FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CH/HNA/2021/0007 FVP**
Property	**:**	**166 Rodsley Avenue, Gateshead, NE8 4LB**
Applicant	**:**	**Ms Rachel Rees**
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 Decision	**:**	**17 September 2021**

DECISION

DECISION - The appeal is successful and the Tribunal quashes the Penalty Charge.

Hearing

A hearing took place on 21 July 2021. This was a remote hearing by video which was not objected to by the parties. The Applicant attended. The Respondent was represented by Mr R Currie, Solicitor and its witnesses were Ms R Crosby, Senior Environmental Health Officer and Ms D France, Technical Officer. With the consent of the parties, the form of the hearing was by video using the Tribunal video platform. A face to face hearing was not held because it was not practicable and all relevant issues could be determined in a remote hearing. The documents that we were referred to are in core and supplementary bundles, the contents of which we have recorded. (The parties were content with the process).

The Tribunal subsequently completed its deliberations.

Introduction

1. The Applicant made application (the "Application") dated 12 January 2021 to the Tribunal appealing a financial penalty imposed on her by the Respondent in the sum of £5,223.00 (the "Penalty") made under section 249A of the Housing Act 2004 (the "Act"), set out in a Final Notice dated 17 December 2020. The Applicant is sole owner of the Property.

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 was issued in April 2018 by Ministry of Housing, Communities and Local Government (the "MHCLG Guidance"). 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 19 March 2021.

5. The Tribunal found from the evidence in the papers that the Property is a pre-1919 Tyneside flat with two bedrooms.

Facts and Law

6. The Respondent provided a chronology of events leading up to the issuing of a Notice of Intention to issue a Financial Penalty Charge under s249A of the Housing Act 2004, which chronology to that point in time was not in dispute. The Property was occupied by a tenant, Ms A Dobson, from November 2015 and continuing during the period to which this appeal relates. 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 the boundaries of the licensing scheme, running from 30 October 2018 and applicable throughout the period to which this appeal relates. 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 she did not hold the requisite licence for the period at issue. The process of the formalities leading to the issuing of the Penalty Notice however was in dispute.

7. 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 (1) "*A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed*."

8. Further, Section 95 (3) states "*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 86(1), or

   (b) an application for a licence had been duly made in respect of the house under section 87,

   and that notification or application was still effective…"

9. The Tribunal understands that in accordance with the decision of the Upper Tribunal in London Borough of Waltham Forest v Allan Marshall [2020] UKUT 0035 (LC) UTLC the Tribunal is carrying out a rehearing not a review, but is starting from the decision-maker's policy (i.e. that of the local authority) and has to pay proper attention to the Respondent's decision and the reasoning behind it.

10. Also relevant for this decision is the legislation appearing in the Annex to this decision.

Evidence and submissions

11. The Tribunal received documentary and oral evidence on all aspects of the appeal, including the basis of the calculation of the penalty and submissions on its quantum. However, a point of procedure was pursued by the Applicant that the Notice of Intention was served out of time and it is that issue alone which forms the content of this decision.

12. It was common between the parties that the Applicant submitted an application for a licence and this subsequently was granted.

13. Paragraph 1 of Schedule 13A of the Act required the Respondent to give to the Applicant a Notice of Intention to issue a financial penalty, the purpose of which is so that the receiver may make written representations to the local housing authority about the proposal to impose a financial penalty.

14. The timelimit set out in the aforementioned Schedule for serving the advance notice is "*….before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.*" (Paragraph 2(1). It was not argued by the Respondent that the effect of missing the time limit has any other consequence of making the penalty unenforceable and therefore liable to be quashed by the Tribunal using its powers under paragraph 10(4) of Schedule 13A of the Act.

15. The evidence of Ms Davies was that the Notice of Intention was posted personally by her through the letter box at the Applicant's home address at 15:55 on 21 May 2020 (accepted by the Applicant as her home address).

16. The Respondent's first position was that the commission of the offence for being unlicensed was continuing but ended on the date the Applicant paid the application fee, having made a couple of attempts to present an acceptable application form. It asserts that the trigger date was 21 November 2019, being the date the offence ended, when payment appeared on its ledger record, which was produced in evidence.

17. The Applicant however presented her bank statement showing the fee payment leaving her account at 09:27 on 20 November 2019. She asserted that payment was instantaneous, or at least within 2 hours, through the banking faster payment scheme for customers. The Respondent did not produce a bank statement and argued receipt is when the relevant department knows payment has been made – i.e. the date on its ledger.

18. The parties' did not disagree that the day for service ran until 1 minute to midnight on the relevant day. The Respondent relied on the decision of the Supreme Court in Mathew & Others v Sedman [2021] UKSC 19 - about a Limitation Act defence – in which it was held that any part of a day (but not a

whole day) happening after the cause of action accrues is excluded from the calculation of the limitation period (on our facts therefore, potentially one day between the payment date and the delivery date could be excluded from the count specified by Sch 13A 2(1)).

19. If the Applicant is correct about the payment, it was made on 20 November 2019 and the last moment for service of the Notice of Intention was 1 minute to midnight on 20 May 2020, therefore service was out of time. If the Respondent is right, then it could serve in time until 1 minute to midnight on 21 May 2020

20. The Respondent further argued in the alternative, relying on the provision in paragraph 2 of Schedule 13A of the Act and it referred to the MHCLG guidance stating '*The notice of intent must be given no later than 6 months after the authority has sufficient evidence of the conduct to which the penalty relates, or at any time when the conduct is continuing'*. We set out in full its written representations on this point (omitting identification of exhibits) and we record that the Applicant did not dispute the chronology of record of events:

"The Respondent undertook an investigation into the suspected offence and only when a thorough investigation of all the facts and evidence, including establishing if the offence has occurred and if there a defence or reasonable excuse defence applicable, can they become satisfied of the conduct to which the penalty relates. This approach forms part of a fair and reasonable investigation to the Applicant.

The PACE interview forms part of this investigation process to become satisfied of conduct and is critical to allow a suspect to provide their version of events before a decision can be made by the Respondent.

The PACE interview was arranged at a time when a duly made application remained outstanding (29/10/19) and was undertaken on 18/11/20 [understood to mean 2019]*, three days before the application was deemed to be duly made on receipt of the application fee. Two days after the PACE interview the Applicant sent an email to Ms France, Technical Officer. Within the email the Applicant sought to rely on information that she did not provide when questioned under caution during the PACE interview. The Applicant cited the illness of both herself and her mother as reasons for not responding to the numerous requests for the further information that would deem her application to be duly made. The email advised that the Applicant had suffered a burst appendix in late June 2019 and that her mother had been diagnosed with Non – Hodgkin Lymphoma in April 2019.*

As this information may have been relevant to the conduct of the Applicant, including presenting a possible defence, the Respondent agreed to be provided with it and therefore requested the Applicant to provide the information, with the Applicant confirming on 28/11/19 that they would do so. The Respondent proceeded to propose the granting of the licence in the meantime as they were then in receipt of a duly made application from 21/11/19.

The Applicant did not provide the relevant information until 19/3/20 after being prompted further by the Respondent to do so when it did not transpire.

It was not until the Respondent had receded and considered the evidence and information provided by the Applicant that they were able to become satisfied of the conduct that led to the decision to impose a financial penalty. The consideration of the evidence provided and the Respondents view of it are discussed in Respondents response to representations."

21. The Respondent concluded "*On the basis that the information was received on 19/3/20 and the Notice of Intention was served on 21/5/20, the Notice was served in time."*

22. The Respondent also submitted "*.....on 23/3/2020 the UK was placed under its first national lockdown in response to the COVID-19 pandemic. This had a profound impact on the ability of the Respondent to serve the Notice of Intention any earlier. Investigating officers due to the nature of their role (Environmental Health Officers) were immediately seconded and prioritised to duties in order to provide a front line response to COVID-19 in relation to public health, housing and business compliance within Gateshead, with this continuing to date. Furthermore, there was restricted access to the place of work for several weeks and it took several weeks for home working and remote access to files and databases to be embedded and for ongoing cases to then be progressed."*

Decision

23. 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 she did not hold an appropriate licence for the Property in the relevant period. Prima facie there is the commission of a relevant housing 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 Tribunal was satisfied with the Respondent's evidence that the Applicant was a person managing or having control of the Property. The Respondent would be justified in imposing a sanction. The Respondent's decision to issue a penalty charge rather than prosecuting is to the benefit of the Applicant in avoiding a conviction.

24. However, there was a preliminary question for the Tribunal, namely whether the Notice of Intention was served in time.

25. Section 246 of the Act deals with service of documents. The section is not prescriptive and generally extends the methods of service available to local authorities under section 233 of the Local Government Act 1972 (see Annex). Subsection (2) of section 233 applies to any notice, order or other document required or authorised to be given to or served on any person by or on behalf of a local authority. They authorise various methods of service including by leaving the document at the person's proper address (section 233(2)).

26. The Tribunal was not directed to find other than that the day for service ran until 1 minute to midnight on the relevant day and that letterbox service was effective at the time of hand delivery.

The bank transfer of funds

27. Under Section 87(3) of the Act a local housing authority can require a fee to accompany an application for a licence. Therefore we determined that in this case the application is only "duly made" (the requirement of section 95(3)(b) once the required fee is paid. The Respondent did not argue that there was anything further required than payment of the fee for it to approve the licence application – which it issued on 5 December 2019.

28. The Tribunal was not persuaded by the Respondent's argument that the date of receipt of a payment is not until a particular department's ledger shows it as credited. It was telling that the Respondent did not produce its bank statement to demonstrate when funds were shown as appearing into its bank account. It offered no evidence of how the funds become allocated to a ledger record and how long that might take from actual receipt into the Respondent's bank account. We found the Applicant's position to be credible and that it was reasonable through the standard faster bank transfer for the Tribunal to find, on a balance of probabilities, that the licence fee funds were received into the Respondent's bank account on 20 November 2020 i.e. that the money was simultaneously taken from the sender account and credited to the recipient account. Therefore we found that the application for the licence was duly made on that date. In consequence and following the Respondent's caselaw authority (paragraph 18) we found that the last moment for the Respondent to serve the Notice of Intention was 1 minute to midnight on 20 May 2021 so as to be within time specified by Sch 13A 2(1). Therefore the delivery on 21 May 2021 was out of time.

The alternative argument of the Respondent

29. The Tribunal was invited to find that the Respondent did not crystallise its determination that an offence had been committed until 19 March 2020, when the Applicant provided clarification regarding periods of ill-health suffered by herself and her Mother. The Respondent's position was that until representations about the impact of those events, presented as reason for the Applicant failing to make her application for a licence in a timely manner, could be properly evaluated then no offence was occurring – as a potential "reasonable excuse" defence could have been available to the Applicant.

30. It was apparent from the transcript of the PACE interview on 18 November 2019 that during it such excuses were not raised by the Applicant, who said it was only when driving home after the interview that she realised why she must have omitted to make the application for the licence. The Applicant did not disagree with the chronology of events surrounding her later provision of information – i.e. that she first raised it in a telephone conversation with Ms France on 20 November 2019, but that the documentary support was not provided until 19 March 2020. She could not explain that delay.

31. The point at issue under Sch13A 2(2) is that the Respondent potentially has 6 months in which to serve the Notice of Intention starting from the last day on which the conduct occurs - 2(2)(b). The Respondent said that it could not be satisfied that there was no defence to the alleged offence until it had the information on 19 March 2020 (meaning service of the Notice of Intention on 21 May 2020 was well in time).

32. The Applicant's oral evidence was that at the PACE interview, i.e. under caution, she was given a clear impression that the Respondent had decided she had committed an offence, else why was she being interviewed?

33. In its written Statement of Case (paragraph 109) the Respondent presented "*Following the consideration of the representations made by the Applicant to the Notice of Intention, the Council is satisfied beyond reasonable doubt that the offence occurred. The Council does not consider that the evidence provided required it to cancel the financial penalty that was imposed as detailed below.*" This is suggesting it is only following the Applicant's response to the Notice of Intention that it makes its determination.

34. The Tribunal was not directed to any authority and nor is it aware of any on the point of whether investigation of a potential reasonable excuse defence stops the clock ticking. While we accept that the decision to issue the penalty (Section 249 of the Act) has to be made on the criminal standard of proof – beyond reasonable doubt – the Act sets out a number of procedural steps to be taken leading to imposition of the penalty. It is the conclusion of the Tribunal, however, that the period of 6 months envisaged by Sch13A 2(2) does not depend on the final decision leading to issue of the Final Notice (of penalty). The point of the Notice of Intention is to invite representations on possible defences and to gather information on points that may mitigate the penalty sum, therefore the decision to serve the Notice of Intention is based on the local housing authority possessing knowledge of the basic elements of the offence having occurred – and here, triggering an interview under caution. We determined that the reasonable expectation that an offence has occurred is all that is required to permit the issuing of a Notice of Intention – the enforcement of the penalty could not begin before completion of the additional procedures surrounding the Final Notice. We found that it would be nonsense to mean that all steps prior to the Notice of Intention depended on the Respondent completing definitive investigations so as to draw a definitive conclusion. On the facts of this case, to find in line with the Respondent's position, it could not be said that the licence granted on 5 December 2019 could stop the clock ticking on commission of an offence (or the earlier receipt of the payment), because the investigation on whether there

was an offence occurring before then did not conclude until 19 March 2020. Plainly that is wrong.

35. The undisputed evidence of the Respondent was that it began communicating with the Applicant about the need for a licence for the Property in March 2017 and continued toward the commencement of the relevant licensing scheme in October 2018, effectively encouraging the Applicant to make her application. The Respondent stated that on 20 September 2018 Mrs L Craig, Senior Support Assistant of the Respondent emailed the Applicant (following a series of previous emails) and informed her that if an application was not received, then the Property was being let illegally. The Respondent's Statement of Case records (paragraph 67) records "*On 13/09/2019 a meeting was held between Mrs Rachel Crosby, Senior Environmental Health Officer and Ms Carol Atkin, Senior Support Assistant. At this meeting the outstanding application deficiencies and the lack of contact from the Applicant were discussed as was the amount of the correct licence fee. Mrs Crosby requested that Ms Atkin attempt to contact the Applicant via the telephone rather than email to advise that a completed application form remained outstanding and was required within seven days. The submission of the completed form would both* ***end the offence*** *and prevent a higher licence fee being applied.*" (Tribunal emphasis).

36. On 15 October 2019 Mrs. Crosby sent a formal refusal of application letter to the Applicant (due to deficiencies in the content of her form). The letter included "*The Property has now been operating since 30th October 2018 without a licence which is a criminal offence*." It went on to advise that the offence continues to be committed until an application has been duly made. The Tribunal found that communication persuasive that the Respondent had formed its view on or about 15 October 2019 that an offence was being committed. Consequently the Notice of Intention delivered on 21 May 2020 was outside of the 6 month time limit. We therefore dismissed the Respondent's alternative basis for arguing service of the Notice of Intention was within the statutory time limit.

37. The Respondent's reference to the effects of the COVID-19 pandemic merely suggested that the Respondent was under various resource and time pressures, but it was not presented (or found by the Tribunal) to be a reason affecting the effective date of service of the Notice of Intention.

38. In light of our findings and determinations we find that the Respondent has failed to follow the correct procedure for imposition of a financial penalty and that the Applicant's appeal to quash the penalty is successful. We quash the penalty.

WL Brown
Tribunal Judge
17 September 2021

ANNEX

Housing Act 2004

Schedule 13A:

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").

2(1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—

(a) at any time when the conduct is continuing, or

(b) within the period of 6 months beginning with the last day on which the conduct occurs.

.....

10(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.

Section 246 Service of documents

(1) Subsection (2) applies where the local housing authority is, by virtue of any provision of Parts 1 to 4 or this Part, under a duty to serve a document on a person who, to the knowledge of the authority, is—
(a) a person having control of premises,
(b) a person managing premises, or
(c) a person having an estate or interest in premises,
or a person who (but for an interim or final management order under Chapter 1 of Part 4) would fall within paragraph (a) or (b).
(2) The local housing authority must take reasonable steps to identify the person or persons falling within the description in that provision.
(3) A person having an estate or interest in premises may for the purposes of any provision to which subsections (1) and (2) apply give notice to the local housing authority of his interest in the premises.
(4) The local housing authority must enter a notice under subsection (3) in its records.
(5) A document required or authorised by any of Parts 1 to 4 or this Part to be served on a person as—
(a) a person having control of premises,
(b) a person managing premises,

(c) a person having an estate or interest in premises, or
(d) a person who (but for an interim or final management order under Chapter 1 of Part 4) would fall within paragraph (a) or (b),
may, if it is not practicable after reasonable enquiry to ascertain the name or address of that person, be served in accordance with subsection (6).
(6) A person having such a connection with any premises as is mentioned in subsection (5)(a) to (d) is served in accordance with this subsection if—
(a) the document is addressed to him by describing his connection with the premises (naming them), and
(b) delivering the document to some person on the premises or, if there is no person on the premises to whom it can be delivered, by fixing it, or a copy of it, to some conspicuous part of the premises.
(7) Subsection (1)(c) or (5)(c) applies whether the provision requiring or authorising service of the document refers in terms to a person having an estate or interest in premises or instead refers to a class of person having such an estate or interest (such as owners, lessees or mortgagees).
(8) Where under any provision of Parts 1 to 4 or this Part a document is to be served on—
(a) the person having control of premises,
(b) the person managing premises, or
(c) the owner of premises,
and more than one person comes within the description in the provision, the document may be served on more than one of those persons.
(9) Section 233 of the Local Government Act 1972 (c 70) (service of notices by local authorities) applies in relation to the service of documents for any purposes of this Act by the authorities mentioned in section 261(2)(d) and (e) of this Act as if they were local authorities within the meaning of section 233.
(10) In this section—
(a) references to a person managing premises include references to a person authorised to permit persons to occupy premises; and
(b) references to serving include references to similar expressions (such as giving or sending).
(11) In this section—
"document" includes anything in writing;
"premises" means premises however defined.

Local Government Act 1972

Section 233 Service of notices by local authorities

(1) Subject to subsection (8) below, subsections (2) to (5) below shall have effect in relation to any notice, order or other document required or authorised by or under any enactment to be given to or served on any person by or on behalf of a local authority or by an officer of a local authority.
(2) Any such document may be given to or served on the person in question either by delivering it to him, or by leaving it at his proper address, or by sending it by post to him at that address.
(3) Any such document may—
(a) in the case of a body corporate, be given to or served on the secretary or clerk of that body;

(b) in the case of a partnership, be given to or served on a partner or a person having the control or management of the partnership business.

(4) For the purposes of this section and of section 26 of the Interpretation Act 1889 (service of documents by post) in its application to this section, the proper address of any person to or on whom a document is to be given or served shall be his last known address, except that—

(a) in the case of a body corporate or their secretary or clerk, it shall be the address of the registered or principal office of that body;

(b) in the case of a partnership or a person having the control or management of the partnership business, it shall be that of the principal office of the partnership;

and for the purposes of this subsection the principal office of a company registered outside the United Kingdom or of a partnership carrying on business outside the United Kingdom shall be their principal office within the United Kingdom.

(5) If the person to be given or served with any document mentioned in subsection (1) above has specified an address within the United Kingdom other than his proper address within the meaning of subsection (4) above as the one at which he or someone on his behalf will accept documents of the same description as that document, that address shall also be treated for the purposes of this section and section 26 of the Interpretation Act 1889 as his proper address.

(6) < . . . >

(7) If the name or address of any owner, lessee or occupier of land to or on whom any document mentioned in subsection (1) above is to be given or served cannot after reasonable inquiry be ascertained, the document may be given or served either by leaving it in the hands of a person who is or appears to be resident or employed on the land or by leaving it conspicuously affixed to some building or object on the land.

(8) This section shall apply to a document required or authorised by or under any enactment to be given to or served on any person by or on behalf of the chairman of a parish meeting as it applies to a document so required or authorised to be given to or served on any person by or on behalf of a local authority.

(9) The foregoing provisions of this section do not apply to a document which is to be given or served in any proceedings in court.

(10) Except as aforesaid and subject to any provision of any enactment or instrument excluding the foregoing provisions of this section, the methods of giving or serving documents which are available under those provisions are in addition to the methods which are available under any other enactment or any instrument made under any enactment.

[(11) In this section “local authority” includes a joint authority[, [an economic prosperity board, a combined authority. . .]][, [a fire and rescue authority created by an order under section 4A of the Fire and Rescue Services Act 2004,] a police and crime commissioner and the Mayor's Office for Policing and Crime].