FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/HNA/2021/0060 and 0059**
HMCTS code (paper, video, audio)	**:**	**V: CVP REMOTE**
Property	**:**	**Flat 3, 107 Queens Drive, London N4 2BE (1) and Flat 3, 105 Queens Drive, London N4 2BE (2) ("the Property")**
Appellant/applicants	**:**	**Gillplot Property Limited (1) and QD Property Development Limited. (2)**
Representative	**:**	
Respondents	**:**	**London Borough of Hackney**
Representative	**:**	**Matthew Feldman of Counsel**
Type of Application	**:**	**Appeal against a financial penalty** - Section 249A & Schedule 13A to the Housing Act 2004
Tribunal Members		**Judge Professor Robert Abbey and Sue Coughlin (Professional Member)**
Date of Hearing	**:**	**21 July 2022**
Date of Decision	**:**	**26 July 2022**

DECISION

- This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice Cloud Video Platform with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and because all issues could be determined in a remote hearing. The documents that were referred to are in two bundles of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it a pair of non-paper-based digital trial bundles of documents prepared by the applicant and the respondent, in accordance with previous directions.

Decision

1. The decision by the respondent to impose a financial penalty is upheld in the total sum of £6000 being an amount reduced from the original amount of £7500. But, for the reasons set out below the Tribunal has determined that the financial penalty of £6000 should be subject to a reduction to the sum of £5000 per property.

2. In the light of the above, the appeal by the appellant against the imposition of a financial penalty by the respondent under section 249A and schedule 13A of the Housing Act 2004 is therefore allowed in part.

Introduction

3. This is the hearing of the applicant's application regarding **Flat 3, 107 Queens Drive, London N4 2BE (1) and Flat 3, 105 Queens Drive, London N4 2BE (2) (**"the Properties"), pursuant to Schedule 13A of the Housing Act 2004 ("the 2004 Act"), to appeal against a financial penalty imposed by the respondent under s249A of the 2004 Act. A financial penalty of £7,500 has been imposed on the applicants by the respondent in a Notice dated 5 October 2021 for having control of a property which was not licensed and therefore committing an offence under section 95(1) of the Housing Act 2004.The applicant is the freeholder of the properties and the respondent is the local authority responsible for the locality in which the property is situate. To be clear Flat 3, 107 Queens Drive, London N4 2BE was owned by applicant (1) and Flat 3, 105 Queens Drive, London N4 2BE was in the ownership of applicant (2).

The Hearing

4. The appeal was set down for hearing on 21st July 2022 when the applicant was represented by Mr L Heer. who described himself as the Director of Gillplot Properties and the Chief Executive Officer of QD Property Developments Ltd. His brother Mr B Heer is a Director of that

company. Mr Matthew Feldman of Counsel appeared for the respondent. This hearing is a re-hearing of the local authority decision, see paragraph 10(3)(a) of Schedule 13A to the 2004 Act. The Tribunal is therefore to consider whether to impose a financial penalty afresh, and is not limited to a review of the decision made by the respondent.

5. The imposition of the financial penalty was imposed on the basis that the Applicant committed an offence under s.95(1) of the 2004 Act by being a person in control of a property which was required to be licensed under Part 3 of the 2004 Act but was not so licensed.

6. Both applicant companies had signed Management Agreements with Estates Management Services (London) Ltd. EMS, a company set up by Mr Balbir Singh for the purpose of managing properties which the 2 applicants failed to sell and which would therefore be let. It is clear from these Agreements that EMS act as managing agents and the rental from the properties is paid into the bank accounts of the two applicant companies. The Tribunal is satisfied that the companies are therefore persons in control of the premises as defined in s.263(1) of the Housing Act 2004

7. In regard to this dispute and at all material times the applicants admitted they had failed to hold a selective licence (under Part 3 of the 2004 Act) and so the Properties were not licensed. This was notwithstanding that Hackney had a scheme in place for selective licences from 1 October 2018 in the Brownswood Ward where the properties were located. As a result of the above an offence was committed under s.95(1) of the 2004 Act.

8. In the recent case *of I R Management Services Limited v Salford City Council* [2020] UKUT 81 (LC) Martin Rodger QC the Deputy Chamber President wrote at paragraph 27 "*The offence of failing to comply with a relevant regulation is one of strict liability, subject only to the statutory defence*."

9. This Tribunal must be bound by the decisions of the Upper Tribunal and as such these are therefore strict liability offences and if they existed and were identified at the time of an inspection by the respondent then at the point a notice is issued the strict liability arises there and then. This is what occurred in this case.

10. Accordingly, the dispute was not about the existence of a licence but rather about the quantum, the amount of the penalty and whether the applicant had a reasonable excuse for not licensing the property. With regard to the defence of reasonable excuse, the applicant did expressly seek to rely on the statutory defence contained within s234(4) of the 2004 Act:

> "*In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation*."

11. The appellant/applicants appeal on three grounds, namely that: -

    1) there is a reasonable excuse due to mitigating factors;

    2) the level of penalty is unfair, unjust and excessive; and

    3) regarding 107 Queens Drive the property was not in the ownership of the company named in the documentation.

    On the other hand, the respondent considers that the financial penalty should remain as imposed and was firmly of the view that it had conformed with its policies in place for cases of this kind. It was asserted by the local authority that, contrary to the applicants' contentions, the respondent has properly complied with its legal duties and due process both in relation to the imposition of a financial penalty and the level of penalty. As the respondent has an enforcement policy in place the Tribunal must take that as its starting point and implement that policy, (see *Marshall v Waltham Forest London Borough Council* [2020] UKUT 35 (LC) at §52 and §74.)

12. The respondent offered the applicants a 20% overall discount to the financial penalty of £7,500, reducing the same to £6,000 per property, on the basis that the Applicants had taken early action to licence the properties and provided that the penalty was paid within 28 days. The financial penalty was not paid within 28 days, or at all. The applicants chose to appeal, hence this application before this Tribunal.

13. At the hearing the Tribunal heard evidence on behalf of the respondent from Angela Reynolds who is a Private Sector Housing Officer in the Private Sector Housing Service of Hackney Council. No witness statements were supplied by the applicants who simply relied upon the verbal submissions made by Mr L. Heer. Ms Reynold's evidence regarding 107 Queens Drive was that: -

    "For the purpose of Selective licensing in the Brownswood Ward of London Borough of Hackney. Myself (Angela Reynolds) and colleague Kenneth Appiah Private sector Housing officer conducted a doorstep survey on 22.06.2021 at approx 14'43pm' The Buzzer was pressed in respect of Flat 3, 107 Queens Drive, N4 2BE. What appeared to be a female voice answered over the intercom system. I introduced myself by giving details of my name and department within the London Borough of Hackney; I confirmed I was speaking with Flat 3 and gave the reason for my visit. I then asked if the property was rented by herself to which she confirmed Yes, then continued to ask about how many persons resided in the accommodation, and the female voice confirmed 2 persons, I

asked for the landlord details and the female stated that the property was found through the website Open Rent' however the female voice declined to provide her personal details' The London Borough of Hackney records indicated at the time of the visit there had been no selective licence application submitted for Flat 3,107 Queens Drive, N4 2BE, as a rented accommodation situated within the ward of Brownswood. I carried out a land registry search and GILLPLOT PROPERTY LIMITED are registered as the owners. I then proceeded to issue a Licence warning letter dated 04.10.21; followed by a letter of Notice of intent dated 05'10'21 intending to impose a financial penalty of £7,500 for Failure to Licence under selective Licensing scheme Housing Act 2004 (Sec. 95) A final Notice letter was issued on 04.11 .2021 and consideration of client representation discussed my Team Principal Officer Emmanuel, who would be able to answer any further questions about the property licensing schemes. Client Representations were taken into account, reducing the financial penalty by 20% which would then reduce the amount payable to £6,000 if paid within the 28 days beginning with the day after that on which the Notice was served. The financial penalty fine amount may revert back to the £7500 from £6,000 in the event that the penalty is paid within the 28 days beginning with the day after that on which the Notice was served."

14. Additionally, Ms Reynold's evidence regarding 105 Queens Drive was that: -

For the purpose of selective licensing in the Brownswood ward of London Borough of Hackney' Myself (Angela Reynolds) and Colleague Kenneth Appiah Private Sector Housing Officer conducted a doorstep survey on 22.06.2021 at approx 13.44pm. The London Borough of Hackney records indicated at the time of the visit there had been no selective Licence application submitted for Flat 3' 105 Queens Drive, N4 2BE, as a rented accommodation situated within the ward of Brownswood' I carried out a land registry search and QD PROPERTY DEVELOPMENTS LIMITED is registered as the owners. I then proceeded to issue a Licence warning letter dated 04'10'21, followed by a letter of Notice of intent dated 05.10.21 intending to impose a financial penalty of £7500 for Failure to Licence under selective Licensing scheme Housing Act 2004 (sec. 95)' A final Notice letter was issued on 04.11.2021. l discussed the case representation with my team manager Emmanuel Mfum and consideration of client representation was taken into account, reducing the financial penalty by 20% which would then reduce the amount payable to Ê6,000 if paid within the 28 days beginning with the day after that on which the Notice was served'

Decision and Reasons

15. From the evidence before it and the admission mentioned above, the Tribunal was satisfied that the applicants were in breach of the requirements of the London Borough of Hackney selective licencing scheme.

16. The applicant stated that regarding 107 Queens Drive the property was not in the ownership of the company named in the documentation. To back up this assertion the applicant showed to the Tribunal a front page of a Land Registry transfer Form TR1 and confirmed to the Tribunal that this transfer was dated 2 July 2021. The applicant also said that the transfer had not yet been registered at the land registry but that the application to transfer had been submitted to the Registry.

17. In the respondent's bundle the local authority had produced the official copy title details issued by the land registry and dated 20 July 2021. This showed the applicant as the registered proprietor. While a transfer may have been completed it seemed to the Tribunal that the respondent was entitled to rely upon the details within the official copy entries and to accept that Gillplot was the owner of 107 Queens Drive. The copy title entries show who is entitled to the legal estate and there is no need to look behind this information even if mention is made of a transfer. It was for the applicant to rebut this presumption and there was no convincing evidence to show that this had been done. Therefore, the Tribunal was satisfied that the right company was involved with the financial penalty. At the time the offence had been ascertained, on the 22 June 2021 when the inspection visit was made, the applicant was the owner and was the party to whom the financial penalty details had to be and were submitted.

18. At the hearing much was made about how the respondent had not been given time to make representations. The respondent pointed out the procedure set out in the notice documents and that there was a defined period in which the applicant could have made representations. The applicant did write a letter in this time and the local authority did take that as the applicants' representations. The Tribunal considered all the evidence before it in this regard and was firmly of the view that all the documentation was properly communicated and served by the respondent allowing time for representations and there is nothing in this regard that might assist the applicant.

19. If your property fell within the scheme area there was a clear obligation upon you to licence a property that was let to tenants such as was the case for this property and these applicants. By the time of this offence, the selective licensing scheme had been in place for nearly three years having been started in October 2018. Ignorance of the law is no defence

and even if the applicants were excellent landlords there was a statutory obligation to obtain a licence. None was in place and the absolute nature of this offence means that this is an offence under the Housing legislation which brings with it financial implications. The policy of the respondent was to proceed on information about an unlicensed property and to issue a notice. This is what they did and they cannot be criticised for complying with their own policy and agreed procedures.

20. In connection with reasonable excuse the applicants asserted that a party is not in control of or managing an HMO for the purposes of s72(1) if it engages a professional management company to manage the property (*D'Costa v D'Andrea & Ors* [2021] UKUT 144 (LC)). In such cases, the party will not be considered to have committed the offence and will have 'reasonable excuse' under s72(5) HA 2004. They therefore asserted that their agent, EMS, had day-to-day management of the Property and was responsible for the licencing As such, the Applicant says that it is not liable to pay any fine in respect of failure to licence. The Tribunal looked at this case and came to the conclusion that the applicants had completely misunderstood the effect of this decision. At paragraph 39 the Judge wrote "*It is difficult to understand why a landlord would not have the defence of reasonable excuse to the offence created by section 72(1) of the 2004 Act where he or she has been told by a local authority employee that their property does not need an HMO licence and that they will be told if that situation changes, and I find that Ms D'Costa had that defence.*" It is clear therefore, that this case applied to a different set of circumstances and the inference made by the applicant is completely incorrect.

21. The Tribunal also considered the terms of the Management Agreements between the applicant companies and EMS. Mr L Heer stated that the Applicants were property development companies and had set up EMS specifically to manage their rented properties. Mr Heer informed the Tribunal that there was no compelling reason why he could not have made enquiries about licensing himself on behalf of his company. The Tribunal does not consider that this agreement provides a reasonable excuse.
22. The applicants also asserted that they had tried to make enquiries about licensing with the Respondent who had failed to provide information to them. The only documentary evidence provided post-dated notification of the offence
23.
24. Accordingly, nothing that the applicants said persuaded the Tribunal that the applicants had a reasonable excuse.

25. Finally, the Tribunal considered the level of the penalty. The applicant says the level of the penalty is excessive as they tried at all times to co-

operate with the respondent and had made a speedy application to licence the properties once the local authority had been in contact with the applicant. The respondent says it has a policy and a fee matrix that dictates how and why a financial penalty might be imposed and at what level. As has been noted previously as the respondent has an enforcement policy in place the Tribunal must take that as its starting point and implement that policy, (see *Marshall v Waltham Forest London Borough Council* [2020] UKUT 35 (LC) at §52 and §74.).

26. As for the calculation of the penalty, within the respondent's Notice of Intent dated 5 October 2021, it was indicated that the culpability of the offence had been assessed as low, but the harm severity had been assessed as medium. These various factors, culpability/harm and severity are from the penalty matrix and formed the core for the structure of the fee level. The applicants were also informed of the possible discount of 20% applicable on the basis of an expression of a willingness to settle. The assessment of culpability and harm was not clear either from the policy or from the evidence provided by the Respondent's witness, however the local authority is entitled to take into account other matters when deciding on the level of fine including the deterrent effect on both the offender and other property owners. Notwithstanding the assertion by the applicants that the penalty was unjust, unfair and excessive as set out in the Grounds of Appeal, it is clear that the Respondents Policy is that the starting point for the offence of failing to licence under a selective licensing scheme is a financial penalty of £7,500 ..

27. The respondent's "Guide to Applying the Civil Penalty Fee Matrix" provides that:

> "*Failure to licence a property under a Selective Licensing Scheme will usually be regarded as a moderate matter and therefore meriting a Band 2 penalty of £7,500 CPN charge average as a starting point (see Table 1) unless there are mitigating factors to reduce or aggravating factors to increase the proposed CPN charge…..*"

28. Accordingly, the respondents have simply followed ,their policy as to the level of the penalty imposed in this case. It is clear that within the Final Notice, and as set out above, the respondent offered the applicants a 20% discount, reducing the final amount to £6000 provided it was paid within 28 days of the Final Notice but this was not accepted by the applicants who chose to advance this appeal instead as they had the right to do.

29. In passing the Tribunal did note that the evidence of Ms Reynolds as to how the level of harm was set as medium was unimpressive. She conceded that she had not seen inside the flat and therefore did not know what facilities and fire safety provisions were in place to ensure the safety and comfort of tenants. She confirmed she simply assumed

that in the absence of any supporting evidence she had to fix a medium level for harm.

30. Accordingly, we consider that the amount set by the respondent in the sum of £7500 to be a reasonable amount for an offence of this type, since the local authority scored the amount of the financial penalty in accordance with their policy. However, the Tribunal considers that the discount of 20% to £6000 was to be applied as it was apparent that the applicants had responded quickly to licence the property once they became aware of the requirement to do so, having submitted licence applications for seven flats within the two buildings on 15 October 2021.

31. Consequently, in the light of the above, the appeal by the appellant/applicants against the imposition of the financial penalty levied by the respondent under section 249A and schedule 13A of the Housing Act 2004 is allowed in part to reduce the financial penalty from £7500 down to the discounted level of £6000.

32. However, additionally, accompanying the licence applications the applicants had also supplied a lot of detailed information about the good level of accommodation that was available at the addresses. It was clear to the Tribunal that had the Council made reasonable enquiries across its own departments by checking the details of the licensing application and supporting documentation, it would have seen that this was high class accommodation that fully complied with all the latest building regulations. Therefore, the Tribunal thought that this was an additional mitigating factor to be included and that therefore the financial penalty should be reduced to £5000 per property.

33. Rights of appeal are set out in the annex to this decision and relevant statutory extracts can be found in an appendix below.

Name:	Judge Professor Robert Abbey	**Date:**	26 July 2022

Annex

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).

Appendix

249A Financial penalties for certain housing offences in England

(1)The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

(2)In this section “relevant housing offence” means an offence under—

(a)section 30 (failure to comply with improvement notice),

(b)section 72 (licensing of HMOs),

(c)section 95 (licensing of houses under Part 3),

(d)section 139(7) (failure to comply with overcrowding notice), or

(e)section 234 (management regulations in respect of HMOs).

(3)Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4)The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5)The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—

(a)the person has been convicted of the offence in respect of that conduct, or

(b)criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6)Schedule 13A deals with—

(a)the procedure for imposing financial penalties,

(b)appeals against financial penalties,

(c)enforcement of financial penalties, and

(d)guidance in respect of financial penalties.

(7)The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8)The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

(9)For the purposes of this section a person's conduct includes a failure to act.

Schedule 13A

Notice of intent

1Before 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.

(3)For the purposes of this paragraph a person's conduct includes a failure to act.

3The notice of intent must set out—

(a)the amount of the proposed financial penalty,

(b)the reasons for proposing to impose the financial penalty, and

(c)information about the right to make representations under paragraph 4.

Right to make representations

4(1)A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2)Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given (“the period for representations”).

Final notice

5After the end of the period for representations the local housing authority must—

(a)decide whether to impose a financial penalty on the person, and

(b)if it decides to impose a financial penalty, decide the amount of the penalty.

6If the authority decides to impose a financial penalty on the person, it must give the person a notice (a “final notice”) imposing that penalty.

7The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.

8The final notice must set out—

(a)the amount of the financial penalty,

(b)the reasons for imposing the penalty,

(c)information about how to pay the penalty,

(d)the period for payment of the penalty,

(e)information about rights of appeal, and

(f)the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

9(1)A local housing authority may at any time—

(a)withdraw a notice of intent or final notice, or

(b)reduce the amount specified in a notice of intent or final notice.

(2)The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given.

Appeals

10(1)A person to whom a final notice is given may appeal to the First-tier Tribunal against—

(a)the decision to impose the penalty, or

(b)the amount of the penalty.

(2)If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(3)An appeal under this paragraph—

(a)is to be a re-hearing of the local housing authority's decision, but

(b)may be determined having regard to matters of which the authority was unaware.

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

(5)The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed.

Recovery of financial penalty

11(1)This paragraph applies if a person fails to pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.

(2)The local housing authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3)In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a)signed by the chief finance officer of the local housing authority which imposed the penalty, and

(b)states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

(4)A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

(5)In this paragraph “chief finance officer” has the same meaning as in section 5 of the Local Government and Housing Act 1989.

Guidance

12A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions under this Schedule or section 249A