



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

Case Reference : **MAN/00CH/HNA/2019/0094**

Property : **37, Saltwell Street, Gateshead NE8 4QX**

Applicant : **Steven Enright**

Respondent : **Gateshead Council**

Type of Application : **Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**

Tribunal Members : **Tribunal Judge C Wood
Ms S Latham**

Date of Decision : **1 July 2020**

ORDER

Order

1. In accordance with paragraph 10(4) of Schedule 13A to the Housing Act 2004, (“the Act”), the Tribunal confirms the final notice dated 15 August 2019 by imposing a financial penalty of £6776.94.

Application

2. By an application dated 5 September 2019, (“the Application”), the Applicant appealed against a financial penalty under section 249(a) of the Act.
3. Directions dated 24 October 2019 were issued pursuant to which both parties submitted written representations. The Tribunal considered the matter on 31 January 2020.
4. The Tribunal has determined the substantive application following a consideration of the written representations and supporting documentary evidence provided by the parties, but without holding a hearing. Rule 31 of the Tribunal’s procedural rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed). In this case, the parties have given their consent. Moreover, having reviewed the parties’ submissions, the Tribunal is satisfied that this matter is suitable to be determined without a hearing: although the Applicant is not legally represented, the issues to be decided have been clearly identified in their respective statements of case, which also set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including any incidental issues of fact.
5. The parties were given a further opportunity to make written submissions on the procedural issue regarding the Final Notice identified by the Tribunal in the course of its deliberations.

Law and Guidance - Power to impose financial penalties

6. 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.
7. 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.
8. 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

9. 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.
10. 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.
11. 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.
12. 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.

Relevant guidance

13. 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 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.”

14. 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.
15. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, Gateshead Council has adopted the Gateshead Private Sector Housing Team Civil Penalties Enforcement Guidance (a copy of which is attached at Appendix 20 to the Respondent's Statement of Case), (“the Policy”). We make further reference to the Policy later in these reasons.

Appeals

16. 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).
17. 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.
18. 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.

Evidence

19. The Respondent's Statement of Case sets out in detail the background to this matter, including, without limitation, the Respondent's dealings with the Applicant during a previous licensing scheme effective from 18 May 2012 – 16 May 2017 in respect of the area in which the Property is located which led to

the Applicant's conviction on 16 March 2016 for, inter alia, his failure to obtain a licence for the Property; together with details of the communications by the Respondent with the Applicant and other interested parties between January – July 2018 in relation to the selective licensing regime for the area in which the Property is located effective from 30 April 2018.

20. The Statement of Case also details the process undertaken by the Respondent to determine the suitability of a financial penalty in this case, and having determined that it was, the procedure undertaken in accordance with the Policy to determine the amount of the financial penalty at £6676.94.
21. The Applicant's written submissions are set out in a letter dated 6 December 2019. Reference is made to the Respondent's letter dated 15 August 2019 which was sent in response to the Applicant's representations dated 22 February 2019, ("the Representations"). The Representations are summarised as follows:
 - 21.1 following his convictions in March 2017 the Applicant stated that he was "instructed formally" by the Respondent that he was not a "fit and proper" person to hold a licence, and "was under the impression" that this was still the case when the requirement arose for a licence for the Property effective from 30 April 2018;
 - 21.2 when contacting the Respondent, he had shown "genuine concern" regarding the need for a licence application to be made;
 - 21.3 the Respondent had never informed the Applicant that "...the conviction finished when the original licence expired";
 - 21.4 although the Respondent had informed the Applicant that he could have applied for a licence up to the date of his bankruptcy, that would have been "pointless" as he was aware of the probability of his bankruptcy from 24 November 2017;
 - 21.5 the Applicant was not in a position to confirm that he had the financial resources to maintain during the licence period as was required in the licence application;
 - 21.6 the Applicant was surprised that the Respondent had not made him aware that his convictions were "spent" and of his ability to apply for a licence, or of the importance of obtaining a licence during the various telephone calls he had made to them.
22. The Applicant's submissions in his letter dated 6 December 2019 re-state much of the content of the Representations. In addition, the Applicant states:
 - 22.1 that, from the date of his bankruptcy, he had no control over his share in the Property which had been ceded to the trustee in bankruptcy;
 - 22.2 that the Final Notice did not give him 28 days to make payment, as it was dated 15 August 2019 and required payment by 28 August 2019.

23. The Respondent's detailed response to the Applicant's Representations is set out in the Respondent's letter dated 15 August 2019, and is summarised as follows:
- 23.1 discussions had previously taken place between the Respondent's officers and the Applicant regarding the rehabilitation period applicable to the Applicant's convictions, and the date when those convictions would be "spent";
 - 23.2 correspondence was sent in January, February and March 2018 regarding the introduction of the selective licensing scheme effective from 30 April 2018, and again following its commencement, on 30 May and 11 June 2018, together with a visit to the Property on 7 June 2018, and contact by telephone on 2 July 2018. Only on 6 July 2018 did the Applicant contact the Respondent and only at that point did the Applicant inform the Respondent of his bankruptcy. Whilst acknowledging that his bankruptcy disqualified the Applicant from holding a licence, he could have applied to be the licence holder from 30 April up until 3 July 2018. Further, notwithstanding his bankruptcy, the Applicant was told that he remained responsible for the Property and therefore legally responsible for ensuring that another appropriate person became the licence holder. Despite this, no further communication was received from the Applicant between July – November 2018, apparently because the Applicant had wrongly understood that his brother and co-owner of the Property had made an application in this period.
 - 23.3 On 30 November 2018, a licence application was finally received but, as advised to the Applicant and to Ms McHugh, the licence applicant, it was incomplete. No further application was submitted. On 10 January 2019, the licence application was refused. As at 22 January 2019, the Property remained unlicensed, meaning that it had been operating without a licence for a period of 38 weeks.
24. The Respondent's response to the Applicant's written submissions dated 6 December 2019 is set out in its letter dated 19 December 2019. It re-states much of the Respondent's response dated 15 August 2019 to the Applicant's Representations. With regard to the two additional points made by the Applicant, the Respondent confirms:
- 24.1 in contradiction of the Applicant's assertion, enquiries made by the Respondent of the Applicant's trustee in bankruptcy confirmed, that the Applicant remained in control of the Property following his bankruptcy "after coming to an agreeable arrangement with the receiver" to this effect;
 - 24.2 the date for payment of the financial penalty in the Final Notice was not, as asserted by the Applicant, the 28th August 2019, but the date which was 28 days from the date of service of the Final Notice, which, in this case, was 28 days from 15 August 2019.

Procedural Issue regarding the Final Notice

25. During its deliberations, the Tribunal noted that there was an apparent procedural defect in the Final Notice, specifically, that the Final Notice provided that payment should be made “on or before the 28th calendar day from the date of this Notice, rather than “ from the day after that on which the notice was given” as prescribed by paragraph 7 of Schedule 13A to the Act.
26. By the Tribunal’s letter dated 10 March 2020, the parties were requested to make their written submissions on this point.
27. By a letter dated 18 March 2020, the Respondent set out its submissions as follows:
 - 27.1 the Applicant has suffered no prejudice or potential prejudice as a result of the payment period being stated to run from the date of the Final Notice;
 - 27.2 the Respondent would not have sought payment until expiry of the statutory period;
 - 27.3 the Applicant had never any intention to make payment of the financial penalty evidenced by his statement of intention to appeal set out in an email dated 20 August 2019, and the making of an appeal dated 5 September 2019;
 - 27.4 provided that the Tribunal did not decide to cancel the Final Notice, it had the power to vary the payment period/date on the Final Notice and/or to provide a new payment date (as the original date for payment has passed).
28. No submissions were received from the Applicant in response to the Tribunal’s letter dated 10 March 2020. However, the Tribunal noted that the Applicant had raised an issue regarding the period for payment of the financial penalty in his submissions dated 6 December 2019, where he stated “...you...gave me until the 28th of the same month to pay in full which gave me only eight working days to pay the full amount”.

Reasons

29. The Tribunal was satisfied that the Applicant’s failure to obtain a licence was conduct amounting to an offence under s95(1) of the Act, which constituted a “relevant housing offence” for the purposes of s249A of the Act, permitting the imposition of a financial penalty.
30. The Tribunal was satisfied that, in respect of the notice of intent and the final notice, the Respondent had complied with the following procedural requirements as required under Schedule 13A to the Act:
 - 30.1 the offence under s95(1) of the Act was continuing as at the date of the notice of intent, namely, 25 January 2019;

- 30.2 the notice of intent and the Final Notice contained the information as required under paragraphs 3 and 8 of Schedule 13A to the Act; and,
- 30.3 the notice of intent contained information about the right to make representations (to which the Applicant had responded by making the Representations).
31. In determining to what extent (if any) the procedural defect regarding the payment period in the Final Notice should be taken into account by the Tribunal, the Tribunal is bound by the Upper Tribunal decision in *London Borough of Waltham Forest v Younis* [2019] UKUT 0362.
32. The Tribunal is satisfied that the Applicant was not prejudiced by the statement in the Final Notice regarding the payment period because he had no intention of making any payment. This is evidenced in the email from the Applicant dated 20 August 2019 in which he notified the Respondent of his intention to appeal and of the making of the appeal on 5 September 2019.
33. Further, it is clear from the Applicant's submission regarding the payment period in his submissions dated 6 December 2019, (see paragraph 28 above), his complaint was based on his misunderstanding that he was required to make payment on the 28th day of the calendar month in which the Final Notice was served (ie on 28 August 2019) rather than, as stated, within 28 days of its date.
34. Having regard to the Policy, the Tribunal agreed with the Respondent's determinations as follows:
- 34.1 that the Applicant's culpability was deliberate: the Tribunal was satisfied that the Applicant had been given numerous opportunities to make an application for a licence in advance of 30 April 2018 but had failed to do so. The Tribunal was unimpressed by the Applicant's reasons (as set out in the Representations) for not doing so. It appears to the Tribunal that the Applicant has failed to appreciate, or has wilfully ignored, that the legal obligation for obtaining a licence for the Property, in his name or, where not appropriate, in the name of another appropriate person remained with him at all times, and that any assistance and/or advice given by the Respondent to him did not remove or discharge that obligation. Specifically, the obligation for understanding the legal effect of his previous convictions and his bankruptcy was that of the Applicant;
- 34.2 the harm and severity of the offence: no evidence was presented to the Tribunal regarding any specific harm caused to tenants/ occupants of the Property by reason of the Applicant's failure to obtain a licence. On that basis, the Tribunal accepts the Respondent's determination that harm and severity of offence should be considered to be low;
- 34.3 the Tribunal agrees that, on the basis of the penalty bands matrix in the Policy, the appropriate range for the financial penalty is £4000-6000;

- 34.4 the Tribunal noted that the penalty level is “automatically configured” by reference to the determined culpability and harm/severity of offence bands. This was determined to be a “moderate” Penalty Level 1 with a “band width” of £0-10,000;
- 34.5 the Tribunal also agreed with the Respondent’s decision to increase the penalty by £1000 for aggravating factors, £1676.94 in respect of financial benefit gained during offence period and £100 in respect of costs.
36. The Tribunal therefore confirmed the final notice imposing a financial penalty of £6776.94, payment to be made within 28 days from the date of this Decision.

C Wood
Tribunal Judge
1 July 2020