach of the Tribunal on an appeal

4. Although not raised as a separate ground of appeal (the appellant acts without legal representation in the appeal) it is necessary to refer at the outset to the basis on which appeals to the FTT against local authority decisions to impose financial penalties are required to be conducted under section 249(A), 2004 Act. Paragraph 10(1) of Schedule 13A, 2004 Act provides a right of appeal to the FTT against the decision to impose a financial penalty, or against the amount of the penalty. Paragraph 10(3) stipulates that such an appeal is to take the form of a re-hearing of the local housing authority's decision, but it may be determined having regard to matters of which the authority was unaware. It is therefore not the task of the FTT in these appeals to consider whether the authority's decision was justified or reasonable; the FTT is instead required to decide for itself whether a financial penalty should be imposed at all and, if so, how much the penalty should be.

5. It is often a sensible precaution near the start of its decision for any court or tribunal to inform the parties, and to remind itself, of the basis of its jurisdiction. In this case the FTT did not refer to paragraph 10 of Schedule 13A or explain on what basis it was determining the appeal. Its decision contains several indications that it may have approached its task as if it was required to review the respondent's decision, rather than to remake the decision and reach its own conclusions on the critical issues. The FTT's general approach will be of some significance in relation to the main ground of appeal but as the appellant did not rely on it as a free-standing point there is no need for me to consider it in detail.

6. The role of this Tribunal on an appeal against the amount of a financial penalty imposed by the FTT is limited. As Newey LJ has recently explained in *Sutton v Norwich City Council* [2021] EWCA Civ 20 at [31]:

> "A Tribunal's decision as to what civil penalty it should impose for either a breach of the 2007 Regulations or failure to comply with an improvement notice involves, as I see it, both evaluation and discretion. An appellate tribunal is not, accordingly, entitled to overturn a penalty just because it thinks it would have imposed a different one. To interfere, the Court/Tribunal must conclude that the decision under appeal was an unreasonable one or is wrong because of "an identifiable flaw in the Judge's reasoning such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"."

The facts

7. The appellant bought her flat at City View in 2005 and she lived there for the next two years before moving to Canada to study for a doctorate. While in Canada she let the flat to a single tenant from 2007-2018. During that period the property was managed on her behalf by a managing agent, and from 2007 until 2018 it was let to the same tenant. In 2018 the appellant instructed agents to sell the flat after she became ill and fell behind with her mortgage payments. Although it was not mentioned by the FTT, the appellant's explanation for her mortgage arrears was that her tenant had left some time in 2017 without giving notice.

8. The estate agents instructed to sell the flat were Foxtons, who suggested to the appellant that it should be let to short-term occupiers seeking holiday accommodation while they sought a buyer. The flat was occupied on that basis during May and June 2018, but it then became vacant. The appellant eventually became dissatisfied with Foxtons' performance and appointed a new agent, RNZ, who arranged a letting of the flat for a term of 12 months from 1 August 2018.

9. On 13 July 2017 the part of Ilford in which the appellant's flat is located became the subject of a selective licensing scheme introduced by the respondent under Part 3 of the 2004 Act. The appellant was in Canada when the licensing scheme was introduced and neither of her agents told her that a licence was now required lawfully to continue the original letting or for the new letting from 1 August 2018 (RNZ later told her that they had not been aware of the requirement). In the subsequent financial penalty proceedings both the respondent and the FTT accepted the appellant's evidence that she had not known that a licence was required.

10. In June 2018 the respondent became aware (it is not clear how) that the flat had been let and wrote to the appellant on 6 June pointing out that a licence was required and that an application should be made within 14 days. The respondent's letter was sent to the flat itself, which was the address given for the appellant on the registered title at the Land Registry, and to the address it had on record for her for the purpose of Council Tax. Neither of those was a current address for the appellant, who remained in Canada, and the FTT accepted that the respondent's letter did not reach her. It also found that when she left the UK in 2007 the

appellant had not given "formal written notice of change of address to the usual agencies or otherwise made reliable arrangements for the forwarding of mail".

11. On 10 July 2018 and again on 25 October 2018 one of the respondent's housing officers visited the property and left calling cards asking the occupier to contact her. One of these cards eventually reached the appellant's agent and on 6 November he made contact with the housing officer by email. The officer and the appellant's agent spoke on the telephone the next day and on being told that the property was indeed let the officer advised that a licence was required.

12. The housing officer inspected the flat on 14 November 2018 and noted that it was well maintained and equipped with smoke detectors. The appellant's agent, who was in attendance, confirmed that he was responsible for collecting the rent and managing the property and that the landlord was based in Canada although she was currently in Nigeria. He said that he was awaiting mortgage information before completing the selective licensing application.

13. A licensing application was submitted by the appellant's agent on 27 November 2018, three weeks after the first contact between the agent and the housing officer.

14. Almost six months later, on 1 May 2019, the respondent served a notice on the appellant of its intention to issue a financial penalty of £2,500 in respect of the offence, contrary to section 95, 2004 Act, of having control of or managing a house which is required to be licensed but is not so licensed. The date of the offence was stated to be 14 November 2018.

15. The penalty of £2,500 was arrived at by applying the respondent's financial penalty matrix which is divided into six categories in each of which the available scores are 1, 5, 10, 15 or 20. That assessment was made by a panel of three housing officers and recorded in a document headed "enforcement panel decision on level of financial penalty". In three categories the appellant's offence was given a score of 1 by the panel. In the category "punishment" it was given a score of 5 on the basis that this was a "minor offence" and that no previous warnings or civil penalties had been issued against the appellant. In the category dealing with deterrence it was given a score of 10 reflecting the panel's assessment that a moderate financial penalty would deter repeat offending by the appellant and that some publicity through informal channels would deter others from offending. A score of 10 was also given for "severity of offence" reflecting that the panel judged the offence to be a moderate one. A score of 5 was given in the category "financial benefit" on the grounds that the appellant had obtained "some benefit from operating illegally or sub-standard accommodation".

16. A final notice confirming the penalty was issued on 9 October 2019 after the respondent had considered representations made by the appellant.

17. The respondent also served a notice of intention to impose a financial penalty of £5,000 on the appellant's agent, RNZ. This figure was later reduced by 50% expressly in recognition of the agent undertaking not to appeal against the penalty. The same offer of a reduction of 50% in her penalty in return for an undertaking not to appeal was made to the appellant but

she declined to accept it. The net result of the respondent's consideration was therefore that the same penalty, £2,500, was imposed on the appellant and on her agent.

The FTT's decision

18. The FTT began its decision by recording the basis of the appellant's case. After referring to her representations in response to the notice of intent and to her rejection of the respondent's offer to reduce the penalty by half, it went on:

> "This offer was rejected by the Applicant, who argued (as she has before the Tribunal) that she had committed no more than a technical infringement, that no financial penalty at all should have been imposed, and that the appropriate penalty would have been to issue a warning."

19. In paragraph 20 the FTT also referred to the fact that the appellant's solicitor had relied upon a decision of a different FTT panel in another financial penalty appeal, *Tizero v The London Borough of Redbridge*, in which a financial penalty had been set aside because the respondent had departed from its own internal policy. The FTT went on:

> "In that case, the penalty was set aside because the Respondent had departed from its own internal policy, approved in Cabinet, which provided that one of the informal actions which might be taken to secure compliance with the legislation might be in the form of the issuing of a hazard awareness notice. [The appellant's solicitor] argued that the Respondent had not served such a notice in this case, had likewise departed from internal policy, and that accordingly the penalty should be set aside. This point seems to the Tribunal to be completely misconceived. There was no issue of any non-compliant hazard in this case, and the point is rejected."

20. The FTT's own analysis started by addressing the appellant's criticism of the scores given to the offence by the respondent. It recorded the explanation for the scores given by its housing officer, Ms Chisokwa (see paragraph 16 above) and then concluded:

> "The Tribunal does not consider that the respondent can be criticised in these scorings. Of course there is always some degree of subjectivity in these allocations, but it seems to the Tribunal that Ms Chisokwa (whom the Tribunal found an impressive witness) was genuinely seeking to do justice according to the guidelines, and that her allocations were rational and reasonable."

21. The FTT then addressed points made by the appellant's solicitor. It accepted that the appellant was not aware of the system of selective licensing but said that that was not a defence but a mitigating factor. It considered that the respondent could not be criticised for the attempts it had made to alert the appellant to the fact that she was committing an offence before serving the notice of intent. It referred to the letter sent to two addresses on 6 June 2018 and to the visits made to the property on 10 July and 25 October 2018. It concluded:

> "The Tribunal does not think that the respondent can be criticised for its attempts in this regard to contact the applicant. The applicant was not able to demonstrate that upon leaving the UK she had given formal written notice of change of address to the usual agencies, or otherwise made reliable arrangements for the forwarding of mails. The respondent used the last known address for written communication, which the Tribunal considers reasonable."

22. The FTT ended by describing this as "an unfortunate case in some respects because there seems no doubt that the applicant was at the relevant time in ill-health, not a professional landlord and was let down by her agents." Nevertheless, it was "satisfied that the respondent properly applied the considerations contained in its matrix, reaching reasonable conclusions" and therefore it dismissed the appeal.

The appeal

23. The appellant's first ground of appeal was that the FTT should have set aside the financial penalty because the respondent had failed to follow its own internal policy which required informal action to resolve non-compliance with licensing requirements before imposing a financial penalty.

24. The basis of this ground of appeal is the respondent's own private sector housing enforcement policy. Three paragraphs of the policy are relied on by the appellant. In paragraph 2.1 the "scope and purpose of the policy" are said to be to set out what owners, landlords and others being regulated can expect from the respondent's enforcement officers. It goes on:

> "We recognise that in most cases landlords want to comply with the law. We will, therefore, take care to help landlords and others to meet their legal obligations without unnecessary expense, while taking firm action, including prosecution and civil penalties where appropriate, against those who disregard their obligations under the law or act irresponsibly."

25. Paragraph 4.2 explains that the respondent's policy is that:

> "Officers will always try and resolve the issues informally in the first instance. In deciding what course of action to take the following will be taken into consideration:
>
> - Whether the act or omission is serious enough to warrant formal action
> - Whether past history with the local authority indicates that informal action can be expected to achieve full compliance
> - Whether officers' confidence in the premises management is high
> - Whether the consequences of non-compliance will pose a significant risk to the occupants or the public as a whole.

> Informal action to secure compliance with legislation may be given in the form of:
>
> - Verbal advice/warnings
> - Written requests for action or advice
> - Issuing a Hazard Awareness Notice"

26. Paragraph 4.3 deals with formal action and begins:

> "Should the informal approach fail to prompt action by the owner, then the next stage will be statutory action."

27. In *London Borough of Waltham Forest v Marshall* [2020] UKUT 35 (LC) (in a passage approved by the Court of Appeal in *Sutton*) the Tribunal explained the respect which should be afforded to a local housing authority's enforcement policy by an appellate court or tribunal:

> "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."

In considering the weight which a court or tribunal should attach to a local housing authority's decision when hearing an appeal against a financial penalty, the Tribunal said:

> "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.

28. *Marshall* was a case in which a local housing authority had applied its policy, and the landlord on whom a penalty had been imposed argued that it should not have done. In this case the appellant contended that it was the respondent, and the FTT, which had failed to comply with the policy. She had taken immediate action to apply for a licence as soon as she had been informed about the licensing obligation and had returned a completed selective licensing application to her agent on the same day as it had been sent to her. This was not a case in which she had failed to engage with the respondent. Moreover, the flat had been found to be in good condition and no prejudice had been identified to her tenants. The application of paragraph 4.2 of the policy ought therefore to have resulted in an informal resolution of the case.

29. Mr Underwood suggested that this ground of appeal was not open to the appellant because she had never invited the FTT to consider it. That submission does not seem to me to be in accordance with the record of proceedings provided by the FTT's decision. The FTT recorded that the appellant's case was that no financial penalty at all should have been imposed on her and that the appropriate response should have been to issue a warning (see paragraph 19 above). It also referred to her solicitor's reliance on the case of *Tizero* in which

a different FTT panel had set aside a financial penalty because the respondent had departed from its own policy. It was clearly the appellant's case before the FTT that the appropriate response to the offence (which she did not deny) should have been a warning or other informal action.

30. Mr Underwood also argued that the ground of appeal was in any event without merit. The respondent had taken informal action by sending the letter of 6 June 2018 to the known addresses for the appellant, by visiting the property in July and October and by writing to the occupiers on 31 October. Mr Underwood suggested that, as the FTT had held, the fact that none of these steps had appraised the appellant of the need to license the property was not an outcome for which the respondent could be criticised. It was the appellant's fault that she had not provided the respondent with an address when she moved to Canada in 2007 and had made no reliable arrangements for the forwarding of her post.

31. Mr Underwood's submissions on this aspect of the appeal seem to me to miss the point. They also highlight the underlying difficulty with the FTT's approach. Whether the respondent had acted reasonably in the steps it took to engage the appellant and the reason why those steps were not initially successful did not go to the substance of the issue. It was for the FTT to consider whether the appropriate response to the facts which it had before it was a warning or a penalty. It needed to make that decision for itself and not simply to consider whether the respondent's decision was a reasonable one. A material consideration in making that decision was the respondent's enforcement policy and it was therefore necessary for the FTT to have regard to the policy and to consider how it should be applied in the circumstances of this case or whether there were good reasons to depart from it.

32. The fundamental objection to the FTT's treatment of the policy issue is that it did not address its mind clearly to the question whether a penalty should be imposed at all. It recorded in paragraph 6 of its decision that the appellant's case was "that no financial penalty at all should have been imposed, and that the appropriate penalty would have been to issue a warning" but it began its own analysis at the next stage, by considering the amount of the penalty. The decision then concentrated entirely on the scores attributed to the offence by the respondent's enforcement panel.

33. The enforcement panel's decision assessed each of the six categories of the respondent's financial penalty matrix. The *pro forma* document in which the decision is recorded is headed "enforcement panel decision on level of financial penalty" and it does not require the panel to consider whether the appropriate response is to deal with the offence by informal advice. Nor did the decision document include an option for the panel to impose no penalty at all. The lowest available penalty band appears to be £250, but if, as Mr Underwood submitted, the minimum score which may be attributed to each of the categories is 1, (so that a score of zero is not allowed), the minimum aggregate score would be 6 which would result in a penalty of £500. Mr Underwood acknowledged that the decision to impose a penalty, as opposed to the decision on the level of penalty, was not recorded in the document in evidence before the FTT and must have preceded it (the housing officer's witness statement also suggests that they were the subject of two separate decisions). But while the respondent itself may have approached the decision in two stages, the FTT did not, and by focussing exclusively on the panel's decision document and by considering whether it

agreed with the panel's scoring, it overlooked the need to address the appellant's argument that no financial penalty at all should have been imposed.

34. The only passage in the FTT's decision which touches on the appellant's reliance on the respondent's policy is quoted at paragraph 20 above and deals with the case of *Tizero*. The FTT dismissed any reliance on that decision as "completely misconceived" because, it said, *Tizero* was a case about the respondent's omission to consider issuing a hazard awareness notice whereas "there was no issue of any non-compliant hazard in this case". But the FTT appears to have misread the decision relied on by the appellant and missed the point her solicitor was making. The facts of *Tizero* were quite similar to the facts of this case. Contrary to the impression given by the FTT in paragraph 20 of its decision, (suggesting that the *Tizero* offence related to a hazard under Part 1, 2004 Act) it concerned a notice of intent to impose a financial penalty issued in January 2018 and confirmed in February 2019 in respect of the same licensing offence under section 95(1), 2004 Act as the appellant has admitted in this case. The only reference to a hazard awareness notice was in the FTT's quotation from paragraph 4.2 of the respondent's policy which applies to a range of different offences and therefore lists various types of informal action including verbal advice, written requests for action or issuing a hazard awareness notice. The case was not otherwise concerned with a non-compliant hazard, and the FTT's reason in paragraph 20 of its decision for dismissing it as irrelevant was unjustified. Even if *Tizero* had concerned a physical hazard, rather than a licensing offence, the appellant's point that the respondent had not followed its own policy remained to be grappled with.

35. Interestingly the respondent acknowledged to the FTT in *Tizero* that for a period of a "few weeks" in 2019 on instructions from its Head of Consumer Protection and Licensing its officers had consciously and secretly disapplied its own policy of engagement and of trying to resolve issues informally in the first instance. I was told by Mr Underwood that the secret instruction had been rescinded and compliance with the policy had resumed by the time of the decision to issue a notice in this case. Nevertheless, the background explained in *Tizero* might have attracted the FTT's attention rather more than it seems to have done.

36. Having had its attention drawn to *Tizero*, the FTT ought to have addressed its mind to the respondent's policy on informal resolution and to whether it applied in this case. Despite the treatment of *Tizero* in the decision it is clear to me that the FTT did not address the substance of the policy issue. Instead, the FTT began by considering the amount of the penalty, rather than the prior question of whether there should be a penalty at all, and having reached that prior question only at the end of its decision, it dismissed it on grounds which did not examine the policy or consider its application. In doing so the FTT failed to deal with a significant part of the appellant's case; it also omitted to consider a material factor and thus its evaluation of the case and its exercise of its discretion were flawed. For both of those reasons, the FTT's decision to uphold the penalty must be set aside. It is no answer to those omissions for the respondent now to say that the imposition of the penalty was nevertheless appropriate. That was a question for the FTT to address, and it did not do so. For that reason, its decision to uphold the penalty must be set aside.

37. In the circumstances it is not necessary for me to consider the appellant's second ground of appeal.

Re-making the decision

38. Where this Tribunal sets aside a decision of the FTT it is empowered by section 12(2)(b), Tribunals, Courts and Enforcement Act 2007 either to remit the case to the FTT for reconsideration, or to re-make the decision. When it remakes the decision, the Tribunal may make any decision which the FTT could have made and may make such findings of fact as it considers appropriate (section 12(4), 2007 Act).

39. In considering whether a financial penalty is appropriate in this case I first bear in mind the overall purpose of the civil penalty regime. Mr Underwood drew my attention to various statements where this policy was explained, including in Guidance issued in April 2017 by the Department for Communities and Local Government under Schedule 9, Housing and Planning Act 2016 entitled Civil Penalties under the Housing and Planning Act 2016 - Guidance for Local Authorities ("the Guidance"). The foreword to the Guidance encouraged local housing authorities to use their new powers "robustly as a way of clamping down on rogue landlords". The foreword nevertheless appreciated that not all landlords are "rogues":

> "The Government wants to support the good landlords who provide decent well-maintained homes and is keen to strike the right balance on regulation in order to avoid stifling investment in the sector. But a small number of rogue or criminal landlords knowingly let out unsafe or substandard accommodation. We are determined to crack down on these landlords and disrupt their business model".

40. The guidance encourages local authorities to develop and document their own policies and lists the factors which should be taken into account in determining what penalty is appropriate. Those are the factors reflected in the respondent's financial penalty matrix.

41. I also have regard to the respondent's own policy and to the indication in paragraph 4.2 that the first option should be informal action in the form of a verbal or written warning or a request for action, and that moving to the next stage of statutory action is appropriate where "the informal approach fails to prompt action by the owner".

42. In considering whether informal action is appropriate the first matter to which the policy directs attention is whether the act or mission is serious enough to warrant formal action. There is no doubt that a failure to license a house which is required to be licensed is not a technical or minor infringement, as the appellant suggested. I entirely accept the reasons given by the respondent's housing officer for treating the offence in this case as one of moderate seriousness, because unlicensed tenancies cannot be monitored by the respondent as intended by the scheme. But whether in a specific case an offence of moderate seriousness is serious enough to warrant formal action depends on all the circumstances of that offence, including those identified in the remaining bullet points under paragraph 4.2 of the policy.

43. The appellant in this case has no past history with the local authority which indicates that informal action would not be expected to achieve full compliance. The licensing offence was committed between August and November 2018 and ceased on 28 November. Full

compliance had therefore been achieved months before the service of the notice of intention and there is no suggestion that any other problem has since been brought to the respondent's attention. The appellant remains keen to sell her property, but a sale has been delayed by cladding issues.

44. When the respondent's officer inspected the flat on 14 November 2018, they found it to be well maintained and in good condition. A licence was granted without a requirement for any work to be done. The licence was for five years, and it can be inferred that the respondent's housing officers had confidence in the standard of management. The appellant's non-compliance with the licensing requirement did not, therefore, cause a significant risk (or any risk) to the occupants or to the public as a whole. These considerations must also be taken into account when considering the seriousness of the offence in this case.

45. Mr Underwood's answer to the appellant's case was that the respondent had attempted informal action in June and again in October 2018, but without success because the appellant had not provided it with a current postal address. That is undoubtedly the case (although the respondent's Council Tax department was in email communication with the appellant) and I agree with the FTT that the respondent cannot be criticised for the efforts it made to contact the appellant. But unless the appellant's failure to provide a current address is in itself a sufficiently serious default on her part, it does not seem to me that the unsuccessful attempts of the housing officer to contact her are relevant to the assessment of whether it is appropriate at this stage to deal with the offence by way of informal action rather than a financial penalty. The position would be entirely different if the appellant had been aware in June 2018 that the respondent required her to obtain a licence, but the FTT found that she had not been aware either of the selective licensing regime or of the attempts being made to contact her.

46. The appellant had been out of the country for more than 10 years by the time the licensing regime was introduced. For the whole of that period she had entrusted the management of her property to a professional agent. In its submissions to the FTT the respondent suggested that the appellant should have made greater efforts to inform herself of legislative changes, but it also drew attention to the failure of her agent, RNZ, to keep her informed of the need to obtain a licence, quoting a statement on the agent's website that as part of its full management service it would meet legislative requirements.

47. Mr Underwood submitted that under the terms of the management agreement entered into by the appellant with her agent it was the appellant's responsibility to deal with licensing matters. That does not seem to me to be a correct reading of the (very) small print to which Mr Underwood referred. The terms and conditions of the management agreement deal only with HMO licensing, stating that "if a property is classed as an HMO, and an HMO licence from the local authority is required then it is the responsibility of the landlord to ensure that they are correctly licensed." The appellant's flat was not an HMO and the terms and conditions of the agreement say nothing about responsibility for selective licensing. It would be surprising if a "fully managed" letting agency agreement failed to deal with compliance issues and in the absence of any reference to selective licensing, and having carved out HMO licensing, there are tenable arguments that licensing responsibility lay with RNZ (whose obligations included arranging for a gas safety certificate and "any other safety/compliance certificates" and making reasonable endeavours to notify the local authority of a change of

occupant at the commencement of the tenancy). At the very least a landlord resident abroad who engages an agent to manage her property in this country would reasonably expect the agent to inform her if it was in an area of selective licensing and check that it could lawfully be let.

48. If the housing officer's attempts to contact the appellant are put to one side, then the basic facts of this case are that a landlord with a single property, formerly her own home, who had entrusted its management to a managing agent, was unaware of the need for a licence, having been absent from the country for 10 years; she committed an offence of moderate seriousness by not having a licence but took the necessary steps to obtain one as soon as she became aware of the requirement. Within 3 weeks of the first contact between the respondent and the appellant's agent an application for a licence had been submitted., and the appellant herself returned the completed document on the same day she received it. I do not consider that the omission of the appellant to supply a contact postal address to the local housing authority, which was the reason for the delay in the flat being licensed between August and November, casts those facts in any more serious a light.

49. I bear in mind that the respondent considered that a financial penalty was justified, but the focus of the panel was on the appellant's failure to respond to warnings of which she was unaware. I do not give that failure the weight which it appears to have been given by the officers.

50. This seems to me to be a case in which the appropriate disposal in accordance with the respondent's policy is to deal with the matter informally, without the imposition of any financial penalty. The objective of the financial penalty regime, as explained in the MHCLG Guidance, to support good landlords who provide decent well-maintained homes and crack down on a small number of rogue or criminal landlords knowingly letting out unsafe and substandard accommodation, is not advanced by the imposition of a financial penalty in this case. On the contrary, it seems to me to be consistent with both the policy and the Guidance to encourage more landlords, especially those who live abroad, to engage professional agents to act on their behalf. The appellant's case was not presented to the FTT on the basis that, having appointed an agent to manage her property and that agent having failed to alert her to the need for a licence, she had a reasonable excuse for the property having been unlicensed which provided her with a statutory defence under section 95(4), 2004 Act. Nevertheless, the fact that she engaged the services of an agent, as a responsible landlord in her circumstances would have done, is a highly relevant consideration. The FTT accepted that she had "delegated the obtaining of a licence to her agents" but said that that did not "divest her of her statutory liability". Whether it did or not is not an issue in this appeal, (because the appellant did not rely on the defence of reasonable excuse), but the appellant having delegated management to an agent is a strong reason, in my judgment, for concluding that this is a case in which an informal resolution is sufficient and no financial penalty ought to be imposed.

51. I conclude with two subsidiary points. The appellant's failure to license her flat has not been cost free, as she will have paid tribunal fees at each stage of her appeal in addition to any charges incurred for the services of her solicitor. Secondly, the disposal of the appeal without the imposition of a penalty is not free of potential consequences; the respondent's

policy treats any prior history of non-compliance, even if resolved informally, as a relevant consideration when determining the punishment appropriate to a future offence.

52. I therefore allow the appeal and set aside the financial penalty imposed on the appellant.

Martin Rodger QC
Deputy Chamber President

29 July 2021