FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CE/HNA/2019/0021** **MAN/00CE/HNA/2019/0022**
Property	**:**	**20 Princes Crescent, Edlington, Doncaster, DN12 1BB** **3 Dukes Crescent, Edlington, Doncaster, DN12 1AZ**
Applicant	**:**	**Tiger Leisure Holdings Ltd**
Respondent	**:**	**Doncaster Council**
Type of Application	**:**	**Appeal against financial penalty – Section 249A and Schedule 13A to the Housing Act 2004**
Tribunal Members	**:**	**J A Platt FRICS (Chairman)** **W. Reynolds MRICS**
Date of Determination	**:**	**16 December 2019**
Date of Decision	**:**	**30 January 2020**

DECISION

The Decision and Order

The Financial Penalties in respect of the properties are amended to one Financial Penalty of £3,335.

Preliminary

1) The Tribunal received two applications from the Applicant relating to financial penalties issued by the Respondent, in respect of the letting of two separate houses. Both cases raise common issues relating to the concurrent letting of two properties in the same ownership, situated within the same selective licencing area. For reasons detailed below, the Tribunal decided to consolidate the two sets of proceedings, in accordance with The Tribunal Procedure Rule 6. (3)(b).

2) The Tribunal gave Directions on 27 June 2019.

3) Both parties provided a bundle of relevant documents including written submissions which were copied to the other. Neither party requested a hearing.

4) The Tribunal made its deliberations on 9th December 2019.

5) These appeals are by way of re-hearings of the local housing authority's decisions to impose the penalties and / or the amount of the penalties. They may be determined having regard to matters of which the authority was previously unaware. When deciding whether to confirm, vary or cancel the final notices imposing the financial penalties, the issues for the Tribunal to consider initially include:

   (a) Whether the Tribunal is satisfied, beyond reasonable doubt, that the Applicant's conduct amounts to a "relevant housing offence" in respect of premises in England (under section 95(1) of the Act), and

   (b) Whether the local housing authority, has complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty (under Section 249A and paragraphs 1 to 8 of Schedule 13A of the Act).

6) It is, therefore, appropriate for the Tribunal to have regard to the Respondent's submissions before considering the Applicant's appeal submissions.

The Properties

7) The Tribunal did not inspect the properties but understands they are both houses in tenanted residential occupation.

Facts and Submissions

8) The Applicant is the owner of 20 Princes Crescent, Edlington, Doncaster, DN12 1BB and 3 Dukes Crescent, Edlington, Doncaster, DN12 1AZ ("the properties"). It is accepted by the Applicant that at the relevant time the properties were located within an area subject to selective licensing under Part 3 of the Housing Act 2004 ("the Act") but were not licensed.

The Respondent's Submissions

9) On 7th November 2017 the Respondent, in exercise of its powers under the 2004 Act, designated part of Edlington as a Selective Licence area with effect from 7th February 2018. To advertise the new designation and the consequent need for relevant persons to apply for a licence, the Respondent's evidence is that it sent out various letters to known landlords on 30th January 2018.

10) The Respondent's evidence is that notifications of the need to obtain licences were also sent on 5th April 2018, to: Tiger Leisure holdings at 244a Balby Road, Doncaster, DN4 0NE, in respect of 3 Dukes Crescent and Galley Properties, Unit 2, Riverside Development, Chesterton Road, Eastwood Trading Estate, Rotherham, S65 1SU, in relation to 20 Princes Crescent. These being the correspondence address available on the respective council tax records.

11) On 11th July 2018, further letters were sent to Tiger Leisure holdings at 244a Balby Road, Doncaster, DN4 0NE, in respect of 3 Dukes Crescent and at 21 Hollow Gate, Rotherham, S60 2LE, in respect of 20 Princes Crescent.

12) On 23rd July 2018, two officers of the council visited 3 Dukes Crescent and were advised by the tenant that the property was managed by Galley Properties of 244a Balby Road, Doncaster, DN4 0NE i.e. the address at which Tiger Leisure Holdings had been written to on 5th April 2018.

13) Conversations took place between the Respondent's officers and Galley Properties, in respect of one or both properties, on 23rd July 2018, 14th August 2018, 20th September 2019 (by email), 19th October 2019 and 31st October 2019. During these conversations the Respondent's officers were advised that the owner of the properties was aware of the selective licencing scheme and would be submitting applications.

14) On 1st November 2018, in response to a final verbal warning issued to Galley Properties on 31st October 2018, Mr Matthew Anthony from Tiger Leisure Holdings Ltd ("the Applicant") phoned the Respondent for assistance in completing the on-line applications and advised they would be submitted that same day.

15) As no applications had been received by 7th November 2018, the Respondent decided to issue civil penalties of £5,000, in respect of each property, and Notices of Intent were issued to Tiger Leisure Holdings Ltd.

16) On 19th November 2018, application forms, dated 16th November 2018, were received in relation to both properties.

17) On 20th November 2018 representations were received from the Applicant in response to the Notices of intent.

18) Draft licences were issued in respect of 3 Dukes Crescent on 10th December 2018 and 20 Princes Crescent on 11th December 2018.

19) Having considered the Applicant's representations, the Respondent applied additional discounts, to reflect the fact that the Applicant had subsequently complied with the licencing requirements and for good cooperation and compliance history at both properties, before issuing Final Notices on 14th December 2018. The Civil Penalties imposed were £4,000 per property with an opportunity to obtain a 33% early payment discount, reducing the sums to £2,680 per property.

The Applicant's Submissions

20) The Applicant's submissions are substantially that no correspondence was received directly from the Respondent prior to the issuing of the Notice of Intent. The Applicant was first made aware of the need to obtain selective licences on 31st October 2018 during a phone call from Galley Properties.

21) The Applicant makes no submissions relating to earlier correspondence and conversations between the Respondent and Galley Properties but, due to the use of a defunct email address, denies having received any notification of those conversations from Galley properties.

22) Having been advised of the requirement by Galley Properties, Mr Anthony sought assistance from the Respondent in completing the on-line application forms on 1st November 2018 and subsequently submitted both applications on 16th November 2018. The Applicant submits that having done so within two weeks of receiving notification it had acted reasonably.

23) The Applicant contends that the Respondent should have made more effort to contact it, as the owner, directly and should, in particular, have utilised details from the Land Registry at an earlier stage than when issuing the Notices of Intent.

24) The Applicant also submits that civil penalties are being imposed for breaches of the Housing Act 2004 that are not applicable.

25) The Applicant contends that fines of £5,000 per property would cause severe hardship to the company and has provided balance sheet evidence in support of this.

The Statutory Framework and Guidance

26) Section 249A(1) of the 2004 Act (inserted by the Housing and Planning Act 2016) states that a "local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence…"

27) A list of relevant housing offences is set out in Section 249A(2),which includes the offence, under section 95(1) of 2004 Act, of a person having control or managing a house which is required to be licensed under part 3 of the 2004 Act that is not licensed. Section 95(4) states that "it is a defence that he had a reasonable excuse".

28) Section 249A(3) confirms only one financial penalty may be imposed in respect of the same conduct and subsection (4) confirms that whilst the penalty is to be determined by the housing authority it must not exceed £30,000. Subsection (5) makes it clear that the imposition of a financial penalty is an alternative to instituting criminal proceedings.

29) The procedural requirements are set out in Schedule 13A of the 2004 Act.

30) Before imposing a penalty the local housing authority must issue a "Notice of Intent" which must set out

- the amount of the proposed financial penalty,
- reasons for proposing to impose it, and
- information about the right to make representations. (Paras 1 & 3)

31) Unless the conduct which the penalty relates (which can include a failure to act) is continuing the notice of intent must be given before the end of the period of 6 months beginning on the first day on which the authority has sufficient evidence of that conduct. (Para 2)

32) A person given notice of intent has the right to make written representations within the period of 28 days beginning with the day after that on which the notice was given. (Para 4)

33) If, having had regard to any representation received, the housing authority decides to impose a financial penalty it must give a "Final Notice" imposing that penalty and requiring it to be paid within 28 days beginning with the day after that on which the final notice was given. (Paras 6 and 7)

34) The final notice must set out: –

- the amount of the financial penalty,
- the reasons for imposing it,
- information about how to pay it,
- the period for payment,
- information about rights to appeal; and
- the consequences of failure to comply with the notice. (Para 8)

35) The local housing authority in exercising its functions under Schedule 13A or section 249A of the 2004 Act must have regard to any guidance given by the Secretary of State (Para 12).

36) Such guidance ("the Guidance") was issued by the Ministry of Housing Communities and Local Government in April 2018 and is entitled "Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities".

37) Paragraphs 3.3 and 3.5 of the Guidance confirm that the local housing authority is expected to develop and document their own policies on when to prosecute and when to issue a civil penalty and the appropriate levels of such penalties and should make such decisions on a case-by-case basis in line with those policies.

38) The Guidance states "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. Local housing authorities should consider the following factors to help ensure that the… penalty is set at an appropriate level:

- severity of the offence,…
- culpability and track record of the offender,…
- the harm caused to the tenant,…
- punishment of the offender,…
- deter the offender from repeating the offence,….
- deter others from committing similar offences,….
- remove any financial benefit the offender may have obtained as a result of committing the offence…

39) The Respondent has documented its own "Enforcement Policy" and included a copy of that in the papers. The Tribunal makes further reference to the Respondent's policy later in these reasons.

The Tribunal's Deliberations and Conclusions

40) The Tribunal is satisfied beyond reasonable doubt that the Applicant has committed a "relevant housing offence" in respect of each property. It is, however, necessary for the Tribunal to consider if the Applicant has a defence of "reasonable excuse" under Section 95(4).

41) The Tribunal has regard to the Applicant's submissions regarding lack of communication from its agent and the contention that the Respondent should have made a greater effort to contact the Applicant directly at an earlier stage.

42) The Tribunal notes that the Applicant is a property investment company investing in a small portfolio of residential properties. The subject properties are managed by a professional letting agency located within a neighbouring Doncaster post code area to the area of selective licencing. At least one of the Applicant's Directors lives within a Doncaster post code area. It is not unreasonable to expect a property investment company and its professional agent to be aware of licencing requirements within their area of operation. The Tribunal notes the Applicant's assertion that it did not receive any direct correspondence prior to 31st October 2018 but the Tribunal has no reason not

to accept the Respondent's evidence that a letter was sent directly to the Applicant's registered office on 11th July 2018. The Tribunal notes the Applicant's assertion that the Respondent should have consulted the records at the Land Registry at an earlier stage. The view of the Tribunal is that it is not unreasonable for the Respondent to have regard to its own council tax records (as per the guidance) and, in any event, the Land Registry address is as per the 'disputed' letter of 11th July 2018 referred to above.

43) It is not disputed that the Respondent communicated with Galley Properties nor that they were 'the person managing' the properties. A relevant offence is committed by a person 'having control of or managing a property' and having established those facts it was not unreasonable for the Respondent to take, at face value, the notifications from Galley Properties that the owner was aware and had been made aware (by Galley Properties) of the urgent requirement to obtain licences. Any issues relating to the duties of agent and principle and the nature, timeliness and effectiveness of communication between the Applicant and its agent is outside the jurisdiction of this Tribunal.

44) For all of the above reasons, the Tribunal finds that the Applicant has no reasonable excuse for committing a relevant housing offence.

45) The Applicant asserts that the Respondent is imposing Civil Penalties for offences which are not applicable to the properties. This assertion appears to relate to the Respondent's use of a generic heading within its letter accompanying the notices, which lists each of the relevant sections to the Housing Act 2004 under which a Civil Penalty may be issued. The Notices are clear that the Respondent is imposing a Civil Penalty in respect of a breach under Section 95. It also appears to the Tribunal that the Applicant is well aware of this fact, as in its evidence it has copied the non-applicable sections but omitted to include a copy of Section 95. The Tribunal, therefore, dismisses the argument that the Respondent has imposed Civil Penalties for offences which are not applicable.

46) The Tribunal also finds that the authority has complied with all the necessary procedural requirements relating to the imposition of the financial penalties.

47) It is, therefore, necessary for the Tribunal to consider whether financial penalties are appropriate and if so, have been set at the appropriate level.

Dealing with each of these issues in turn:

48) The Applicant does not deny that it did not have a licence for each of the properties at the times when they should have been licensed. The Tribunal is satisfied that it is appropriate to impose a financial penalty. We considered whether rather than impose a financial penalty a caution would have been sufficient but decided that such a sanction would be inadequate in terms of its likely punitive and deterrent effect.

49) The Tribunal then went on to consider the amount of penalty. In so doing we had particular regard to the 7 factors specified in the Guidance referred to in paragraph 36 above.

50) Although not bound by it, the Tribunal has reviewed the Respondent's policy and found that it broadly provides a sound basis for quantifying financial penalties on a reasonable, objective and consistent basis.

51) The Respondent's policy is itself based on factors specified in the Guidance, and the Respondent went through a checklist before calculating the financial penalties of £5,000 referred to in the 7th November 2018 notices of intent. In assessing culpability and harm it concluded, for each property, that there was a medium harm rating and a medium culpability rating. This resulted in an assessment that the penalty should be in the 3rd of 5 penalty level bands which it had set as follows: –

Penalty level 1	£500-£2,000
Penalty level 2	£2,000-£4,000
Penalty level 3	£4,000-£6,000
Penalty level 4	£6,000-£15,000
Penalty level 5	£15,000-£30,000

52) The Tribunal, in making its own decision has regard to the Guidance previously referred to above and the Respondent's policy matrix. The Tribunal notes, in particular, para 41 of the guidance that:

> *"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."*

53) In seeking to ensure some consistency, the Tribunal also had regard to a previous determination relating to a breach within the same selective licencing area, in respect of 4 Staveley street, Edlington (*MAN/00CE/HNA/2019/0014)*. In that case both the Council (in their initial assessment) and the Tribunal, determined that a failure to obtain a licence with no additional contributing factors, e.g. no identified category 1 or 2 hazards, resulted in a low level of harm and impact. There is no evidence that the Council consider the subject properties to be in disrepair and licences were granted very quickly once the applications had been received. The Tribunal is, therefore, of the view that it is appropriate to assess the level of actual and likely harm as low.

54) The Applicant is a property investment company investing in a small portfolio of residential properties. The subject properties are managed by a professional letting agency located within a neighbouring Doncaster post code area to the area of selective licencing. It is not unreasonable to expect a property investment company and its professional agent to be aware of licencing requirements within their area of operation. The Tribunal, therefore, concurs with the council's assessment that the level of culpability is medium.

55) These assessments of medium culpability and low harm place the properties within Penalty Level 2 within the Respondent's policy. The policy goes on to consider the size of the Applicant's business and as a "local landlord / letting agent who owns or manages several properties" with "regular but low to medium financial income from property rentals" the expected penalty, for

one offence i.e. related to one unlicensed property, is bottom of the range of penalty band plus 30%. The bottom of penalty band 2 is £2,000 plus 30% = £2,600. There are no aggravating factors but a 5% mitigation for 'no previous convictions ..'. Resulting in an assessment of £2,470.

56) The primary purpose of enforcement action is to ensure that landlords become compliant and properties become licenced. The Tribunal therefore, concurs with the approach taken by the Respondent in applying a discount to reflect the timely response by the Applicant to the Notice of Intent, in seeking (and obtaining) licences. The costs of enforcement action are, in themselves, unnecessary and hence there is a balance to be applied between crediting the landlord for responding in a timely manner and allowing the council to recoup its additional enforcement costs incurred. The Tribunal concurs with the Respondent's approach in applying a further 10% discount to reflect the Applicant making a timely application for a licence following the service of the Notice of Intent. The Respondent applied an additional 10% discount to reflect the good maintenance history. The Tribunal has already had regard to the good maintenance history in assessing the level of harm as 'low'.

57) Applying a further 10% discount results in an assessment of £2,223.

Financial Penalty

58) The offences were committed concurrently at both properties. The Tribunal has considered whether the offences should be considered as one offence and concluded that, in accordance with the legislation they are two offences.

59) Section 249A(3) of the Act states that:

"Only one financial penalty under this section may be imposed on a person in respect of the same conduct."

Section 249A(9) states that:

"For the purposes of this section a person's conduct includes a failure to act."

It is the view of the Tribunal that a concurrent failure to apply for a licence at two properties, within the same selective licencing area, amounts to the same conduct and hence, only one financial penalty should be imposed.

60) In assessing the level of financial penalty, however, it is the Tribunal's view that the number of concurrent offences i.e. in this case, the number of properties at which a breach is being committed, is a relevant aggravating factor for which an appropriate additional level of penalty is 50%.

61) The starting point for a Civil Penalty, in this case is, therefore £2,223 plus 50% = £3,334.50 (say £3,335).

62) Should the Tribunal be incorrect in its view that concurrent breaches amount to the same conduct, the Tribunal would have taken an alternative approach with the same outcome. Having determined that an appropriate starting point for a Civil Penalty in respect of property A is £2,223 the Tribunal would have regard to the financial impact of this penalty on the Applicant when assessing the appropriate level of penalty in respect of Property B. In the view of the Tribunal, it would be appropriate to reduce the level of penalty in respect of property B by 50% to reflect the financial impact already imposed on the Applicant by virtue of the penalty in respect of property A.

63) In the opinion of the Tribunal, this approach is consistent with the approach taken by the courts when considering concurrent offences and the resultant financial penalty is at a high enough level to:

(d) Punish the offender
(e) Deter the offender from repeating the offence
(f) Deter others from committing similar offences and
(g) Remove any financial benefit the offender may have obtained as a result of committing the offence

64) The Applicant makes representations about the licence fees being backdated to 7th February 2018. Non-compliance with the law should not be cheaper than full compliance. For the benefit of doubt therefore, the Tribunal would have increased the level of financial penalty by the amount of the unpaid licence fees had the properties not been so licenced retrospectively.

65) Applying all the above, we determine the appropriate level of financial penalty to be £3,335.

Tribunal Judge J Platt
30 January 2020

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix 1

Housing Act 2004

s249AFinancial penalties for certain housing offences in England

(1)The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

(2)In this section "relevant housing offence" means an offence under—

(a)section 30 (failure to comply with improvement notice),

(b)section 72 (licensing of HMOs),

(c)section 95 (licensing of houses under Part 3),

(d)section 139(7) (failure to comply with overcrowding notice), or

(e)section 234 (management regulations in respect of HMOs).

(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—

(a)the person has been convicted of the offence in respect of that conduct, or

(b)criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6) Schedule 13A deals with—

(a)the procedure for imposing financial penalties,

(b)appeals against financial penalties,

(c)enforcement of financial penalties, and

(d)guidance in respect of financial penalties.

(7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

(9) For the purposes of this section a person's conduct includes a failure to act.

Schedule 13A

Notice of intent

1Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").

2 (1)The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2)But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—

(a)at any time when the conduct is continuing, or

(b)within the period of 6 months beginning with the last day on which the conduct occurs.

(3)For the purposes of this paragraph a person's conduct includes a failure to act.

3The notice of intent must set out—

(a)the amount of the proposed financial penalty,

(b)the reasons for proposing to impose the financial penalty, and

(c)information about the right to make representations under paragraph

4 Right to make representations

4 (1)A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2)Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ("the period for representations").

Final notice

5After the end of the period for representations the local housing authority must—

(a)decide whether to impose a financial penalty on the person, and

(b)if it decides to impose a financial penalty, decide the amount of the penalty.

6If the authority decides to impose a financial penalty on the person, it must give the person a notice (a "final notice") imposing that penalty.

7The final notice 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.

8The final notice must set out—

(a)the amount of the financial penalty,

(b)the reasons for imposing the penalty,

(c)information about how to pay the penalty,

(d)the period for payment of the penalty,

(e)information about rights of appeal, and

(f)the consequences of failure to comply with the notice.