



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

<b>Case Reference</b>	: CH1/21UD/HNA/2019/0001 CH1/21UD/HNA/2019/0002 CH1/21UD/HNA/2019/0003
<b>Property</b>	: 11, 12 & 13 Croft Hall, Hastings East Sussex TN34 3BF
<b>Applicant</b>	: Antonia Lucy Birk
<b>Representative</b>	: None
<b>Respondent</b>	: Hastings Borough Council
<b>Representative</b>	: Mr Cowan Solicitor
<b>Type of Application</b>	: Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004
<b>Tribunal Member(s)</b>	: Judge H Lederman Mr R Athow FRICS Mr P Gammon MBE
<b>Date and Venue of Hearing</b>	: Hastings County Court 9 <sup>th</sup> May 2019
<b>Date of Decision</b>	: 18 <sup>th</sup> June 2019

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DECISIONS AND REASONS

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## **Decisions**

11 Croft Hall

**(1) The appeal by Antonia Birk against the imposition of a financial penalty on 12th November 2018 by Hastings Borough Council under section 249A and schedule 13A of the Housing Act 2004 is dismissed.**

**(2) The decision by Hastings Borough Council to impose a penalty in the sum of £1000.00 is varied and a penalty in the sum of £750.00 is substituted. This part of the appeal is to that extent allowed**

12 Croft Hall

**(3) The appeal by Antonia Birk against the imposition of a financial penalty on 12th November 2018 by Hastings Borough Council under section 249A and schedule 13A of the Housing Act 2004 is dismissed**

**(4) The decision by Hastings Borough Council to impose a penalty in the sum of £1000.00 is varied and a penalty in the sum of £750.00 is substituted. This part of the appeal is to that extent allowed.**

13 Croft Hall

**(5) The appeal by Antonia Birk against the imposition of a financial penalty on 12th November 2018 by Hastings Borough Council under section 249A and schedule 13A of the Housing Act 2004 is dismissed.**

**(6) The decision by Hastings Borough Council to impose a penalty in the sum of £1000.00 is varied and a penalty in the sum of £750.00 is substituted. This part of the appeal is to that extent allowed.**

## REASONS

### Appeal

1. By an application received on 4<sup>th</sup> December 2018, the applicant Antonia Lucy Birk (in these reasons referred to as Antonia Birk) appealed 3 financial penalties imposed by the respondent local housing authority, Hastings Borough Council (“HBC”) under notices each dated 12<sup>th</sup> November 2018 relating to properties known as 11, 12 and 13 Croft Hall, Croft Road Hastings East Sussex TN34 3BF, respectively. Each notice imposed a financial penalty of £1,000 in respect of the alleged offence concerning the individual property. Each appeal was made under section 249A of the Housing Act 2004 (“the 2004 Act”).
2. In these reasons the numbers in square brackets refer to the pages in the hearing bundle.
3. Each notice alleged that Antonia Birk,  
  
“between 26 October 2015, the date the selective licensing scheme for private rented homes in the seven wards in the borough came into effect, and 21 March 2018 .... did have control of or did manage a house which was required to be licenced under Part 3 of the Housing Act 2004 but which was not so licenced contrary to section 95(1) of the Housing Act 2004”

See [549-553] (11 Croft Hall), [537-541] (12 Croft Hall) and (13 Croft Hall) [543-548].

### Hearing and procedural history

4. Antonia Birk attended the hearing of this appeal on 9<sup>th</sup> May 2019 accompanied by Ms Scallon. Mr Cowan a solicitor represented HBC and called evidence from the witnesses referred to below. Antonia Birk is an intelligent and articulate person who conducted her appeal with conspicuous politeness and moderation. Neither she nor her friend appeared to have any legal expertise. Nevertheless, Antonia Birk displayed a good grasp of the issues and the procedure. The procedure and legal issues were explained to her in some detail before the hearing commenced.
5. On 9<sup>th</sup> January 2019 the Tribunal issued written directions for all 3 appeals in one set of directions at [3-11]. All 3 appeals have been dealt with together by the Tribunal and were the subject of one hearing Bundle which contained Antonia Birk’s documents and HBC’s

documents. The Hearing Bundle comprised 589 paginated pages including witness statements. Before the hearing commenced the Tribunal confirmed:

- A. all parties had a copy of the hearing bundle;
- B. all parties had copies of the DCLG Guidance Civil Penalties under the Housing and Planning Act 2016 (April 2018 edition) (“the Guidance”) and Schedule 13A to the 2004 Act;
- C. the issues were – was HBC properly “satisfied beyond reasonable doubt” that the conduct alleged in each notice amounted to the offence alleged and, if so, was the amount of penalty appropriate in each of the 3 cases;
- D. the burden (onus) of proving the offence was committed in each case was upon HBC. There was no onus or burden upon Antonia Birk. One consequence of this was that Antonia Birk did not need to give any additional evidence at the hearing of the appeal if she did not wish to do so upon the issue of whether she had committed the alleged offence; and if she followed that course she could still cross-examine HBC’s witnesses and make closing arguments. The Tribunal would not draw any conclusions adverse to her from a decision not to give evidence;
- E. the standard of proof was the criminal standard of proof. HBC had to prove that HBC were satisfied beyond reasonable doubt – (sometimes explained as satisfied so that they were sure) that the offence had been committed or was ongoing at the date that the penalty notices were issued: see section 249A of the 2004 Act;
- F. those issues would be decided upon the evidence put before the Tribunal either in the hearing bundle or from witness evidence;
- G. the Tribunal had the power to confirm, vary or cancel the final notice: (Schedule 13A paragraph 10(4) of the 2004 Act) but could not increase impose a financial penalty more than HBC could have imposed;
- H. the commencement date of section 249A of the 2004 Act was 6<sup>th</sup> April 2017, so conduct or omissions before that date would not be capable of giving rise to a financial penalty in each of the cases alleged to amount to an offence;
- I. if Antonia Birk asserted a “reasonable excuse” for non-compliance with the requirement to obtain a licence as a defence

it was for HBC to prove to the criminal standard that the excuse was not reasonable;

- J. This was an appeal by way of re-hearing; the appeal could be decided having regard to matters of which HBC was unaware at the time of reaching the decision to issue the penalty (paragraph 10(3) of Schedule 13A to the 2004 Act). The Tribunal's task was to look at the decision in each case afresh and not simply carry out a review of HBC's decisions.
6. After that initial introduction of the issues the Tribunal adjourned for 15 minutes to enable Antonia Birk to have the opportunity to confer with her friend about the issue of whether she wished to give evidence or simply to present her case without giving additional evidence (and being cross examined on that evidence or questioned upon that evidence by the Tribunal). Antonia Birk decided that she did not wish to give evidence because, as she put it, her case was adequately set out in the appeal notice and letters in the hearing Bundle.
  7. The Tribunal was satisfied that Antonia Birk understood the choice put to her about giving evidence but in any event extended leeway to her during the course of the hearing when she was asking questions of the witnesses and did not treat her questions as evidence.
  8. Before the case for HBC was commenced the Tribunal directed that Paul Taylor and Deborah Watts (the two witnesses who were due to give evidence for HBC) should leave the hearing room so that, their evidence would not be influenced by the evidence of any other witnesses or submissions.
  9. Antonia Birk was given the choice whether she wished to open the appeal or if (as was suggested to her by the Tribunal) she wished to listen to the opening speech and evidence presented by HBC and then ask questions. She chose to allow HBC to commence the hearing.

### **The approach of the Tribunal to the evidence**

10. As the burden of proof was on HBC to prove its case to the criminal standard and Antonia Birk had elected not to give evidence, at the hearing the Tribunal was careful not to ask her questions, about issues relating to whether an offence was committed at the relevant time. The Tribunal did however ask HBC's witnesses questions about the evidence they gave, partly to understand the documentary evidence and partly to ensure that Antonia Birk was not handicapped by the absence of professional representation.
11. Likewise, Mr Cowan did not cross examine Antonia Birk.

### **HBC's opening statement**

12. Shortly after the commencement of the opening for HBC it became apparent that Mr Cowan had prepared and (he said) sent to the Tribunal office a written copy of his opening statement on behalf of HBC. The Tribunal had not received that written opening at the time of the hearing. Mr Cowan did not have sufficient copies for all parties to use at the hearing. To assist Antonia Birk, a copy was provided to her. The Tribunal was not provided with a copy. The Tribunal has not been provided with a copy of that opening subsequently and has not taken into account anything in that opening that was not said by Mr Cowan at the hearing before all of the parties.
13. The Tribunal has not treated anything said by Mr Cowan as evidence upon which it can rely in reaching its decision. Mr Cowan's role was to draw the Tribunal's attention to the relevant evidence and statutory provisions and make submissions.

### **Closing submissions**

14. Antonia Birk was given the opportunity to make closing submissions last and to comment upon HBC's case.

### **Inspection of the properties**

15. The Tribunal explained its view that inspection of the properties would not provide any assistance in deciding the issues on this appeal which primarily related to the existence of a licence at the relevant dates between 21st March 2018 and 21st November 2018, whether the properties were "part 3 House" during those dates, whether there was a reasonable excuse for managing the properties without a licence and the amount of the penalty. It was not part of HBC's case that the properties were in a poor or substandard condition. For the purpose of its decision about the decision to impose a penalty and the amount of the penalty, the Tribunal is prepared to accept Antonia Birk's contention in her appeal form that each of the 3 properties was at the relevant time "high end, extremely well maintained": see [22].

### **Structure of these reasons**

16. For ease of reference, these reasons have been divided into separate headings. Reference to reasons under one heading is often relevant to the Tribunal's conclusions under other headings. The omission to cross refer to reasons should not be read as meaning that sections of these reasons which relate to one of the 3 appeals are not relevant to other parts of these reasons. The factual background to all 3 appeals was very similar and in some respects identical as all 3 properties are in the same building.

17. These reasons address in summary form the key issues raised by the appeal. They do not rehearse each and every point raised or debated. The Tribunal concentrates on those issues which in its view go to the heart of the appeal. For convenience the Tribunal addresses the issues in the order of how they arise for the purpose of this appeal.

### **Findings of fact**

18. Where the Tribunal finds a particular matter as a fact, it does so on the basis that it is sure that on the evidence that fact is established or proven by HBC beyond reasonable doubt.

### **Background – the properties in issue**

19. The evidence of Deborah Watts was that each of Apartments 11, 12 and 13 Croft Hall were at the relevant time residential dwellings within a property known as Croft Hall in the Old Hastings Ward of within HBC's jurisdiction for the purpose of the 2004 Act. This was the effect of her witness statement dated 1<sup>st</sup> February 2019 (in paragraphs 5-14 pages [30-31] taken with Paul Taylor's witness statement dated 29<sup>th</sup> April 2018 pages 1- 3 at [115-117]).
20. Antonia Birk's appeal form makes it clear that at the date of the appeal (1<sup>st</sup> December 2018) 11 Croft Hall was a 2 bedroomed flat within a converted Victorian school building; see [13]. 12 Croft Hall was a one bedroom flat within the same building. 13 Croft Hall was a 2 bedroomed flat within that building see [13]. That remained the position at the time of the hearing.
21. Antonia Birk described the 3 properties as "my rental properties" and offered HBC an inspection to confirm they were "maintained to an incredibly high standard" in her e-mail of 8<sup>th</sup> June 2018 which she incorporated into her appeal form at [24]. The Tribunal finds that she was closely involved in the management and ownership of each of those properties at the date of the appeal and on 12<sup>th</sup> November 2018.

### **11 Croft Hall – was this a Part 3 House which was required to be licensed under the 2004 Act?**

22. For a licence to be required the property must have been "a Part 3 house" at the date of the alleged offence (12<sup>th</sup> March 2018 to 12<sup>th</sup> November 2018). "Part 3 house" is defined by sections 100, 85(5) and 79(2) of the 2004 Act as a "house" which is
  - (a) " ..... in an area that is for the time being designated under section 80 as subject to selective licensing, and

- (b) the whole of it is occupied either–
  - (i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4), or
  - (ii) under two or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence under subsection (3) or (4).”

23. For the purpose of part 3 of the 2004 Act the word “house” is defined by section 99 as follows:

“dwelling” means a building or part of a building occupied or intended to be occupied as a separate dwelling;

“house” means a building or part of a building consisting of one or more dwellings;

and references to a house include (where the context permits) any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it).”

**Was 11 Croft Hall a “House” within the meaning of Part 3 of the 2004 Act at the relevant date?**

24. Paul Taylor was at the relevant time a senior technical officer in the Housing Licensing department of HBC. He was called to give evidence after Ms Watts gave evidence for HBC. He was a frank and honest witness who was prepared to accept when asked, what the limits of his knowledge were, in relation to council tax records. He has been in that role for 3 years. His evidence was that HBC relied upon a number of separate factors to decide whether a property was a part 3 House which required to be licensed. These factors included Council tax searches, land registry searches, and responses to warning letters sent by HBC.
25. Paul Taylor’s evidence was that the Council tax search undertaken by HBC on or about 26th July 2017 referred to an occupant of 11 Croft Hall occupying as “domestic” premises” valuation band B. This was referred to at page [116] of Paul Taylor’s witness statement (incorrectly referred to in his statement as PDT 002 at [133]) which is found at page [153] of the Bundle.
26. On 1<sup>st</sup> August 2017 a first “warning letter” relating to 11 Croft Hall was sent to Antonia Birk by Paul Taylor on behalf of HBC. That letter was exhibited as PDT005 at pages [139 – 140] of the Bundle. The warning letter asserted 11 Croft Hall was a privately rented property falling within HBC’s designated selective Licensing area and that 11 Croft Hall



was being rented out by a private landlord. The words “warning letter” in the body of that letter were coloured red with the aim of drawing attention to the letter. Antonia Birk refers to receiving such a warning letter in her appeal form incorporating her e-mail of 8<sup>th</sup> June 2018 at [24].

27. According to Mr Taylor, HBC’s records showed that on 2<sup>nd</sup> August 2017 Antonia Birk telephoned Mr Taylor’s department at HBC about the warning letter and left a message for someone to call her back. Mr Taylor referred to the statement of Mr Steven Smith at pages [347 - 348] of the Bundle dated 25<sup>th</sup> April 2018. Mr Smith was not called to give evidence and no explanation was given for his absence or attempt made to seek permission to rely upon the statement under any of the provisions of the Civil Evidence Act. Accordingly, the contents of Steven Smith’s witness statement were not taken into account or admitted into evidence as evidence of the truth of their contents. However, Mr Paul Taylor’s evidence about receipt of a message from Steven Smith from Antonia Birk is admissible as evidence of the fact that such a message was left by her. Paul Taylor also gave evidence that he left a message by telephone attempting to contact Antonia Birk. Antonia Birk’s appeal form incorporating her e-mail of 8<sup>th</sup> June 2018 [24] accepts that she received a letter (although it is unclear to which of the 3 properties this related) and she made a telephone call to HBC in response.
28. Paul Taylor’s evidence was that on 11<sup>th</sup> September 2017 a “second” “warning letter” was sent which he referred to as PDT006 in his statement at pages [116-117]. That letter is at pages [141-142] and the certificate of posting is at [143].
29. Paul Taylor’s written evidence was that he made a number of attempts to speak with Antonia Birk in September and November 2017 at [117] but was unable to find a time which was convenient for her.
30. None of the above evidence was challenged by Antonia Birk. She did not dispute (in her written comments or otherwise) that she telephoned HBC. Nor did she deny attempts had been made to contact her by telephone. Antonia Birk’s written comments dated 05 February 2019 entitled “Response to HBC Bundle” at page [502] accepted that she received these warning letters referred to in Mr Taylor’s statement. Antonia Birk did dispute receipt of the warning letter relating to 11 Croft Hall sent on 12<sup>th</sup> February 2018 at page [147]: see her written comment at page [503].
31. Mr Taylor’s evidence was that a “renewed first warning letter” dated 12<sup>th</sup> February 2018 at [147-148] was sent relating to 11 Croft Hall by him to Antonia Birk on that date (PDT0008). Antonia Birk disputes that she received that letter [at page 503]. However, the subsequent final “warning letter” sent by HBC on 28<sup>th</sup> February 2018 at page [149–151] refers to that earlier letter. All of the correspondence from

HBC was sent to Antonia Birk's address at 9 Croft Hall and the Tribunal is sure that the first "warning letter" of 12<sup>th</sup> February 2018 would have arrived at that address. Had it not done so she would have mentioned this in her e-mail of 8<sup>th</sup> June 2018 included in the bundle at page [561-563] and elsewhere.

32. Paul Taylor's evidence was on 28<sup>th</sup> February 2018 he requested a renewed council tax search relating to 11 Croft Hall: see the part of his statement at [117]. His evidence was that search showed that as from 7<sup>th</sup> August 2017 that property was occupied by Ms Alexandra Jackson and Mr Andrew Vicary and he referred to the search at [133] which does not bear any confirmation of the date the search was made. In answer to the Tribunal's questions, Paul Taylor accepted that he was not trained or an expert in understanding council tax records, but it was clear that he understood the record to provide that information as it was in 2018. He also said that at the time he downloaded that search, the screen depicted the date of the search.
33. Paul Taylor's evidence was that on 16<sup>th</sup> April 2018 he requested a renewed council tax search relating to 11 Croft Hall and this showed the same persons were occupying referring to PDT 010: see the part of his statement at [117]. Unfortunately, PDT010 at [153-154] is another council tax search which relates to 11 Croft Hall for a period from 3<sup>rd</sup> August 2016 and gives the name of another occupier Mr James Wong. The Tribunal will return to this later. As the Tribunal found Mr Taylor to be an honest and (otherwise) reliable witness, the most likely explanation for this was the incorrect numbering or transposition of exhibits as there appeared to be two identical copies of an undated council tax search at PDT 007 [145] and PDT-002 at [133]. Part of this apparent confusion might be attributable to HBC's practice of exhibiting his witness statement to the witness statement of Deborah Watts.
34. The Tribunal's findings on this issue are supported by the contemporaneous account prepared by Mr Taylor of his council tax searches in 2018 for the purpose of seeking authorisation for enforcement action in about April 2018 a copy of which is exhibited as DW005 at [53-59] referred to in Deborah Watts' statement at paragraph 16 [31]. This makes it clear that the sequence of events was a council tax search for 11 Croft Hall which showed Mr Wong as the occupier from August 2016 and a second search in April 2018 showing the occupants as Alexandra Jackson and Andrew Vicary: see [54-55].
35. On 1st June 2018 a notice of intent to issue a financial penalty was issued by HBC for 11 Croft Hall by post, a copy of which is at [89-90]: see Deborah Watts' witness statement of 1<sup>st</sup> February 2019 (paragraph 19) at [31]. The certificate of posting of this document is at [91]. The Tribunal finds it was received by Antonia Birk.

36. Deborah Watts gave evidence in accordance with her witness statements at the hearing. The statement relevant to 11 Croft Hall was at [29-33]. She was a responsible and educated manager. The Tribunal formed the view she was a credible and honest witness doing her best to provide accurate evidence.
37. The response from Antonia Birk in her e-mail of 8<sup>th</sup> June 2018 at [94–95] is illuminating. Antonia Birk’s use of reference numbers adopted in the earlier series of warning letters sent by HBC in 2017 for 11 Croft Hall (and for 12 and 13 Croft Hall) shows clearly that she received those letters. Her use of the HBC reference numbers for 11 Croft Hall adopted in the “warning letters” sent by HBC in 2018 for 11 Croft Hall show beyond doubt that she received those letters. The e-mail of 8<sup>th</sup> June 2018 at [94–95] is an articulate and intelligent response. None of these responses disputed that the properties were let out as a dwelling in March 2018 or subsequently or that they were within the selective licensing area. Nor did Antonia Birk’s response in June 2018 assert facts which might have led a responsible officer of HBC to question whether 11 Croft Hall was such a property.
38. On 12<sup>th</sup> June 2018 an attempt was made by Deborah Watts to respond to Antonia Birk’s e-mail of 8<sup>th</sup> June 2018 by an e-mail a copy of which is at [93]. Unfortunately, that e-mail contained a small error in the e-mail address and did not arrive in Antonia Birk’s “in-box”. That e-mail does however inform the Tribunal of the state of mind of a senior officer of HBC at that time.
39. Deborah Watts gave evidence that on 6<sup>th</sup> July 2018 the Housing Renewal Manager and Senior Technical officer met to consider the representations of Antonia Birk and referred to the consideration of Representations form at [99-100]. Even if the contents of that record are excluded from the Tribunal’s consideration as evidence of the truth or accuracy of their contents, that record would still be admissible as evidence of the fact that senior officers of HBC considered the issues raised by Antonia Birk as representations on 6<sup>th</sup> July 2018. Deborah Watts produced them as the record of that fact and the fact that in October 2018 the record shows the Chief Legal Officer of HBC reviewed the file and agreed with the decision of the other senior officers. The Tribunal accepts that evidence and so finds. This finding applies to each of 11, 12 and 13 Croft Hall.
40. The Tribunal finds that those searches and exchanges with Antonia Birk showed at 12<sup>th</sup> November 2018 (the date of the final penalty notice at [103-106]) that HBC was sure and had evidence from which it could properly conclude that 11 Croft Hall had been occupied as a dwelling by various individuals from August 2016 and were so occupied in May 2017 and February 2018 and had been let to those individuals and was accordingly “a Part 3 House”.

41. In reaching this conclusion the Tribunal has not required Antonia Birk to show that the exercise of its statutory discretion or powers by HBC was wrong, but has considered afresh the evidence available to HBC at November 2018: cf the approach criticised in *Hope and Glory Public House R v City of Westminster Magistrates Court* [2011] EWCA Civ 31.
42. The Tribunal is fortified in that conclusion by the fact that Antonia Birk did not seek to assert facts which might have undermined the conclusion that this was a “Part 3 House” in her grounds for appeal at [18] [22-25] or in written comments at [496-506]. On the contrary she asserted that the properties were “high end extremely well maintained properties which she offered for rental” at [22]. This finding applies to each of 11, 12 and 13 Croft Hall.

### **12 Croft Hall – The Background**

43. On 1<sup>st</sup> August 2017 a first “warning letter” was sent to Antonia Birk by Paul Taylor on behalf of HBC. That letter was exhibited as PDT005 at pages [289 – 290] of the Bundle. The warning letter asserted that 12 Croft Hall was a privately rented property falling within HBC’s designated selective Licensing area and that 12 Croft Hall was being rented out by a private landlord. The words “warning letter” in the body of that letter were coloured red with the aim of drawing attention to the letter. Antonia Birk refers to receiving such a warning letter in her appeal form incorporating her e-mail of 8<sup>th</sup> June 2018 at [24].
44. According to Paul Taylor’s statement of 23<sup>rd</sup> April 2018 at [272], HBC’s records showed that on 2<sup>nd</sup> August 2017 Antonia Birk telephoned Mr Taylor’s department at HBC about the warning letter and left a message for someone to call her back. Mr Taylor referred to the statement of Mr Steven Smith at pages [347-348] of the Bundle dated 25<sup>th</sup> April 2018. For the reasons given above, the contents of Steven Smith’s witness statement were not taken into account or admitted into evidence as evidence of the truth of their contents. However, Paul Taylor’s evidence about receipt of a message from Steven Smith from Antonia Birk is admissible as evidence of the fact that such a message was left by her. Paul Taylor also gave evidence that he left a message by telephone attempting to contact Antonia Birk. Antonia Birk’s appeal form incorporating her e-mail of 8<sup>th</sup> June 2018 [24] accepts that she received a letter (although it is unclear to which of the 3 properties this related) and she made a telephone call to HBC in response.
45. Paul Taylor’s evidence was that on 5<sup>th</sup> September 2017 a “second” “warning letter” relating to 12 Croft Hall was sent which he referred to as PDT006 in his statement at pages [272-273]. That letter is at pages [291-292] and the certificate of posting is at [293].
46. Paul Taylor’s evidence was that he made a number of attempts to speak with Antonia Birk in September and November 2017 at [273] but was

unable to find a time which was convenient for her. The Tribunal so finds.

47. None of the above evidence was challenged by Antonia Birk. She did not dispute (in her written comments or otherwise) that she telephoned HBC. Nor did she deny attempts had been made to contact her by telephone. Antonia Birk's written comments dated 05 February 2019 entitled "Response to HBC Bundle" at page [502] accepted that she received these warning letters referred to in Mr Taylor's statement.
48. Paul Taylor's evidence was that a "renewed first warning letter" dated 12<sup>th</sup> February 2018 at [299-300] relating to 12 Croft Hall was sent by him to Antonia Birk on that date (PDT0008). The subsequent final "warning letter" sent by HBC on 28<sup>th</sup> February 2018 at page [301–302] refers to that earlier letter. All of the correspondence from HBC was sent to Antonia Birk's address at 9 Croft Hall. The Tribunal is sure that the first "warning letter" of 12<sup>th</sup> February 2018 would have arrived at that address. Had it not done so she would have mentioned this in her e-mail of 8<sup>th</sup> June 2018 included in the bundle at page [561-563] and elsewhere.

#### **Council tax searches 12 Croft Hall**

49. Paul Taylor's evidence was that he conducted a Council tax search on 12 Croft Hall on 26<sup>th</sup> July 2017 which showed that Mr Gene Wint had been the occupant since November 2010: see his statement at [272]. A copy of the search was exhibited as PDT002 at [283]. The Tribunal so finds.
50. On 28<sup>th</sup> February 2018 he requested a renewed council tax search relating to 12 Croft Hall: see the part of his statement at [273]. His evidence was that search showed that as from November 2010 that property remained occupied by Mr Gene Wint and he referred to the search at [295-297] which does not bear any confirmation of the date the search was made. In answer to the Tribunal's questions, Mr Taylor accepted that he was not trained or an expert in understanding council tax records, but it was clear that he understood the record to provide that information as it was in 2018. He also said that at the time he downloaded that search, the screen depicted the date of the search.
51. Paul Taylor's evidence was that on 16<sup>th</sup> April 2018 he requested a renewed council tax search relating to 12 Croft Hall and this showed the same person was occupying referring to PDT 010: see the part of his statement at [273]. Unfortunately, PDT 010 at [305-308] is another council tax search which relates to 13 Croft Hall. As the Tribunal found Paul Taylor to be an honest and (otherwise) reliable witness, the most likely explanation for this was an error in the compilation of the exhibit. The Tribunal is sure that his belief about the contents of this renewed council tax search relating to 12 Croft Hall is correct. It was not challenged directly or indirectly by Antonia Birk.

52. The Tribunal's findings on this issue are supported by the contemporaneous account prepared by Paul Taylor of his council tax searches in 2018 for the purpose of seeking authorisation for enforcement action in about April 2018 a copy of which is exhibited as DW005 at [207-213] referred to in Deborah Watts' statement at paragraph 16 [185]. This makes it clear that the council tax search for 12 Croft Hall showed Mr Wint as the occupier from November 2010: see [208-209].

### **Notice of intent 12 Croft Hall**

53. On 29<sup>th</sup> May 2018 a notice of intent to issue a financial penalty was issued by HBC for 12 Croft Hall by post, a copy of which is at [243-246]: see Deborah Watts' witness statement of 4<sup>th</sup> February 2019 (paragraph 19) at [185]. The certificate of posting of this document is at [247]. The Tribunal finds it was received by Antonia Birk.
54. Deborah Watts gave evidence in accordance with her witness statements at the hearing. The statement relevant to 12 Croft Hall was at [183-187]. She was a responsible and educated manager. The Tribunal formed the view she was a credible and honest witness doing her best to provide accurate evidence.

### **13 Croft Hall – The Background**

55. On 1<sup>st</sup> August 2017 a first "warning letter" was sent to Antonia Birk by Paul Taylor on behalf of HBC. That letter was exhibited as PDT005 at pages [455 – 446] of the Bundle. The warning letter asserted that 13 Croft Hall was a privately rented property falling within HBC's designated selective Licensing area and that 13 Croft Hall was being rented out by a private landlord. The logo "warning letter" in the body of that letter was coloured red with the aim of drawing attention to the letter. Antonia Birk refers to receiving such a warning letter in her appeal form incorporating her e-mail of 8<sup>th</sup> June 2018 at [24].
56. According to Paul Taylor's statement of 25<sup>th</sup> April 2018 at [426], HBC's records showed that on 2<sup>nd</sup> August 2017 Antonia Birk telephoned Mr Taylor's department at HBC about the warning letter and left a message for someone to call her back. Paul Taylor referred to the statement of Mr Steven Smith at pages [347 -348] of the Bundle dated 25<sup>th</sup> April 2018. For the reasons given above the contents of Steven Smith's witness statement were not taken into account or admitted into evidence as evidence of the truth of their contents. However, Paul Taylor's evidence about receipt of a message from Steven Smith from Antonia Birk is admissible as evidence of the fact that such a message was left by her. Paul Taylor also gave evidence that he left a message by telephone attempting to contact Antonia Birk. Antonia Birk's appeal form incorporating her e-mail of 8<sup>th</sup> June 2018 [24] accepts that she

received a letter (although it is unclear to which of the 3 properties this related) and she made telephone call to HBC in response.

57. Paul Taylor's evidence was that on 11<sup>th</sup> September 2017 a "second" "warning letter" relating to 13 Croft Hall was sent which he referred to as PDT006 in his statement at pages [426-27]. That letter is at pages [449-450] and the certificate of posting is at [451].
58. Paul Taylor's evidence was that he made a number of attempts to speak with Antonia Birk in September and November 2017 at [427] but was unable to find a time which was convenient for her.
59. None of the above evidence was challenged by Antonia Birk. She did not dispute (in her written comments or otherwise) that she telephoned HBC. Nor did she deny attempts had been made to contact her by telephone. Antonia Birk's written comments dated 05 February 2019 entitled "Response to HBC Bundle" at page [502] accepted that she received these warning letters referred to in Paul Taylor's statement.
60. Paul Taylor's evidence was that a "renewed first warning letter" dated 12<sup>th</sup> February 2018 at [457-458] relating to 13 Croft Hall was sent by him to Antonia Birk on that date (PDT0008). The subsequent final "warning letter" sent by HBC on 28<sup>th</sup> February 2018 at page [459–460] refers to that earlier letter. All of the correspondence from HBC was sent to Antonia Birk's address at 9 Croft Hall. The Tribunal is sure that the first "warning letter" of 12<sup>th</sup> February 2018 would have arrived at that address. Had it not done so she would have mentioned this in her e-mail of 8<sup>th</sup> June 2018 included in the bundle at page [561-563] and elsewhere.

### **Council tax searches 13 Croft Hall**

61. Paul Taylor's evidence was that he conducted a Council tax search on 12 Croft Hall on 26<sup>th</sup> July 2017 which showed that Ms Almut Becker and Mr Nzeli Patrick had been the occupants since September 2015: see his statement at [426]. A copy of the search was exhibited as PDT002 at [437]. The Tribunal so finds.
62. On 28<sup>th</sup> February 2018 he requested a renewed council tax search relating to 13 Croft Hall: see the part of his statement at [427]. His evidence was that search showed the occupants were the same as the previous search and he referred to the search at [453-455] which does not bear any confirmation of the date the search was made. In answer to the Tribunal's questions, Paul Taylor accepted that he was not trained or an expert in understanding council tax records, but it was clear that he understood the record to provide that information as it was in 2018. He also said that at the time he downloaded that search, the screen depicted the date of the search.

63. Paul Taylor’s evidence was that on 16<sup>th</sup> April 2018 he requested a renewed council tax search relating to 13 Croft Hall and this showed the same persons were occupying 13 Croft Hall referring to PDT 010: see the part of his statement at [247]. A copy of the search is at [463-464]. The Tribunal is sure that his belief about the contents of this renewed council tax search relating to 12 Croft Hall is correct. It was not challenged directly or indirectly by Antonia Birk.
64. The Tribunal’s findings on this issue are supported by the contemporaneous account prepared by Paul Taylor of his council tax searches in 2018 for the purpose of seeking authorisation for enforcement action in about April 2018 a copy of which is exhibited as DW005 at [360-361] referred to in Deborah Watts’ statement at paragraph 16 [338].

**Notice of intent 13 Croft Hall**

65. On 29<sup>th</sup> May 2018 a notice of intent to issue a financial penalty was issued by HBC for 13 Croft Hall by post, a copy of which is at [401-404]: see Deborah Watts’ witness statement of 4<sup>th</sup> February 2019 (paragraph 19) at [338]. There is no certificate of posting for this document. The Tribunal finds it was received by Antonia Birk.
66. Deborah Watts gave evidence in accordance with her witness statements at the hearing. The statement relevant to 13 Croft Hall was at [335-339]. She was a responsible and educated manager. The Tribunal formed the view she was a credible and honest witness doing her best to provide accurate evidence.

**Was an offence committed under Section 95(1) of the 2004 Act in respect of 11, 12 and/or 13 Croft Hall?**

67. Section 95(1) of the 2004 act provides
- “ A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed. ....”
- (4) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—
- (a) for having control of or managing the house in the circumstances mentioned in subsection (1), or
- (b) for failing to comply with the condition,
- as the case may be.”



68. There are several elements to this offence each of which must be considered separately.

**Was Croft Hall within the area of selective licensing?**

69. Deborah Watts' unchallenged evidence was that Croft Hall came within the selective licensing scheme for Old Hastings Ward in October 2015: see for example paragraph 5 of her statement of her February 2019 at [29-30]. The Tribunal so finds. This finding applies to each of 11, 12 and 13 Croft Hall.

**Had an application for a licence been made?**

70. Deborah Watts also gave evidence that no application for a licence had been made for any of the 11, 12 and 13 Croft Hall by Antonia Birk or anyone on her behalf as the date the decision was made to issue final penalty notice in June 2018. This was not a live issue. Antonia Birk's case has always been that she should have been given more information about the scheme and the licence or a reduced licence fee (the early bird scheme), not that any of the properties (save for 9 Croft Hall where she resides) were not required to be licensed.
71. The Tribunal finds that it is clear beyond reasonable doubt that no application for a licence had been made for any of 11, 12 and 13 Croft Hall on 21<sup>st</sup> March 2018, at the date of the penalty notices on 12<sup>th</sup> November 2018 or at the date of the hearing of this appeal.

**Was Antonia Birk a person having control or managing the part 3 House?**

72. This was not a live issue. Antonia Birk accepted at the hearing and always been her case that she managed the "rental properties": see for example her e-mail of 8<sup>th</sup> June 2018 incorporated into her grounds of appeal at [24] and her grounds of appeal at [22]. This was not simply a turn of phrase. It is clear from her evidence that she did so for receipt of rents as she asserted herself to be a responsible landlord.
73. The material parts of section 263 of the 2004 Act provide:

(1) "In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent."

(3) “In this Act “person managing” means, in relation to premises, the person who, being an owner or lessee of the premises—

(a) receives (whether directly or through an agent or trustee) rents or other payments from—

.....

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

.....

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.”

74. The Tribunal had no need to consider this question in any detail. Although Antonia Birk challenged the accuracy of entries upon the land registers for the leasehold and freehold ownership of 11, 12 and 13 Croft Hall at various points, it was not part of her case that she denied receipt of rents from persons in occupation.

**Did Antonia Birk have a reasonable excuse for not obtaining a licence of any of 11, 12 or 13 Croft Hall?**

75. The Tribunal turns to consider the defence of reasonable excuse before reaching any conclusion on the question whether an offence had been committed under section 95 of the 2004 Act.
76. The high point of Antonia Birk’s case on whether an offence has been committed was her criticism of HBC’s attempts to provide information about the need to obtain a licence at an early stage in 2015, of the fee structure for the licence and of HBC’s omission (on her case) to

respond to her questions about the licence: see her grounds for appeal at [18] and [24-25].

77. Before reaching any finding on this issue the Tribunal reminds itself of three important principles. Firstly, if the Tribunal finds that such a defence has been raised, it is for HBC to prove to the criminal standard that the excuse was not reasonable: see *Polychronakis v Richards & Jerrom Limited* [1998] Env. L.R. 346
78. Secondly it is open to the Tribunal to take into account matters of which HBC were unaware: paragraph 10(3) of Schedule 13A to the 2004 Act. Thirdly HBC was required to “have regard to” Guidance issued by the Secretary of State about the exercise of its functions under Schedule 13A and section 249A of the 2004 Act: see paragraph 12 of Schedule 13A.
79. The nub of her case on this issue is that Antonia Birk did not receive a leaflet or other written information notifying her of the intention to introduce a Selective Licensing scheme or the introduction of such a scheme: see her e-mail of 8<sup>th</sup> June 2018 at [24-25] and [22]. By inference, her case is that HBC did not take reasonable steps to publicise the existence of the scheme as section 85(4) of the 2004 Act requires. This could also be said to extend to the incentive for her to apply on an “early bird” basis and receive a discount for being a member of an “approved landlords” group. For the purposes of considering whether in law this might amount to a reasonable excuse within section 95(4) of the 2004 Act, it may be assumed that Antonia Birk’s account and recollection is correct, as the gist of her case is that she is a good landlord whose properties are managed to a high standard.
80. Section 85(4) of the 2004 Act provides:

“The local housing authority must take all reasonable steps to secure that applications for licences are made to them in respect of houses in their area which are required to be licensed under this Part but are not so licensed.”
81. It has been confirmed by the Divisional Court in *Thanet District Council v Grant* [2015] EWHC 4290 that HBC’s duty to take reasonable steps to publicise the existence of the scheme under section 85(4) of the 2004 Act is a “target duty” and not a duty owed to an individual landlord such as Antonia Birk. Accordingly, any failure to comply with the duty to publicise cannot *of itself* give rise to a defence of reasonable excuse for having control of or managing a “Part 3 House” without a licence for the purposes of section 95 of the 2004 Act: see [2015] EWHC 4290 at [16].

82. The Court in *Grant* accepted that the discharge (or non-discharge) of the local authority's duty under section 85(4) might impact upon whether an individual was unaware of the requirement for a licence and whether this was a reasonable excuse on a particular date.
83. HBC alleged that the date of the offence in each case relating to each of 11, 12 and 13 Croft Hall was "21st March 2018 (ongoing)" see [105-106], [259-262] and [411-419].
84. The relevant history of publicity given to the designation is summarised in the witness statement of Deborah Watts of 1st February 2019 (paragraph 5) [29-30]. She referred to the cabinet meeting of HBC of 30<sup>th</sup> March 2015 exhibited as PDT001 and found (inter alia) at [429 - 436]. Minute 76 at page [431] makes it clear that HBC had received opposition to proposed introduction of the licensing scheme during the consultation period from private landlords, managing agents, letting agents and landlords' associations. The Tribunal finds, if it is necessary to do so, that the consultation took place.
85. HBC's review of the scheme which took place on its second anniversary in October 2017 is recorded at [197-206]. Among other things, that review noted that by that date HBC had received over 6000 applications for licences and had issued over 5000 licences: see paragraph 4 on page [198]. The "early bird" reduced fee incentive scheme for the first 6 months of the scheme commencing in October 2015 was reported to have resulted in 44% of the expected total number of applications over the 5 year period: see paragraph 15 on page [200].
86. Reference was made by Deborah Watts to publicity given to the scheme at the consultation stage at page [39]. If necessary to do so, the Tribunal finds that HBC had taken "reasonable steps" to ensure licences were applied for. The Tribunal turns to the possibility that for one reason or another that publicity did not result in Antonia Birk becoming aware of the selective licensing scheme as it applied to Old Hastings ward in October 2015 or before the early bird discount ended in April 2016.
87. The Tribunal is sure HBC believed that Antonia Birk would have become aware of the need to apply for a licence following receipt of the warning letters from HBC, examples of which are 1<sup>st</sup> August 2017 [139-140], 11<sup>th</sup> September 2017 [141-142], 12<sup>th</sup> February 2018 [147-148] and 28<sup>th</sup> February 2018 [149-150]. The central premise upon which she formulated her appeal (question 9 at page [22]) is that it was not explained to her *why* she was required to pay.

**Was HBC’s decision to impose a financial penalty for 11, 12 or 13 Croft Hall wrong in principle?**

88. This issue resolves itself to whether HBC was satisfied beyond reasonable doubt that Antonia Birk’s conduct amounted to an offence under section 95 at the date each decision was made: see section 249A of the 2004 Act. The steps which led to that decision being made are well documented and referred to above.
89. The principal response from Antonia Birk to the warning letters in relation to each of the 3 properties in 2018 was her e-mail of 8<sup>th</sup> June 2018 at [93-95] [561-562] and [22].
90. Indeed in response to questions from Antonia Birk, Mr Taylor of HBC said in evidence that he (and other members of the HBC staff) formed the view that their attempts to contact Antonia Birk by telephone were not successful because she was avoiding them. The Tribunal accepts that Antonia Birk’s omission to make contact with HBC about the warning letters and her omission to apply for a licence properly gave rise to the perception on the part of HBC that she was avoiding them (whether or not that perception was correct).
91. The next substantive contact from Antonia Birk in time appears to be her e-mail of 21<sup>st</sup> November 2018 (14.22) sent after receipt of the 3 penalty notices: see [559].
92. Antonia Birk implicitly criticises the thinking of HBC at the date of the decision to issue the penalty notices on two grounds. Firstly, Deborah Watts sent a response intended to reach Antonia Birk to an incorrect e-mail address on 12<sup>th</sup> June 2018. This is found at [575] (referred to above). Secondly Antonia Birk points out HBC had erroneously sent a “Notice of Intent to issue a financial penalty” dated 29<sup>th</sup> May 2018 (found at page [577]) which indicated that the property which required a licence was *9 Croft Hall* not 11, 12 or 13 Croft Hall. Both of those errors occurred as a matter of historical fact. However, the Tribunal is sure that they did not vitiate HBC’s decision that it was satisfied beyond reasonable doubt that an offence had been committed at the date of issue of the penalty notices for each of 11, 12 and 13 Croft Hall as paragraph 3 of the Guidance required. The decision making process for each of the properties was mostly contemporaneously documented and was as follows:

<b>Date</b>	<b>Step taken/event</b>	<b>Bundle reference [ ]</b>
21 03 2018	Commencement date of alleged offence for each of 11, 12 13 Croft Hall and expiry date on warning letters	

Undated but April 2018	Authorisation of Proposed enforcement action 11 Croft Hall (Paul Taylor)	53-59
23 04 2018 (reviewed 23 05 2018)	Authorisation of Proposed enforcement action 12 Croft Hall (Paul Taylor)	207-213
25 04 2018 (reviewed 23 05 2018)	Authorisation of Proposed enforcement action 13 Croft Hall (Paul Taylor)	359-365
27 04 2018 (reviewed 23 05 2018)	Rationale for calculating Financial penalty for each of 11, 12 13 Croft Hall	85-86, 241-242, 393-394
01 06 2018	Notice of Intent 11 Croft Hall	87-90, 529-532
29 05 2018	Notice of Intent 12 Croft Hall	243-246
29 05 2018	Notice of Intent 13 Croft Hall	401-404
12 06 2018	Notice of Intent 13 Croft Hall (further copy of notice dated 29 05 2018)	533-536
06 07 2018	Consideration of representations 11 Croft Hall	99-100
06 07 2018	Consideration of representations 12 Croft Hall	255-256
06 07 2018	Consideration of representations 13 Croft Hall	407-408
09 07 2018	Witness statements of Deborah Watts relating to 11, 12 and 13 Croft Hall respectively	97-98, 253-254 and 405-406
30 10 2018	Review of file and form by Chief Legal officer in each of above cases	100, 256 and 408

93. The Tribunal finds that on the information available in late May 2018, HBC had satisfied itself beyond reasonable doubt that it had sufficient evidence of the commission of an offence under section 95 of the 2004 Act by Antonia Birk in respect of each of 11, 12 and 13 Croft Hall in the previous 2 months, and that the omission to seek a licence continued to amount to such an offence in each case. Paragraph 4.4 of the Guidance was complied with at the time of the issue of Notice of Intent in each case.
94. The Tribunal finds that on the information available on 21<sup>st</sup> November 2018 HBC was satisfied beyond reasonable doubt that the offences alleged under section 95 of the 2004 Act had been committed by

Antonia Birk in respect of each of 11, 12 and 13 Croft Hall. In particular the review of the evidence by HBC's Chief Legal Officer in each case evidences that consideration was given to whether there was sufficient evidence to provide a realistic prospect of conviction against Antonia Birk on each charge as the CPS Code for Crown prosecutors and paragraph 3.2 of the Guidance required.

95. Antonia Birk points to the Council tax search on page [137] as showing that the owner of the relevant property was Antonia and Mo Property Monsters and questions why this was sent to her: see Response to HBC Bundle page [503]. This search related to 9 Croft Hall and does not have a bearing upon the decisions made relating to 11, 12 and 13 Croft Hall.

### **The Level of penalty imposed by HBC**

#### **Level of penalty: HBC's Housing Renewal Enforcement Policy**

96. In April 2017 the former Department of Communities and Local Government issued guidance which local authorities are required to have regard to under paragraph 12 of schedule 13A of the 2004 Act (reissued as the Guidance).
97. Paragraph 3.5 of the 2017 Guidance provided that local authorities "should develop and document their own policy on determining appropriate level of civil penalty in a particular case". That paragraph suggested seven factors that should be taken into account when setting civil penalties. – which are reproduced in HBC's policy at [72-73]. These are
  - a) **Severity of the offence.** The more serious the offence, the higher the penalty should be.
  - b) **Culpability and track record of the offender.** A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations.
  - c) **The harm caused to the tenant.** This is a very important factor when determining the level of penalty. The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty.
  - d) **Punishment of the offender.** A civil penalty should not be regarded as an easy or lesser option compared to

prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities.

- e) **Deter the offender from repeating the offence.** The ultimate goal is to prevent any further offending and help ensure that the landlord fully complies with all of their legal responsibilities in future. The level of the penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.
- f) **Deter others from committing similar offences.** While the fact that someone has received a civil penalty will not be in the public domain, it is possible that other landlords in the local area will become aware through informal channels when someone has received a civil penalty. An important part of deterrence is the realisation that (a) the local housing authority is proactive in levying civil penalties where the need to do so exists and (b) that the civil penalty will be set at a high enough level to both punish the offender and deter repeat offending.
- g) **Remove any financial benefit the offender may have obtained as a result of committing the offence.** The guiding principle here should be to ensure that the offender does not benefit as a result of committing an offence, i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

98. The HBC Policy repeats the seven factors in the DCLG guidance and then sets out a matrix to which its officers should have regard and five stages for determining the level of the Penalty at [73-79]. 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 aggravating or mitigating factors”: [73].
99. In each case HBC officers determined the level of the penalty at £1000.00 as follows:

“Culpability - Owner has owned the 3 properties (including this one) within Croft Hall for the full duration of the licensing scheme. During the warning letter process the landlord has contacted the licensing team to express dissatisfaction with the warning letter process; investigating



officer, has attempted to contact her further to explain the process but landlord has been elusive.

As per housing renewal enforcement policy this is a high level of culpability.

Level of harm -with regard to the offence of not licensing the level of harm is considered low.

Penalty Band Score - 3

Aggravating factors - the landlord has shown persistent reluctance to licence all the properties and has been obstructive towards the investigation therefore it is reasonable to increase the penalty band score to 4.

Penalty is proportionate as it seeks to remove financial benefit gained for not having applied to licence the property and as a deterrent”

[85], [241] and [393].

100. Deborah Watts explained as follows. Following the HBC matrix, the high level of culpability would attract a penalty of £750 per offence. The aggravating factors were said to justify the fixed penalty by one penalty point £250 in each case: see [76].
101. Antonia Birk did not criticise the matrix or methodology in principle. She did however feel that she should have been entitled to an “early bird” incentive and mentioned that she was not in work so the financial penalties would cause her more financial impact than if she were in a stronger financial position. Antonia Birk did not choose to provide details of her finances to the Tribunal. The Tribunal concluded from her assertions that the properties were “high end” that she had the ability to make payment of each notice in the sum of £750.00, and payment would be in the nature of a proportionate sanction, given the length of the period over which the offence was committed.
102. The Tribunal explored with Antonia Birk possible mitigating factors. She confirmed that the operation which she had referred to in her appeal notice at [16] post-dated the final notices. She disputed that she had been “avoidant” but given her lack of experience of the scheme and lack of knowledge genuinely sought to find out what the scheme was for and whether HBC had made a mistake: see her e-mails of 8<sup>th</sup> June 2018 and 21<sup>st</sup> November 2018 at [555]. The Tribunal accepted her account that she had not intentionally sought to avoid contact with HBC officers but found that she was contacted in the course of her work at an adventure playground and was hoping to receive more information

which did not arrive. She has shown that the aggravating factors as they were perceived by HBC at the date of each notice, were not made out, having regard to the facts now known. Although HBC legitimately perceived she was obstructive on the information then available, the Tribunal does not accept that finding in the light of the evidence given at the hearing. Accordingly, the penalty point of £250.00 in each of the notices is not confirmed and the overall amount payable under each notice is varied to £750.00.

103. In relation to the substantive penalty, the Tribunal is satisfied the level in each case is appropriate to the offence committed. In each case Antonia Birk has had the benefit of not applying for a licence from October 2015 (on one view) and on any view from the earliest of the warning letters sent to her in August 2017 (by which date the civil penalty regime had been brought into force). The condition of each property and the absence of harm to the occupiers are not factors in her favour or mitigating factors but simply mean that the level of harm is not as high as it might otherwise have been. The Tribunal accepts HBC's categorisation of the culpability of Antonia Birk's omission to apply for a licence from 21<sup>st</sup> March 2018 as high in the sense that she had "wilful blindness to the risk of offending but the risk was nevertheless taken": see the Banding at [75].
104. The level of penalty in respect of each property was appropriately set at £750.00. The Tribunal has been alert to the possibility of "double counting" where there is more than one penalty notice. The Tribunal has considered each penalty notice separately as the factual background for each notice is subtly different although very similar.
105. Each penalty is now payable in the sum of £750.00.

**Name: Tribunal Judge H Lederman**

**Date: 18<sup>th</sup> June 2019**

## **RIGHTS OF APPEAL**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking