FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CH/HNA/2019/0053**
Property	:	**311 Whitehall Road, Gateshead NE8 4PT**
Applicant	:	**Mr Steven McGarvie**
Respondent	:	**Gateshead Council**
Type of Application	:	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal Members	:	**Judge W.L. Brown** **Mr I R Harris MBE FRICS**
Date of Determination	:	**3 February 2020**
Date of Decision	:	**23 March 2020**

DECISION

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The appeal is dismissed and the Tribunal confirms the Penalty Charge imposed on the Applicant of £5,626.75.

Introduction

1. The Applicant made application (the "Application") dated 7 May 2019 to the Tribunal appealing a financial penalty imposed on him by the Respondent in the sum of £5,626.75 (the "Penalty") made under section 249A of the Housing Act 2004 (the "Act"), set out in a Notice dated 9 April 2019. The Applicant is sole owner of the Property. The Application was received on 8 May 2019, one day late, but permission for a late appeal was accepted by the Tribunal on 30 May 2019.

2. The Housing and Planning Act 2016 introduced Civil Penalties from 6th April 2017 as an alternative to prosecution for certain offences under the Act. The maximum penalty is £30,000. Local housing authorities are expected to develop their own policy on when to prosecute and when to issue a civil penalty and should decide which option it wishes to pursue on a case-by-case basis in line with that policy. The amount of the penalty is to be determined by the local housing authority in each case, which determination is subject to the right of appeal to the Tribunal.

3. The procedures for imposing financial penalties and appeals against them are set out in Schedule 13A of the Act. The appeal is by way of a re-hearing of the Respondent's decision, as the relevant local housing authority, to impose the penalty. Statutory guidance under section 23(10) and Schedules 1 and 9 of the Housing and Planning Act 2016 (the "MHCLG Guidance") was issued in April 2018 by Ministry of Housing, Communities and Local Government. Local housing authorities must have regard to this guidance in the exercise of their functions in respect of civil penalties. The Guidance provides that in determining an appropriate level of penalty, local housing authorities should have regard to the Guidance at paragraph 3.5 which sets out the factors to take into account when deciding on the appropriate level of penalty. Only one penalty can be imposed in respect of the same offence. 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. While the Tribunal is not bound by it, it will have regard to the MHCLG Guidance.

4. Directions were made by the Tribunal on 16 September 2019.

5. Neither party requested a hearing and the Tribunal convened on 8 January 2020 to make its determination on the papers. Both parties presented written representations and a bundle of documents was provided for the Tribunal.

6. The Tribunal understood the Property to be a first floor 2 bedroom flat.

Facts and Law

7. The Respondent provided a chronology of events which was not in dispute. The Property was occupied by a tenant, Connor Harvey, from 15 July 2018 until 6 August 2018 and since 1 September 2018 by Shaun Locker. The Property fell within the scope of Section 79(2)(1) and (b)(i) of Act to which Part 3 licensing powers applied and an application for a licence was required under Section 85(1).

The Property is situated within both the former licensing area that ran from 2012 – 2017, when the Applicant had been the licence holder and within the boundaries of the existing scheme, running from 30 April 2018 to 29th April 2023. The basis for the issuing of the Penalty was the alleged offence by the Applicant under Section 95 of the Act in having control or managing a property which is required to be licensed. None of the statutory defences were relied upon. The Applicant did not deny that the Property was affected by the selective licensing regime, nor that he did not hold the requisite licence for the period at issue. The process of the formalities leading to the issuing of the Penalty Notice was not in dispute.

8. The Respondent determined to impose on the Applicant a financial penalty under Section 249A of the Act which states:

   "*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*."

   The "relevant housing offence" alleged is that under Section 95.

Evidence and submissions

9. The Applicant referred to his intension to sell the Property following departure of the tenant Connor Harvey on 6 August 2018, thinking that if he ceased by 31 October 2018 to own the Property he would not need a licence. When he received a valuation of the Property he decided that it was not financially viable to sell, so he re-let it and the application for the relevant licence was dispatched to the Respondent on 31 October 2018.

10. He claimed that the penalty was excessive and did not take account of his personal financial difficulties.

11. He provided in evidence an email from accountant Bailey Group referring to financial data from his self-assessment tax return, showing losses carried forward of £21,014.00 for his property business. He had no income from his company, Pioneer Luminum Ltd. The last set of trading accounts for his company Steven McGarvie Ltd for the year ending 30 June 2015 showed a loss of £28,885 and he stated that the business only traded for 2 years. He stated that he recently had sold one of his rented properties and to pay off the mortgage it had been necessary to contribute £250 of his own money. When he made his representations to the Tribunal, he had 6 unoccupied properties but he was still having to service mortgages and incur tenant-search fees. He accepted that he had a large rent income overall, but stated that this was out-weighed by mortgage costs and other expenses of property management including the cost of repairs following tenant damage and rent arrears.

12. He stated that he had just become 60 years of age and so could not borrow money to pay the penalty, having recently been refused credit for £300.

13. He asked the Tribunal to take account of the purpose of the relevant legislation leading to the penalty – "….to bring into line 'rouge landlords'…." Not to punish a "clerical error on my part", having been a landlord for 30 years and that the penalty was "…out of all proportion."

14. The Respondent provided a table of contact to the Applicant, from which it invited the Tribunal to find that the Applicant was on notice of the need to apply for the licence, also referring to his previous licence holding and experience of owning and managing rental properties, being owner of 24 such properties. It provided office copy entries from Land Registry dated 21 January 2019 identifying that the Applicant was the sole owner of the Property.

15. The Applicant sent an email to the Respondent dated 30 July 2018 advising that his PC had crashed, he had lost his application and would be starting again. A visit the Property was undertaken on 8 October 2018 during which the Respondent learned that Mr Lockyer had been occupying the property from 1 September 2018 under an assured shorthold tenancy with the Applicant for a period of twelve months. The monthly rent was £400.

16. An application for a licence was received by the Applicant on 1 November 2018, six months after scheme commencement, resulting in the Property being rented out twice without a landlord licence. The Applicant's licence was granted on 16 January 2019.

17. On 22 January 2019 the Notice of Intention to issue a Financial Penalty was issued to the Applicant at his home address and he replied on 8 February 2019 with representations by email. The representations were considered and the Final Notice to impose a financial penalty was issued on 9 April 2019.

18. The period of the offence has been calculated by reference to 23 weeks of occupation of the Property from scheme start (30 April 2018) during which it was unlicensed.

19. The Respondent used its "Checklist for Assessing Prosecution vs Civil Penalty Charge Notice" document to determine that a Financial Penalty was a suitable method of enforcement action. The Checklist considers: the seriousness of the offence; this includes the vulnerability of the occupiers of the property and any proven harm outcome on them or on the neighbourhood because of the offence; the culpability of the landlord; this includes the effort made by the landlord to comply with requirements prior to formal action being taken, any mitigating factors that the landlord could demonstrate in his defence of not complying with requirements, any relevant unspent convictions, the landlord's track record in respect of complying with housing legislation in Gateshead and nationally, the landlord's experience; such as the length of time the landlord has managed privately rented homes, and the size of the property portfolio, and membership of any recognised landlords association. The consideration of these factors led to the decision to impose a civil penalty charge as an alternative to a prosecution.

20. The civil penalty is made up of two components. The first is the penalty calculation; this is where the severity of the offence, the landlord's culpability and track record and the landlord's income (if deemed appropriate) are considered. The second considers the amount of financial benefit, if any, which the landlord obtained from committing the offence. These two components are then added together to determine the final penalty amount that will be imposed on a landlord.

21. The level of the penalty was set based on the Applicant's culpability being reckless (acting with foresight / wilful blindness) because the Applicant had previously held a similar licence for the Property as that at issue; he had ignored reminders, had informed the Respondent on 25 July 2018 that he had intentionally not made his application as his tenant planned to vacate the Property and the Applicant did not plan to re-let it, but had allowed another tenant into occupation on 1 September 2018 and it was only from prompting by the Respondent on 24 October 2018 that the application had been submitted, received on 1 November 2019.

22. As to the seriousness of harm this was assessed at the lowest level as no direct evidenced harm was caused to the tenant or the community as a result of the non-application. Category 2 hazards were identified at the Property but were low scoring hazards and had since been rectified.

23. The resulting penalty band range was between £3,000-£5,000 with a starting point of £4,000 and therefore a 'moderate' Level 1 penalty level.

24. Regarding income issues of the Applicant the MHCLG Guidance states that in determining an appropriate penalty assessment should be made of a landlord's assets and any income (not just rental income) they receive. In this instance the Respondent indicated that as this was a moderate offence a financial investigation was unnecessary "……as the income considered was the income that the Applicant received in relation to the property when the offence occurred." No adjustment was made, therefore.

25. For mitigating factors, the maximum reduction from the starting point is £1,000 – a maximum 25% in this matter. At the Notice of Intent stage a reduction of 12.5% (£500) was made because the offence was the first committed by the Applicant and he had ultimately applied for the licence. As the Applicant had expressed remorse the penalty amount was reduced by a further £250.

26. As to aggravating factors due to the track record of the offender within Gateshead and nationally the Respondent found none and so there was no increase.

27. The net effect of the above adjustments was a reduction of the penalty in the sum of £750.

28. The Respondent determined the financial gain element to be the rental income earned from the letting of the unlicensed property. By reference to the rent sum of £400 rent per calendar month recorded in a tenancy agreement for the Property the Respondent calculated rental income at £ 92.30 per week, applied over 23 weeks, to be added into the penalty charge, amounting to £2,076.75.

29. The cost band for this financial penalty was assessed as medium - £300 - which the Respondent adopted when drafting its policy as a reasonable and proportionate representation of the costs associated with imposing a financial penalty.

30. Therefore the total charge was:

Penalty Charge Starting Amount	+£4,000
Charges due to offender's income	£0
Changes due to offender's track record	-£750
Financial Benefit gained during offence period	+£2,076.75
Costs	+£300
	£5,626.75

31. Regarding the specific points made by the Applicant in his representations, the Respondent made additional comments that the Applicant may be confusing the start date for the licensing scheme with that for another licensing area which began on 31 October 2018. The communications with him could not justify such confusion. Further, the loss/profit from the Applicant's companies are separate to the property portfolio and are not relevant. It stated that "The financial gain added to the penalty has been limited to the gain from the property itself during the period of the offence/s. The income/losses of the companies have not factored in the calculation which is in line with the Council's policy considering the calculated severity of the offences." It noted that no information as to values or equity for the portfolio of properties, including the Applicant's own home. The Applicant advised that only some of his properties are in negative equity.

32. The Applicant's accounts state that 50% of the rental income from the property portfolio should be considered rather than the full rent as the Applicant jointly owns the properties. However, no supporting evidence was supplied and the Respondent knew from its search of Land Registry that the Applicant is the sole owner of the Property. As to the Applicant's claim that he pays management fees of £3,636 there is no evidence of a managing agent agreement in any of the communications about the Property.

33. It also stated that it did "……not consider mortgage costs, property insurances etc. as expenditure for which deductions should be applied. Spend on such items is investment in the Applicant's asset resulting in benefit to him in terms of paying off a debt, increasing property equity and capital investment, and receiving a service, and as a result not lost to him. Costs for tenant find and property maintenance are all part of the business of being a landlord and should be factored into the financial planning for the property."

Decision

34. The same criminal standard of proof is required for a civil penalty as for prosecution. This means that before taking formal action, a local housing authority should satisfy itself that if the case were to be prosecuted in the Magistrates Court, there would be a realistic prospect of conviction. In order to actually achieve a conviction in the Magistrates Court, the local housing authority would need to be able to demonstrate beyond reasonable doubt that a relevant

offence has been committed. Similarly, where a civil penalty is imposed and an appeal is subsequently made to the Tribunal, the local housing authority needs to be able to demonstrate beyond reasonable doubt that the offence had been committed. The Applicant did not deny that he did not hold an appropriate licence for the Property between 30 April 2018 to 16 January 2019. Prima facie there is the commission of a relevant housing offence and the Tribunal finds on these facts that the Applicant committed an offence under Section 95 of the Act. The Property was subject to compulsory selective licensing and was rented out in the absence of an appropriate licence. The Respondent is justified in imposing a sanction and the Tribunal was satisfied with the Respondent's evidence (paragraph 14) that the Applicant was a person managing or having control of the Property. The Respondent's decision to issue a penalty charge rather than prosecuting is to the benefit of the Applicant in avoiding a conviction.

35. Therefore the question for the Tribunal is the level of the penalty.

36. The Tribunal considered the MHCLG Guidance at paragraph 3.5 which sets out the factors to take into account when deciding on the appropriate level of penalty. Those factors are:

    Severity of the offence.

    Culpability and track record of the offender.

    The harm caused to the tenant.

    Punishment of the offender.

    Deter the offender from repeating the offence.

    Deter others from committing similar offences.

    Remove any financial benefit the offender may have obtained as a result of committing the offence.

37. The Tribunal reviewed the Respondent's policy on assessing the level of culpability. The MHCLG Guidance states that in terms of culpability and track record of the offender 'a higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their obligations. Landlords are running a business and should be expected to be aware of their legal obligations'.

38. The Tribunal found that assessment of culpability as reckless, which the Respondent's penalty banding describes as "foresight or wilful blindness", was appropriate. The Applicant was an experienced landlord and as a former licence holder for the Property aware of selective licensing obligations. The Tribunal found from the chronology of contact presented by the Respondent and not contradicted by the Applicant that he had been put on notice of the need to apply for a licence for the Property (and not merely of a general requirement), from 29 January 2018, by way of telephone calls, emails and letters. The Applicant did not

deny understanding the licensing obligation. He excused his omission to apply in time for the licence to commence on 30 April 2018 by indicating he anticipated he would be selling the Property. In July 2018 he demonstrated awareness when he indicated a fault with his computer delaying submission of an application. The Applicant was letting the Property without a licence before and at 30 April 2018, until 6 August 2018 and again from 1 September 2018 until applying at the end of October 2018 – and until the licence was granted on 16 January 2019.

39. As to the severity of the behaviour the Tribunal found no persuasive evidence that the level should be otherwise than low, as decided by the Respondent, meaning the banding is £3,000 - £5,000.

40. The Tribunal considered the Respondent's policy of having a starting point in the middle of each band of penalty – i.e. £4,000 here. The Applicant made no representation against that approach and in the absence of persuasive representations to the contrary the Tribunal is prepared to accept the position. No aggravating factors were found.

48. The MHCLG Guidance states that it is reasonable that each mitigating factor may justify a reduction. The Respondent's policy regarded £1,000 for this factor in total from the starting point for the penalty as appropriate. The Tribunal accepts the Respondent's findings of mitigation and reduction of £750 cumulative for mitigating factors, being in particular the application for a licence before the issuing of the notice of intention to issue a penalty and that this was the first occasion of formal action being taken arising from commission of a relevant offence, plus the Applicant's remorse.

49. As to the financial benefit to the Applicant he did not deny receipt of rent or in the sums calculated by the Respondent. The period used in calculating receipt of rent (23 weeks) is not unreasonable, thus adding into the penalty the sum of £2,076.75 for such benefit.

50. The Tribunal determined the ongoing expenses incurred by the Applicant in managing the Property – insurance, general maintenance, mortgage cost - were not items for which there should be a reduction in the penalty. They were expenses arising ordinarily on the capital investment in the Property and there is an indirect benefit in paying off a debt, increasing equity in the property and receiving an income. The Applicant did not deny that he owns and / or manages additional properties – see paragraph 14 – and therefore has alternative sources of income. The Applicant produced no verifiable corroboration that he was joint owner of other properties receiving only one half of the rent from them.

51. The Tribunal disagreed with the Applicant that his personal finances should cause a reduction in the penalty. The Respondent submits that the relevant measure of the Applicant's financial gain is the rent received on the unlicensed property, rather than the picture presented by the finances of the Applicant's wider business interests. The Tribunal finds that the MHCLG Guidance does require consideration to be given to the defaulting person's means in that it states (Section 3.5 at d): "…..it is important that it [the penalty] is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrates

the consequences of not complying with their responsibilities" which the Tribunal understands necessarily involves some consideration of the offender's means. Nevertheless, the information produced by the Applicant is selective so there is some uncertainty about the Applicant's actual income. The Tribunal agrees with the Respondent that some of the figures listed as expenses in the accounts appear to be excessive and lacking in detail, for example, the Applicant claims around £12,000 in motor expenses, which is a high sum when there is no suggestion that the Applicant's properties are located otherwise than in the north east. Despite maintenance and repair costs being listed, there is an entry in the accounts for 'sundry expenses' of over £24,000, without explanation. While the Tribunal has taken into account the apparent difficulty for the Applicant to raise funds personally and overall flat rent levels in the market locally, the Tribunal found that the adding into the penalty calculation of the rent received in the unlicensed period, without adjustment for personal means in the circumstances of the facts of this matter is not contrary to the MHCLG Guidance principles.

52. Recovery of the Respondent's fixed costs in connection with the penalty process of £300 was found by the Tribunal to be reasonable, both as to payability, arising from the offence and as to amount, being reasonable.

53. Having taken into account the evidence, representations, the MHCLG Guidelines and the Respondent's own Civil Penalties Enforcement Guidance the Tribunal approves the penalty charge in this matter of £5,626.75 without variation.

Judge W L Brown
23 March 2020