



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

**Case Reference** : **MAN/30UD/HNA/2019/0099 P**

**Premises** : **45 Parkinson Street  
Burnley  
BB11 3LS**

**Appellant** : **Mr Muhammer Ahmed**  
**Representative** : **N/A**

**Respondent** : **Burnley Borough Council**  
**Representative** : **N/A**

**Type of Application** : **Housing Act 2004 – Schedule 13A,  
paragraph 10**

**Tribunal Members** : **Judge J Holbrook  
Regional Surveyor N Walsh**

**Date and venue of  
Hearing** : **Determined without a hearing**

**Date of Determination** : **22 April 2020**

**Date of Decision** : **20 May 2020**

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**DECISION**

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## **DECISION**

**The Final Notice dated 1 October 2019 is varied by the substitution of £8,500 as the amount of the financial penalty imposed.**

## **REASONS**

### **INTRODUCTION**

#### **The appeal**

1. On 18 October 2019, Mr Muhammer Ahmed appealed to the Tribunal against a financial penalty imposed on him by Burnley Borough Council under section 249A(1) of the Housing Act 2004 (“the 2004 Act”). The penalty related to an alleged housing offence in respect of premises known as 45 Parkinson Street, Burnley BB11 3LS (“the Premises”).
2. To be more precise, Mr Ahmed appealed against a final notice dated 1 October 2019 given to him by Burnley Council under paragraph 6 of Schedule 13A to the 2004 Act (“the Final Notice”). It imposed a financial penalty of £11,000 on Mr Ahmed for conduct amounting to an offence under section 95(1) of the 2004 Act.

#### **The Premises**

3. The Tribunal did not inspect the Premises. However, we understand them to comprise a two-bedroomed house which is in tenanted residential occupation.

#### **Tribunal procedure**

4. On 23 December 2019, the Tribunal issued directions and informed the parties that, in accordance with their indicated preference, the appeals would be determined upon consideration of written submissions and documentary evidence only. The Tribunal accordingly convened on the date of this decision to consider the appeal in the absence of the parties. In addition to the tribunal application form itself, we had the benefit of a bundle containing detailed written submissions and supporting evidence provided by Burnley Council. The Appellant did not provide his own bundle, his grounds of appeal therefore being limited to the matters mentioned in the application form.

## **STATUTORY FRAMEWORK**

#### **Power to impose financial penalties**

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

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

6. Relevant housing offences are listed in section 249A(2). They include the offence, under section 95(1) of the 2004 Act, of having control of or managing a house which is required to be licensed under Part 3 of that Act but is not so licensed.
7. Only one financial penalty under section 249A may be imposed on a person in respect of the same conduct. The amount of that penalty is determined by the local housing authority (but it may not exceed £30,000), and its imposition is an alternative to instituting criminal proceedings for the offence in question.

### **Procedural requirements**

8. Schedule 13A to the 2004 Act sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under section 249A. Before imposing such a penalty on a person, the local housing authority must give him or her a notice of intent setting out:
  - the amount of the proposed financial penalty;
  - the reasons for proposing to impose it; and
  - information about the right to make representations.
9. Unless the conduct to which the financial penalty relates is continuing, that notice must be given before the end of the period of six months beginning on the first day on which the local housing authority has sufficient evidence of that conduct.
10. A person who is given a notice of intent has the right to make written representations to the local housing authority about the proposal to impose a financial penalty. Any such representations must be made within the period of 28 days beginning with the day after that on which the notice of intent was given. After the end of that period, the local housing authority must decide whether to impose a financial penalty and, if a penalty is to be imposed, its amount.
11. If the local housing authority decides to impose a financial penalty on a person, it must give that person a final notice setting out:
  - the amount of the financial penalty;
  - the reasons for imposing it;
  - information about how to pay the penalty;
  - the period for payment of the penalty;
  - information about rights of appeal; and
  - the consequences of failure to comply with the notice.

## Appeals

12. A final notice given under Schedule 13A to the 2004 Act must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given. However, this is subject to the right of the person to whom a final notice is given to appeal to the Tribunal (under paragraph 10 of Schedule 13A).
13. Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within 28 days after the date on which the final notice was sent to the appellant. The final notice is then suspended until the appeal is finally determined or withdrawn.
14. The appeal is by way of a re-hearing of the local housing authority's decision, but may be determined by the Tribunal having regard to matters of which the authority was unaware. The Tribunal may confirm, vary or cancel the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than the local housing authority could have imposed.

## RELEVANT GUIDANCE

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

"Generally, we would expect the maximum amount to be reserved for the very worst offenders. The actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the landlord's previous record of offending."

16. The HCLG Guidance also sets out the following list of factors which local housing authorities should consider to help ensure that financial penalties are set at an appropriate level:
  - a. Severity of the offence.
  - b. Culpability and track record of the offender.
  - c. The harm caused to the tenant.
  - d. Punishment of the offender.
  - e. Deterrence of the offender from repeating the offence.
  - f. Deterrence of others from committing similar offences.

- g. Removal of any financial benefit the offender may have obtained as a result of committing the offence.
17. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, Burnley Council has adopted its own *Policy and Matrix for the use of Civil Penalties* (“Burnley’s Policy”). We make further reference to this policy later in these reasons.

## **BACKGROUND FACTS**

18. The Premises comprise a house situated within an area designated by Burnley Council (as the local housing authority) under section 80 of the 2004 Act as subject to selective licensing under Part 3 of the 2004 Act. This designation has been effective since 15 November 2016.
19. Mr Ahmed has been the owner of the Premises since 2011 and, between 2014 and 2019, he let the Premises on an assured shorthold tenancy. He does not hold a selective licence for the Premises and has not applied for one.
20. In June 2018, Burnley Council sent Mr Ahmed a selective licence application pack in respect of the Premises. Notwithstanding several reminders, however, no licence application was returned. On 24 April 2019, an officer of the council spoke to Mr Ahmed by telephone. The need for the Premises to be licensed was discussed, and Mr Ahmed asked for another application form to be emailed to him. This was done the next day and Mr Ahmed was asked to return his completed application by 2 May.
21. No application was received and so, on 19 August 2019, Burnley Council gave Mr Ahmed a notice of intent under paragraph 1 of Schedule 13A to the 2004 Act. That notice proposed the imposition of a financial penalty of £11,000 and it informed Mr Ahmed of his right to make representations about that proposal. No such representations were received. However, on 29 August 2019, Mr Ahmed emailed Burnley Council requesting a call back. The email stated that he had received a letter stating that he was being pursued for a civil penalty in respect of the Premises and that he wanted to know why. An officer of the council endeavoured to follow up this request by telephone and email, but no further response was received from Mr Ahmed. Burnley Council therefore issued the Final Notice which is the subject of this appeal on 1 October 2019.
22. We note that Mr Ahmed owns other properties in Burnley which are also situated within designated selective licensing areas. He has applied for (and has been granted) selective licences for those properties. The correspondence address which Mr Ahmed provided in connection with those licence applications is the address which Burnley Council used when communicating with Mr Ahmed about the need for the Premises to be licensed.

## **GROUNDINGS OF APPEAL**

23. Mr Ahmed states that his failure to obtain a selective licence for the Premises was an honest mistake. He says that his brother had been acting as management agent in respect of the Premises and that (because Mr Ahmed had been abroad dealing with a family matter at the time of his discussion with Burnley Council in April 2019) he had forwarded the resulting email to his brother but had then forgotten about it. Mr Ahmed says that he had assumed that his brother had submitted the necessary licence application.
24. Mr Ahmed also says that the correspondence address used by Burnley Council was an old address (it was a property which was being rented to students at the time). He says that it was only by chance that he collected the letter which contained the notice of intent.
25. Finally, Mr Ahmed notes that he owns 8 or 9 other licensed properties in Burnley, as well as licensed HMOs in Manchester. He states that all of these properties are well-managed and in good order and that the Premises themselves have recently been renovated, have all necessary safety certificates, and are occupied by a long-term tenant. He therefore had no reason intentionally to fail to obtain a selective licence.

## **DISCUSSION AND CONCLUSIONS**

### **Procedural compliance**

26. We are satisfied that Burnley Council has complied with the relevant procedural requirements for imposing the financial penalty. It is clear that a valid notice of intent was given within the time permitted for doing so. It was sent to Mr Ahmed at an address he had registered with HM Land Registry upon acquiring the Premises as well as an address he had given when making selective licence applications for other properties in Burnley. It is also clear that Mr Ahmed actually received the notice of intent within the period for making representations about the proposal to impose a financial penalty.

### **Relevant housing offence**

27. Burnley Council's decision to impose a financial penalty can only be upheld if the Tribunal is itself satisfied, beyond reasonable doubt, that Mr Ahmed's conduct amounts to the relevant housing offence specified in the Final Notice (i.e., to an offence under section 95(1) of the 2004 Act).
28. We note that Mr Ahmed has not disputed that his conduct amounts to the offence in question. We also note that the Premises should have been licensed under Part 3 of the 2004 Act from 15 November 2016 but that no licence application has been made to date in respect of them. The fact that Mr Ahmed had entrusted management of the Premises to his

brother does not constitute a reasonable excuse for his failure to apply for a licence. Nor does the fact that he might otherwise be complying with his obligations as a landlord in respect of these, or other, premises. As a professional landlord who owns a significant portfolio of rental properties, it is incumbent on Mr Ahmed to ensure that all of his properties are properly licensed, where necessary.

29. We have also considered whether Mr Ahmed might have had a reasonable excuse for his failure to licence the Premises if, as he says, he did not receive the communications from Burnley Council which preceded the notice of intent dated 19 August 2019. We are satisfied that this is not the case: as noted at paragraph 20 above, Mr Ahmed discussed the need for the Premises to be licensed with an officer of Burnley Council in April 2019 and he was emailed a copy of the necessary licence application form. He was therefore well aware of the need to take action but nevertheless failed to do so. We are therefore satisfied, beyond reasonable doubt, that Mr Ahmed's conduct amounts to a continuing offence under section 95(1) of the 2004 Act.

### **Amount of the financial penalty**

30. We are satisfied that it is appropriate to impose a financial penalty on Mr Ahmed in respect of his failure to licence the Premises. We must therefore determine the amount of that financial penalty. Whilst Mr Ahmed's stated grounds of appeal do not expressly challenge the amount of the financial penalty imposed by Burnley Council, we infer that such a challenge is implicit in his appeal.

### *Guiding principles*

31. The Tribunal's task is not simply a matter of reviewing whether the penalty imposed by the Final Notice was reasonable: the Tribunal must make its own determination as to the appropriate amount of the financial penalty having regard to all the available evidence. In doing so, the Tribunal should have regard to the seven factors specified in the HCLG Guidance as being relevant to the level at which a financial penalty should be set (see paragraph 16 above).

32. The Tribunal should also have particular regard to Burnley's Policy (see paragraph 17 above). As the Upper Tribunal (Lands Chamber) observed in *Sutton & Another v Norwich City Council* [2020] UKUT 0090 (LC):

“It is an important feature of the system of civil penalties that they are imposed in the first instance by local housing authorities, and not by courts or tribunals. The local housing authority will be aware of housing conditions in its locality and will know if particular practices or behaviours are prevalent and ought to be deterred.”

33. The Upper Tribunal went on to say that the local authority is well placed to formulate its policy and endorsed the view that a tribunal's starting point in any particular case should normally be to apply that policy as

though it were standing in the local authority's shoes. It offered the following guidance in this regard:

“If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision.”

34. Upper Tribunal guidance on the weight which tribunals should attach to a local housing authority's policy (and to decisions taken by the authority thereunder) was also given in another recent decision of the Lands Chamber: *London Borough of Waltham Forest v Marshall & Another* [2020] UKUT 0035 (LC): whilst a tribunal must afford great respect (and thus special weight) to the decision reached by the local housing authority in reliance upon its own policy, it must be mindful of the fact that it is conducting a rehearing, not a review: the tribunal must use its own judgment and it can vary such a decision where it disagrees with it, despite having given it that special weight.
35. It follows that, in order to determine this appeal, it is necessary for us to consider the provisions of Burnley's Policy, together with the decision which the Council made in reliance upon that Policy in Mr Ahmed's case.

#### *Burnley's Policy*

36. Burnley's Policy is itself based on the relevant factors specified in the HCLG Guidance. However, it places particular emphasis on an assessment of the seriousness of the relevant conduct in terms, firstly, of the harm it caused (or its potential for harm) and, secondly, on the culpability of the offender. 'Harm' is given a rating of low, medium or high; and 'Culpability' is given a rating of low, medium, high or very high. The interrelation between harm and culpability then feeds in to a matrix which determines which of six bands the penalty should fall into. The amount of the penalty is taken to be the mid-point of the relevant band, subject to further upwards or downwards adjustment (in increments of £1,000) to take account of additional aggravating or mitigating factors. The six penalty bands are as follows:

Band 1	£0	- £4,999
Band 2	£5,000	- £9,999
Band 3	£10,000	- £14,999
Band 4	£15,000	- £19,999
Band 5	£20,000	- £24,999
Band 6	£25,000	- £30,000

#### *The Council's decision*

37. In applying its Policy to Mr Ahmed's non-compliance with the selective licensing regime, Burnley Council assessed both 'harm' and 'culpability'



as medium, indicating that the appropriate financial penalty should lie within Band 3 of the penalty matrix. Burnley Council also determined that there was one aggravating factor which should be taken into account; namely, the fact that Mr Ahmed had not applied for a selective licence even after his telephone conversation with an officer of the council on 24 April 2019.

38. Burnley Council decided that the amount of the financial penalty should therefore be £11,000. It was considered that such a penalty would have an appropriate economic impact on Mr Ahmed; that it would deter him (and others) from committing similar offences in the future; and that it would remove any financial benefit Mr Ahmed may have obtained as a result of committing the offence (the council took account of the fact that the likely gross rental income from the Premises during the period when they were unlicensed was approximately £13,300).

### *Consideration*

39. In setting the amount of the financial penalty, Burnley Council took the figure of £10,000 as a starting point and then increased this figure by £1,000 to take account of the aggravating factor referred to above. However, for the following reasons, we consider that £10,000 was *not* the appropriate starting point in this case:

- According to Burnley's Policy, the appropriate starting point for a financial penalty falling within Band 3 of the penalty matrix is £12,500 (i.e., the mid-point of that Band).
- In any event, the penalty should – in our judgment – fall within Band 2 rather than Band 3: whilst we agree with Burnley Council's assessment of medium culpability in this case (because of Mr Ahmed's negligence in failing to licence the Premises), we disagree with the assessment of medium harm. The importance of failing to obtain a selective license should not be understated, of course: an unlicensed property undermines a local housing authority's regulatory role and poses a potential for harm. However, it appears that no actual harm arose from Mr Ahmed's failure to licence the Premises. Given that the property concerned is a house in single occupation, and that Mr Ahmed appears to have otherwise been a responsible landlord, we find the appropriate harm classification to be low and not medium. Burnley's Policy explains that a low harm classification is appropriate where there is a low risk of an adverse effect on individuals, or where the relevant housing offence concerns a housing defect which itself poses a low risk. A failure to obtain a selective licence falls into this category.

40. The appropriate starting point for a financial penalty falling within Band 2 of the penalty matrix is £7,500. We agree with Burnley Council's assessment that there should be an increase of £1,000 from the appropriate starting point to take account of the aggravating factor referred to above: Mr Ahmed's negligence in failing to apply for a

selective licence for the Premises is compounded by his lack of response to the council's efforts to assist him.

41. We consider that the resulting financial penalty of £8,500 is sufficient to achieve the objectives mentioned at paragraph 38 above, which include removing any financial benefit Mr Ahmed may have obtained as a result of his failure to licence the Premises. Such benefit comprises the amount by which the landlord profits from not obtaining a selective licence: in most cases, this is likely to be limited to the amount of the licence application fee plus any other sums the landlord would have needed to expend in order to obtain a licence. However, it would *not* generally include the gross rental income from the premises for the period during which the offence was being committed: not only is the gross rent unlikely to comprise pure profit, but it is also unlikely to be income which the landlord would not have received but for committing the offence. Thus, it is not a financial benefit obtained from committing it.

## **OUTCOME**

42. We have decided to uphold Burnley Council's decision to impose a financial penalty on Mr Ahmed, but to vary the Final Notice so that the amount of the penalty imposed on him is £8,500.