FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BY/HNA/2019/0060 and 0061**
Property	**:**	**9 Altcar Avenue, Liverpool L15 2JD**
Applicants	**:**	**Asaad Shalash**
Respondent	**:**	**Liverpool City Council**
Type of Application	**:**	**Appeal against a financial penalty imposed under Section 249A & Schedule 13A Housing Act 2004**
Tribunal Member	**:**	**J White (Judge)** **S Latham (Valuer)**
Date of Determination	**:**	**30 March 2020**
Date of Decision		**16 April 2020**

DECISION

Decision

1. The Final Notices of a Financial Penalty for breach of licence conditions dated 31 May 2019 in respect of 9 Altcar Avenue, Liverpool L15 2JD, are confirmed.

2. The Penalty for a failure to retain a full log of inspections is varied from £2,550 to £1,237.5.

3. The Penalty for a failure to fit smoke alarms is confirmed at £4,250.

4. The Applicant is to pay the penalties within 28 days of the receipt of this decision by the parties.

Application

1. The Tribunal has received an application under paragraph 10 of Schedule 13A to the Housing Act 2004 ("the Act") against two decisions of Liverpool City Council to impose a financial penalty against the Applicant under section 249A of the Act. The Council is a local housing authority ("LHA") as defined by the Act.

2. The penalties relate to a failure to comply with a licence condition under Part 3 of the Act in relation to 9 Altcar Avenue, Liverpool L15 2JD (the "Property"). The LHA had designated the whole of the city as an area of selective licensing on 1 April 2015. Mr Shalash has had a licence for the Property since 20 February 2017. He is the Applicant and the licence holder. The LHA inspected the Property on 12 September 2018 and interviewed Mr Shalash under caution on 31 October 2018.

3. The first penalty determines that Mr Shalash failed to keep a record of inspections carried out every 6 months in breach of a licence condition and imposes a penalty of £2550.

4. The second penalty determines that Mr Shalash failed to install a smoke alarm in breach of a licence condition and imposes a penalty of £4250.

5. Directions were given by the Regional Judge of the Tribunal for the further conduct of this matter.

6. Those directions have been largely complied with and the matter was set down for an inspection and oral hearing. This could not go ahead due to the suspension of inspections and hearings. In accordance with new regulations I reviewed the bundle and determined that the matter could proceed on the papers. It was fair and in the interests of justice to do so.

The parties consented. The LHA had produced a comprehensive bundle. Mr Shalash had produced sufficient grounds of appeal and subsequent evidence and the matters were distinct and clear. They were sufficient for the Tribunal to be able to determine the application.

7. This is a rehearing of the LHA's determination taking into account all evidence before us including the LHA's own guidance.

The Issues

8. S126 of the Housing and Planning Act 2016 introduced s249A into the Act with effect from 10 March 2017. LHA's were empowered to impose a civil penalty upon any person committing such an offence, instead of bringing a prosecution. It provides that the LHA may impose a penalty if it is satisfied that a person's conduct amounts to a relevant offence, including under s95. S249A(4) states that the penalty cannot exceed £30,000.

9. The Application and Response raises the following issues:

a) Has the LHA followed the correct procedure in accordance with Schedule 13A of the Act?

b) Has the relevant housing offence been proved beyond reasonable doubt? Under s95(2) of the Act a person commits an offence if (a) he is a licence holder or person on whom restrictions or obligations under a licence are imposed in accordance with s90 and (b) he fails to comply with any condition of the licence.

c) Is there a defence? S95(4) of the Act provides a defence where a licence holder had a reasonable excuse for failing to comply with the conditions.

d) Is the amount of the penalty appropriate in the circumstances? Schedule 13 states that a LHA must have regard to the Secretary of States guidance. This is entitled Civil Penalties under the Housing and Planning Act 2016 (the Guidance). The LHA should develop their own policies on when to issue a penalty and at what level. Under paragraph 3 of the Guidance the policy must have regard to (1) the severity of the offence, (2) the culpability and track record of the offender, (3) the harm caused to the tenant, (4) punishment of the offender, (5) Deterrence of the offender from repeating the offence (6) Deterrence of others from committing similar offences (7) the removal of any financial benefit the offender may have obtained as a result of committing the offence.

10. In accordance with Paragraph 10 of Schedule 13A to the Act the tribunal may confirm, vary or cancel the final notice.

11. The law in this area is complex. We annex further relevant statutory provisions to this decision.

The Findings

Background

12. The Applicant is the owner of the Property. It is within the area designated by the LHA under its powers to impose selective licencing requirements in furtherance of its duty to ensure the maintenance and improvement of housing standards within the city.

13. Since the introduction of licencing in April 2015 Mr Shalash has been granted selective licences for 384 properties as well as 115 properties as managing agent. He has been a landlord for over 20 years and has not been convicted of an offence or had other penalties imposed. This Property is a two-bedroom mid terrace occupied by a family with two children who have been tenants since around 2012, with the last renewal being on 11 September 2017.

14. On 24 August 2018 the LHA wrote to Mr Shalash to schedule an appointment for 12 September at 10 am. At the inspection it identified a number of defects, including that there were no smoke alarms at the Property and no evidence of any ever being fitted. Mr Shalash fitted the smoke alarms and carbon monoxide detectors that same day and scheduled the other minor works. On the same day the LHA wrote to Mr Shalash requesting a copy of the records of inspection. On 14 September Mr Shalash emailed the LHA with photos of the work and a new log starting on 12 September with 3 entries at 10 am that day. There were no other entries before or afterwards.

15. On 31 October 2018 the LHA interviewed him under caution. They adhered to the requirements of PACE. On 8 March 2019 they issued the Notice of Intent for both penalties. On 4 April 2019 Liberty Law wrote to say grounds of appeal would be submitted within 7 days. On 9 May 2019 the LHA wrote to them giving until 13 May to make representations. On 10 May 2019 Liberty Law sent an email stating that they had not seen any document that the LHA had adhered to PACE when interviewing Mr Shalash. No other grounds were put forward. On 31 May 2019 the LHA issued both Final Notices, following a review of the decision. On 20 June 2019 Mr Shalash appealed. He later submitted a brief statement, a letter from the tenant dated 3 June 2019 and an Inspection record from 5 January 2017 until 25 July 2019.

The evidence

16. The Applicant admitted both offences in the interview under caution. In relation to the first offence his application states that he carried out regular inspections every 3 months, notifies his office to record it, that he did provide semi inspection records when requested and that full records had not been requested. Records were later produced. In relation to the second offence that the smoke alarm was there two weeks before the inspection, he was surprised it was not at the date of inspection and the tenant had removed it to redecorate. He later produced an undated letter from the tenants.

17. The Respondent provided a comprehensive bundle of documents including the interview under caution transcript and the statements of private Sector Housing officers Sarah Simm, Gary Steele, Ray Mensah and Andrew Parsons, officers of the Respondent, outlining the inspection, policies and processes of the council in relation to enforcement of the licensing regime and the operation of the financial penalty regime within the City. They suggest:
    (1) That offences in relation to the breach of conditions had been established and had been admitted by the Applicant.
    (2) In relation to the first offence, a full record had been requested and the interview was clear.
    (3) In relation to the second offence there was no sign that a smoke alarm on the landing had ever been fitted and this was admitted by the tenant.
    (4) That the Respondent had in place, and operated, appropriate procedures to establish this.
    (5) They had extended the time for responding to the Notice of intention and the only response from Mr Shalash's legal advisers related to a failure to interview Mr Shalash under caution properly.
    (6) The duty imposed upon the Respondent in relation to its obligations to improve housing standards, which it had chosen to do by imposing a licensing scheme over the whole city justified the imposition of a financial penalty
    (7) The policy that was in place, and the manner in which it had implemented it, also justified the level of the penalty that had been decided upon.

Determination

Procedural compliance

20. Schedule 13A states that before imposing a financial penalty, the LHA must give the person concerned a notice of intent setting out the amount of the

proposed penalty; the reasons for proposing to impose it; and information about the right to make representations. There is a time limit for doing this.

21. Once the LHA has decided to impose a financial penalty (having taken account of any representations made in response to the notice of intent), it must do so by giving the person a final notice, which must also contain prescribed information. Sutton & Another v Norwich City Council [2020] UKUT 0090 (LC) confirms that a final notice will be a nullity if the LHA omitted to give a notice of intent first. In London Borough of Waltham Forest v Younis [2019] UKUT 0362 (LC), the UT has held that less serious procedural shortcomings will not necessarily be fatal. The LHA's reasons for proposing a penalty must be set out sufficiently clearly so that they can be understood and responded to. It must include the amount, explain why a penalty is proposed and the seriousness of the offence.

19. The Notices of Intent are dated 8 March 2019, and both set out the amount of the penalty, full details of the offence together with reasons for the decision and how to make representations [107-158]. Mr Shalash states in his application that a full log had not been requested by the LHA. The tribunal found clear evidence that it had done so. The letter dated 12 September 2018 outlined the breach and requested a copy of inspection records [242]. Mr Shalash had a further opportunity to do so following the Notice of Intent dated 8 March 2019. No other procedural deficiency has been raised or is found by the Tribunal. The Final Notices were dated 31 May 2019. They reviewed the decision, further submissions and reasons for the decision.

Proving the relevant housing offence

20. A tribunal may only uphold a LHA's decision to impose a financial penalty if the tribunal is itself satisfied, beyond reasonable doubt, that the appellant's conduct amounts to the relevant housing offence.

22. In Opara v Olasemo [2020] UKUT 0096 (LC), the UT observed:

> "*For a matter to be proved to the criminal standard it must be proved "beyond reasonable doubt"; it does not have to be proved "beyond any doubt at all". At the start of a criminal trial the judge warns the jury not to speculate about evidence that they have not heard, but also tells them that it is permissible for them to draw inferences from the evidence that they accept." (para 46).*

23. In relation to the first offence the Tribunal finds that it is proved beyond reasonable doubt. Mr Shalash is a licence holder and has failed to comply with condition 5.6 of the licence conditions in breach of s95(2) of the Act. It is a condition regulating "the management, use or occupation of the house" and so may be included as a licence condition in accordance with s90(1). It is a relevant offence in accordance with s249(A).

24. Condition 5.6 states that "*The licence holder must ensure that inspections of the property are carried out at a minimum every six months to identify any problems relating to the condition and management of the property. The records must contain a log of who carried out the inspection and issues found and action (s) taken. Copies of these must be provided to the authority within 28 days on demand."*

25. On 12 September 2018 the LHA wrote to Mr Shalash outlining this together with other breaches and consequences of failure. It stated that there was "*a failure to retain records of inspections at the property for the duration of the licence. Please advise how you intend to log these inspections and went on to state "you are required to produce [] a copy of records of inspection of the property within 28 days"* [242-3].

26. On 14 September 2019 Mr Shalash emailed the LHA outlining the work and went on to say "*please find attached pictures of the fitted smoke alarms, CO alarm, the fixed kitchen door and a copy of the inspection records"* [245]. The attached inspection record was a one-page document with three entries all dated 10 am on 12/9/18 including the fitting of smoke alarms fitted that day [246].

27. On 31 October 2018 Mr Shalash was interviewed under caution. He stated that he visited regularly personally, though it was unclear if this was for a formal inspection as he said he had tea [204] and was informal [208]. He has inspected the kitchen and bathroom [210 and 11] He inspected monthly and sometimes twice a month. The office "mostly" logs inspections. Sometimes he told them and other times he didn't [206]. He then confirmed that he had no records of the inspections in relation to the smoke alarms [2013] and confirmed that there were no records [215].

28. It wasn't until after the directions that Mr Shalash submitted an undated "statement of reasons", saying that he had thought the LHA only wanted records for the works requested and including a full inspection record. He answered no to questions as he didn't personally make the records. He submitted a record with nineteen entries from 5/1/17 to 25/7/19. This included the first entry on 5/1/17 "Routine inspection + Smoke Alarms & CO Alarm checked" by Mr Konecgeska. The only inspection by Mr Shalash was on the date of the LHA inspection.

29. The tribunal did not accept this Record as a genuine ongoing log but a construction because it contradicted the earlier evidence. Mr Shalash is a professional landlord with many properties. Contrary to what Mr Shalash claimed, there had been a clear request in the demand letter; Mr Shalash statement under caution was unclear but admitted he did not keep a full log; this later record clearly did not match the one submitted on 14 September 2018 as this copy had entries before it on the same page that had not been there before. Finally, there was sufficient evidence that there had never been a smoke alarm fitted as set out below and adding further to the credibility of Mr Shalash's evidence.

30. In addition, Mr Shalash breached the licence condition as he failed to submit a full record within 28 days as requested.

31. The second penalty determines that Mr Shalash failed to install a smoke alarm on any floor of the Property and imposes a penalty of £4250. In relation to the second offence the tribunal finds that it is proved beyond reasonable doubt. Mr Shalash is a licence holder and has failed to comply with condition 1 of the licence conditions in breach of s95(2) of the Act. This states that the "*License Holder must ensure that smoke alarms and carbon monoxide alarms are installed in the property in accordance with condition 1.7 and keep each alarm in working order*" This is a relevant offence in accordance with s 249(A). It was a condition that must be included in the licence conditions in accordance with s90 (4) and Schedule 4 (1)(4).

32. The statement of Mr Steele, who inspected the property clearly sets out that *"there were no smoke alarms on either levels of the property nor any evidence that they had been in place….The tenant indicated that there hadn't been any smoke alarms in place previously."* [228] Mr Shalash was present and has admitted the offence. The issue was whether there was a reasonable excuse.

Defence

33. A statutory defence of 'reasonable excuse' is available in respect of the relevant housing offence in accordance with s95(4)(b). The UT IR Management Services Ltd v Salford City Council [2020] UKUT 0081 (LC) that the standard of proof was on the balance of probabilities and observed that;

> *"[T]he issue of reasonable excuse is one which may arise on the facts of a particular case without an appellant articulating it as a defence (especially where an appellant is unrepresented). Tribunals should*

consider whether any explanation given by a person … amounts to a reasonable excuse whether or not the appellant refers to the statutory defence." (paragraph 31).

34. However, nothing that the Tribunal has seen suggests that the Applicant would be able to rely on any of the defences to criminal liability outlined in Section 95.

35. In relation to the first offence the excuses put forward for the failure to record are not reasonable from the point of view of what a reasonable person might have expected the Applicant to have done. The Tribunal would expect a professional landlord to be familiar with the terms of the licence, his office proccesses and to have in place sufficiently robust procedures for keeping inspection logs for all his properties and for all inspections. When under caution he appeared unsure of the licence conditions and appeared to rely too heavily on his staff to inform him without sufficient checks in place. For example, he states they read the conditions and told me [180].

36. Similarly, in relation to the second offence he appears to be saying that when he applied for the licence he was not compliant, was going around upgrading properties and sometimes things go missing [180]. When put to him that there was no evidence there had ever been a smoke alarm he stated that one wasn't fitted when they moved in. This had been in around 2012 with their last renewal tenancy being 11 September 2017 [181]. He hadn't checked it, and someone was supposed to go round the day before the LHA inspection to check the Property and had clearly failed to so [198]. He suggested that maybe they had removed it as they decorate for Christmas each year. One was fitted the same day. The letter signed by the tenant is dated 3 June 2019 and said they removed them whilst decorating and failed to put them back. It provides no more detail than that and contradicts the earlier statement to Mr Steele.

37. The tribunal prefer the more contemporaneous evidence of the LHA. There had clearly been no evidence of a smoke alarm ever being fitted during the inspection. There would be screw holes where it was attached, if it had been removed temporarily for redecoration purposes. It is extremely unlikely that the tenant would be decorating for Christmas three and a half months before the day and there was no sign of recent decoration at the time. The letter was dated some 9 months after the inspection, had not been produced before, contradicted earlier evidence and Mr Shalash was extremely unsure of what had happened during the interview.

38. The Tribunal is so satisfied that the offences had been committed.

Amount of Penalty

39. 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 for each offence.

40. The tribunal must make its own determination, having regard to the seven factors specified in the Guidance as being relevant to the level at which a financial penalty should be set. Those factors are set out above.

41. Tribunals should also have particular regard to the LHA policy and apply it as if standing in its shoes. As the UT 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…" (paragraph 244)

"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." (paragraph 245)*

42. It went on to say the tribunal should consider whether it had applied its policy in a way which imposed disproportionate penalties without proper consideration of the facts. This was confirmed in London Borough of Waltham Forest v Marshall & Another [2020] UKUT 0035 (LC). The UT stated that a tribunal may depart from a LHA's policy in determining the amount of a financial penalty, only in certain circumstances (where the policy was applied too rigidly, for example). The tribunal must be mindful of the fact that it is conducting a rehearing, not a review and must use its own judgment and so can vary such a decision where it disagrees with it, despite having given it that special weight. The tribunal must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed.

43. In this case the LHA's guidance has adopted the Guidance, provided and explained its matrix and methodology to support its final finding. It has followed its own policy and imposed proportionate penalties. However, as this is a rehearing we have taken into account the additional evidence and applied the policy to the totality of the evidence. We have also taken into account proportionality.

44. In relation to the first penalty the tribunal in applying its policy arrived at different conclusions. It had evidence in the form of a fuller record. Though we concluded it had been constructed for the purpose of this appeal, there was clearly some record keeping throughout the period, though not in a log as required. The LHA had never contended that inspections did not take place. It is admitted that full records were not supplied within 28 days, though not that they were requested.

45. We concluded that culpability was low (as opposed to medium) in that failings were minor and occurred in an isolated incident. We agreed that the risk of harm was low. This gave a starting point of £1500 in a penalty band of £750-£2250. We agree that as a professional landlord he would have been expected to have known and 10% should be added in accordance with the policy giving an amount of £1650. We accept that there were no previous cautions or penalties in the last two years and deduct 25% in accordance with the policy giving an amount of £1237.5.

46. In reviewing the amount taking into account the seven factors we do not accept that there has been an admission of guilt and so do not agree that there should be a further 33% deduction. Mr Shalash appeared evasive in the interview and provided contradictory evidence. We do not agree that he has admitted guilt and so make no deduction for that. The amount of £1237.50 is an appropriate deterrence and punishment taking into account the severity, culpability and track record. There was no direct financial benefit. We have accordingly varied the penalty from £2,550 to £1237.5

47. In relation to the second penalty the tribunal in applying its policy arrived at the same conclusions. It had evidence in the form of a letter from the tenant. Though we did not place great weight on this as set out above. We concluded smoke detectors had never been fitted and the letter had been constructed for the purpose of this appeal. With multiple properties Mr Shalash had clearly being attempting to update them following obtaining a licence, though not beforehand as declared in his application. The interview shows that he had instructed his electrician to install them before the inspection, but the electrician had failed to do so and consequently Mr Shalash had been taken by surprise at the inspection. He fitted them that same day.

48. We concluded that culpability was medium in that the offence was committed through an act or omission which a person exercising reasonable care would not commit. We agreed that the risk of harm was medium due to having no early warning in place in case of fire. We accept their assessment that it was not high as limited to a small house as opposed to a larger house of block of flats. This gave a starting point of £7500 in a penalty band of £5250-12,000. We agree that as a professional landlord he would have been expected to have known and 10% should be added in accordance with the policy giving an amount of £8,250. We accept that there were no previous cautions or

penalties in the last two years and deduct 25% in accordance with the policy giving an amount of £6,375.

49. In reviewing the amount taking into account the seven factors we broadly accept that there has been an admission of guilt and so agree that there should be a further 33% deduction giving a total of £4,250. Mr Shalash appeared evasive in the interview and provided contradictory evidence. The amount of £4,250 is an appropriate deterrence and punishment taking into account the severity, culpability and track record. There was no direct financial benefit. We have accordingly confirmed the penalty of £4,250.

50. The LHA has not specifically taken into account Mr Shalash's immediate action to remedy the problems as listed in the mitigating factors. However, we consider that this is balanced by Mr Shalash's obstruction of justice by the apparent construction of evidence as listed in the aggravating factors [96]. Mr Shalash has an ability to pay, being a landlord of multiple properties.

Cost applications

51. There were no cost applications and we found no grounds to make an order for costs.

Judge J White
16 April 2020

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(Shalash) 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 of Further Relevant Legislation

Section 90-91 of the Act covers licence conditions:

Section 95 of the Act provides:

(1)

(2) A person commits an offence

i. if he is a licence holder or a person on whom restrictions or obligations under a licence imposed in accordance with section 90(6), and

ii. he fails to comply with any conditions of the licence

(3) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse-

(4) – (9)

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.
(4) The amount of the financial penalty imposed under this section is to be determined by the local housing authority but must not be more than £30,000.
(5)- (9)

Schedule 13A of the Act sets out the procedure to be followed in imposing financial penalties. Paragraph 10 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.

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 the requirements to be satisfied in an application.