



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

Case Reference : **MAN/32UH/HNA/2019/0097**

Property : **9, Bacon Street, Gainsborough DN21 1DQ**

Applicants : **Glen Reginald McCartney**

Respondent : **West Lindsey District Council**

Type of Application : **Appeal against a financial penalty
imposed under Section 249A & Schedule
13A Housing Act 2004**

Tribunal Member : **Mr J R Rimmer
Ms S D Latham**

Date of Determination : **31st January 2020**

Date of Decision : **6th February 2020**

DECISION

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Order: The decision to impose a financial penalty notice in respect of 9, Bacon Street, Gainsborough is upheld. The amount of that penalty shall be £3,000.00.

A. Application

1. The Tribunal has received an application under paragraph 10 of Schedule 13A to the Housing Act 2004 (“the Act”) against a decision of West Lindsey District Council (the “local housing authority”) to impose a financial penalty against the Applicant under section 249A of the Act.
2. This penalty relates to an offence that the Council determined had been committed by the Applicant in relation to operating an unlicensed dwelling house in an area of selective licencing under the regime established by the Act. The Council had designated the relevant area of Gainsborough, within which the subject property is situated, as such a selective licencing area with effect from 18th July 2016
3. The Tribunal has sent a copy of the application to the Respondents.
4. Directions were given by the Deputy Regional Judge of the Tribunal for the further conduct of this matter.
5. Those directions have been complied with sufficiently for the Tribunal to be able to determine the application.

B Background

6. The Applicant is the owner of 9, Bacon Street, Gainsborough that is within the area designated by the Council, as the local housing authority, under its powers to impose selective licencing requirements in furtherance of its duty to ensure the maintenance and improvement of housing standards within the District.
7. It came to the Council’s attention on or about 9th April 2019 that the property at 9, Bacon Street was subject to a relevant residential tenancy, but a licence had neither been applied for, nor obtained. Subsequent enquiries had identified the name and address of the landlord.
8. The Applicant accepts that he did not make an application to obtain a licence, being unaware that the licencing scheme had come into effect. On receipt of a notice indicating that an inspection of the property was proposed the Applicant engaged with the respondent and provided details

of the possession proceedings then being undertaken to recover possession from the tenant.

9. The Respondent provides details within its statement of the difficulties encountered in obtaining entry to the property for the purposes of its inspection and the state and condition of the premises when entry was finally obtained, pursuant to a warrant granted at Lincoln Magistrates' Court.
- 10 Thereafter the Respondent indicated that it had formed an intention to impose a financial penalty and served an appropriate notice of intent on 16th July 2019 which was then confirmed by a final notice dated 12th September 2019 following the consideration of representations from the Applicant. The amount of the penalty is £3,500.00.

C The Law

- 11 It is appropriate at this stage to set out the various statutory and regulatory provisions that the Tribunal needed to take into account in coming to its decision.

In relation to the commission of a relevant offence and imposition of a financial penalty

- 12 Section 249A of the Act provides;
 - (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-
 - (c) Section 95 (licencing of houses...)
 - (3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.
- 13 Section 95 of the Act provides:
 - (1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed but is not so licenced
 - (2) ...
 - (3) In proceedings for an offence under subsection (1) it is a defence that at the material time
 - (a)...

- (b) an application for a licence had been duly made in respect of the house under section 87 and that application was still effective
 - (4) In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse-
 - (a) For having control or managing the house in the circumstances mentioned in subsection (1)
 - (7) For the purposes of subsection (3) an...application is effective at a particular time if at that time it has not been withdrawn and either-
 - (a) The authority have not decided whether or not to serve a temporary exemption notice, or... grant a licence in pursuance of the application or
 - (b) (if a license is refused either the time to appeal that decision has expired, or an appeal has been unsuccessful)
- 14 Section 87 of the Act sets out the requirements to be met in any application, those being-
- (1) ...made to a local housing authority
 - (2) ...made in accordance with such requirements as the authority may specify
 - (3) ...be accompanied by any fee required by the authority
 - (4) ... comply with any requirements specified by the authority subject to any regulations made under subsection (5)
 - (5) The appropriate national authority may by regulations make provision about the making of applications under this section
 - (6) Such regulations may, in particular, specify the information, or evidence, which is to be supplied in connection with applications.
- 15 Regulation 7 and Schedule 2 of the Licensing and Management of Houses in Multiple Occupation and other Houses (Miscellaneous Provisions) (England) Regulations 2006 (“the 2006 Regulations”) provide a whole raft of requirements to be satisfied in an application, but the Tribunal is not concerned on this occasion with these. The Applicant did satisfy them within an application that was in due course made for an appropriate licence.
- 16 Paragraph 10 of Schedule 13A of the Act provides
- (1) A person to whom a final notice is given may appeal to the First-tier Tribunal against-
 - (a) The decision to impose the penalty, or
 - (b) The amount of the penalty

- (2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn
- (3) An appeal under this paragraph-
 - (a) Is to be a re-hearing of the local authority's decision, but
 - (b) May be determined having regard to matters of which the authority was unaware
- (4) On an appeal under this paragraph the First-tier Tribunal, may confirm, vary, or cancel the final notice
- (5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a penalty of more than the local housing authority could have imposed.

D The evidence

- 17 The Applicant's case is relatively simple and is put clearly in the application form he submitted to the Tribunal dated 24th September 2019, together with an expanded statement which appears at section 2 of his bundle of documents in support of his case. He makes a number of points that may be summarised as follows:
- (1) He was unaware of the need to comply with the licensing requirements imposed by the Respondent.
 - (2) He had not received communications from the Respondent between 2014-2016 relating to the licensing requirements
 - (3) The length of time over which the licensing process had not been undertaken stems from those initial issues and not any deliberate decision to ignore them.
 - (4) The state and condition of the property at the time of the Respondent's inspection arose from the lifestyle choices and actions of the occupier and not those of the Applicant.
 - (5) The imposition of the financial penalty is unfair in the light of those issues.
 - (6) He had been attempting to gain possession through appropriate legal means and sought to engage with the Respondent as soon as the licence requirements were made apparent in May 2019.
- 18 The Respondent provided an extremely comprehensive bundle of documents and a lengthy statement, with exhibits, from Emily Holmes, a Housing Standards and Enforcement Officer. They were supported by further statements as to the process that the Respondent follows in its enforcement of housing standards and licensing. The thrust of this was to establish:

- (1) That an offence of operating an unlicensed dwelling had been established
 - (2) That the Respondent had in place, and operated, appropriate procedures to establish this, had put in place procedures to make contact with the relevant landlords and sought to implement the financial penalty regime when neither an application nor appropriate contact from an Applicant had been forthcoming.
 - (3) The duty imposed upon the Respondent in relation to its obligations to improve housing standards, which it had chosen to do by imposing a selective licensing scheme over a specific area within the District and the manner of the Applicant's failure to obtain a licence, justified the imposition of a financial penalty
 - (4) An appropriate, considered, policy was in place and the manner in which the Council had implemented it, justified the level of the penalty that had been decided upon.
- 19 The Tribunal accepts that it should not seek to interfere unnecessarily with the democratic process that had taken place within the elected council and its implementation by its officers. There was nothing to suggest that any of the Respondents actions, or decisions, in this case are fundamentally flawed or incorrect.

E Determination

- 20 The Tribunal reminds itself, however, that these proceedings being conducted by way of a rehearing. It, firstly, takes the view that the Tribunal should consider carefully whether the Respondent had taken care to put in place both a licensing policy and a policy for the imposition of financial penalties where appropriate and had provided clear documentary evidence of how they had been applied to reach the conclusion that it had in relation to the Applicant.
- 21 Indeed, the Tribunal accepts that the policies are the direct result of the democratic process whereby the Respondent seeks to fulfil its statutory duty by seeking from its officers a clear and rational process for doing so.
- 22 The Tribunal also has the duty to re-hear the case against the Applicant. It has done so with the policies of the Respondent always within its mind and seeks to use those as the basis of its determination. It offers no criticism of the thorough manner in which the Respondent has approached this case and the documented procedures it has followed.
- 23 Has an offence been committed?

The first question the Tribunal must ask itself is whether an offence has been committed. The clear answer is yes. There was, no licence in place in

respect of 9, Bacon Road. The Tribunal accepts that such a situation only continued up to May 2019 by reason of ignorance of the implementation of the scheme on the part of the Applicant. The Tribunal accepts what he says about the difficulties he has encountered in dealing with the tenant and the effect that his conduct had upon the condition of the property. It also accepts that the Applicant will have had no choice but to obtain possession by court order. It also takes the view that in the circumstances it would have been unwise to rely upon a concept of informal surrender of the tenancy by the abandonment of the property.

- 24 There is, however, a clear breach of Section 95(1) Housing Act 2004. Nothing that the Tribunal saw, or heard, suggests that the Applicant would be able to rely on any of the defences to criminal liability outlined in Section 95(3) and (4). The reason put forward for the failure to licence is not reasonable either from the point of view of what might be expected to have been done by any reasonable person, nor from the point of view of what a reasonable person might have expected the Applicant to have done. Ignorance is not a defence, although it might be a mitigating factor. The Tribunal consider this below.
- 25 The Tribunal is so satisfied that it is sure that the offence has been committed.
- 26 What sanction is appropriate to mark the commission of the offence
Under the financial penalty regime, the Respondent, in the event of an offence having been committed, has available to it an amount of up to £30,00.00 that it can impose as a penalty. It has provided and explained its matrix and methodology to support its finding that an amount of £3,500.00 is appropriate.
- 27 The Tribunal would accept that the Respondent has an appropriate policy for the imposition of a financial penalty and a clear matrix for the assessment of the level of that penalty. The Respondent sets out its use of the matrix, as it relates to this case, at pages 128 onwards of its submission.
- 28 The Tribunal takes the view that a starting point of £2,500. For the offence of failing to obtain a licence is a proportionate penalty. The Tribunal has considered within this the explanation put forward by the Applicant for his failure to make application, his lack of awareness of the licensing regime. It is not persuaded that this is of any great significance. The Applicant lives at no great distance from the subject property (although in a different local authority area) and, to the Tribunal's mind should be proactive in keeping abreast of developments in relation to rented property, even as a landlord with a very limited portfolio.

- 29 It does however take the view that any additional element of the penalty should properly take into account the difficulties that faced the Applicant for the period of the failure to licence and at the time the enforcement process was being undertaken.
- 30 In this regard the Tribunal would interpose some flexibility of approach and attribute much of the concern as to the condition of the property to the tenant's actions over what would appear, at the time of the Respondent's inspection, to have continued for some time. The Tribunal considers that this should have a considerable effect upon the score within the scoring matrix in table 3 of the Respondent's assessment.
- 31 Similarly, the assessment of moderate income received should be considered in the light of the costs being incurred in possession proceedings that are not likely to be recovered and the cost of repairs to be undertaken after possession is obtained.
- 32 Together with the Respondent's own reassessment of the deterrent effect of a penalty upon the Applicant and the already low assessments associated with culpability and the number of properties owned the tribunal is of the view that the matrix score would be within the range of 50-60: at the very lowest end of the impact scales
- 33 The effect of the above, from the Tribunal's perspective is to reduce the amount of the penalty by a significant amount, whereby that impact assessment result in an amount of £500. This reflects the Tribunal looking at the flexibility referred to in paragraph 29, above, within the ranges applied by the Respondent. The Tribunal therefore imposes a financial penalty of £3,000.00.

JR Rimmer
Tribunal Judge
6th February 2020