FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BY/HNA/2018/0021 & 0022**
Premises	**:**	**37 Wellington Avenue** **Liverpool L15 0EH** **82 Ferndale Road** **Liverpool L15 3JZ**
Appellant	**:**	**Miss Marina Cannon**
Representative	**:**	**N/A**
Respondent	**:**	**Liverpool City Council**
Representative	**:**	**Miss T O'Leary, Counsel**
Type of Application	**:**	**Housing Act 2004 – Schedule 13A, paragraph 10**
Tribunal Members	**:**	**Judge J Holbrook** **Deputy Regional Valuer N Walsh**
Date and venue of Hearing	**:**	**15 March 2019** **Liverpool**
Date of Decision	**:**	**3 April 2019**

DECISION

DECISION

A. Final Notice 1 is varied by the substitution of £2,925 as the amount of the financial penalty imposed.

B. Final Notice 2 is varied in the same way as Final Notice 1.

See paragraph 2 of the following reasons for definitions of the "Final Notices" referred to above.

REASONS

INTRODUCTION

The appeals

1. On 27 September 2018, Miss Marina Cannon appealed to the Tribunal against two financial penalties imposed on her by Liverpool City Council under section 249A(1) of the Housing Act 2004 ("the 2004 Act"). One of those financial penalties related to an alleged housing offence in respect of premises known as 37 Wellington Avenue, Liverpool L15 0EH. The other financial penalty related to a separate (but similar) alleged housing offence in respect of premises known as 82 Ferndale Road, Liverpool L15 0EH.

2. To be more precise, Miss Cannon appealed against two 'final notices' given to her by Liverpool City Council under paragraph 6 of Schedule 13A to the 2004 Act. Those notices are both dated 29 August 2018 and comprise:

    - "Final Notice 1" (as subsequently varied) imposing a financial penalty of £3,250 for conduct amounting to an offence under section 95(1) of the 2004 Act in respect of 37 Wellington Avenue; and

    - "Final Notice 2" (also as subsequently varied) imposing a financial penalty of £3,250 for conduct amounting to an identical offence in respect of 82 Ferndale Road.

The Premises

3. The Tribunal did not inspect either of the two properties in question. However, we understand them to comprise two separate houses in tenanted residential occupation.

The hearing

4. On 15 March 2019, a hearing was held at the Civil & Family Justice Centre in Liverpool. Miss Cannon represented herself at the hearing, and Liverpool City Council was represented by Miss Tara O'Leary of counsel.

5. The Tribunal heard oral evidence given by Miss Cannon and by two witnesses for Liverpool City Council: Jennifer Driscoll and Andrew Parsons (both Private Sector Housing Licensing Compliance Co-ordinators employed by the Council). In addition, written statements given by a number of additional witnesses for the Council were admitted. The parties had also each submitted bundles of documentary evidence in support of their respective cases.

6. Judgment was reserved.

LAW AND GUIDANCE

Power to impose financial penalties

7. New provisions were inserted into the 2004 Act by section 126 and Schedule 9 of the Housing and Planning Act 2016. One of those provisions was section 249A, which came into force on 6 April 2017. It enables a local housing authority to 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.

8. Relevant housing offences are listed in section 249A(2). They include the offence, under section 95(1) of the 2004 Act, of having control of or managing a house which is required to be licensed under Part 3 of that Act but is not so licensed.

9. Only one financial penalty under section 249A may be imposed on a person in respect of the same conduct. The amount of that penalty is determined by the local housing authority (but it may not exceed £30,000), and its imposition is an alternative to instituting criminal proceedings for the offence in question.

Procedural requirements

10. Schedule 13A to the 2004 Act sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under section 249A. Before imposing such a penalty on a person, the local housing authority must give him or her a notice of intent setting out:

- the amount of the proposed financial penalty;
- the reasons for proposing to impose it; and
- information about the right to make representations.

11. Unless the conduct to which the financial penalty relates is continuing, that notice must be given before the end of the period of six months beginning on the first day on which the local housing authority has sufficient evidence of that conduct.

12. A person who is given a notice of intent has the right to make written representations to the local housing authority about the proposal to impose a financial penalty. Any such representations must be made within the period of 28 days beginning with the day after that on which the notice of intent was given. After the end of that period, the local housing authority must decide whether to impose a financial penalty and, if a penalty is to be imposed, its amount.

13. If the local housing authority decides to impose a financial penalty on a person, it must give that person a final notice setting out:

- the amount of the financial penalty;
- the reasons for imposing it;
- information about how to pay the penalty;
- the period for payment of the penalty;
- information about rights of appeal; and
- the consequences of failure to comply with the notice.

Relevant guidance

14. A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions in respect of the imposition of financial penalties. Such guidance ("the HCLG Guidance") was issued by the Ministry of Housing, Communities and Local Government in April 2018: *Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities*. It states that local housing authorities are expected to develop and document their own policy on when to prosecute and when to issue a financial penalty and should decide which option to pursue on a case by case basis. The HCLG Guidance also states that local housing authorities should develop and document their own policy on determining the appropriate level of penalty in a particular case. However, it goes on to state:

> "Generally, we would expect the maximum amount to be reserved for the very worst offenders. 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."

15. The HCLG Guidance also sets out the following list of factors which local housing authorities should consider to help ensure that financial penalties are set at an appropriate level:

a. Severity of the offence.
b. Culpability and track record of the offender.
c. The harm caused to the tenant.
d. Punishment of the offender.
e. Deterrence of the offender from repeating the offence.
f. Deterrence of others from committing similar offences.
g. Removal of any financial benefit the offender may have obtained as a result of committing the offence.

16. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, Liverpool City Council has adopted a *Private Sector Housing Civil Penalties Policy* dated 6 November 2017 ("Liverpool's Policy"). We make further reference to this policy later in these reasons.

Appeals

17. A final notice given under Schedule 13A to the 2004 Act 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. However, this is subject to the right of the person to whom a final notice is given to appeal to the Tribunal (under paragraph 10 of Schedule 13A).

18. Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within 28 days after the date on which the final notice was sent to the appellant. The final notice is then suspended until the appeal is finally determined or withdrawn.

19. The appeal is by way of a re-hearing of the local housing authority's decision, but may be determined by the Tribunal having regard to matters of which the authority was unaware. The Tribunal may confirm, vary or cancel the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than the local housing authority could have imposed.

BACKGROUND FACTS

20. Both 37 Wellington Avenue and 82 Ferndale Road are houses situated within an area designated by Liverpool City Council (as the local housing authority) under section 80 of the 2004 Act as subject to selective licensing under Part 3 of the 2004 Act. This designation has been effective since 1 April 2015. However, as we explain below, Miss Cannon did not complete the licence application process in respect of either of the houses in question until early 2018, and the licences themselves were not granted to her until 19 February 2018.

21. As well as being the licence holder, Miss Cannon is the freehold owner of both houses, each of which is let to third parties on an assured shorthold tenancy. It is accepted that both houses have been tenanted since at least the middle of 2016.

22. The selective licensing regime operated by Liverpool City Council involves a two-part application process. The first part requires the applicant to submit details which enable the Council to decide whether he or she is a fit and proper person to be a licence-holder. The second part involves the submission of property-specific details, so that the Council can decide whether a licence should be granted in respect of that property (or those properties) and, if so, what conditions should be attached to the licence. It is not until both parts of the application have been submitted (and the appropriate application fee paid) that an

application for a licence has been "duly made" for the purposes of section 95(3)(b) of the 2004 Act.

23. On 5 May 2017, Miss Cannon telephoned the Council in relation to a matter concerning property repairs and, as a consequence of that call, she learnt that selective licences were required for both houses.

24. On 10 April 2017, the Council wrote to Miss Cannon inviting her to apply for a selective licence in respect of 37 Wellington Avenue. However, Miss Cannon did not receive that letter because it was not sent to her current home address. A second letter of invitation (this time correctly addressed) was sent to Miss Cannon on 23 October 2017.

25. On 7 August 2017, Miss Cannon had submitted the first part of the selective licensing application. She did not at that time submit the second (property-specific) part of the application or pay the application fee. The Council emailed Miss Cannon on 1 September 2017 asking her to submit a part two application and the application fee within 14 days. It appears that Miss Cannon then queried whether she would need to submit an electrical certificate with her part 2 application. The Council replied on 26 October, as follows:

> "You can proceed with your application for the above property but continue to pursue the certification as you will require this for compliance."

26. On 17 January 2018, Liverpool City Council invited Miss Cannon to attend and interview under caution.

27. On 21 January 2018, Miss Cannon submitted the second part of her licence application and paid the application fee.

28. Miss Cannon's interview under caution took place on 2 February 2018 and was conducted by two officers of the Council. Miss Cannon acknowledged both that she was aware of the requirement to licence the premises, and that she had committed a criminal offence by not doing so. Miss Cannon stated that she had been waiting for the electrical certification process to be completed before submitting the second part of her application and that she also had some personal problems which had led to her not completing the application process sooner.

29. On 3 July 2018, Liverpool City Council gave Miss Cannon two notices of intent under paragraph 1 of Schedule 13A to the 2004 Act. Those notices proposed the imposition of two separate financial penalties of £4,875 each. Miss Cannon submitted written representations in response to the notices of intent. Having considered those representations, however, Liverpool City Council issued the Final Notices which are the subject of this appeal on 29 August 2018.

30. In the form in which they were originally issued, each of the Final Notices imposed a financial penalty of £4,875. However, following consideration

of Miss Cannon's grounds of appeal to the Tribunal, Liverpool City Council subsequently reduced the amount of each financial penalty to £3,250. The Final Notices were varied on 12 November 2018 to give effect to these reductions.

GROUNDS OF APPEAL

31. Although Miss Cannon accepts that, in relation to each of the properties, her conduct amounted to an offence under section 95(1) of the 2004 Act, she nevertheless challenges the imposition upon her of the financial penalties. She contends that the circumstances of her case are such that it would have been appropriate for her to be cautioned for the offences, rather than subjected to financial penalties.

32. Miss Cannon also argues that, even if the imposition of financial penalties is appropriate, those imposed by Liverpool City Council are excessive in amount. She argues that the Council failed to have regard to the representations she made in response to the notices of intent and that it reached incorrect conclusions about her culpability and about the level of harm associated with the offences. Miss Cannon considers that these conclusions do not reflect a number of relevant considerations. These include the fact that Miss Cannon is of good character and is a responsible landlord; a lack of publicity surrounding the selective licensing scheme generally; misleading advice given by her letting agent; the fact that the application process had been initiated before the Council took enforcement action; confusion as to the need to await electrical certification; health and personal issues; and reliance by the Council upon a tenancy agreement which Miss Cannon believes was forged by a tenant. Miss Cannon also argues that insufficient regard has been given to the 'totality' of the two financial penalties.

DISCUSSION AND CONCLUSIONS

Relevant housing offences

33. In respect of each of the Final Notices which are the subject of these appeals, Liverpool City Council's decision to impose a financial penalty can only be upheld if the Tribunal is itself satisfied, beyond reasonable doubt, that Miss Cannon's conduct amounts to the relevant housing offence specified in that notice (i.e., to an offence under section 95(1) of the 2004 Act).

34. As we have already noted, Miss Cannon admits that her conduct in respect of both 37 Wellington Avenue and 82 Ferndale Road amounts to that offence. We note that both properties should have been licensed under Part 3 of the 2004 Act but that they were not so licensed, and we find that Miss Cannon did not have a reasonable excuse for her failure to license them. We are therefore satisfied, beyond reasonable doubt, that in each case Miss Cannon's conduct amounts to an offence under section 95(1).

35. We note that Miss Cannon has challenged the validity of Liverpool City Council's assertion that the offences were committed between 9 October 2017 and 21 January 2018. She queries whether this is correct, given that (in her view) applications for selective licences had been made prior to October 2017 and those licences actually came into force in February 2018. We note that Miss Cannon's application for selective licences was not "duly made" until the second part of the application was submitted, with the fee, on 21 January 2018. It follows that the offences were being committed until that date. However, the offences were not being committed thereafter.

Amounts of the financial penalties

36. We are satisfied that it is appropriate to impose financial penalties on Miss Cannon in respect of her failure to licence the premises. Given our findings below in respect of Miss Cannon's culpability, we do not accept that she should merely have been cautioned for the conduct in question. In our view, such a sanction would be inadequate in terms of its likely punitive and deterrent effect. We must therefore determine the amount of the applicable financial penalties.

Guiding principles

37. The Tribunal's task is not simply a matter of reviewing whether the penalties imposed by the Final Notices were reasonable: the Tribunal must make its own determination as to the appropriate amount of the financial penalties having regard to all the available evidence. In doing so, the Tribunal should have particular regard to the seven factors specified in the HCLG Guidance as being relevant to the level at which a financial penalty should be set (see paragraph 15 above).

38. We also consider it appropriate to have regard to Liverpool's Policy which guided the Council's decision-making process in this case (see paragraph 16 above). Although we do not consider ourselves bound to adopt Liverpool's Policy for the purposes of these appeals, we consider it to provide a sound basis for quantifying financial penalties on a reasonable, objective and consistent basis. We are therefore content to use the Policy as a tool to assist in our own decision-making.

39. Liverpool's Policy is itself based on the relevant factors specified in the HCLG Guidance, as stated above. It places particular emphasis – rightly, in our view – on an assessment of the seriousness of the relevant conduct in terms, firstly, of the harm it caused (or its potential for harm) and, secondly, on the culpability of the offender. Both harm and culpability are given a rating of low, medium or high. The interrelation between harm and culpability then feeds in to a matrix which determines which of seven bands the penalty should fall into. The amount of the penalty is taken to be generally around the mid-point of the relevant band, subject to further adjustment to take account of additional aggravating or mitigating factors. The seven penalty bands are as follows:

Band 1	£750	-	£2,250
Band 2	£2,250	-	£3,750
Band 3	£3,750	-	£5,250
Band 4	£5,250	-	£12,000
Band 5	£9,000	-	£15,000
Band 6	£15,000	-	£20,000
Band 7	£20,000	-	£30,000

Assessment of culpability and harm

40. In determining the harm and culpability of the conduct in question, Liverpool City Council proceeded on the basis that there were no material differences between the circumstances relating to 37 Wellington Avenue and those relating to 82 Ferndale Road. We agree. The Council's starting point for each penalty was £7,500 (Band 4), on the basis that the seriousness of each offence was medium; both in terms of the harm it caused and also in terms of Miss Cannon's culpability.

41. The importance of failing to obtain a selective license should not be understated. The Tribunal understands and agrees with the Council that an unlicensed property undermines its regulatory role and poses a potential for harm. However, it is clear that no actual harm arose from Miss Cannon's failure to licence the two houses in question. We agree that the failure to licence did give rise (at least indirectly) to the potential for harm. Nevertheless, given that the premises in question were houses in single occupation, together with the fact that Miss Cannon appears to have otherwise been a responsible landlord, we find the appropriate harm classification to be low and not medium.

42. We find that Liverpool City Council correctly classified Miss Cannon's culpability as being medium, however. Whilst, as already stated, we accept that Miss Cannon is an otherwise responsible landlord and that her failure to licence was a first offence, we are not persuaded that her offending conduct can be adequately explained, or justified, by the reasons she has offered for it. It is not correct, for example, that Liverpool City Council failed to take steps to bring selective licensing to the notice of landlords. On the contrary, it had done much to publicise the scheme – including providing information as an insert with every council tax bill. Miss Cannon was the landlord of more than one property and she should have done more to inform herself about her regulatory obligations as such. Moreover, it is plain that Miss Cannon did know about her licensing obligations at least nine months before she completed the licensing application.

43. Turning to Miss Cannon's assertion that she was misled by the advice of a letting agent we note that, in June 2016, she had engaged a residential lettings agent, Move Residential, to manage 82 Ferndale Road on her behalf. The agent was to be responsible for finding a tenant, obtaining references, and dealing with the legal formalities. The property was subsequently let on a standard-form tenancy agreement, produced by the agent, which contained the following statement:

> "The Property is not let as a House in Multiple Occupation within the meaning of the Housing Act 2004. The Property does not require the Landlord to hold a licence to be able to lawfully let it."

44. Although the property was not an HMO, this statement was clearly erroneous – because a tenanted house in Liverpool requires a selective licence even if it does not require an HMO licence. Nevertheless, although Miss Cannon may have cause to feel aggrieved by the advice she was given, that advice did not absolve her from responsibility for ensuring that her properties were correctly licensed.

45. Miss Cannon argues that submission of the second part of her licence application on 21 January 2018 was not precipitated by the fact that she had received an invitation to attend an interview under caution a few days earlier. She also argues that there are adequate reasons to explain why she had not completed the application process sooner. We are unable to accept either of these arguments. On the question of timing, it seems highly improbable that there was no connection between the receipt of the invitation on or about 18 January 2018 and submission of the application (which had by then been outstanding for about five months) on 21 January.

46. Miss Cannon attributes that five-month delay to a combination of her confusion about the need to provide proof of electrical certification and certain health and personal problems which she was experiencing at the time. As far as the question of electrical certification is concerned, we are not persuaded that this is a satisfactory explanation for the delay. Whilst the message conveyed in the Council's email of 26 October 2017 could have been better expressed, the email made it tolerably clear that the licensing application could proceed without an electrical certificate, but that such a certificate might still need to be produced for other purposes at a later date. Even if Miss Cannon misunderstood this, we note that she had actually obtained the certificate by 7 November 2017 – two and a half months before she finally submitted the second part of the licence application.

47. We do accept that Miss Cannon had been suffering from ill-health during the latter part of 2017: she had been undergoing medical investigations, including MRI scans, at the time. She was also supporting friends who were experiencing cancer or who had been recently bereaved. However, we note that Miss Cannon had still been able to manage her properties during this period and that she was able to work and to provide childcare for her young granddaughter. We have not found any evidence to indicate that Miss Cannon's health or personal issues were such as to prevent her from submitting a selective licensing application.

48. Finally, we turn to the matter of the allegedly forged tenancy agreement. Essentially, Miss Cannon believes that one of her tenants altered their tenancy document to make it appear that the rent payable was more than was actually being paid. She considers that Liverpool City Council

improperly relied upon this evidence in determining her culpability and in setting the amount of the financial penalty. We do not consider that to be correct. Certainly, the marginal level of extra rent which the tenancy agreement suggests was payable has no effect upon our assessment of Miss Cannon's culpability or, indeed, upon the amount of the penalties which we consider should be imposed in this case.

49. Applying the matrix in Liverpool's Policy, but adopting the low harm / medium culpability classification, places the penalty in respect of each property in the £3,750 - £5,250 band, with a starting-point figure of £4,500 for each financial penalty.

Aggravating and mitigating factors

50. We agree with Liverpool City Council's assessment that there are no aggravating factors in this case which would justify increasing the amount of either financial penalty above £4,500.

51. The question of mitigating factors – which may justify one or more reductions from that starting point – requires closer consideration, however. In order for Liverpool City Council to arrive at its final assessment of £3,250 as the appropriate amount of each financial penalty, it discounted its initial figure of £7,500 by 25% to reflect the fact that Miss Cannon had no relevant unspent previous convictions. A further 10% was deducted to reflect the fact that she had obtained selective licences for the properties prior to the Council issuing her with notices of intent. An additional one-third of the resulting penalty of £4,875 was then deducted to reflect the fact that Miss Cannon had made admissions of guilt during her interview under caution on 2 February 2018. It was to achieve this final one-third deduction that Liverpool City Council varied the Final Notices on 12 November 2018.

52. We agree that the starting figure for the financial penalties in this case should be reduced by 25% to reflect Miss Cannon's good character as well as the fact that she otherwise appears to be a responsible landlord. We also agree that a further reduction of 10% is appropriate given that both properties had successfully been licensed by the time formal enforcement action commenced. This results in a reduction in the amount of each financial penalty from £4,500 to £2,925.

53. However, we do not consider that any additional discount is warranted to reflect Miss Cannon's admission of guilt. We recognise that Liverpool's Policy provides that at early admission of guilt will potentially result in a reduction in the amount of the financial penalty imposed, and that the maximum level of such reduction will be one-third of the penalty amount. However, the Policy also states that:

> "In some circumstances there will be a reduced or no level of discount. For example where the evidence is overwhelming or there is a pattern of behaviour."

54. Conventionally, in criminal proceedings, the sentence imposed by the court is discounted in recognition of a guilty plea. In part, of course, this reflects the fact that a guilty plea avoids the need for a full criminal trial to be held. The position is somewhat different in the case of a financial penalty appealed to the Tribunal, even in cases where the appellant accepts that their conduct amounts to a relevant housing offence. Although there will still be cases where the appellant's recognition of their wrongdoing deserves to be reflected in the amount of the financial penalty, we consider that there will be few cases which merit a one-third reduction in the penalty amount.

55. In the present case, we acknowledge that Miss Cannon admitted, during her interview on 2 February 2018, that she was aware of the need for her properties to be licensed, but that she had failed to licence them. Given that the evidence to this effect was indisputable, however, she could hardly have said otherwise. The fact that Miss Cannon is of good character and is otherwise a responsible landlord has already been recognised by the penalty reductions discussed above and we consider that any further reduction, to reflect Miss Cannon's admission, would unduly diminish the punitive and deterrent effects of those penalties.

Multiple financial penalties and the question of 'totality'

56. Miss Cannon argues that insufficient regard has been paid to the fact that two financial penalties have been imposed for essentially the same offence. She argues that, taken together, the amount of the penalties is excessive.

57. The HCLG Guidance makes the obvious point that only one penalty can be imposed on the same person in respect of the same offence. However, it also makes it clear that a separate penalty can be imposed on that person for each separate offence. Liverpool's Policy rightly requires the question of proportionality to be considered in cases where financial penalties are issued for more than one offence. It states that the total penalties imposed should be "just and proportionate to the offending behaviour". We agree.

58. However, Liverpool's Policy goes on to recommend the adoption of guidance for the criminal justice system on 'totality'. Section 166(3) of the Criminal Justice Act 2003 provides that, in determining an appropriate sentence for an offence in criminal proceedings, a court may take into account any other penalty imposed in that sentence. To what extent does that principle apply to the determination of the appropriate amount of a financial penalty under section 249A of the 2004 Act? Although such a penalty may only be imposed as an alternative to criminal prosecution, appeals against financial penalties are not criminal proceedings and section 166 of the 2003 Act does not apply in the present context. Nevertheless, the end result might actually be not dissimilar in practice. The reason for this, in our view, is that – as recognised in Liverpool's Policy – the overarching principle is that the

amount of any financial penalties imposed under section 249A must be proportionate to the circumstances of the case.

60. Whilst the fact that multiple financial penalties are being imposed obviously does not diminish the seriousness of the individual offences in question (in terms of the harm they have caused or the culpability of the offender), the fact that an offender is receiving more than one penalty may be relevant when gauging whether those penalties are likely to have the appropriate punitive and deterrent effects. Viewed in isolation, we consider the penalties in question (i.e. £2,925 in respect of each of the two unlicensed properties), to be entirely proportionate for all the reasons explained in earlier sections of this decision. The question is whether, taken together, the cumulative amount of the penalties is disproportionate in the circumstances. We do not consider that it is.

61. In coming to this conclusion, we have taken account of the fact that the two penalties are imposed in respect of conduct relating to two separate properties, each of which independently generated rental income for Miss Cannon. Moreover, it would be incorrect to characterise the offences as flowing from the same act: they flow from similar, but separate, acts (or omissions) in respect of different properties: Miss Cannon must accept separate responsibility for those acts or omissions. Applying the principles encapsulated in the HCLG Guidance, we consider that imposing two separate penalties of £2,925 in respect of Miss Cannon's offending conduct in this case achieves an outcome which is proportionate in the circumstances.

OUTCOME

62. Our findings and conclusions in this case lead to the variation of each Final Notice. The effect of the variation, in each case, is to amend the amount of the financial penalty imposed by the notice to £2,925.