



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

Case reference : **LON/00BH/HNA/2017/0013**

Property : **Flat 1, 2 and 4, 55 Westbury Road,
London E17 6RH**

Appellant : **Muhammad Afzal Khan (“Mr
Khan”)**

Representative : **Khan & Co**

Respondent : **London Borough of Waltham
Forest**

Representative : **Kim Travis, Head of Litigation and
Public Law**

Type of application : **Appeals under section 249A of and
schedule 13A to the Housing Act
2004**

Tribunal members : **Angus Andrew
Anthony Harris LLM, FRICS,
FCIArb
Leslie Packer**

**Date and Venue of
hearing** : **12 March 2018
10 Alfred Place, London WC1E 7LR**

Date of decision : **12 June 2018**

DECISIONS

Decisions

1. By consent we cancel the three financial penalty notices relating to Mr Khan's asserted breaches of condition number 3 of the selective licences granted on 21 and 22 July 2015.
2. We dismiss Mr Khan's appeal against the two financial penalty notices imposed in respect of his breaches of condition 16 of the selective licences granted on 21 and 22 July 2015.
3. We vary the financial penalty notices imposed in respect of condition 16, by increasing the financial penalty in each case from £3,200 to £5,000.

Appeal

4. By three applications received on 14 November 2017 Mr Khan appealed, under section 249(A) of the Housing Act 2004 ("the Housing Act"), against the following five financial penalties imposed by Waltham Forest: -
 - i. In respect of flat 1 a financial penalty of £12,800 in respect of an asserted failure to comply with condition number 3 of a selective licence granted on 22 July 2015
 - ii. In respect of flat 1 a financial penalty of £4,000 in respect of an asserted failure to comply with condition number 16 of the same selective licence.
 - iii. In respect of flat 2 a financial penalty of £12,800 imposed in respect of an asserted failure to comply with condition number 3 of selective licence granted on 22 July 2015
 - iv. In respect of flat 2 a financial penalty of £4,000 in respect of an asserted failure to comply with condition number 16 of the same selective licence
 - v. In respect of flat 4 a financial penalty of £12,800 in respect of an asserted failure to comply with condition number 3 of a selective licence granted on 21 July 2015.
5. The three-selective licenses were in similar form. In essence condition 3 of the licenses required the Mr Khan to ensure that appropriate smoke alarms were installed and kept in a proper working order; condition 16 required the Mr Khan or his manager to inspect the flats at least every six months to ensure that they were in "a decent state of repair".

Hearing and subsequent procedural history

6. We heard the appeals on 12 March 2018. Mr Khan was represented by Aslam Khan of Khan & Co. Waltham Forest was represented by Dean Underwood, who is a barrister.
7. Mr Khan's bundle included five witness statements given by himself, Iqbal Johal, Riza Fanaj, Chantal Labi Mbele and Mustaf Hassan Mire. Both Mr Khan and Aslam Khan are partners of Khan and Co whilst Mr Johal is employed by that firm as a project manager. Mr Fanaj is a building contractor who works part-time for Khan and Co. Mr Mire and Ms Mbele are respectively tenants of the first floor front flat and the ground floor rear flat. In the event Mr Fanaj and Mr Mbele did not attend the hearing for cross examination and we gave their statements little weight.
8. Waltham Forest's bundle included witness statements from David Beach and Julia Morris. Mr Beach is an Environmental Health Officer and Ms Morris is a Private Rented Property Licensing Team Leader.
9. Following the hearing we became aware of a Court of an Appeal decision in Paul Brown v Hyndburn Borough Council [2018] EWCA Civ 242 that was handed down on 21 February 2018. In summary Hyndburn is authority for proposition that section 19 of the Housing Act does not entitle a relevant authority to require the installation of smoke alarms as a condition of a selective licence. We invited both parties to send further written submissions by 3 April 2018. At Waltham Forest's request we extended that day to 18 April 2018.
10. In his submissions Mr Underwood conceded that Waltham Forest did not, when the licenses were granted, have power to include condition 3 and he agreed that we should allow the appeals against his client's decisions to impose penalties for breach of that condition. However Mr Underwood went on to contend that we should increase the penalties for breach of condition 16 "*by 20%, or such other higher percentage as the Tribunal considers fit in the circumstances*". We gave the Mr Khan the opportunity to respond to that invitation and Aslam Khan's further submissions were received on 4 May 2018.
11. We reconvened in private on 10 May 2018 when we reached the decisions recorded above. In doing so we took into account all the documents in the bundles, the evidence given at the hearing and the further submissions received from the parties.

Background

12. Waltham Forest exercised its powers under section 80 of the Housing Act by designating the whole of the borough as a selective licensing area with effect from 1 April 2015. The effect of the designation is to require most

privately rented homes to have a property licence, which requires the holder to comply with the conditions set out in the licence.

13. Section 95(2) creates the offence of failing to comply with a licence condition and provides that a person commits an offence if: -
 - a. *he is a licence holder or a person on whom restrictions or obligations under licence are imposed in accordance with section 90(6) and*
 - b. *he fails to comply with any condition of the licence.*
14. Section 126(2) and Schedule 9 of the Housing and Planning 2016 amended the Housing Act by inserting a new section 249A and schedule 13A. These make provision for a local authority to impose financial penalties for a number of offences under the Housing Act as an alternative to prosecution. Those offences include offences in relation to the licensing of houses in a selective licensing area, which in turn includes the offence created by section 95(2) of the Housing Act.
15. By sub-section 249A(1) a local authority may only impose a financial penalty “*if satisfied beyond reasonable doubt*” that an offence has been committed. By sub section (3) only one financial penalty may be imposed in respect of the “same conduct” and by sub-section 4 the amount of the financial penalty is limited to £30,000.
16. Schedule 13A of the Housing Act deals with appeals, which lie to this Tribunal. An appeal is to be a rehearing of the local authority’s decision but may be determined having regard to matters of which the authority was unaware. On an appeal this Tribunal may confirm, vary or cancel a notice imposing a financial penalty.
17. In April 2017 the former Department of Communities and Local Government issued guidance for local authorities under paragraph 12 of schedule 13A. The guidance relates to “civil penalties” under the 2016 Act and a copy is at pages 26-45 of Waltham Forest’s bundle. We take the terms “financial penalty” and “civil penalty” to be interchangeable.
18. Paragraph 3.5 of the guidance provides that local authorities “*should develop and document their own policy on determining appropriate level of civil penalty in a particular case*”. The paragraph suggests seven factors that should be taken into account when setting civil penalties.
19. Waltham Forest did indeed develop and document its own policy on determining the appropriate level of financial penalties and it is at pages 67 to 76 of Waltham Forest’s bundle. The policy repeats the seven factors in the DCLG guidance and then sets out a matrix to which its officers should have regard. The matrix is “*intended to provide an indicative*

minimum tariff under the various offence categories, with the final level of the civil penalty adjusted in each case to take into account other relevant or aggregating factors”.

20. The matrix categorises offences as being either Moderate, Serious or Severe. Each category has two bands with the result that there are six equal bands of £5,000. A subsequent section under the heading “breach of licence conditions” adds little to the matrix save to suggest that landlords controlling five or less dwellings should be treated more leniently than those controlling a larger number of dwellings. Although not entirely clear that suggestion appears to be that officers should impose a lower category band penalty for landlords controlling five or less dwellings and a higher category band penalty for landlords controlling more than 5 dwellings.
21. Mr Khan told us that he purchased 55 Westbury Road in 1976 when it was a single dwelling house. He converted it to form four flats in 1995 or 1996 without obtaining either planning or building regulation consent. He told us that in 2012 he obtained a certificate of lawful use for its current use as four flats.
22. The Mr Khan either alone or with his two partners owns a large number of properties and he made 160 selective licensing applications in respect of properties within Waltham Forest including the four flats at 55 Westbury Road.
23. On 29 June 2017 Mr Beach and Ms Morris made an unannounced inspection of 55 Westbury Road. Between them they inspected the two ground floor flats and the first floor front flat. On the basis of Mr Beach’s evidence this inspection revealed many deficiencies in some or all the flats including the absence of smoke and heat detectors and firefighting equipment and some rotten skirting boards.
24. There was then an exchange of correspondence between the parties from which it appears that the Mr Khan remedied a number of the identified deficiencies. The file was then considered by Julia Morris who decided to impose a financial penalty as an alternative to criminal proceedings. She recommended penalties of £20,000 in respect of each of the three asserted failures to comply with condition 3; penalties of £5,000 in respect of each of the two asserted failures to comply with condition 16; and a penalty of £5,000 in respect of an asserted failure to comply with Regulation 8 of the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007.
25. At this point the file was passed to Mr Beach both for a review and for a final decision. Having given further consideration to Mr Beach’s witness statement we have to say that we find it somewhat confusing. At paragraph 60 he says that he reduced the penalties recommended by Ms Morris by 20% by the application of “*a totality principle to cap the overall level of penalties*”. This resulted in revised penalties of £16,000 for each failure to

comply with condition 3; £4,000 in respect of each failure to comply with condition 16; and £4,000 in respect of failure to comply with regulation 8.

26. Mr Beach then appears to have decided to make a further reduction of 20% to reflect Mr Khan's subsequent compliance with condition 3 and regulation 8 resulting in revised penalties of £12,800 for each breach of condition 3 and £3,200 for the breach of regulation 8.
27. On 11 August 2017 Waltham Forest gave formal notice of its intention to impose the revised penalties. The Mr Khan was given the opportunity to make further representations. Having received those representations Mr Beach wrote to the Mr Khan on 16 October 2017. In that letter Mr Beach wrote that the financial penalties would be imposed in respect of the breaches of the licence conditions but that no further action would be taken in respect of the asserted failure to comply with regulation 8.
28. Following that letter and on 18 October 2017 Waltham Forest issued the financial penalty notices against which the Mr Khan now appeals.
29. It is however clear both from Mr Beach's statement at paragraph 73 and from the documents in Waltham Forest's bundle at pages 471 to 479 that Mr Beach intended to apply the second 20% reduction to the two failures to comply with condition 16, apparently on the basis that the Mr Khan had replaced the rotten skirting board in the two flats. Certainly, on 3rd January 2018 revised notices were issued to Mr Khan imposing a reduced penalty of £3,200 in respect of each breach. The covering letter makes it clear that these notices were issued in substitution for those issued on 18 October 2017. We are surprised that our attention was not specifically drawn to these revised notices at the hearing and that the revised submissions received from Waltham Forest still speak to penalties of £4,000 with the request that they be increased to £5,000. Nevertheless, this decision now proceeds on the basis of appeals against financial penalties of £3,200 and not £4,000.

Reasons for our decisions

To cancel the three financial penalty notices relating to Mr Khan's asserted breaches of condition number 3 of the selective licences.

30. These are cancelled with the consent of and at the request of Waltham Forrester and for the reasons given above.

To dismiss Mr Khan's appeal against the two financial penalty notices imposed in respect of his breaches of condition 16 of the selective licences.

31. At that start of the hearing Mr Underwood agreed with our assessment that the only issue was whether or not the Mr Khan had failed to inspect each of the flats at least every six months. He agreed that it was not

sufficient for Waltham Forest to demonstrate that the flats were not in repair.

32. For Waltham Forest Mr Beach's evidence was straightforward. The deficiencies found on the inspection were such that the flats could not have been subject to regular inspections. If there had been regular inspections the deficiencies would have been at least observed and hopefully remedied. In particular smoke and carbon monoxide alarms would have been installed and the rotten skirting boards would have been noted.
33. In response Mr Khan relied largely on his own evidence and that of Mr Johal who was responsible for undertaking the inspections and who has been employed by the Khan and Co for over 12 years. In terms of the regular inspections Mr Johal largely relied on property inspection logs at page 91 to 98 of Mr Khans bundle. These logs record inspections from 5 January 2015 to 15 January 2018. They also record both general inspections and specific inspections of both gas and electrical installations and to remedy reported faults.
34. It is perhaps worth noting that the general inspections were not conducted every six months. The first general inspection was on 5 January 2015 whilst the next was not until 23 January 2016. Inspections on 2 February 2015, 23 January 2016, 9 January 2017 record that the smoke alarms were in working order and correctly positioned. It is not until an inspection on 30 June 2017 that the smoke alarms in all three flats are recorded as missing. That inspection was of course the day after the inspection by Mr Beach and Ms Morris. Mr Johal explanation was that after the general inspection on 9 January 2017 but before that on 30 June 2017 the tenants in all three flats had themselves removed the smoke alarms. The suggestion that each of the three tenants removed the alarms in their flats within a period of six months, after they had been in place for some time, does not strike us as credible.
35. At the first sight the inspection logs are impressive and appear to substantiate regular inspections. However, the credibility of these inspection logs was undermined by the oral evidence of both Mr Khan and Mr Iqbal. Under cross-examination the Mr Khan very candidly said that the logs were prepared after the local authority's inspection on 29 June 2017 and that they were based on file inspection notes that had not been produced. Equally Mr Iqbal, in answer to our questions said that his inspections of the flat were "*reactive and not proactive*", a comment that undermines his evidence of the claimed six monthly inspections.
36. Of Mr Khan's other witnesses only Mr Mire attended for cross examination. Mr Mire is the tenant of the first floor front flat. He gave two statements, the first on 30 August 2017 and the second on 30 August 2017. In so far as relevant to this issue his evidence was that he had removed the smoke alarms "*in mid-April 2017 because my ex-girlfriend was a smoker and unfortunately the smoke alarms would trigger off*

when she would smoke". We have to say with some regret that we simply do not believe this explanation. In answer to questions from Mr Underwood, Mr Mire could not explain how he removed the alarms from the ceiling and neither did he know his girlfriend's last name nor her date of birth. He also had some difficulty in explaining his reason for not removing the smoke alarms until mid-April 2017 given that his relationship with his ex-girlfriend, who he knew only as Sofia, had ended in 2015.

37. In answer to Mr Underwood's questions Mr Mire also confirmed that the six-monthly inspections had been conducted by the same person. He was however unable to identify Mr Johal, who was sitting in the room and whose evidence was that he, Mr Johal, had conducted the inspections. When this was pointed out to Mr Mire he said on reflection different people had undertaken the inspections, which comment contradicted Mr Johal's evidence.
38. It will be recalled that Mr Beach also relied on rotten skirting boards in both flats pointing out that if there had been regular inspections the defect would have been identified. Mr Beach considered that the cause of the rot was dampness. Pictures of the rotten skirting boards are at pages 224 and 228 of Waltham Forest's bundle. In both cases the rot is advanced and Mr Beach said that it must have been both present and observable for a long of time.
39. Mr Johal response was to assert that there had been no sign of damp in either flat when he inspected the flats on 16 February 2017. In support of that assertion he said that the rot was caused not by dampness but by dripping water from the pipes behind the skirting board in the ground floor front flat and from a dripping radiator in the ground floor rear flat. That however, is beside the point or as Mr Underwood put it "*a red herring*". The extent of the rot was such that it must have been observable for a considerable period of time and if there had been regular inspections it would have been identified and remedied.
40. In summary we are satisfied that the evidence in support of the regular inspections was neither credible nor believable. We are satisfied beyond reasonable doubt that there were no regular inspections of either of the ground floor flats by Mr Johal or anyone else. Consequently, and for each and all of the above reasons we dismiss the appeals.

To increase the two financial penalty notices imposed in respect of breaches of condition 16 of the selective licences

41. As noted above Ms Morris had originally recommended a penalty of £5,000 in respect of each of the two breaches. Her reports are at pages 335 and 341 of Waltham Forest's bundle. The reports identified a failure to make regular inspections and indicate a moderate, band 2 penalty with no aggravating features. Ms Morris concluded by recommending a financial

penalty of £5,000, which is the lowest band 2 penalty. The reviews by Mr Beach on the following pages reduced those penalties to £4,000 on the grounds of the “totality principle”. To repeat ourselves the penalties were subsequently reduced to £3,200 to reflect what might be described as Mr Khans good behaviour in replacing the rotten skirting boards.

42. In his closing submissions Aslam Khan considered the financial penalties to be “*very harsh*”. He considered that they should be lower but in answer to our questions he could not “*put a finger on it*”. It has to be said that Aslam Khan’s comments were made at a time when Mr Khan was facing total financial penalties in the sum of £36,000.

43. We remind ourselves that we are rehearing Waltham Forest’s decision to impose the two financial penalties. We agree with Mr Underwood that we should have regard to the comments of Deputy President, Martin Rodger QC in *Clerk v Manchester City Council* (2015) UKUT 0129 LT when he said:-

“On a rehearing an appellant is entitled to expect that the F-tT will make up its own mind. In doing so it is not required to adopt the approach advocated by Mr Madden of starting with a blank sheet of paper, and it is entitled to have regard to the views of the local housing authority whose decision is under appeal. How influential those views will be being likely to depend on the subject matter; Buxton LJ’s recommendation that a county court judge should be slow to disagree with the views of the authority does not seem to me to apply with the same force to a specialist tribunal”.

44. The matrix used by Waltham Forest is based on the DCLG guidance and we consider that it works effectively to distribute the weight of the allocated criteria across the range of possible fines up to £30,000. Furthermore, the review by a second officer, in this case Mr Beach, adds a degree of robustness to the process.

45. A failure to inspect could have profound consequences; for example, disrepair, antisocial behaviour or overcrowding may go unnoticed. Nevertheless, we agree that Ms Morris’ categorisation of the offences as moderate is reasonable and proportionate and we also adopt it.

46. Mr Khan owns a large number of properties in the borough and Waltham Forest’s policy of applying a higher band to offences by portfolio landlords is again both reasonable and proportionate. On that basis we endorse Ms Morris’ allocation of the offences to band 2, which is the higher “moderate” band. That allocation indicates penalties in the range £5,000 to £9,999 so that Ms Morris was recommending the lowest fine within the band.

47. However, we have considerably more difficulty with the two-subsequent reductions of 20% made by Mr Beach. We can find no reference in either the DCLG guidance or Waltham Forest’s guidance to a “totality cap”. Even

if we are wrong about that the reasoning falls away with the cancellation of the condition 3 financial penalties.

48. We have equal difficulty with the further reduction to reflect the replacement of the rotten skirting board. As Ms Morris identified in her report and as both parties accepted at the hearing, the real issue in this case was the failure to inspect and not the condition off the skirting board. Given Mr Khan's property portfolio and Waltham Forest's policy and the objective behind the requirement to inspect, £5,000 is the minimum penalty applicable to these offences.

49. Consequently, and for each of the above reasons we consider it appropriate to impose a financial penalty of £5,000 in respect of each offence.

Name: Angus Andrew

Date: 12 June 2018

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).