FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00AH/HNA/2021/0016** **LON/00AH/HNA/2021/0017**
HMCTS code	**:**	**V:VIDEO**
Property	**:**	**74 Clarendon Road Croydon CR0 3SG**
Appellants	**:**	**Mr K Bhatia** **Mrs N Sharma-Bhatia**
Representative	**:**	**Mr K Bhatia**
Respondent	**:**	**London Borough of Croydon**
Representative	**:**	**Mr D Collins**
Type of application	**:**	**Appeal against a financial penalty - Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge Pittaway** **Ms S Coughlin MCIEH**
Date of hearing	**:**	**19 October 2021**
Date of decision	**:**	**1 November 2021**

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Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the tribunal at the hearing, the contents of which the tribunal has noted, were;

1. The appellants' bundle (22 pages) with separate Annex A (19 pages) and Annex H (3 pages)
2. The respondent's bundle (354 pages) and a further witness statement from Mr Gracie-Langrick (3 pages)

At the start of the hearing Mr Bhatia advised the tribunal that he had received a final reminder from L B Croydon dated 28 September 2021 which was not in his bundle. The tribunal noted this and requested that a copy be sent to the tribunal for its records. This was sent to the tribunal on 19 October.

At the video hearing the the appellants appeared in person, with Mr Bhatia representing them both. The respondent ws represented by Mr Collins, solicitor. The tribunal heard evidence from Miss England, Mr Gracie-Langrick and Mr Bhatia, and heard submissions from Mr Bhatia and Mr Collins.

Decision

1. The tribunal finds that the appellants did not have a reasonable excuse for having committed a criminal offence under s95(1) of the Housing Act 2004 (the '**2004 Act**') .

2. The tribunal finds, having regard to the policy of L B Croydon (the '**Council**'), and the evidence it heard, that the appropriate financial penalty to impose on the appellants in respect of the property is £2,000, £100 per appellant.

Application

3. By an application dated 24 March 2021 the appellants seeks to challenge the imposition by the Council of a financial penalty of £4,000 in respect of the property, £2,000 per appellant.

4. Directions were issued on 24 May 2021

Background

5. The property is described in the application as a 1 bedroom house.

Agreed matters

6. The parties agreed that the property was one which required a selective licence from 1 October 2015 to 30 September 2020, and that the appellants received the rack rent for the property.

Issues

7. The issues for the tribunal to determine were
    - Did the appellants have a reasonable excuse for having committed the offence under section 95(1) of the 2004 Act?
    - If appellants did not have a reasonable excuse had the respondents complied with the council's policy in relation to charging a financial penalty?
    - If appellants did not have a reasonable excuse what was the appropriate level of penalty?

Evidence

8. Miss Jane England, a Housing Enforcement Officer for the Council gave evidence on its behalf.

9. Between 1 October 2015 and 30 September 2020 the property fell within a discretionary licensing scheme, the Croydon Private Rented Property Licensing Scheme (the '**Scheme'**). There had been extensive consultation and publicity about the scheme in the borough in 2014/2015 before it took effect.

10. On 12 February 2020 a search of the Land Registry showed the appellants' address to be that of the property. A search of Council Tax records showed the appellants to have owned the freehold from 10 December 2015 and that Mrs Farinda Ednigir and Mr Abderrahim Benchouirfa to have been liable for the council tax from 23 December 2015.

11. Letters were sent to the appellants at the property on 12 February 2020 and 6 March 2020 stating that the property appeared to be rented without a licence, and advising how to obtain a licence. The second letter warned that an unannounced visit would be carried out at the property. Miss England visited the property on 20 August 2020 and spoke to Mrs Farida Ednigir who confirmed that she and her husband had rented the property since December 2015 at a rent of £950 paid to Mr Bhatia.

12. On 3 September 2020 Miss England was advised of contact details (other than the address of the property which until then was the only address she had for them) for the appellants. She telephoned Mr Bhatia and informed him that if a licence for the property was not applied for within a few days

both he and his wife might be given a financial penalty. On 8 September 2020 she e mailed Mr Bhatia at an e mail address taken from the council records stating that the Council had no record of any licence application having been made for the property. This e mail was apparently received as there was no 'ping back'. No application for a licence for the property was made before 30 September 2020.

13. On 17 December 2020 the Council served two Notices of Intention to issue a Financial Penalty, proposing a fine of £2000 on each of the appellants. Each recipient of a notice was given until 22 January 2021 to make representaions, which were received from the appellants on 14 January 2021 and 18 January 2021. These representations were considered by Mr Michael Goddard, Head of Public Protection and Licensing but the decision was to issue the Financial Penalties.

14. The Financial Penalty Notices were issued on 22 March 2021.

15. Miss England gave evidence that in reaching the decision to imposes Financial Penalties the following guidance and policies had been applied (all of which/ relevant extracts from which were copied in the bundle before the tribunal)

    - The statutory guidance issued by the Secretary of State under Article 12 of Schedule 13A of the 2004 Act;
    - The 2013 Code for Crown Prosecutors;
    - The Croydon Council Public Protection Enforcement Policy (incorporating the Private Sector Housing Enforcement Policy)
    - The cabinet authority of the Council to issue financial penalties and the procedure for determining the level of Financial Penalty of 3 May 2017.

16. Miss English gave evidence that offences are banded to determine the action that the Council will take against the offender, using a scoring matrix, which is then converted into a Financial Penalty, if this is the appropriate action for the Council to take. On the basis of a score of 6, which was that awarded to this property by the Council, the appropriate action to take was to impose a Financial Penalty.

17. Scoring is determined in five stages
    - Banding the offence following an assessment of the culpability of the landlord and the level of harm the offence has caused;
    - Adjusting the band based on aggravating factors;
    - Adjusting the band based on mitigating factors;
    - Reviewing the penalty to ensure it is proportionate and reflects the landlord's ability to pay; and
    - Adopting a 'Totality Principle' to ensure that the total penalty is just and proportionate to the offending behaviour in cases of multiple offences or where an RRO is applied for.

18. Miss England referred the tribunal to the documents in the bundle 'Determining the Penalty' which set out the basis upon which the band had been ascertained. She had considered the level of culpability of the appellants to be High, namely that 'Landlord had actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken.' This was because they had not responded to the Council's warning letters or phone call. This was given a score of 3. Miss England considered the level of harm to be Moderate, 'Moderate risk of an adverse effect on individual(s) (not amounting to low risk)' Public misled but little or no risk of actual adverse effect on individual(s)'. The property was in a satisfactory condition but failure to licence puts compliant landlords at a competitive disadvantage. She gave a score of 2 to the level of harm. Miss England did not consider there to be any aggravating or mitigating factors which would alter this score, and did not consider that proportionality required the score to be adjusted. She noted that a penalty was being issued in relation to another property owned by the appellants but did not consider that this necessitated an adjustment under the totality principle.

    On the basis of a score of 6 the score falls in Band 2 of the Council's Financial banding, for which the appropriate penalty fine is £4000.

19. Miss England gave evidence that once she had determined the band into which she considered the action fell her determination was checked by Mr Gracie-Langrick, or his manager if representations were received from the offenders.

20. In cross-examination Miss England said that she had not re-sent the warning letters to the appellants at their actual address as she did not think this necessary. As to the existence of the Scheme this is apparent from the Council website. Action had only been commenced against the appellants in 2020 as the team taking such action was small and had only got to considering the property at that time. It was not her department's normal practice to contact Leasehold Services for addresses of landlords; for these her department relied on information obtained from the Land Registry and Council Tax records. Miss England confirmed that in the event that there had been no warning letters nor the telephone call of 8 September the appellants' culpability would have been considered moderate, not high. Even without having received the letters the appellants culpability would remain 'high' because of the telephone call she had had with Mr Bhatia.

21. Mr Gracie-Langrick also gave evidence on behalf of the Council.

22. Mr Gracie-Langrick gave evidence, on the basis of information received from a colleague, that the Scheme would not automativcally appear as a Land Charge registered against the property on a Land Charges search. If a person wishes to know whether a property is subject to some licensing requirement this must be asked, when making a local authority search, by way of a supplemental question. On the question of how one department in the Council might know the appellants' actual address and others might not he stated that this was because the Council had more than one data base.

23. Mr Gracie-Langrick acknowledged that there had been a break-down in communication between departments at the Council which had resulted in a premature attempt to collect the fine (on 13 January 2021), the payment being chased (on 26 May 2021) and the final reminder being sent (28 Septenmber 2021). This was notwithstanding that the standard Council procedure was that the payment of the penalty should only be pursued on his express say-so. He accepted that certain actions by the Council, subsequent to the issue of the Penalty Notice and independent of its issue had caused the appellants distress and he offered an apology on behalf of the Council.

    The tribunal notes this apology.

24. Mr Gracie-Langrick gave evidence that it would not be cost effective for the Council to continually advertise the existence of the Scheme.

25. Mr Bhatia gave evidence to the tribunal that he and his wife had been unaware of the need for a licence when they purchased the property as it was not revealed by the searches that their solicitor undertook. They had used an agent, Time 2 Move, to let the property and it did not advise them of the need for a licence.

26. Mr Bhatia stated that he had not received the warning letters sent in February and March despite the fact that his tenants normally forwarded post to him. In the telephone call of 3 September 2020 he had requested that Miss England send copies of the warning letters to him, to confirm that the call was not a scam, and this had not been done. The first correspondence he had received from the Council was the 'Local Government Miscellaneous Provisions' notice contained in a letter of 26 November 2020, by which time it was too late to apply for a licence as the Scheme had ended on 30 September 2020.

27. Mr Bhatia also referred the tribunal to the letters chasing payment that had been incorrectly sent and the manner in which certain letters had been delivered to his actual address.

Submissions

28. Mr Bhatia submitted that neither he nor his wife were aware of the need for a licence. The requirement had not been revealed at the time they purchased the property nor had they been advised of the necessity by their letting agents.

29. Mr Bhatia submitted that as the Council had been able to ascertain his actual address by 3 September 2020, through a council tax search, it should have been able to ascertain it before sending out the warning letters in February and March 2020. He had endeavoured to apply for a licence following receipt of the first letter that he had received from the Council at his actual address but as the Scheme had ended by then he was unable to do so.

30. Mr Collins submitted that the duty on the Council to advertise the Scheme was not a duty owed to individual landlords, referring the tribunal to the decision in *Thanet District Council v Grant* [2015] (unreported). The Council had sent its warning letters to the only address that the department of the Council for which Miss England and Mr Gracie-Langrick worked had for the appellants. When Miss England discovered the alternative contact details from another department in the Council on 3 September she had telephoned Mr Bhatia and advised him of the need for a licence so that he had actual knowledge of the need for a licence from that date and had not applied for one.

31. Mr Collins submitted that the possible defence of reasonable excuse to the offence was not applicable. The appellants should have known of the need for a licence. By 3 September 2020 they had actual knowledge of the need for a licence but had not applied for one until 26 November 2020, by when it was no longer possible to make an application.

32. Mr Collins submitted that the Council had clearly complied with its process prior to issuing the Final Notice. As to the level of fine he submitted that a fine of £4,000 (£2,000 each) was fair and proportionate given the length of time during which the property did not have a licence and the lack of action on the part of the appellants once they learnt of the need for a licence.

33. Mr Collins then applied to the tribunal for costs on the basis that his clients had made a without prejudice offer to the appellants which had not been accepted. Mr Bhatia submitted that it would be unfair to award costs against him and his wife. It was unfair to seek to fine them, they themselves were unrepresented as they could not afford legal representation, they made minimal profit from the property and could not afford to pay legal fees.

Reasons for the tribunal's decision

34. The tribunal makes the determinations in this decision on the basis of the bundle before it at the hearing, the evidence heard at the hearing and the submissions by the appellant and by Mr Collins on behalf of the respondent. The relevant sections of the 2004 Act to which the tribunal had regard are referred to below.

Did the appellants have a reasonable excuse for committing the offence?

35. An offence under section 95(1) of the 2004 Act is one of strict liability, however Section 95(4) of the 2004 Act provides that,

> (4)In proceedings against a person for an offence under subsection (1) or (2) 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 failing to comply with the condition,

as the case may be.

36. Mr Bhatia submitted that the appellants should not each receive a financial penalty as they had been unaware of the Scheme and the need to obtain a licence. Mr Collins submitted that this was not a reasonable excuse as the appellants should have known of the need for a licence from when they bought the house, and had actual knowledge of the necessity for a licence from 3 September 2021.

37. The tribunal has to determine objectively whether not the appellants have a reasonable excuse. Ignorance of the need to obtain a licence may be relevant in a financial penalty case. This is confirmed at paragraph 26 of *Thurrock Council v Daoudi* [2020]UKUT 209 (LC).

38. The tribunal finds, on the evidence before it, that the appellants did not have a reasonable excuse for not obtaining a licence. The appellants could not have had an excuse after 3 September 2020, as from that date they had actual knowledge of the need for a licence. The appellants may have had a reasonable excuse for not obtaining a licence for a period after they purchased the property. However the tribunal find a reasonable landlord would have made enquiries from time to time during a period of over four years as to whether there were any licensing requirements in respect of the property. The council were not under an obligation to advise every landlord individually of the need for a licence, as stated in the decision in *Thanet DC v Grant* referred to by Mr Collins.

Quantum of the financial penalties

39. In ascertaining the level of penalty to be charged the tribunal should have regard to the Council's policy and whether it was followed by the Council.. While not referred to in the hearing this approach is consistent with the Upper Tribunal decision in *Waltham Forest LBC v Marshall* [2020] 1 WLR 3187). The tribunal find that the Council did comply with statutory procedure and its policy in deciding to impose a financial penalty.

40. This appeal is by way of a re hearing and the tribunal have therefore reconsidered each of the five stages set out in the council's scoring matrix in turn.

41. Although the Council issued two Financial Penalty notices it treated the liability of the appellants as joint and the tribunal has adopted this approach.

42. Culpability of landlord and harm caused

Having reviewed the Council's guidelines on assessing culpability the tribunal find the appellants culpability to be Moderate rather than High.

Moderate culpability is where ‘Offence committed through act or omission which a landlord exercising reasonable care would not commit.’ The tribunal find this to be a more accurate description of the appellants’ failure to check the need to licence the property. The tribunal find that although the appellants had actual knowledge of the offence from 3 September 2021 this did not amount to ‘actual foresight or wilful blindness to risk of offending’, as required to make their culpability High. ‘Foresight’ implies anticipatory not actual knowledge.

There was little evidence before the tribunal as to the impact of failure to licence on the tenants. The tribunal therefore accept the Council’s assessment of the harm as Moderate.

That creates a score of 4, and according to the Council’s Financial Banding, a Financial Penalty of £1,000.

43. Aggravating factors

Where there is an aggravating factor the Council’s policy may allow the Financial Penalty to be increased by one point. Examples of aggravating factors, listed in the Council’s policy include profit from the activity and refusal to accept or respond to the Council’s advice as regards responsibilities and warnings.

The tribunal accept that the appellants benefited marginally from the failure to licence (saving £750) and that the appellants did not respond to the Council’s advice, given on 3 September 2020, that they should apply for a licence.

The tribunal therefore increase the score by one point, making the Financial Penalty, according to the Council’s Banding £2,000.

44. Mitigating factors

Ms England gave evidence that there were no mitigating factors and this was not challenged by the appellants. From the evidence before it the tribunal find her approach to have been correct.

45. Proportionality

Having reviewed the Council’s guidelines for this Stage (Step 1 being to check that the provisional assessment meets the aims of the Crown Prosecutions sentencing principles and Step 2 being to check that the Financial penalty assessment is proportionate and will have an appropriate impact) the tribunal finds that there is no need to adjust the Financial Penalty by reason of these requirements. The Financial Penalty will remove any financial benefit the appellants enjoyed through not applying for a licence and from the appellants’ submissions the tribunal finds that it will have an appropriate impact on them.

46. Relevance of Totality Principle

The tribunal accept the Council's view that this was not relevant to the present appellants, although reference was made to one other possible financial penalty being issued against the appellants.

47. The penalty

The tribunal therefore determine that the appropriate financial penalty to impose on the appellants jointly in relation to the offence is £2,000.

Name: Judge Pittaway **Date:** 1 November 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).