FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AR/HNA/2019/0169**
Property	**:**	**51 Nyall Court, Kidman Close, Gidea Park, Romford RM2 6GE**
Applicant	**:**	**Peter Ekers**
Respondent	**:**	**London Borough of Havering**
Type of application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge Nicol** **Mr M Cairns MCIEH**
Date and venue of hearing	**:**	**11th March 2020** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**30th March 2020**

DECISION

The Applicant shall pay a penalty of £8,000 in accordance with section 249A of the Housing Act 2004.

Relevant legislation is set out in an Appendix to this decision.

Reasons

1. The Applicant owns the subject property which is a 5-bedroom flat on the top two floors of a purpose-built block of flats. It is part of a portfolio of some 20 properties which he lets out. He seeks to appeal a financial penalty imposed by the Respondent for failing to licence this property.

2. In 2010 the Applicant applied for and obtained an HMO licence for the subject property, both he and the Respondent being under the impression that one was mandatory under the Housing Act 2004. In 2013 it was ruled in *London*

Borough of Islington v The Unite Group plc [2013] EWHC 508 (Admin) that the then requirement for 3 storeys applied to the HMO itself, not the building in which it is located. The Respondent notified the Applicant that he did not need to renew his licence when it expired in 2016.

3. In May 2017 the Respondent put out for consultation a proposed additional licensing scheme which would require HMOs which fell outside the statutory mandatory scheme to be licensed. The proposed scheme did not cover all the wards in the borough but just those for which the Respondent believed it had a sufficient evidential base to justify it in accordance with the statutory criteria. The Applicant was amongst those invited to respond but it appears he did not do so.

4. The Tribunal was not provided with full copies of the scheme, the report to cabinet on 11th October 2017 containing the Respondent's consideration of the scheme or the consultation documents. However, the material which was provided showed that there were a number of critical responses to the consultation, a minority of which the Respondent accepted, and their answers to these criticisms provide some of the underlying reasoning as to why they went ahead with the scheme. It came into force on 1st March 2018.

5. Throughout his interaction with the Respondent from this time, right up to the hearing of his appeal before the Tribunal on 11th March 2020, the Applicant has attacked the Respondent for an allegedly overbearing, bullying and unreasonable approach, often in grandiose terms. To hear him tell it, the Respondent's behaviour undermined the fundamentals of democracy and fair dealing. His appeal to the Tribunal was accompanied by an opening statement in which he said this was an opportunity to bring local and central government malpractice into the spotlight and he invited the Tribunal to include as much strong criticism and condemnation as possible. In the history which follows, the Tribunal found nothing which remotely justifies the Applicant's approach. In the Tribunal's opinion, this is a simple case of someone flouting the law because he disagrees with it. The Tribunal has no criticism to make of the Respondent in this case.

6. On 28th February 2018 GBP Estates, the Applicant's agent, emailed him warning him of the pending requirement to be licensed and asking if he would like them to deal with the application process, for which their charge would be £250 plus VAT. The Tribunal appears not to have copies of all the relevant correspondence but the Applicant did not take up GBP's offer until around July 2019. Instead, the Applicant sought further information from the Respondent.

7. In an email dated 1st March 2018 the Applicant angrily complained about the Respondent's response to some previous correspondence (which the Tribunal has not seen) and demanded details, including relevant documents, of the additional licensing scheme and how it came to be introduced. The Respondent replied the same day indicating that all the information he wanted could be found in the report presented to cabinet on 11th October 2017 and provided a suitable hypertext link.

8. On 30th October 2018, a generous 8 months after the additional licensing scheme had come into force, the Respondent wrote to the Applicant informing him of his obligation to obtain a licence and how he could do so. The Applicant again requested information in response to which the Respondent, by email dated 8th November 2018, again referred him to the report to the cabinet meeting of 11th October 2017. The Respondent sent a further letter dated 13th November 2018 giving the Applicant 7 days to apply. The Applicant did not apply for a license.

9. Given the lack of co-operation from the Applicant, the Respondent had to take further steps to confirm that the subject property was still licensable by being an HMO. Therefore, on 13th December 2018 they carried out an unannounced visit to the property and took details of the occupants which did, indeed, confirm that it was licensable. The Applicant has claimed that the visit was "a most frightening and disruptive … dawn raid" and "heavy-handed", particularly in the light of the fact that the council officers had a police escort waiting in the vicinity. The Applicant's bundle included an email dated 13th December 2018 from one of his tenants, Charlotte Parrish, giving details of what happened but there is nothing in that to suggest that they or any other tenant was frightened or even much inconvenienced. It is difficult to see what else the Respondent was supposed to do when the Applicant deliberately refused to comply. The Applicant had had the power to prevent its happening by properly applying for a licence but had chosen not to do so.

10. The Applicant makes much of the fact that he is a good landlord in the sense that his properties are of a high standard, his tenants are fully vetted and he has complied with the standards required for HMOs by working in the past with the Respondent's officers. The Respondent did not demur from this and, indeed, took it into account in calculating the financial penalty, as will be seen below. On this basis, he asserted at various times that the enforcement process against him should be suspended or that he should not be penalised for failing to do as the Respondent asked. However, it is not for him to decide such matters. During the consultation process for the additional licensing scheme, a number of respondents suggested that the scheme was not relevant to good landlords and that, by one method or another, they should not have to comply with it. In their answers, the Respondent acknowledged that the scheme was aimed at bad landlords, not good ones, but the way they would accommodate good landlords was not by exempting them but by granting them licences with longer terms and fewer conditions.

11. The Respondent further explained itself in its Private Sector Housing Enforcement Policy which states that it aims to ensure the law is applied fairly and consistently and to tackle offenders in proportion to any crime committed. In the absence of any specific grounds of challenge raised in judicial review proceedings before the Administrative Court, the Tribunal has no reason to question the Respondent's reasoning – on the face of it, the Respondent's reasoning is entirely reasonable and rational.

12. Following the visit to the property, on 18th December 2018 the Respondent sent the Applicant a Notice of Intention to issue a Financial Penalty of £1,000 for his failure to obtain a license. He was invited to make representations.

13. By email dated 2nd January 2019 the Applicant sought clarification. On 1st October 2018, the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 had come into force, changing the definition of HMOs for the purposes of statutory mandatory licensing. The Applicant asked whether he needed a mandatory license (the type he had previously had from 2011) or an additional license under the Respondent's scheme. By emails dated 8th and 14th January 2019, the Respondent made it crystal clear that he was not required to apply for a mandatory license but, rather, for an additional license.

14. By email dated 15th January 2019 the Applicant referred to a previous request (which the Tribunal has not seen) "to put this matter on hold." He said that, since "no one is willing" to do that, he would pay the financial penalty and the license application fee on condition that, "should the higher authorities rule the council's additional licensing scheme is illegitimate", the money would be returned.

15. There was a number of problems with his "offer". Firstly, a license fee cannot be paid unless and until an application is made. The Respondent used the analogy of trying to pay Amazon before actually ordering anything. The Applicant made a later offer to pay the license fee which was, again, worthless without actually making an application.

16. Secondly, the Applicant was under the impression throughout that he could trigger a review of the legality of the Respondent's additional licensing scheme by writing to the Secretary of State for Housing, Communities and Local Government and his local MP, the outcome of which would be a binding decision on whether it was valid or not. When he refers to "the higher authorities", this is what he means.

17. It is not clear to the Tribunal why the Applicant thought this. There is no such process, nor is there any guidance or advice available online or elsewhere, from the Government or anyone else, to suggest that there is. Under section 58 of the Housing Act 2004, a designation of an area as subject to additional licensing cannot come into force unless it has been confirmed or comes within a general approval issued by the Secretary of State but the Applicant only sought to challenge the Respondent's scheme after that stage had long passed. The only power of review of a scheme which is already in force is that of the Respondent itself under section 60(3).

18. The Applicant said he was advised by a barrister and, if so, he should have been aware that the appropriate route of legal challenge to the scheme would have been by way of judicial review in the Administrative Court. Having written his letters to the Secretary of State, James Brokenshire, and his MP, Andrew Rosindell, his later letters to them show increasing frustration as he gets no substantive response, let alone any indication that there would be a review.

19. On 4th February 2019 the Respondent issued the Final Notice for the Applicant to pay a financial penalty of £1,000. The covering letter rejected the Applicant's representations on the basis that "the additional licensing scheme is legitimate as it has been passed by cabinet."

20. On 27th February 2019 the Applicant paid the financial penalty, as he put it in an email to the Respondent, "under duress", reserving the right to dispute its validity. He did not appeal it. It would seem that he was again referring to a supposedly pending ruling from "the higher authorities".

21. The Applicant's complaint to the Secretary of State was referred to the leader of the Council, Cllr Damian White. Sasha Taylor, Public Protection Manager and Chair of Havering's Safer Neighbourhood Board, provided to Cllr White a copy of her response to an email dated 22nd February 2019 from the Applicant in which she stated, amongst other things,

> I should first of all point out that any challenge to the Council's decision to introduce additional licensing must be by judicial review. I therefore recommend that you seek professional legal advice on how such a challenge might be commenced.
>
> The Council remains satisfied that the evidence on which the areas selected for additional licensing meets the statutory requirements.
>
> I am advised that in the course of enforcing the scheme Council officers have already uncovered a number of properties that are being operated as very poor, overcrowded and even dangerous HMOs, including some which are located within the ward in question. The Council is of the view that these properties may not have come to light without the licensing scheme having been introduced. I believe that the impact of the Council's HMO licensing scheme has proved to be largely successful in improving standards of accommodation within the lower end of the private rental market and has also identified a number of criminal landlords who would otherwise have continued to exploit vulnerable tenants.
>
> My service has a clear mandate from Havering's Cabinet to take robust enforcement action against landlords not complying with the scheme. I therefore respectfully advise you to urgently licence any of your properties covered by the scheme. Failure to do so is likely to result in further enforcement action by the Council.

22. Ms Taylor's reference to "the ward in question" relates to the Squirrels Heath ward in which the subject property is located. The Applicant has asserted that the ward did not meet the statutory criteria for inclusion within an additional licensing scheme. At the hearing on 11th March 2020 the Tribunal explained to him that it did not have the jurisdiction to rule on the legality of the scheme but the Applicant had prepared his written statement of case and his bundle of documents before this and so the Tribunal expected to find the details of his case in the papers before it. The only relevant matter included within the Applicant's bundle was some evidence indicating that Squirrels Heath ward did not have a high crime rate. This is, of course, only one of a number of criteria that the Respondent might have considered and could not, of itself, make the Applicant's case. The Tribunal invited the Applicant to explain why he thought the scheme was invalid or illegal but he failed to make any other submissions or to point to any other evidence which would support his assertion.

23. A further generous 3 months later, on 13th June 2019, the Respondent emailed the Applicant to remind him that he needed to licence the subject property. By

email dated 16th June 2019 the Applicant stated that he had attempted to pay the licence fee via the Respondent's website without success. By emails dated 17th June 2019 the Respondent pointed out that there needed to be a valid application first. By email dated 18th June 2019 they provided a link to their licensing guidance.

24. There then followed emails in which the Respondent pointed out that there were companies which would make the application on the Applicant's behalf. Despite his own agent, GBP, having already offered this service 15 months previously (see above), the Applicant claimed to be unable to find any such company.

25. It appears that the Applicant did ultimately instruct GBP for this purpose. It is recorded on the Respondent's website that an application was commenced for the Applicant on 5th July 2019. In an email dated 9th September 2019, GBP informed the Respondent,

> Further to submitting on line a HMO application form on the 5th July, Mr Ekers the owner of the property was also sent the link to sign the application as he will be the licence holder, but he has refused to sign the application. He has said that he has asked our local MP to get Havering to suspend the current application pending the outcome of a review at the government department level. The situation being as it is, we would be grateful if you would please leave the application to one side until further notice.

26. The Applicant has claimed that he did not sign the application, at least in part, because there was confusion about what kind of application he should make. In an email dated 2nd July 2019 GBP told the Applicant that, "Havering department has also advised that this is a Mandatory Licence and not Additional …" When the Applicant relayed this to the Respondent, they asked for details of how and when this advice was given because, as far as Paul Oatt, the principal officer involved, was concerned, no such advice had been given by him or any of his colleagues. The Applicant failed to provide any such details until the hearing before the Tribunal on 11th March 2020 when he revealed that the advice was given at a seminar at Council offices aimed at landlords and agents throughout the borough but which happened to be attended only by a number of GBP staff. Therefore, it was not a meeting about the Applicant or the subject property, nor was it with Mr Oatt. It is also not clear what GBP's statement is based on, even assuming that they weren't somehow mistaken in how they relayed the information.

27. By email dated 3rd July 2019 the Applicant complained that this supposed advice contradicted earlier statements from the Respondent, which he then enumerated. He maintained his alleged confusion at the hearing but the Tribunal is satisfied that this was no more than a smokescreen for his desire not to apply for a licence at all:

(a) From 28th February 2018 until GBP's email of 2nd July 2019, the Applicant had been consistently told, both by GBP and various officers of the Respondent, that he needed to apply for an additional licence, not a mandatory licence. He had

all that time to make the application before the alleged contradictory statement was made.

(b) Further, the Applicant was faced on the one hand with a series of consistent statements made authoritatively by officers directly involved in his case over a period of 15 months and on the other with one hearsay statement arising from a seminar which wasn't about his case at all. Any reasonable person would have understood the former was much more likely to be the correct position.

(c) GBP commenced the Applicant's application just 2 days later, on 5th July 2019, using the correct form. They were apparently not confused in the least.

(d) Even if there were confusion, the Applicant had another option other than not proceeding with the application, which he himself had suggested previously. This was that he would proceed as he was being asked to do while reserving his right to challenge its validity later. He had already been subjected to a financial penalty once and then warned that further enforcement action could be taken. Any reasonable person would have understood the more expedient and cheaper option would be to apply and pay now and continue with the objection later. The Tribunal is satisfied that the Applicant fully understood this but chose not to do it.

(e) In any event, the Respondent clarified the position yet again by email dated 16th July 2019: "It has always been made clear to Mr Ekers that he is required to make an application for an additional HMO licence."

28. On 17th September 2019 the Respondent sent the Applicant another Notice of Intention to issue a Financial Penalty, this time for £8,000, for his continuing failure to obtain a license. He was again invited to make representations.

29. The Applicant responded by email the same day repeating his contentions that the Respondent was confused as to what type of application he should make and that he had tried to pay his fee before. Despite both contentions having been adequately addressed already, Mr Oatt replied by a lengthy letter dated 18th September 2019 (also sent by email) dealing comprehensively with them again. The Applicant responded by email within 2 hours again asserting that he required clarification about what kind of licence to apply for. Mr Oatt replied later the same day, reiterating that the Respondent's position was already clear. The Applicant replied, also on the same day, saying he would provisionally take the latest reiteration of the Respondent's position as the definitive one. In reply, by email dated 23rd September 2019, Mr Oatt, exasperatedly but correctly, told the Applicant,

- <u>You</u> are responsible for your application.
- <u>You</u> are responsible for providing the council with the correct information.
- <u>You</u> are then responsible for upholding the licence conditions.

30. The Applicant's application for an additional licence was finally made on 19th September 2019. Nevertheless, given his continued resistance over the period of more than 7 months since the last financial penalty, the Respondent decided to serve the Applicant on 23rd October 2019 with a Final Notice for the further financial penalty of £8,000.

31. The Applicant has sought to appeal this penalty to the Tribunal under paragraph 10(1)(a) of Schedule 13A to the Housing Act 2004. His principal ground of objection has always been that the additional licensing scheme itself

was invalid but, as a creature of statute, the Tribunal has been granted no power to resolve such an objection. For the reasons already set out above, the Tribunal is satisfied beyond a reasonable doubt that the Applicant committed the offence under section 72(1) of the Act in that he is a person having control of or managing an HMO which is required to be licensed but was not so licensed. Further, the Tribunal is satisfied that the Applicant has no excuse whatsoever for refusing to apply for a licence for such a long time and that a financial penalty is an appropriate sanction. The only real question is what the quantum of the penalty should be.

32. Although the appeal is a rehearing and the Tribunal needs to reach its own conclusion on this issue, the Tribunal is entitled to have regard to the Respondent's views (*Clark v Manchester CC* [2015] UKUT 0129 (LC)) and must consider the case against the background of the policy which the Respondent has adopted to guide its decisions (*R (Westminster CC) v Middlesex Crown Court* [2002] EWHC 1104 (Admin)).

33. In order to ensure fairness and consistency amongst all those subject to financial penalties, and in accordance with the Government's guidance on Civil Penalties under the Housing and Planning Act 2016, the Respondent uses a matrix which considers:

(a) The need to deter and thereby prevent similar crimes.
(b) The removal of any financial incentive to commit such crimes.
(c) The nature of the offence and the history of the offender.
(d) Any harm to the tenants.

34. A score of 1, 5, 10, 15 or 20 is given to each element depending on the circumstances of the case. The Respondent gave the following scores in the Applicant's case:

- Deterrence & Prevention: 20. "Very little confidence that a low financial penalty will deter repeat offending. Informal publicity will be required to prevent similar offending in the landlord community."
- Removal of Financial Incentive: 20. "Large portfolio landlord (over 5 properties) or a medium to large Managing Agent. Large asset value. Large profit made by offender."
- Offence & History: 5. "Minor previous enforcement. Single offence."
- Harm to Tenants: 1. "Very little or no harm caused. No vulnerable occupants. Tenant provides no information on impact." The Government guidance suggests this element should be given extra weight by doubling the score so that the Respondent factored in a score of 2.

35. The total score was 47. The Respondent then measured this score against a scale of increasing penalties across bands of scores. A score of 47 put the Applicant squarely in the band 41-50, for which the fine indicated is £8,000.

36. The Tribunal is satisfied that this is a good approach, for the reasons given by the Respondent, and the Applicant advanced no arguments to depart from it.

37. The Tribunal considered whether the Deterrence and Prevention score could be reduced on the basis that there could be more confidence than the Respondent exhibited that the Applicant would not re-offend. However, on reflection, the Respondent's lack of confidence is entirely justified. Despite already having

been fined, the Applicant persisted in his unlawful approach for as long as he possibly could. His lack of insight into the flaws in his arguments appears to be the result of wilful blindness rather than any genuine lack of understanding. There is every reason to think that, unless he is sufficiently incentivised, the Applicant will commit the same offence in future.

38. The Applicant objected strongly to the assumptions made by Mr Oatt as to the value of his assets in calculating the score for the element of Removal of Financial Incentive. However, the Respondent has only to be broadly correct rather than precisely accurate in order to make a valid assessment on this point. Even if the Applicant's profit margins are as small as he claims (for which he provided no evidence), there is no doubt that he satisfies the definition of a large portfolio landlord.

39. As already referred to, the Applicant made much of the lack of harm to any tenant for whose protection the additional licensing scheme was brought in. However, it can be seen that this was fully accounted for in the Respondent's assessment. The Tribunal is satisfied that the Applicant's good record apart from his refusal to apply for a licence is not a sufficient basis for reducing the financial penalty below the amount imposed by the Respondent.

40. Therefore, the Tribunal is satisfied that it is appropriate to impose the financial penalty of £8,000 on the Applicant.

Name: NK Nicol **Date:** 30th March 2020

Appendix of relevant legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(2) A person commits an offence if–

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) A person commits an offence if–

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

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

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either–

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

249A Financial penalties for certain housing offences in England

(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.

SCHEDULE 13A
FINANCIAL PENALTIES UNDER SECTION 249A

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").

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.