FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference:	**MAN/00CH/HNA/2020/0036**
HMCTS code (audio,video,paper):	**V:FVHREMOTE**
Property:	**91 Eastbourne Avenue, Gateshead, Tyne & Wear NE8 4NH**
Applicants:	**Mr & Mrs N.T. Higbee**
Respondent:	**Gateshead Council**
Type of Application:	**Appeal against financial penalty- Section 249A and Schedule 13A to the Housing Act 2004**
Tribunal Members:	**Judge J.M.Going** **J.A. Jacobs FRICS**
Date of Hearing :	**27 April 2022**
Date of Decision :	**29 April 2022**

DECISION

Covid -19 pandemic: description of hearing:

This has been a remote Full Video Hearing which has been consented to by the parties. The form of remote hearing was V.FVHREMOTE. 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 that the Tribunal was referred to were in a series of document bundles, statements, and submissions as described below, the contents of which were noted.

The Decision and Order

The Final Notice is to be varied by amending the financial penalty to £5750 to be paid within the period of 28 days beginning with the day after that on which this Decision is posted to the parties.

Preliminary

1. By an Application dated 15 June 2020 the Applicants ("Mr & Mrs Higbee") appealed to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under paragraph 10 of Schedule 13A of the Housing Act 2004 ("the Act") against the Respondent ("the Council")'s issue on 26 May 2020 of a Penalty Charge Notice ("the Final Notice") requiring the payment of a penalty charge of £4864.33, after it had been satisfied that they had failed to licence the property when it was required to be licensed thereby having committed an offence under section 95 of the Act.

2. The Tribunal gave Directions.

3. Both parties provided a bundle of relevant documents including written submissions which were copied to the other.

4. A Full Video Hearing was held on 27 April 2022. Mr Higbee represented himself and his wife. Also in attendance were Mr Weaver, a Private Sector Housing Officer with the Council, Ms Crosby who is Mr Weaver's Manager, and Mr Currie, the solicitor for the Council.

The Property

5. The Tribunal did not inspect the property but understands it to be a small 2 bedroomed ground floor "Tyneside flat" in a mid-terraced house.

The Facts and Chronology

6. The following facts and timeline of events are confirmed from an analysis of the papers. None have been disputed, except where specifically referred to.

26 September 2006	Land Registry entries show that the property (together with 89 Eastbourne Avenue) was purchased by Mr and Mrs Higbee.
3 February 2015	A Shorthold Tenancy Agreement was signed by Paul Robson acting as agent for Mr and Mrs Higbee (who were unnamed) with Shaun Lamb as the tenant, for an initial term of six months at a monthly rental of £411.66 (equivalent of £95 per week).
25 January 2018	The Council in exercise of its powers under the Act designated an area described as Phase 1 of the Avenues area of Gateshead, which includes the property, as a selective licence area for a 5-year period beginning on 30 October 2018 until 29 October 2023, meaning that any property occupied under a tenancy or licence within the area would require a licence.
2 February 2018	The Council sent a letter to Mr Higbee at an address in Bexhill inviting an application to licence the property, but which he confirmed he did not receive.
2 August 2018	A further letter was sent to Mr and Mrs Higbee at their address in Tunbridge Wells advising of the requirement to apply for a licence.
30 October 2018	The need for the property to be licensed became operative.
30 November 2018	The Council wrote reminder letters to Mr and Mrs Higbee, advising that no application had been received and that they were operating without the necessary licence in respect of both the property and 89 Eastbourne Avenue.
9 January 2019	Further "final reminder" letters were sent by the Council in respect of both properties. These (inter alia) referred to various possible sanctions for failing to apply for a licence ranging from prosecution, civil penalty charges, rent repayment orders, and restrictions on possession orders.
1 March 2019	The Council wrote to Mr and Mrs Higbee confirming that "At an inspection of the property on 24 January 2019 certain hazards were identified in accordance with the Housing Health and Safety Rating System. In order to progress this matter, it is necessary to regain access to carry out a further inspection… I therefore give you notice of my intention to enter.. on 7 March 2019…"
6 March 2019	Lynn Robson telephoned the Council advising that she was the agent for the property and that a licence application had been posted to the Council in December 2018.
6 March 2019	Emails were exchanged between Ms Robson and Mr Higbee. In one he asked her "does this mean that there is not a selective licence in place for this property at this time?" In her reply she stated "Yes, no selective licence has been allocated, this is what I'm trying to get sorted today…"
7 March 2019	A gas safety inspection of the property was recorded.

7 March 2019	The Council inspected the property and found Category 1 and 2 hazards.
7 March 2019	A licence application and some supporting documents were received by the Council from Ms Robson, as the proposed licence holder. The application form was dated 10 December 2018 and confirmed that she was not a member of any landlords' association or professional body, not part of any accreditation scheme and not a current member of any agent redress scheme. The application did not include a legible gas safety inspection certificate or any current energy performance certificate, confirmed that there was no existing in date and satisfactory Electrical Installation Condition Report and contained multiple and manifest further omissions.
8 March 2019	Ms Robson sent an email to Mr Higbee reporting (inter alia) "the visit with (Mr Weaver) at 91 Eastbourne Avenue went well, he now has all the paperwork for the selective licence".
29 April 2019	The Council sent letters both to Mr and Mrs Higbee and Ms Robson detailing the outcome of its inspections of the property and the remedial works required as a consequence of the Category 1 and 2 hazards found at the property.
20 June 2019	The Council returned the licence application to Ms Robson stating that it was an incomplete and outlining what additional information was required.
25 June 2019	The Council wrote to Mr and Mrs Higbee advising them that the licence application had been returned and outlining the additional information which was required.
5 July 2019	An Improvement Notice was served by the Council on Mr and Mrs Higbee in respect of the property. A copy was sent separately to Mr and Ms Robson.
19 July 2019	An email from the Council to Ms Robson reminded her of the need to return the licence application with the requested information without delay.
8 August 2019	The Council sent further "final" reminder letters both to Mr and Mrs Higbee and Ms Robson.
15 August 2019	Ms Robson emailed the Council confirming that she would be returning the outstanding information via recorded delivery that day.
28 August 2019	The Council sent further emails to Ms Robson and Mr and Mrs Higbee confirming that nothing had been received.
29 August 2019	The Council emailed Ms Robson confirming receipt of the application that morning, noting that it was still deficient with information still missing.
29 August 2019	An email from Ms Robson expressing disappointment that she had not completed the application with all the necessary information assuring the Council that it would be completed in full and sent on Monday (2 September 2019).
2 September 2019	An email from Ms Robson at 16.30 stated that she was stuck in traffic due to an accident and "(not) going to make it today to go through the application". The Council replied with an

	email at 17.30 stating "due to the lack of action on providing the correct information for your licence applications I have no option now but to refuse these applications".
3 September 2019	Mr Higbee emailed the Council stating "I am sorry that Lynn was unable to meet you yesterday and take up your kind offer regarding the completion of the selective licence application; I am assured that you will receive the completed application today…"
5 September 2019	An energy performance certificate was completed in respect of the property.
6 September 2019	The licence application was accepted by the Council as having been duly made following a meeting at its offices with Ms Robson after the application and the necessary supporting documents had been both discussed and checked.
19 September 2019	Mr Higbee emailed the Council "to confirm the sale of the above reference property took place yesterday".
7 October 2019	Letters were sent by the Council to Mr and Mrs Higbee and Mr and Ms Robson requesting attendance at a formal taped interview under caution carried out in accordance with the Police and Criminal Evidence Act 1984.
14 October 2019	Mr Higbee wrote to the Council in reply, setting out the history and concluding "Finally, regarding the proposed interview, although I welcome the opportunity to assist you with your investigation, I regret that I have little further to add … Lynn Robson is my agent for this property and will happily provide any further information that you require"
26 November 2019	The Council wrote to Mr and Mrs Higbee with a schedule of questions.
11 December 2019	Mr Higbee replied explaining that he was in the process of obtaining documents from his managing agents to accompany his responses, and that he intended to take the advice when he had received the same.
27 December 2019	Mr Higbee completed signed and returned to the Council his replies to the schedule of questions. Those replies confirmed (inter alia) that he had been a landlord for over 30 years, that he owned or rents out over 10 properties in the north-east and London, that he had not ever contravened any housing or landlord and tenant law, that Lynn and Paul Robson were responsible for managing the property, collecting the rent, dealing with maintenance issues, any tenants problems, and "assuming responsibility regarding Gateshead Council selective licence and housing standards". He confirmed that the monthly rental was £328 with the agents taking 10%. In answer to the question as to how often he visited the property, he answered "rarely – only once in fact". He confirmed that he was first aware of the selective licensing scheme on 21 October 2018 when he sent a copy of the Council's letter to Ms Robson. He confirmed also sending a copy of the Council's reminder letter of 30 November 2018

	to Ms Robson on 4 December 2018. Mr Higbee stated his understanding that the Robsons "did apply in a timely manner, however Gateshead Council took 8 weeks to respond".
3 February 2020	The Council served a Notice of Intent to impose a Financial Penalty of £6488.83 on Mr and Mrs Higbee and included a sheet setting out the detail of how that figure had been calculated.
25 February 2020	Mr Higbee sent an email to the Council disputing the Council's assessment of the level of culpability pointing out that they had relied on their agents who had been given specific instructions to apply for the licence and stating that the assessment should be reduced to the band referring to "little or no fault of landlord". He also strongly disagreed with the addition of £3505.50 to Financial Penalty under the heading "financial benefit from committing the offence" which had been calculated by multiplying a weekly rental of £85.50 by 41 weeks, said to be the period during which the offence had been committed. Mr Higbee maintained that the benefit received "was exclusively as a result of not having paid for a licence from 30 October 2018 to 6 September 2019". He also stated his understanding that a further separate Notice of Intent had been sent to the Robsons and that "it seems very unjust that you are pursuing two separate parties for the same offence".
8 April 2020	The Council sent an email to Mr Higbee requesting evidence/copies of correspondence to the Robsons with instructions to apply for the licence.
6 May 2020	The Council sent a further email repeating the request set out in that of 8 April 2020 and Mr Higbee responded "I am endeavouring to provide the information as requested".
26 May 2020	The Council sent a detailed response to Mr and Mrs Higbee's representations which included a summary of the prior communications. It stated that "in order to have a low level of culpability the offender must have not fallen far short of their legal duties; Providing a request to your managing agent in December 2018 to submit an application, two months after the start date of the licensing scheme when you were aware of the legal responsibility does not fall into the low category". As regards financial gain "Gateshead Council considers the financial gain to be the rental income earned from the letting of a property, that the applicant had no authority to let in the absence of the licence during the period the offence". The Council reviewed and reduced the number of weeks net rent from 41 to 22 recognising that Mr and Mrs Higbee believed that the application was in order when submitted on 7 March 2019 and were unaware that the application was deficient until 8 August 2019. It was also stated that "On the addition and inclusion of the rent as financial gain, Gateshead Council do not at this stage intend

	to pursue a rent repayment order for this offence". The Council explained that the responsibility to apply for a Selective Licence lies both with the owner and managing agent and referred in detail to the relevant statutory provisions.
26 May 2020	The Council served its Final Notice confirming the imposition of a Financial Penalty of £4864.33 on Mr and Mrs Higbee and included a sheet setting out the detail of how that figure had been calculated, together with details of notes on their rights of appeal.
17 June 2020	The Tribunal received Mr and Mrs Higbee's appeal Application dated 15 June 2020.

The Council's calculation of the Financial Penalty

7. The Council assessed Mr & Mrs Higbee's culpability as negligent behaviour or failure to take reasonable care, and the seriousness of harm as low, and in the Final Notice calculated the penalty charge at £4864.33, by including the following elements: –

Penalty Charge Starting Amount	£3000
Changes due to offender's track record (2 mitigating factors offset by 1 aggravating factor)	-£166.67
Changes due to offender's income	£0
Financial benefit from committing the offence	+£1881
Investigative charges	+ £150
	£4864.33

Submissions and the Hearing

8. Mr Higbee did not deny the offence, but disputed the assessment of his culpability, the amount of the financial penalty, and in particular the addition of rent as a financial benefit. Mr Higbee in the application and his written submissions noted that he lived "about 300 miles from the property. My agents took complete management of my property portfolio of over 30 properties. I took reasonable care regarding the application of the licence and my agents applied for the licence in their names. My level of culpability should be assessed as band 1" … "My financial benefit …. was only the cost of the licence, I would have received the rent irrespective of granting the licence. I am happy to pay the appropriate charge for the licence from 30 October 2018 to 6 September 2019 when the property was sold". Mr Higbee emphasised that his agents were responsible for all matters regarding the licence and that this was corroborated by the various emails between the Council and Ms Robson. He also stated "furthermore, most of my communications with Lynn and Paul Robson were by telephone for which, of course, there are no extant records"

9. The Council in its written submissions referred (inter alia) to those matters set out in the timeline, explaining its justification for and calculation of the financial penalty having regard to its published policy. It disputed that culpability was restricted to the managing agents.

10. The start of the hearing was delayed because of some initial internet connectivity issues. In the event, Mr Higbee was able to participate with an audio link, but without being seen.

11. The Tribunal began by asking various questions in order to clarify various matters from within the papers. The nature of the offence was explained as were the potential defences. Mr Higbee confirmed that he and his wife had owned and let the property throughout the periods in question. He was also asked about 89 Eastbourne Avenue and said that it had also been let at the same time. (To his credit and without being solicited Mr Weaver later made a specific point of correcting Mr Higbee's statement about No.89, confirming that it had in fact then been unoccupied thus not requiring a licence.)

12. Mr Higbee described the application for the licence as being dealt with by Ms Robson when working with Mr Weaver in respect of the works required under the Improvement Notice which he said were made more challenging because of the mental and physical problems of the tenant. He said that throughout he had instructed and relied on Ms Robson to do what was necessary.

13. He confirmed that Ms Robson had been acting as his and his wife's agent in respect of multiple properties over a number of years and after she had been recommended due to him following their purchase of a portfolio of properties. When asked as to whether he was happy with the service he said "No" explaining that that was for a variety of reasons including concerns about withholding monies, not collecting the full amount of rent, and not properly vetting tenants. When asked to explain the difference between his written statement of the gross rent at £328 per month with the figure quoted in the tenancy agreement of £411.66, he could not, other than as another example of the full rent not having been collected and Ms Robson's shortcomings. He said that he had considered on various occasions making a change but had not done so.

14. Mr Higbee confirmed that the address in Bexhill was from when he had been working there. He said that he could not remember when he first became aware of the need for the property to be licensed. He was reminded that in his replies in December 2019 to the Council's schedule of questions he had referred to a date in October 2018 and he explained that was probably as a result of the Council's letter in August but which he would not have looked at until the end of August because of always being on holiday in August. He confirmed that he had not thought to contact the Council direct but had instructed Ms Robson to do so and left everything in her hands. He confirmed that he had had experience of the need for selective licences in respect of another or other properties and had certainly paid the appropriate fees. He had not thought to question why fees had not been requested in the present case. He confirmed that he had not received from Ms Robson a copy of the application when it was initially

submitted, which as Mr Currie pointed out was a requirement, and he readily accepted that it was, at that point, deficient.

15. Mr Higbee confirmed that he and his wife had been in the process of selling the property and he was concerned that it and the licensing should be in order, and had instructed Ms Robson to get the application in. He acknowledged that in hindsight it would have been sensible to keep in touch with the Council but had left licensing matters "entirely in Ms Robson's hands". When later asked by Ms Jacobs as to why he had not called Ms Robson as a witness, he said that it never crossed his mind but that it would have been useful.

16. Having discussed the offence and the possible defences there was a detailed review of the Council's calculation of the penalty. Ms Crosby and Mr Weaver gave advice as to how the process had operated and confirmed that the decisions not to pursue either a rent repayment order, nor a separate civil penalty in respect of the reparation work specified in Improvement Notice which had been marginally out of time, had been taken deliberately in order to act fairly and proportionately.

17. They also confirmed the Tribunal's understanding that whilst an initial processing fee of £190 (included as a part of the overall application fee) together with an additional charge of £25 made when the application was found to be deficient and returned, had been paid, the remainder of the published late application fee of £1000 would not have been paid because of only becoming payable on the grant of a licence. In other words, it was confirmed that the unpaid part of the full licence fee amounted to £810.

18. Questions were asked about the separate penalty imposed on the Robsons. That was confirmed as having been set at £3872.83 and not appealed. It was now in process of being paid albeit under a payment plan and by instalments.

19. Ms Crosby also confirmed the steps taken by the Council including consulting and advertising before the implementation of the Selective Licence scheme and trying to individually contact all known agents and landlords from its Council tax records. She also emphasised how seriously the Council valued and invested in the scheme as a means of improving housing standards.

20. When asked as to whether he wanted to make any comments as regards the computation of the penalty Mr Higbee initially said "I think it should be zero". He thereafter repeated his previous written submissions to the effect that rent should not be regarded as a financial benefit resulting from the offence. In the following discussions Mr Currie and Ms Crosby emphasised that letting a property without the necessary licence was to be operating illegally and the Council's view was that any rent was a fundamental financial benefit resulting from the offence on the basis that a landlord had no authority to let in the absence of a necessary licence.

21. Mr Higbee also questioned why he had not been informed by the Council of the proceedings and the financial penalty imposed on the Robsons. It was apparent from the papers that he had previously been aware of such

proceedings, but he confirmed that he not previously been advised or aware of the amount. He was clearly of the view that one fine should be sufficient in respect of what was one property, and that the culpability for the offence lay with the Robsons. The Council representatives reiterated that it was entitled to take separate proceedings against a landlord and a managing agent.

22. Mr Currie in his closing submissions emphasised that Mr Higbee accepted that the application had not been duly made when it was originally submitted, had a "hands off approach", made no attempt to contact the Council "which didn't really occur to him" despite the various warning letters, and that the Council was right to find that he had been negligent. Mr Currie noted that Mr Higbee was an experienced landlord with previous experience of selective licencing. He emphasised that the Council had been at pains to operate the process fairly and to ensure that there was no double recovery through a separate rent repayment order. He said that the Council was right to see both parties (the Higbees and the Robsons) being liable for the offence and both being culpable. "Both played a major role in the property remaining unlicensed". He also confirmed that if one added their separate fines together one still arrived at a just and proportionate result. He reiterated the submissions that the Council was correct in adding a rent element into the penalty and that its policy was tailored and applied with particular reference to the local area and was an effective tool in securing the policy objectives of selective licensing.

23. Mr Higbee did not feel the need to make any further additional submissions beyond those that had already been made.

The Statutory Framework and Guidance

24. Section 249A(1) of the Act (inserted by the Housing and Planning Act 2016) states that a "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…". Subsections (3)(4) and (5) specify only one such penalty may be imposed on a person for the same conduct, the amount is limited to £30,000 per offence and the housing authority may not impose a financial penalty if there has been a conviction or if there are ongoing criminal proceedings in respect of the offence. Subsection (9) confirms that a person's conduct includes a failure to act.

25. The list of relevant housing offences is set out in Section 249A(2),which includes the offence, under Section 95(1) of the Act of controlling or managing of an unlicensed house.

26. Section 95(3)(b) states that it is a defence, if at the material time an application for a licence had been duly made. Section 95(4) states that it is also a defence if the person committing the offence had a reasonable excuse.

27. The procedural requirements are set out in Schedule 13A of the Act.

28. Before imposing a penalty the local housing authority must issue a "notice of intent" which must set out

- the amount of the proposed financial penalty,
- reasons for proposing to impose it, and
- information about the right to make representations. (Paras 1 and 3)

29. Unless the conduct which the penalty relates is continuing the notice of intent must be given before the end of the period of 6 months beginning on the first day on which the authority has sufficient evidence of that conduct. (Para 2)

30. A person given notice of intent has the right to make written representations within the period of 28 days beginning with the day after that on which the Notice was given. (Para 4)

31. If the housing authority then decides to impose a financial penalty it must give a "final notice" imposing that penalty requiring it to be paid within 28 days beginning with the day after that on which the final notice was given. (Paras 6 and 7)

32. The final notice must set out: –
- the amount of the financial penalty,
- the reasons for imposing it,
- information about how to pay it,
- the period for payment,
- information about rights to appeal; and
- the consequences of failure to comply with the notice. (Para 8)

33. The local housing authority in exercising its functions under Schedule 13A or section 249A of the Act must have regard to any guidance given by the Secretary of State.(Para 12)

34. Such guidance ("the Guidance") was issued by the Ministry of Housing Communities and Local Government in April 2018 and is entitled "Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities".

35. Paragraphs 3.3 and 3.5 of the Guidance confirm that the local housing authority is expected to develop and document their own policies on when to prosecute and when to issue a civil penalty and the appropriate levels of such penalties and should make such decisions on a case-by-case basis in line with those policies.

36. The Guidance states "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. Local housing authorities should consider the following factors to help ensure that the… penalty is set at an appropriate level:
- severity of the offence,…
- culpability and track record of the offender,…
- the harm caused to the tenant,…

- punishment of the offender,...
- deter the offender from repeating the offence,....
- deter others from committing similar offences,....
- remove any financial benefit the offender may have obtained as a result of committing the offence...

37. The Council has documented its own "Housing and Planning Act 2016 Private Sector Housing Enforcement Policy and Enforcement Policy" and subsequently published online the "Gateshead Private Sector Housing Team Civil Penalties Enforcement Guidance" (together referred to as "the Council's policy") and included copies in the papers. The Tribunal makes further reference to the Council's policy later in these reasons.

38. A person receiving a final notice has the right of appeal to the Tribunal against the decision to impose a penalty or the amount of the penalty (under paragraph 10 of Schedule 13A of the Act).

39. The final notice is suspended until the appeal is finally determined or withdrawn. (Para 10(2))

40. The appeal is by way of rehearing, but the Tribunal may have regard to matters which the local authority was unaware of. (Para 10 (3))

41. The Tribunal may confirm, vary or cancel the final notice but cannot impose a financial penalty of more than the authority could have imposed. (Paras 10 (4) and (5))

42. The Upper Tribunal has, in various cases, confirmed that: –

- the Tribunal's task is not simply to review whether a penalty imposed by a Council was reasonable, it must make its own determination having regard to all the available evidence,
- in so doing, it should have regard to the 7 factors specified in the Guidance,
- it should also have particular regard to the Council's own policy. *Sutton and another v Norwich City Council [2020] UKUT 90 (LC).*
- the Tribunal's starting point in any particular case should normally be to apply that policy as if it were standing in the Council's shoes,
- whilst a Tribunal must afford great respect (and thus special weight) to the decision reached by the Council in reliance on its own policy, it must be mindful of the fact that it is conducting a rehearing, not a review; the Tribunal must use its own judgement and it can vary the Council's decision where it disagrees with it, despite having given it that special weight. If, for example, the Tribunal finds that there are mitigating or aggravating circumstances which the Council was unaware of, or of which it took insufficient account, the Tribunal can substitute its own decision on that basis. *London Borough of Waltham Forest v Marshall and another [2020] UKUT 0035 (LC).*

The Tribunal's Reasons and Conclusions

43. There are three substantive issues for the Tribunal to address: –

- whether the Tribunal is satisfied beyond reasonable doubt that Mr & Mrs Higbee have committed a "relevant housing offence" in respect of the property,
- whether the Council has complied with all the necessary procedural requirements relating to the imposition of the financial penalty, and
- whether a financial penalty is appropriate and, if so, has been set at the appropriate level.

Dealing with each of these issues in turn:-

44. Mr Higbee readily confirmed that the property was continuously let from 31 October 2018 until its sale on 18 September 2019. There is no dispute that at the same time he and his wife as its owners received the rent, via their managing agents. It was also agreed, as well as being clear from the papers, that no Licence was granted during that period.

45. There was no dispute therefore that the property was unlicensed at times when it was required to be licensed, and the Tribunal is satisfied, beyond any reasonable doubt, that the offence set out in Section 95(1) of the Act of having control or managing of an unlicensed house was committed.

46. The Tribunal had then next to determine whether Mr and Mrs Higbee had a defence under Section 95(3)(b) that at the material time an application for a licence had been duly made and/or the separate defence under Section 95(4) of having a reasonable excuse.

47. The case of *IR Management Services Ltd v Salford City Council [2020]UKUT 0081(LC)* confirms that the burden of proving such a defence falls on Mr and Mrs Higbee, but which they would need only to establish on the balance of probabilities.

48. Dealing first with the question of whether before 31 October 2018 (or at any time before 6 September 2019) the necessary application had been duly made. The Tribunal found that it had not.

49. There is no evidence of, nor any suggestion of, an application having been made before 31 October 2018. The earliest date on which an attempt may have been made to apply for a licence is in December 2018 with Ms Robson's assertion that she then made an unsuccessful attempt to apply online, and thereafter posted documents to the Council, but without obtaining a certificate of posting. Having regard to the clearly deficient nature of the application which was submitted in March 2019 which contained manifest omissions and had to be rejected, the Tribunal had no difficulty in concluding that if an application had previously been posted in December 2018 it too would have had to be regarded as incomplete and thus not "duly made".

50. The Tribunal then went on to consider whether Mr and Mrs Higbee had a reasonable excuse for committing the offence, that is being in control of the property which was unlicensed when it should have been. The Tribunal

reminded itself that not applying for a licence is not the offence, and as has been recently reaffirmed in the Court of Appeal case of *Palmview Estates Ltd v Thurrock Council [2021] EWCA Civ 1871,* not applying for a licence and controlling a property without a necessary licence are not the same thing.

51. The Tribunal readily accepts that Mr and Mrs Higbee employed the Robsons to look after the premises, but Mr and Mrs Higbee were still the persons receiving rent and having ultimate control of the property. Having carefully considered all the circumstances, the Tribunal does not accept that reliance on the Robsons absolved Mr and Mrs Higbee from ensuring that that their own separate statutory responsibilities (which had been clearly flagged up on multiple occasions) were properly attended to.

52. The Tribunal was singularly unimpressed that despite having concerns and reservations about the Robsons effectiveness as managing agents over a period of years and knowing that they had few if any accreditations or qualifications, Mr and Mrs Higbee thought it appropriate to delegate all responsibility to them.

53. Despite receipt of multiple letters advising that an offence was being committed, it appears that Mr and Mrs Higbee did not make any attempt to even advise the Council that the Robsons were their chosen managing agents and licence holders. This fact only became apparent to the Council after 4 months of the offence being committed. Nor when Mr and Mrs Higbee were alerted to the manifest deficiencies in the application did they attempt to directly engage with the Council to explain or rectify the position.

54. The Tribunal found that Mr and Mrs Higbee are experienced landlords and the owners of an extensive portfolio of properties, operating as a business which needs to be managed properly. It was their responsibility to ensure that statutory requirements are met in a timely manner. The Tribunal finds that they should have invested far more urgency in the process and checked much more rigorously that the necessary requirements were being properly met, particularly as time went on. The Tribunal was not persuaded that their attempts and desire to abrogate responsibility to others with known shortcomings gave them a reasonable excuse.

55. The importance of failure to obtain a licence should not be underestimated. Unlicensed properties undermine the statutory objective to promote proper housing standards and a Housing Authority's regulatory role and poses a risk for harm. Mr and Mrs Higbee as landlords have a duty to ensure that relevant legislation is complied with. The Tribunal found it significant that when, as a direct consequence of the licensing application not having been duly made in a timely manner, the Council inspected the property it found multiple (both Category 1 and Category 2) hazards and that it was subsequently necessary to serve an Improvement Notice. The hazards and deficiencies which were noted included damp and mould, the wash hand basin and bath being loose from the wall, no WC seat, its flush handle not working properly, the kitchen ceiling bowing having been affected by leaks from above, the gas boiler with a loss of pressure meaning that the radiators did not reach an adequate

temperature, 3 double electric sockets in the kitchen which did not work, and more.

56. The Tribunal found that Mr and Mrs Higbee did not have a reasonable excuse for allowing the property to remain unlicensed at the material times.

57. The Tribunal is satisfied therefore, beyond reasonable doubt, that the offence under Section 95(1) of the Act was committed and is also satisfied that Mr and Mrs Higbee have not, on the balance of probabilities, established either the defence of a reasonable excuse, or of a duly made application having been made in time.

58. The Tribunal carefully reviewed the actions taken by the Council and the timing and information set out in its different notices and concluded that it complied with the necessary procedural requirements to be able to impose a financial penalty.

59. The Tribunal then considered the appropriateness and amount of a penalty.

60. The Tribunal is satisfied that it is appropriate to impose a financial penalty in respect of the offence, which as confirmed in the Guidance is an alternative to prosecution.

61. The Tribunal began the task of assessing the appropriate amount of the fine by a review of the actions of the parties and an evaluation of the evidence. In so doing it has had particular regard to the 7 factors specified in the Guidance.

62. Whilst not bound by it, the Tribunal also carefully reviewed the Council's policy and found that (subject, inter alia, to the reservations referred to below) it provides a sound basis for quantifying financial penalties in a reasonable, objective and consistent basis. The Tribunal accepts that the policy results from a process whereby the Council has sought to fulfil its statutory duty to provide a clear and rational basis for its determinations on a case-by-case basis. As confirmed by the Upper Tribunal in the *Sutton* case, the local authority is well placed to formulate its policy on penalties taking into account the Guidance, and that "It is an important feature of the system of civil penalties that they are imposed in the first instance by local housing authorities and not by courts or Tribunals. The local housing authority will be aware of housing conditions in its locality and will know if particular practices or behaviours are prevalent and ought to be deterred".

63. As such the Tribunal was content to use the Council's policy as the starting point and as a tool to assist its own decision making, paying very close attention and respect to the views expressed by the Council, to see if after making its own decision (in place of that made by the Council) the Tribunal agrees or disagrees with the Council's conclusions. In doing so it makes no criticism of the way in which the Council has approached the case, or the procedures which it has followed.

64. The Council's policy is itself based on the factors specified in the Guidance and refers to the 4 potential categories of Harm and Severity of Offence, being Low, Medium, High and Very High, and 4 categories of Culpability being Low (little or no fault of landlord), Negligent (failure to take reasonable care) Reckless (foresight or wilful blindness) and Deliberate (intentional breach) and includes descriptions of each.

65. It thereafter sets out the following table to determine which penalty band is to be applied :–

		Culpability			
		Low Little or no fault of landlord	**Negligent** Failure to take reasonable care	**Reckless** Foresight or wilful blindness	**Deliberate** Intentional breach
Harm	**Low** (Range)£	0 – 3000	2000 – 4000	3000 – 5000	4000 – 6000
And	Starting point	**2000**	**3000**	**4000**	**5000**
Severity	**Medium** (Range) £	2000 – 4000	4000 – 8000	6000 – 10,000	8000 – 12,000
Of	Starting point	**3000**	**6000**	**8000**	**10,000**
Offence	**High** (Range)£	2000 – 6000	6000 – 10,000	10,000 – 14,000	16,000 – 20,000
	Starting point	**4000**	**8000**	**12,000**	**18,000**
	Very High (Range)£	3000 – 7000	8000 – 12,000	16,000 – 20,000	20,000 – 30,000
	Starting point	**5000**	**10,000**	**18,000**	**25,000**

66. The Council's policy states that the process by which the amount of the financial penalties calculated is broken down into five main stages

- Stage 1 determines the penalty band for the offence. Each penalty band has a starting amount and a maximum amount.
- Stage 2 determines how much will be added as a result of the landlord's income and track record, including consideration of any relevant mitigating or aggravating factors
- Stage 3 considers any financial benefit that the landlord may obtain from committing the offence
- Stage 4 is where the costs of investigating determining and applying the penalty are calculated
- Stage 5 considers and combines the results of stages 1-4 and provides the final financial penalty amount.

67. The Tribunal, having had careful regard to all the evidence before it agreed with the Council's assessment that that Mr and Mrs Higbee failed to take reasonable care to ensure that the necessary selective licence was in place from 30 October 2018 or that a properly complete application was made in a timely fashion.

68. The Tribunal did not agree with Mr Higbee's assertions either there was no offence at all or that there was little or no fault of the landlord. The Tribunal found that the correct culpability band was that which was described under the heading "negligent" in the Council's policy.

69. The Tribunal noted that the Council had assessed the harm rating as low, and agreed with that, notwithstanding that any such assessment could and should include not just actual harm but also the potential for harm.

70. Having found the culpability rating to be negligent ie a failure to take reasonable care, and the harm rating low, the starting point figure as dictated by the Council's policy was £3000.

71. The Tribunal then went on to the next stages in the policy.

72. Stage 2 refers to consideration of the landlord's income and finances, and track record.

73. In its policy of the Council sets out 10 different types of "aggravating" factors to consider, stating that each instance would move the fine upwards proportionately from the starting point to the ceiling of the penalty band. It also refers to 6 different potential mitigating factors which could reduce the fine proportionately to the floor of the band.

74. The Council decided that in this case there was 1 aggravating factor (being the separate action in respect of the Improvement Notice) but offset by 2 mitigating factors (being that Mr and Mrs Higbee had admitted the offence and also taken steps to bring it to an end by applying for the licence). The Tribunal agreed with that assessment and that accordingly £166.67 be deducted from the starting point figure.

75. Stage 3 of the Council's policy requires the amount of any financial benefit to be added to the penalty calculation. The policy states that "calculating the amount of financial benefit obtained will need to be done on a case-by-case basis" before giving some examples. In a case relating to offences relating to selective licensing, the examples of potential financial benefit refer to "rental income whilst the property was operating unlicensed…; the cost of complying with any works or conditions on the licence; the cost of the licence application fee".

76. The Tribunal was clear, as acknowledged by Mr Higbee, that it was entirely appropriate that any unpaid licence fee should be added into the calculation. In this case, £810 (being the unpaid part of the £1000 fee less the £190 paid for the initial processing). The Tribunal concluded that a proper

application of the Council's policy required that figure to be added into the calculation.

77. The Tribunal then went on to very carefully consider whether in the particular circumstances of this case the rent or some part of it should also be added.

78. Mr Higbee submitted that it was wrong to equate rent as being a financial benefit obtained as a result of committing the offence and the Tribunal agrees that in most cases the financial benefit resulting from not having a licence is likely to be restricted to the costs of any unpaid licence fee and any other outstanding expenditure needed to obtain the licence. The Tribunal also accepts that it is a moot point as to whether the Council's policy by including rent goes beyond what is set out in the Guidance as regards the removal of financial benefit per se.

79. Nevertheless, the Council's policy clearly envisages the inclusion of rent as a possibility, and Mr Currie and Ms Crosby were articulate in their view that its deliberate inclusion within the Council's policy matrix provides an effective tool in driving up housing standards through Selective Licensing and by deterring not just offenders but also others, thereby satisfying more of the criteria set out in the Guidance, and not just that part referring to the removal of financial benefit which says it should never be cheaper to offend than to ensure a property is well-maintained and properly managed. They also confirmed that the Council would at the same time always review and if found necessary temper its overall calculations by reference to proportionality.

80. The *Sutton* case, as alluded to by Mr Currie, confirms that the Tribunal must give special weight to an individual Housing Authority's own policy. The Tribunal decided therefore, after giving the matter careful consideration, that in this part of its deliberations it could and should include a rent element to satisfy the punishment and deterrence factors set out in the Guidance, before a final review of the resultant calculations.

81. The Tribunal was bolstered in its view that in the circumstances of this case it was appropriate to include and refer to part of the rent in the calculations because it was clear that the Council itself could have separately and additionally sought a rent repayment order but had deliberately chosen not to do so because of including a rent element within the financial penalty. The tenant, who all parties acknowledged had physical and mental problems, was in his own words having the rent paid for by the Council. Under Section 45 of the 2016 Act the Council would have been entitled to apply for repayment of the whole of the amount of universal credit paid in respect of the period from 30 October 2018 to 6 September 2019. On the evidence before it, the Tribunal would have made such an order, and in all probability for a sum in excess of the rental figure £1881 decided upon by the Council, but which the Tribunal was satisfied to use for the present purposes.

82. Stage 4 of the Council's policy "in keeping with the principle that the cost of enforcement should be borne by the offender" sets out a table of the costs it will apply in different cases. In the present case the median figure quoted was

£300 but which the Council had in accordance with its policy divided by 2, because of its administrative costs being shared with work undertaken as regards the separate penalty levied against the Robsons. The Tribunal was content to adopt the resultant figure of £150 although readily agreed with the Council's assertion that a larger figure could well have been justified on a properly time costed basis.

83. Having made its own assessment, by in effect standing in the Council's shoes, and applying the relevant facts as now known, the calculation then made was as follows:-

Penalty Charge Starting Amount	£3000	
Changes due to offender's track record (2 mitigating factors offset by 1 aggravating factor)	-£166.67	
Changes due to offender's income	£0	
Financial benefit from committing the offence ie the unpaid part of the fees	+£810	
Part of the rent in lieu of a Rent Repayment Order and re punishment/deterrence	+£1881	
Investigative charges	+ £150	
	5674.33	
Rounded to		**£5750**

84. It is perfectly logical for a Housing Authority to use a formula (indeed the legislation has mandated that it should have a policy), but it is essential that it, and in this instance the Tribunal, then review the answer given in a holistic way, to see if that answer in a particular case is able to pass the test of being reasonable and proportionate in all the circumstances.

85. The Tribunal, when reviewing the figure of £5750 reminded itself that:-

- the initial application was not received until over 4 months after the scheme commencement date, despite and after various reminders and warnings. It was immediately apparent that it was manifestly deficient and incomplete. The second submission was also severely deficient and there were further delays in submission of basic paperwork which should have been readily to hand.
- Mr and Mrs Higbee despite being experienced landlords with an extensive portfolio of properties, and with experience of selective licensing in other areas, failed to directly engage with the application process.
- the Council would have been entitled to pursue a separate rent repayment order for universal credit paid over a period of more than 10 months, and a further financial penalty in respect of the late compliance with the Improvement Notice but deliberately chose not to do so.
- various hazards were identified at the property as a direct consequence of the process. Some of the defects were serious requiring immediate attention, particularly given the known vulnerability of the tenant, and

the Tribunal concluded that it was highly unlikely that they would have been addressed had not the Council taken action.

- it must consider all 7 factors referred to in the Guidance being the severity of the offence, the culpability and track record of the offender, the harm caused to the tenant, punishment of the offender, and the need to deter not just the offender but also others from repetition as well as removing any financial benefit obtained as a result of committing the offence.

The Tribunal also noted that the overall figure of £5750

- less the unpaid part of the licence fee of £810 amounts to £4940 which is exactly one year's rent and that the offence itself continued for over 10 months
- and is less than 1/5 of the maximum penalty that the Council could have imposed by law for a single offence being £30,000, but which understandably the Guidance states generally would only be expected to be reserved for the very worst offenders.

86. As part of the review process, the Tribunal also gave careful thought as to the submissions relating to the separate penalty charge made against the Robsons. The answer to Mr Higbee's submission that only one charge should be made is found in paragraph 2.5 of the Guidance, which states "where both the letting agent and landlord can be prosecuted for failing to obtain a licence for licensable property, then a civil penalty can be imposed on both the landlord and agent as an alternative to prosecution. The amount of the civil penalty may differ depending on the individual circumstances of case".

87. The Tribunal found nothing illogical about a decision as in this case that landlords, who are ultimately responsible as owners and who receive a much greater share of rents received whilst the offence is committed, should pay a greater sum than their agents.

88. For completeness, having specific regard to the need for fines to be just and proportionate, the Tribunal considered the total of the 2 separate fines together and concluded that each individually passed that test without any need for further discount.

89. Nor did the Tribunal find any reason to limit the extent of the financial penalty on the grounds of Mr and Mrs Higbee's ability to pay which he had readily confirmed was not an issue. As the Guidance confirms "a civil penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at high enough level to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities".

90. The Tribunal, having reviewed all of the evidence and carefully considered all the matters referred to in the Guidance, is content that the figure of £5750 is just and proportionate in all the circumstances and sufficient to achieve all 7 objectives mentioned in the Guidance.

Judge J.M. Going

29 April 2022