FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BH/HNA/2021/0061**
HMCTS code (paper, video, audio)	**:**	**V - Video**
Property	**:**	**1037A Forest Road, London E17 4AH**
Appellant	**:**	**Mr. Adil Rahman**
Representative	**:**	**Mr. Arfan Rahman (Appellant's son)**
Respondent	**:**	**The London Borough of Waltham Forest**
Representative	**:**	**Mr. R. Calzavara of counsel instructed by Sharpe Pritchard solicitors**
Type of Application	**:**	**Appeal against a financial penalty**
Tribunal	**:**	**Tribunal Judge S.J. Walker** **Tribunal Member Mr. C. Gowman**
Date and Venue of Hearing	**:**	**9 August 2022 - video hearing**
Date of Decision	**:**	**31 August 2022**

DECISION

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(1) The appeal against a financial penalty imposed by the London Borough of Waltham Forest on Mr. Adil Rahman in respect of an offence under section 95(1) of the Housing Act 2004 (control of a Part 3 house while no selective licence is in place) in connection with the property at 1037A Forest Road, London E17 4AH is dismissed. The penalty notice dated 22 November 2021 is confirmed. The penalty of £4,800 is upheld.

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. 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 are set out below, the contents of which were noted. The Tribunal's determination is set out below.

Reasons

Procedural History

1. The Appellant appeals against the imposition of a financial penalty under section 249A of the Housing Act 2004 ("the Act") against him in respect of the property known as 1037A Forest Road, London E17 4AH on 22 November 2021. The penalty imposed on the Appellant was for an offence under section 95(1) of the Act in respect of a failure to licence a house which was required to be licensed under a selective licensing scheme.

2. Notice of intention to impose a financial penalty on the Appellant was sent to him on 30 September 2021 (pages 189 to 196). The proposed penalty was £6,000.

3. Representations were received by the Respondent from the Appellant on 4 October 2021 (page 208).

4. Having considered those representations and the fact that on 12 October 2021 the Appellant submitted a licence application, the Respondent decided to reduce the amount of the penalty to £4,800, with a reduced figure of £3,600 if paid within 28 days. The Respondent issued a final notice to the Appellant on 22 November 2021 in that sum (pages 234 to 239).

5. The Appellant appealed to this Tribunal against this penalty on 4 December 2021.

6. Directions were issued on 8 February 2022. Among other things these required the production of bundles by the parties. These directions were largely complied with, and the Tribunal had before it a bundle comprising 244 numbered pages from the Respondent, which included a detailed statement of case drafted by Mr. Calzavara (pages 3 to 7). It also had a collection of un-numbered documents and photographs from the Appellant. References to page numbers throughout this decision are to the Respondent's bundle unless otherwise stated.

The Law

7. Section 249A of the Act permits a local housing authority to impose a financial penalty for a number of housing offences, amongst which is the offence of failing to licence under section 95(1) of the Act. The maximum penalty which may be imposed is £30,000.

8. Schedule 13A of the Act provides that the local housing authority must first give a notice of intent before the end of six months beginning on the first day on which the authority had sufficient evidence of the conduct to which the financial penalty relates. This must set out the amount of the proposed penalty, the reasons for proposing to make it, and information about making representations to the authority. The authority must then give a final notice setting out, among other things, the amount of the penalty and the reasons for giving it.

9. An offence is committed under section 95(1) of the Act if a person has control or management of a house which is required to be licensed under Part 3 of the Act but is not. By section 85(1) of the Act every Part 3 house (which is defined in section 85(5) as a house to which Part 3 of the Act applies) must be licensed save in prescribed circumstances which do not apply in this case.

10. By section 79(2) of the Act Part 3 applies to a house if (a) it is in an area designated under section 80 of the Act as subject to selective licensing and (b) the whole of it is occupied either under a single tenancy or licence or under two or more tenancies in respect of different dwellings.

11. Section 80 of the Act allows a local authority to designate an area as subject to selective licensing. By section 82 any such designation cannot come into force until confirmed by the appropriate national authority (ie the Secretary of State). Once a designation has been confirmed section 83 requires notice of this to be published in a prescribed way.

12. It is a defence to a charge of an offence under section 95(1) of the Act that a person had a reasonable excuse for committing it.

13. The offence under section 95(1) of the Act can be committed by a person who is either a person having control of the Part 3 house or the person managing it. The meaning of these terms is set out in section 263 of the Act as follows;

> "(1) *In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.*
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> *(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.*
>
> *(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–*
>
> *(a) receives (whether directly or through an agent or trustee) rents or other payments from–*
>
> *(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or*

licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it."

14. An appeal to the Tribunal by the person subject to the penalty is to be by way of a rehearing and may be determined with regard to matters of which the authority was unaware.

15. It is for the local housing authority to prove beyond reasonable doubt that the offences relied on have been committed. Any defence of reasonable excuse must be established by the appellant on the balance of probabilities. This is made clear in the case of IR Management Service Ltd. -v- Salford City Council [2020] UKUT 81 (LC), which also provides that Tribunals should consider explanations given by persons managing an HMO in order to ascertain whether or not a reasonable excuse has been established even if such a defence is not expressly raised by them.

16. As is made clear by the decisions of the Upper Tribunal in the cases of London Borough of Waltham Forest -v- Marshall and Ustek [2020] UKUT 35 (LC) and Sutton -v- Norwich City Council [2020] UKUT 90 the Tribunal's starting point when considering an appeal of this kind is the local housing authority's policy. Proper consideration must be given to arguments that there should be a departure from the policy, but the burden is on the Appellant to show that such a departure should be made. The Tribunal must look at the objectives of the policy and consider whether those objectives would be met if the policy were not followed. The Tribunal must also give considerable weight to the local housing authority's decision but may vary it if it disagrees with it. In addition, regard must be given to the guidance issued by the Secretary of State in 2016 and re-issued in 2018 entitled "Civil Penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities" ("the Guidance").

17. As is made clear in the Guidance, when determining the level of a financial penalty regard must be had to the following;
    (a) the offender's means
    (b) the severity of the offence;
    (c) the culpability and track record of the offender;
    (d) the harm or potential harm (if any) caused to a tenant;
    (e) the need to punish the offender, to deter repetition of the offence or to deter others from committing similar offences; and/or
    (f) the need to remove any financial benefit the offender may have obtained as a result of committing the offence

The Hearing

18. Both parties attended the hearing. The Appellant was joined by his son Mr. Arfan Ahmed, who largely spoke on his father's behalf. The Respondent was represented by Mr. R. Calzavara of counsel. Ms. K. Phillips, an officer of the Respondent's, attended and gave evidence.

19. The Tribunal had before it the documents referred to in paragraph 8 above.

Findings of Fact

20. There were very few factual disputes in this case and the evidence of the Respondent's witness Ms. Phillips (pages 8 to 11) was largely accepted by the Appellant. In particular, Mr. Arfan Ahmed, on behalf of the Appellant, accepted that a valid selective licensing scheme was in operation at the material time, that the property required a licence under that scheme, that a licence had not been obtained under that scheme, and that the tenant Mrs. Muza was, at all material times, in occupation of the property under a single tenancy and that she paid the Appellant rent for her occupation.

21. Based on this largely unchallenged evidence and the exhibits provided by Ms. Phillips the Tribunal found the following facts.

22. On 10 May 2015 the Appellant made an application for a selective licence in respect of the property, which is a self-contained ground-floor flat in single occupation comprising two bedrooms, a living room, kitchen and bathroom. It is situated within the London Borough of Waltham Forest and is owned by the Appellant. The property is let on a single tenancy to Mrs. Muza, who has been in occupation throughout the period in question.

23. That application was granted on 15 July 2015 and a selective licence was granted for the period up until 31 March 2020 (page 82). It was accepted by the Appellant that he had received this licence. The Tribunal was satisfied that, had he read the licence, the Appellant would have been aware of this. There was no doubt that the Appellant knew, or ought to have known, when this licence expired.

24. On 2 February 2021 the Respondent wrote to the Appellant to inform him that he needed to apply for a new licence if the property was still

one which needed one (page 89). The Appellant accepted that this letter was sent but his case was that he never received it. For reasons which will become clear, it is unnecessary for the Tribunal to make a finding about whether it was received or not.

25. On 31 March 2021 Ms. Phillips visited the property where she met Mrs. Muza, who said that she had been there for the past 10 years and paid £1,400 per month in rent. The Tribunal accepted this.

26. Whilst at the property Ms. Phillips inspected it and found that there were a number of defects present, in particular in the bathroom. The bath panel was in poor and unhygienic condition, there was exposed wiring to the centre ceiling light, the wash-hand basin was chipped and cracked and the mechanical ventilation did not work. The Tribunal was provided with photographs of the bathroom taken during this inspection (page 120).

27. In the course of the hearing the Appellant accepted that the photographs showed the state of the bathroom at the time. He argued, however, that the mechanical fan was, in fact, working at the time and that he had been unaware of the defects. The Tribunal heard oral evidence from Ms. Phillips, which it accepted, that she had tried to switch the fan on and although it made a noise, she tested with a piece of tissue paper to see if it was extracting, and found that it was not. On the basis of the photographs and this evidence the Tribunal was satisfied that the disrepair identified by Ms. Phillips in her statement was present at the time.

28. On 20 September 2021 the Respondent wrote again to the Appellant at a number of addresses informing him that he needed to apply for a licence. His case was, again, that these were not received by him. No application for a licence was made.

29. Then on 30 September 2021 a notice was sent to the Appellant informing him of the Respondent's intention to issue a civil penalty (page 180). There is no doubt that this was received by him as in response to it, on 4 October 2021, he sent an e-mail to the Respondent (attaching a copy of the notice) stating that he had been out of the country and did not receive the letters (page 208).

30. On 12 October 2021 an application was submitted for a selective licence for the property (page 219) though the application was in the name of Mr. Arfan Rahman, not his father.

31. The Respondent considered the Appellant's representations and decided not to change its decision, other than to reduce the penalty from £6,000 to £4,800 in order to implement its policy of giving a 20% discount if a licence is subsequently applied for. A final notice was sent to the Appellant on 22 November 2021 (page 234).

32. The Tribunal made a number of further findings arising from the evidence it heard during the course of the hearing. The Appellant was asked whether he had any other properties in Waltham Forest. He said that he had a few others, and then said that he had 3 others. He and his son appeared very unclear as to the precise addresses of these properties. Eventually they identified three specific properties which, they said, also had selective licences and in respect of which the licences had been renewed. They said that the licences had been renewed because the Respondent had asked them to do so.

33. Ms. Phillips, on behalf of the Respondent, confirmed that two properties had had selective licences, both of which had expired on the same date as that in respect of this property, and both of which had been renewed. The third property in fact now had a different type of licence.

34. It was clear to the Tribunal, therefore, that not only did the Appellant have a previous licence for the property which stated that it came to an end in March 2020, he also had two other licensed properties whose licences came to an end on the same date and whose licences were renewed on the basis of a reminder from the Council. It is inconceivable, therefore, that the Appellant would not, despite his protestations to the contrary, have been aware, at the very least, that there was a very high likelihood that a new licence was required for this property also.

35. Other aspects of the evidence caused the Tribunal significant concerns about the Appellant's management of property. His evidence was that he was no good at IT and that the administrative parts of the business were, in fact, carried out by his son Arfan. Arfan's evidence to the Tribunal was that he was in Pakistan from November 2020 until April 2021, which suggested that nobody was dealing with that part of the management during that time. This period covers the date the Respondent's first reminder letter was sent and the evidence is consistent with the representation sent to the Respondent in October 2021 (page 208). This says that he did not receive the letters as he was out of the country.

36. The Appellant and his son were at pains to tell the Tribunal that whenever they were asked for something from the Respondent, such as a gas safety certificate, they provided it. The overwhelming impression gained by the Tribunal was that they had a wholly responsive attitude towards management and only took steps when specifically requested to do so.

37. This approach was also shown in their evidence about the disrepair to the bathroom. Their response was that they had not been told about it by their tenant and so could have done nothing about it. It was clear from their evidence that they did not conduct regular formal inspections of the property. When it was pointed out to the Appellant that condition 16 on the selective licence granted in 2015 contained a

requirement to conduct regular inspections (page 86) his reply was that he had not read the conditions on the licence.

38. When asked to further clarify what properties he owned, the Appellant disclosed that he also had a property in Lewisham and several properties in Birmingham, the latter being managed by agents. Again, he and his son appeared very unclear as to the actual addresses of those properties.

39. Overall, the Tribunal considered the Appellant's evidence showed a disturbing lack of engagement with the proper day-to-day management of his properties.

Has the Alleged Offence Been Committed

40. Considering the findings set out above there was no doubt that the necessary elements of the offence had been made out. Indeed, they were largely accepted by the Appellant himself.

41. The only issue which was raised by the Appellant was his contention that he had a reasonable excuse for not obtaining a licence. The basis of his argument was that, as he said in the hearing, he "had no clue that his licence had expired".

42. The Tribunal was satisfied that that argument was completely unmeritorious. The Appellant had a copy of the licence which stated its expiry date. He had two other properties which had the same kind of licence and whose licences ended on the same date. He received a notice from the Council telling him that these licences needed to be renewed and he did renew them. It is simply unarguable that, given those facts, a defence of reasonable excuse can be made out, even if, as alleged, he did not receive a reminder in respect of this particular property. His failure to licence is not because of a reasonable excuse on his part but, rather, is an indication of his poor attitude towards management, which is only to do things when told to do so.

43. For those reasons the Tribunal was satisfied beyond reasonable doubt that the offence had been committed.

The Appropriate Penalty

44. It follows from the Tribunal's conclusion above that the alleged offence had been committed by the Appellant, that the Respondent had power to issue a financial penalty to him under section 249A of the Act.

45. The Tribunal was satisfied that the necessary procedural requirements prior to the imposition of a financial penalty had been complied with as set out in the findings above.

46. Therefore, the only remaining issue for the Tribunal was to consider what the appropriate financial penalty is.

47. The evidence in Ms. Lovett's statement (pages 123 to 128) was that, having applied the Respondent's policy, she concluded that the appropriate penalty was £6,000 which was subsequently reduced to £4,800 as required by the Respondent's policy to reduce penalties by 20% if a licence application is made.

48. In reaching this conclusion the Respondent took account of its policy. This states that for an offence of this kind, where a landlord controls five or fewer dwellings, and in the absence of other relevant factors or aggravating features, the offence is a moderate band 2 offence attracting a penalty of £5,000 (page 146).

49. The policy also states that aggravating features can lead to an increased penalty (page 146). The condition of the property, including the nature and extent of any significant hazards that are present, may, under the policy, justify an increase in the penalty. The Respondent bore this provision in mind and treated the disrepair in the bathroom as an aggravating feature (para 19 at page 126).

50. The policy also states that demonstrated evidence that the landlord was familiar with the need to licence, for instance because they are a licence holder in respect of other premises, is also an aggravating factor (page 147). The Respondent also took this into account (para 18 at page 126).

51. When the aggravating features were taken into account the penalty was increased to £6,000.

52. The Appellant put forward no arguments why the Tribunal should depart from the Respondent's policy. He argued that he was unaware of the disrepair, and he drew attention to remedial works that he has since carried out. In summary, his case was simply that the size of the penalty was unfair. However, the Tribunal considered that there was no doubt that the correct starting point under the policy had been used and that the aggravating defects existed. It was satisfied that, in any event, proper regular inspections were not being made as they should have been. The Appellant's arguments were not sufficient to reduce the aggravating effect of the disrepair.

53. In any event, by far the more serious aggravating feature was the Appellant's clear failure to licence despite his obvious familiarity with the licensing system.

54. In the Tribunal's view, the Appellant did not establish any basis for reducing the penalty imposed upon him. In addition, the Tribunal concluded that it was not satisfied that there were any reasons for departing from the Respondent's policy in respect of the setting of financial penalties and it was not satisfied that the purposes of that policy would be met if there were a departure from that policy.

55. In the course of the hearing Mr. Calzavara reminded the Tribunal that it has power to increase a penalty, and he invited it to do so on the basis that the Appellant's oral evidence showed that he controlled more than 5 properties and so he should be treated under the policy as controlling a significant property portfolio, thereby making the offence a band 4 serious offence with a starting point of £15,000.

56. Whilst the Tribunal accepted that it had the power to increase the penalty imposed, it decided that it would not be appropriate to do so on this occasion. It considered that as the Appellant was unrepresented it would not be fair to consider such a course without giving him time to consider his position and an opportunity to take advice. There was nothing in the papers which suggested that the Respondent may put forward such an argument and, as an unrepresented appellant, he could not be expected to appreciate the possibly of the penalty increasing in the absence of an indication that that might happen. The Tribunal considered that the necessary adjournment which would be needed to enable the Appellant to take such advice would be disproportionate and inconsistent with the overriding objective to avoid delay.

57. Had the Respondent wished to do so, they could have sought information from the Appellant about the extent of his property holdings and, if they considered that the information disclosed would lead to an increase in the penalty, they could have put such an argument forward in their statement of case. Had that been the case, the Tribunal may well have taken a different approach. However, in the particular circumstances of this case the Tribunal decided not to increase the amount of the penalty imposed.

Conclusions

58. It follows from what is set out above that the Tribunal concluded that the appeal should be dismissed and the penalty of £4,800 upheld.

Name: Tribunal Judge S.J. Walker **Date:** 31 August 2022

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.