FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference(s)	:	**BIR/00FK/HNB/2019/0001 & 0002**
Properties	:	**8 & 26 Queensway Derby DE22 3BE**
Applicants	:	**Annabel Lewis & James Lewis**
Representative	:	**Jigsaw Property Management**
Respondent	:	**Derby City Council**
Type of Applications	:	**Appeals against Financial Penalties - Section 41 & Schedule 13A to Housing Act 2004.**
Tribunal Members	:	**V Ward BSc Hons FRICS – Regional Surveyor** **R Chumley - Roberts MCIEH CEnvH, J.P**
Date of Decision	:	**12 May 2020**

DECISION

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BACKGROUND

1. This is the Tribunal's determination in respect of appeals against financial penalties as detailed below under section 249A and Schedule 13A, paragraph 6 of the Housing Act 2004.

8 Queensway Derby DE22 3BE	£5,000
26 Queensway Derby DE22 3BE	£6,000
Total amount	£11,000

Both issued against Annabel and James Lewis, the Applicants by the Respondent Local Housing Authority – Derby City Council.

2. The appeals were first notified to the Tribunal by letter received on 18 October 2019 whilst the application forms and fee were received on 28 October 2019, against Penalty Charge Notices issued on 24 September 2019. By way of Directions issued on 30 October 2019, the Tribunal advised the parties that it was minded to accept the appeals as in time unless either party objected within 14 days of the date of the Directions. Neither party objected.

3. The case management powers provided by Rule 6 (3) (b) of the Tribunal Procedure (First – tier Tribunal) (Property Chamber) Rules 2013 are as follows:

(3) In particular, and without restricting the general powers in paragraph (1) or (2), the Tribunal may-

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case.

The Tribunal therefore consolidated the applications after allowing the parties the opportunity of objecting to the consolidation.

4. The Applicants indicated within their application form that they were content with a paper determination. However, in Directions dated 29 October 2019, the Tribunal took a different view and directed an oral hearing.

4. Following a request by the Applicants, a hearing planned for January 2020, was adjourned due to the widespread flooding.

5. On 25 March 2020, the Tribunal, in response to advice from Public Health England in relation to the coronavirus outbreak, issued further directions

varying previous directions and vacating an oral hearing that had been fixed for 28 April 2020. The Applicant did not withdraw its consent to a paper determination following issue the further directions. The Tribunal decided that it could deal with the application fairly and justly without a hearing because i), the Tribunal had the benefit of detailed written submissions from both parties, and ii), the application does not raise any disputed issues of fact requiring oral evidence. The parties were advised that they had 28 days to object to this proposal. The parties were in addition given until 21 April 2020 to make further submissions. The Respondent subsequently indicated that they did not object to the determination of the appeal on the papers. Accordingly, applying the overriding objective in Rule 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal has determined this application under Rule 31(2) without a hearing having received the consent of both parties.

6. On 18 April 2020, the Applicants requested the hearing of 28 April 2020 be postponed due to the current Covid-19 situation. As it appeared the parties may not have correctly noted the directions of 25 March 2020, on 20 April 2020, the Tribunal wrote to the parties again to confirm that the matter would be determined without an oral hearing or internal inspection of the Property, i.e. on the basis of the written submissions of the parties alone unless any party objected within 7 days.

7. No objections were received so the Tribunal proceeded to determine this matter on the basis of the written submissions of the parties without an inspection of the Property.

Representations of the parties

The Submissions of the Respondent

8. The Respondent outlined the background to its decision to impose the financial penalty on the Applicant.

9. In 2014, the Applicants acquired the properties. On 10 August 2015, Annabel Lewis contacted the Housing Standards team of the Respondent to enquire if 26 Queensway required a House in Multiple Occupation (HMO) licence. At that time, the property did not require a licence as it is only two storeys.

10. On 1 October 2018, the mandatory HMO licence regime was extended to properties which were occupied by five or more people forming two or more households, regardless of the number of storeys.

11. On 31 January 2019, the Housing Standards team received a service request from the tenants of 26 Queensway about issues with the boiler and general disrepair. The request stated that the property was occupied by seven people, all in en-suite rooms.

12. On 6 February 2019, an officer of the Respondent, Adrienne Mainwaring, searched the internet for properties to rent with 5 or more beds. The listing website showed a six-bedroom property at 8 Queensway was available. At that time there were no licensed HMO properties on Queensway.

13. On 14 February 2019, officers of the Respondent inspected 26 Queensway and found that it was a seven-bedroom property occupied by six students. It had previously been occupied by seven students but one had vacated prior to Christmas 2018. On 5 March 2019, officers of the Respondent inspected 8 Queensway and found that it was a six-bedroom property occupied by five students. Land Registry searches established that the Applicants were the owners of both properties.

14. On 20 March 2019, Annabel Lewis made a payment for HMO Licence applications for both properties although the Respondent states that these applications were not "fully received" until April 2019.

15. In April and May 2019, the Applicants and their managing agent Daniel Hoare (of Jigsaw Property Management) attended interviews under caution.

16. On 30 July 2019, the Respondent issued Notices of Intention to impose a financial penalty on the Applicants. The Applicants made written representations which were received on 21 August 2019. These were considered by the Respondent and on 24 September 2019, the Final Financial Penalty Notices were served.

Calculation of the Penalties.

17. The Applicant detailed the method of calculation of the penalties. The first step was to consider the culpability of the Applicants for their failure to licence a HMO. The Respondent considered the Applicants as negligent as through their omissions (in being ignorant of the law and then once being aware not making applications immediately and leaving others to deal with them) an offence was committed. The starting point for negligent culpability under Derby City Council's adopted matrix for civil penalties is £7,500. This was the same for both properties.

18. The third step was to consider any aggravating of mitigating factors.

Mitigating factors for 8 Queensway were as follows:

No previous convictions.
No history of previous penalty charge notices
Evidence of immediate steps taken to apply for licence.
Both Landlords have shown good character.
No history of obstruction of Housing Officers/Serious medical condition of James Lewis (heart attack in September 2018)

The Respondent determined the mitigating factors warranted a reduction of £2,500 therefore the starting penalty was reduced to £5,000.

Mitigating factors for 26 Queensway were as follows:
No previous convictions.
No history of previous penalty charge notices
Evidence of immediate steps taken to apply for licence.
Both Landlords have shown good character.
No history of obstruction of Housing Officers/Serious medical condition of James Lewis (heart attack in 2018)

The Respondent determined the mitigating factors warranted a reduction of £2,500 however two aggravating factors, an issue with the boiler and a lack of responsiveness to repair requests from tenants, offset this amount by £500 each, therefore the starting penalty was reduced to £6,000.

19. The fourth, fifth and sixth steps were to consider the cost to the Respondent of preparing the "penalty charge file" and to make a further charge if these costs are not "well covered" in the penalty charge figure after step 3. No adjustments were made at this point.

20. Step 7 was to "take a step back" and consider whether the financial penalty met, in a fair and proportionate way the objectives of punishment, deterrence and removal of gain derived through the offence. No further adjustments were made at this step.

21. Step 8 was to assess the offender's assets and income. The offender is assumed to be able to pay a penalty unless they can demonstrate otherwise. It was noted that James Lewis was a director of Bamfords Auctioneers and Valuers Limited. No adjustments were made at this stage.

22. Step 9 was to serve the Notice of Intent indicating the proposed penalty figure including a note stating that the costs of considering a written representation should one be made, will be factored into the final penalty figure.

23. However, Notices of Intention were served on both Annabel Lewis and James Lewis on 30 July 2019 in the amounts as follows:

8 Queensway	£5,500
26 Queensway	£6,500

Both penalties had been increased by £500 although there was no reason given for this.

24. The representations made by the Applicants basically concerned that they were not aware of the changes in the law relating to HMO licensing. They had been letting the properties through Orange Tree Lettings Limited (Orange Tree) since June 2015 on a fully managed basis. At no time did Orange Tree inform the Applicants of the change in the law and it was only by chance that they realised that both properties had to become licensed. following a letter from an agent touting for work which they believe was in late September 2018. Since March 2019, the properties have been fully managed by Jigsaw Property Management. The Applicants state that they left Orange Tree as they failed to provide an adequate service and advise them of the HMO legislation changes. On 16 September 2018, James Lewis had a serious cardiac arrest and was subsequently in hospital for six weeks leaving the day-to-day running of the business to Annabel Lewis. The Applicants also state that they have another property – 70 Otter Street Derby - managed by another agent who had advised them of the necessity to obtain a licence which they had done. To an extent, this became intertwined with the licences on the Queensway properties. Relevant evidence from Cheryl Foy employed by the Respondent as a team assistant states that on 26 October 2018, she emailed Annabel Lewis about the incomplete renewal application for Otter Street. There were other emails in between but on 22 November 2018, Ms Foy received an email from Annabel Lewis containing "Fire Certificates" for the Queensway properties. Later that same day, Ms Foy responded saying "You have sent me fire certs for 8 & 26 Queensway but we have no record of these on our system. Are they HMOs too?" There was no response to this email until 14 April 2019 when the certificates were resubmitted. In their representations, the Applicants stress that they had never knowingly flouted the law and always ensured their properties were in a good and safe condition.

27. Following the representations, the Respondent reduced each penalty by £500 from the amounts stated in the Notices of intention for "Good character". This had previously been considered a mitigating factor in the original calculation. The Respondent issued the Final Penalty Notices in the amounts shown below:

8 Queensway	£5,000

26 Queensway £6,000

The Submissions of the Applicants

28. The Applicants' submissions were essentially the same for both properties and to an extent reiterate the representations they had made to the Respondent following the Notice of Intention.

29. The Applicants consider that HMO legislation and specifically the change in October 2018 was to protect tenants from poor living conditions however in the opinion of the Applicants, the Queensway properties did not provide poor living conditions and were maintained to a high standard. A report by Simple Landlords Insurance in December 2018 found that 85% of Landlords were unaware of the change in HMO regulations and in addition, of a sample of 90 local authorities, two thirds did not know how many unlicensed HMOs were operating in their area.

30. The Applicants again reiterate that they did not knowingly flout their responsibilities and all checks regarding fire, gas and electrical were in place.

31. Considering the Respondent's penalty matrix, the Applicants believe that the starting point should be low culpability, with a penalty starting at £3,000 rather than negligent with a starting point of £7,500. The justification for this is that the properties were professionally, fully managed and at no time did their agent – Orange Tree advise them, of the need to licence. As soon as the Applicants became aware of the need, they contacted the Respondent.

32. The illness of James Lewis and the difficulty of communication with the Respondent all contributed to the delay in licensing the properties and the Applicants hoped that the Tribunal would consider these factors in mitigation, as the fines at the levels they are currently imposed will cause great economic hardship.

The Law

33. The Law relating to this matter is detailed within the Appendix.

Discussion

34. The Tribunal considered the appeal in three parts:

    (i) Whether the Tribunal was satisfied, beyond reasonable doubt, that the applicant's conduct amounted to a "relevant housing offence" in

respect of premises in England (see sections 249A (1) and (2) of the Housing Act 2004);

(ii) Whether the local housing authority complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty (see section 249A and paragraphs 1 to 8 of Schedule 13A of the 2004 Act); and/or

(iii) Whether the financial penalty was set at an appropriate level, having regard to any relevant factors, including:

(i) the offender's means;
(ii) the severity of the offence;
(iii) the culpability and track record of the offender;
(iv) the harm (if any) caused to a tenant of the premises;
(v) the need to punish the offender, to deter repetition of the offence or to deter others from committing similar offences; and/or
(vi) the need to remove any financial benefit the offender may have obtained as a result of committing the offence.

Did the Applicants' conduct amount to a relevant housing offence?

38. It was not contested by the Applicants that the Properties required HMO licenses. The Applicants representations in this regard were essentially based on the fact that they expected their agents to keep them informed of any requirements in this regard, as they were in respect of their other properties. In addition, they contend that the Respondent did not advise them of the change in the law, even though they were aware that they had unlicensed HMOs.

39. The Tribunal has some sympathy with the Applicants with regard to the fact that their agent did not advise them of the need to licence. However, it is impractical to expect the Respondent, or any Local Housing Authority, to comb its records and write to individual landlords to advise them of their statutory duties.

40. The Tribunal is therefore satisfied beyond reasonable doubt that the alleged offence was committed.

Whether the local housing authority complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty?

41. The Applicants raised no significant challenge to the procedural elements of the imposition of the penalties save that there was some confusion over addresses.

42. The Respondent served the Notice of Intention on the Applicants on 30 July 2019. Unless the offence is continuing, 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. The Respondent became aware of the offences in February 2019 thus paragraph 2 of Schedule 13A to the Act is satisfied. The Notice of Intent included the information required under paragraph 3.

43. Representations were received from the Applicants and on 24 September 2019, the final Notices of the Decision to impose Financial Penalties were issued by the Respondent.

44. The Tribunal determines that the procedural requirements for the imposition of the Financial Penalties were satisfied.

Whether the financial penalty was set at an appropriate level?

45. In determining whether the penalty was set at an appropriate level, this Tribunal (the First-tier Tribunal, "FTT") must take into account the guidance given in recent Upper Tribunal decisions in respect of financial penalties, particularly the following two cases which were consolidated as follows:

    London Borough of Waltham Forest and Allan Marshall
    London Borough of Waltham Forest and Huseyin Ustek

    Both were noted under the UT Neutral Citation Number: [2020] UKUT 0035 (LC).

46. In both appeals, Judge Cooke reinstated the original penalty amounts and held that the FTT must accept the local authority's policy: "*the FTT is not the place to challenge the policy about financial penalties*". When determining an appeal, it must "*start from the policy*" and, though it may depart from it, may only do so in certain circumstances. In addition, the Applicant, in any particular matter, bears the burden of persuading it to do so, and in considering whether it should do so, the FTT must:

    "*Look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed*", and

"*Consider the need for consistency between offenders, which is one of the most basic reasons for having a policy and an essential component of fairness in the financial penalty system.*"

47. As an appeal under Schedule 13A to the 2004 Act is by way of re-hearing, the Tribunal must of course make its own decision. In doing so, however, it must afford the local authority's decision particular weight, described variously by the Upper Tribunal as "*special weight*", "*considerable weight*" and "*great respect*". Parliament has conferred the primary decision-making function on democratically elected and accountable local authorities.

48. The starting point taken by the Respondent from its penalty matrix calculation was "Negligent":

    "The offender committed the offence through an act or omission which a person exercising reasonable care would not have committed."

    Financial starting point £7,500.

49. The Applicants argue that the starting point should be "Low or no culpability":

    "The offence was committed with little or no fault on behalf of the offender."

    Financial starting point £3,000.

50. The Applicants justification for this assertion was as follows:

    a) That they had informed the Respondents in October 2015 that they owned the Properties and at no time did the Respondent advise them of the change in the law.

    b) They employed professional managing agents.

    c) They sent officer Cheryl Foy of the Respondents the fire certificates (the Tribunal takes these documents to probably be documents relating to the commissioning and/or testing/servicing of the fire/smoke alarms as "fire certificates" no longer exist) on 22 November 2018 and had informed her the Properties "were now licensed properties" during the relicensing of their Otter Street property. The Tribunal would interpret this that the Properties now required a licence.

d) Between October 2018 and March 2019, they were in constant communication with Orange Tree to encourage them to submit the documentation necessary for the properties to be licensed.

e) On 20 March 2019, the Applicants state that they paid the licence fees online and discovered that Orange Tree had not in fact submitted any documentation to the Respondent.

f) The Properties themselves are well equipped and maintained to a high standard.

g) The fines imposed are impossible to pay without great financial hardship particularly since a Rent Repayment Order has just been made in respect of 26 Queensway.

51. The Respondents counter the statement that the Properties were all in good condition as in respect of 26 Queensway an inspection by an Officer of the Respondent had found various repair issues including problems with the gas fired boiler and heating system. These were the “aggravating” factors referred to the calculation of the penalty in respect of that Property.

52. The Tribunal has already detailed the email correspondence with Cheryl Foy, this carries no weight in consideration of the amount of the penalty; documents relating to the subject Properties were attached to an email relating to another property in their ownership and when the recipient officer, later the same day, queried why they had been sent, no response was forthcoming for several months.

53. The Tribunal notes the following in respect of the Applicants:

a) The Applicants are portfolio landlords.

b) They have personally dealt with other HMO licences in the past.

c) They have managing agents (other than Orange Tree) working for them and in any event, should know the law themselves.

d) A completed application for both properties was received on the 24th April 2019 (although payment was the previous March), after inspections by the Respondent on 14 February 2019 (number 26) and 5 March 2019 (number 8). The unlicensed periods for both were therefore at least 6 months.

54. In view of the above, the Tribunal does not consider that the starting point should be adjusted to “Low or no culpability”.

55. The Tribunal notes the following in respect of the Respondent's actions:

a) The Respondent appeared to follow their policy in the calculation of the penalty; They gave suitable weight to the Applicants' good previous character (first offence) and other mitigating factors.

b) The Notice of Intention (30/7/2019) was correctly served.

c) The Respondent considered the Applicants' representations although these had effectively already been considered as mitigating factors in the calculation of the penalties.

56. The calculation thereafter appears to be correct.

Decision

57. The Tribunal therefore confirms the Financial Penalties as follows:

8 Queensway Derby DE22 3BE	£5,000
26 Queensway Derby DE22 3BE	£6,000
Total amount	£11,000

Appeal

58. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

Vernon Ward

Appendix - The Law

The regime of financial penalties as an alternative to prosecution for certain housing offences came into force on 6 April 2017. Section 249A of the 2004 Act, inserted by section 126 of, and paragraphs 1 and 7 of Schedule 9 to, the Housing and Planning Act 2016 ('the 2016 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—

(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.

Paragraphs 1 to 10 of Schedule 13A to the Housing Act 2004 state as follows:

Notice of intent

1 Before 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.

3 The 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

5 After 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.

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

7 The 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.

8 The 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.

Withdrawal or amendment of notice

9 (1) A local housing authority may at any time—

(a)withdraw a notice of intent or final notice, or
(b)reduce the amount specified in a notice of intent or final notice.

(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given.

Appeals

10 (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 housing 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 financial penalty of more than the local housing authority could have imposed.

Recovery of financial penalty

11 (1) This paragraph applies if a person fails to pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.

(2) The local housing authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3) In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a)signed by the chief finance officer of the local housing authority which imposed the penalty, and
(b)states that the amount due has not been received by a date specified in the certificate,
is conclusive evidence of that fact.

(4) A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

(5) In this paragraph “chief finance officer” has the same meaning as in section 5 of the Local Government and Housing Act 1989.