FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00FY/HNA/2022/0033**
Property	:	**128 The Habitat, Woolpack Lane, Nottingham, NG1 1GJ**
Applicant	:	**Mrs S Silver**
Representative	:	**Ms O Silver**
Respondent	:	**Nottingham City Council**
Type of Application	:	**An appeal under paragraph 10 of Schedule 13A to the Housing Act 2004 against a Financial Penalty**
Tribunal Members	:	**Judge M K Gandham** **Mr A McMurdo MCIEH**
Date of Hearing	:	**3 November 2022**
Date of Decision	:	**13 January 2023**

DECISION

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Decision

1. The Tribunal determines that the Final Notice dated 5 May 2022 given to Mrs Sandra Silver be cancelled.

2. The Tribunal orders, under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, that Nottingham City Council reimburse Mrs Sandra Silver the whole of the tribunal application fee and the hearing fee, being a total sum of £300.

Reasons for Decision

Introduction

3. By an application dated 15 June 2022, Mrs Sandra Silver ('the Applicant') applied to the First-tier Tribunal ('FTT') to appeal a decision to impose a financial penalty, and the amount of that penalty, upon her under paragraph 10 of Schedule 13A to the Housing Act 2004 ('the Act'). The penalty had been imposed by Nottingham City Council ('the Respondent') under section 249A of the Act, in respect of the property known as 128 The Habitat, Woolpack Lane, Nottingham, NG1 1GJ ('the Property').

4. The Respondent had, on 16 March 2022, given to the Applicant a notice of their intention to impose the penalty ('the Notice of Intent') and, on 5 May 2022, the Respondent gave to the Applicant a Final Notice in respect of an offence under section 85 of the Act (failure to licence a Part 3 house – selective licensing) ('the Final Notice').

5. Although the application was received out of time, the Tribunal, after considering representations from both parties, found that the Applicant had provided a reasonable explanation for the late submission and exercised its discretion to extend the time limit for receipt of the application. In that preliminary decision, dated 3 August 2022, the Tribunal issued directions, the time limits for which were extended in further directions dated 13 September 2022. A hearing was scheduled for 3 November 2022.

6. The Tribunal received statements and a bundle of documents from the Respondent on 5 September 2022 and a bundle of authorities from them on 2 November 2022. A statement and bundle of documents was received from the Applicant on 18 October 2022.

7. Although in her application the Applicant also sought recovery of her costs from the Respondent, the Tribunal explained to her, at the hearing, the limited powers of the FTT to award costs under the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ('the Rules'). The Tribunal confirmed that the application for costs would be stayed pending the issuing of this decision. The Applicant would then have 28 days after the date on which the Tribunal sent the decision to her, to notify it as to whether she wished to proceed with the same.

The Law

8. Under section 249A of the Act, 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'*. The imposition of the penalty is an alternative to prosecution for a relevant housing offence.

9. Section 249(A)(2) defines the relevant housing offences as offences 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).

10. Section 249A(3) of the Act confirms that only one financial penalty can be imposed on any person in respect of the same conduct and section 249A(4) confirms that the amount of any financial penalty cannot exceed £30,000.

11. Paragraphs 1 to 9 of Schedule 13A to the Act set out the procedure for imposing financial penalties and the person upon whom a final notice is given may appeal to the Tribunal under paragraph 10 of Schedule 13A to the Act which provides:

    "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."

12. Paragraph 12 of Schedule 13A to the Act states that a local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions to impose financial penalties and the Secretary of State has issued 'Guidance for Local Housing Authorities: Civil penalties under the Housing and Planning Act 2016 (April 2018) ('the Guidance'). Paragraph 3.5 of the Guidance sets out a list of factors which local housing authorities should consider when assessing the level of any penalty, these being:

    - the severity of the offence;
    - the culpability and track record of the offender;

- the harm caused to the tenant;
- the punishment of the offender;
- to deter the offender from repeating the offence;
- to deter others from committing similar offences; and
- to remove any financial benefit the offender may have obtained as a result of committing the offence.

Background

13. On 1 August 2018, the Respondent implemented a Selective Licensing Scheme. The Property was located within the scheme area and, accordingly, required a licence if tenanted unless certain exceptions applied.

14. The Property was initially granted a Temporary Exemption Notice (TEN) in August 2019, following an application made by the Applicant, due to the Property being on the market for sale. The Applicant made a further application for a TEN in November 2019 (for the same reason) and the Respondent granted that notice in December 2019. This second TEN expired on 12 February 2020.

15. In February 2021, the Respondent carried out a Land Registry search on the Property. The search disclosed that the proprietor of the Property was Michael Ellman Silver of Green Lane Cottage, Green Lane, Stanmore, Middlesex (Dr Silver – the Applicant's husband) and a council tax search revealed that the Property appeared to be tenanted.

16. On 24 February 2021, the Respondent wrote to Dr Silver, including with their letter notices under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 (requesting details of ownership and occupation) and under section 235 of the Act (requesting details of tenancies and management of the Property). The letter stated that, as temporary exemption for the Property had expired in February 2020, the Property required a licence. The letter also stated, in a box detailed "*ACTION REQUIRED*", that Dr Silver needed to submit a licence application within 10 days of the letter or make an application for "*a temporary exemption*".

17. The Applicant contacted the Respondent on 26 February 2021 with regard to the letter received by Dr Silver, and Miss Cockerton (a Compliance Officer from the Respondent's Safer Housing Team) emailed the Applicant, on 1 March 2021, to inform her that she would need to obtain a licence for the Property and detailed the procedure for obtaining the same.

18. On 2 March 2021, the managing agent for the Property, Walton & Allen Lettings Limited ('Walton & Allen'), emailed the Respondent to ask whether a further TEN could be obtained due to problems relating to the sale of the Property. On 3 March 2021, the Respondent wrote to Walton & Allen enclosing section 16 and section 235 notices and, on 4 March 2021, Dr Silver wrote to Miss Cockerton and confirmed that Walton & Allen were going to contact the Respondent concerning temporary exemption.

19. Following this initial correspondence, additional letters were sent to Dr Silver and Walton & Allen on 23 March 2021. Both letters allowed the recipients a further 10 working days from the date of those letters to make an application for a licence, however, both letters also included links for applications for temporary exemptions.

20. On 24 May 2021, the Respondent emailed Walton & Allen and confirmed that TENs could not be issued for longer than six months in total and, on 7 June 2021, the Respondent confirmed to Walton & Allen that, following the expiration of the second TEN for the Property on 12 February 2020, no further exemptions could be granted and a licence application would need to be made.

21. The Respondent visited the Property on 11 October 2021, where they met Ms Amadi who confirmed that she was a tenant of the Property. She stated that she paid £825 per calendar month rent to Walton & Allen and that Walton & Allen dealt with any repairs required to the Property. She provided the Respondent with an unsigned copy of her tenancy agreement, which detailed the Applicant as the landlord.

22. On 25 October 2021, the Respondent sent further letters to Dr Silver and Walton & Allen, which confirmed that the Property had been visited by them on 11 October 2021. Both letters stated:

    "***ACTION REQUIRED***

    You must submit a licence application or make an application for temporary exemption"

    The letters also stated that, as the Property was being operated without a licence, further enforcement action was being considered and the letters detailed the possibility of a civil penalty notice being imposed.

23. On 29 October 2021, the Applicant made a telephone call to the Respondent requesting a further TEN for the Property. The Applicant stated that she was not aware that the TEN had expired and thought that Walton & Allen were dealing with the same.

24. After reviewing the evidence collected, the Respondent considered that the Applicant was actually the landlord of the Property, not Dr Silver, as the Applicant was listed as the landlord on the tenancy agreement. As such, on 1 November 2021 a copy of a letter, in the same terms as the letter sent to Dr Silver on 23 March 2021, was issued to the Applicant. Again, this letter contained links for both a licence application and an application for a temporary exemption.

25. On 8 November 2021, Dr Silver emailed Miss Cockerton confirming that they had telephoned her contact number and spoken to someone called 'James', that they were awaiting a telephone call from her and were anxious to "*sort this matter out*".

26. On 15 November 2021, as the Respondent had not received the licence application, a final warning letter was sent to the Applicant allowing her a further 10 working days to make an application for the same. Again, this letter contained links on how to obtain both a licence and a temporary exemption. The same day, the Respondent received a telephone call from the Applicant stating that Walton & Allen were going to apply for the licence and, on 17 November 2021, the Applicant confirmed that the application should be with the Respondent the following day.

27. Due to problems with transferring funds to Walton & Allen, the Applicant obtained a paper application form from the Respondent on 22 November 2021, for which she made an advance payment of £35 and, on 29 November 2021, Dr Silver confirmed that Walton & Allen would be forwarding the application to the Respondent on their behalf. The application was finally received by the Respondent from Walton & Allen on 16 December 2021.

28. After a review of the decision documents, the Respondent decided to take further enforcement action against both the Applicant and Walton & Allen. They considered that a financial penalty was the most appropriate and effective sanction against the Applicant as she had received a number of warnings and the Property had been unlicensed for a prolonged period.

29. The Respondent completed their civil penalty 'calculator tool' and calculated a penalty of £2,880 was justified. The Notice of Intent, detailing the proposed penalty, was sent to the Applicant on 16 March 2022.

30. Representations were received from Dr Silver by email on 13 April 2022 and, after receiving an extension from the Respondent, further representations were received on 18 and 19 April 2022. Following consideration of the representations, the Respondent deemed that no change to the penalty was required and a letter responding to the representations, along with the Final Notice, was issued to the Applicant on 5 May 2022, confirming the imposition of a financial penalty of £2,880.

Hearing

31. An oral hearing was held via the Video Hearings service on 3 November 2022. The Applicant attended with Dr Silver and was represented by her daughter, Ms Olivia Silver. The Respondent was represented by Miss Sabina Bashir (a solicitor employed by the Respondent) and Miss Charlotte Cockerton.

The Submissions

32. The Background to the application (as detailed above) was established from the submissions of both parties and did not appear to be in dispute.

33. The Applicant submitted that the Respondent had failed to comply with legislation regarding the imposition of a financial penalty, as well as its own enforcement policy when issuing the Final Notice against the Applicant, for the following reasons:

- the Applicant was not a "*person having control*", so no offence had been committed by her;
- if an offence had been committed by the Applicant, she had a reasonable excuse for committing the same;
- the Respondent had failed to comply with its own enforcement policy and the Guidance in deciding whether to impose a financial penalty; and
- the level of the penalty was excessive as the Respondent had incorrectly applied their own penalty calculation.

Person Having Control

34. Ms Silver, on behalf the Applicant, submitted that the Applicant was not a person having control of the Property, so no offence had been committed by her. She stated that it was Dr Silver who owned the Property and Walton & Allen who both arranged the tenancy and collected the rent for him, as the Applicant and Dr Silver lived in London, 117 miles away.

35. Ms Silver stated that Walton & Allen were professional managing agents and had been placed in charge of the day-to-day management of the Property. As such, she submitted that they were the persons who had control of the Property and the Respondents had already imposed a financial penalty on them.

36. With regard to the tenancy agreement being in the Applicant's name, Ms Silver stated that the Applicant did not have any of the paperwork relating to the Property, which she stated was with Walton & Allen, and had never even had sight of a tenancy agreement. She noted that the tenancy agreement in the Respondent's possession was unsigned and presumed that the Applicant's name had been detailed in error by Walton & Allen, as the Applicant dealt with much of the communication on behalf of Dr Silver, who was 87 years old and had a severe hearing impairment.

37. Ms Silver confirmed that Dr Silver was the person who had signed the management agreement with Walton & Allen and the only person to receive any benefit from the rent for the Property.

38. Ms Silver did not dispute that the Applicant had made the applications for the TENs for the Property but stated that this was back in 2019. In addition, Ms Silver stated that, although the Applicant had previously owned other properties in the building, all of those flats had been sold and the Property was the only flat remaining to be sold due to a cladding issue having arisen.

39. In relation to a statement of account from Walton & Allen and maintenance invoices which also detailed the Applicant's name, Ms Silver submitted that this was for correspondence purposes only. She stated that Dr Silver was the account holder with Walton & Allen and that maintenance was arranged through them. Ms Silver also stated that, although the rent received from Walton & Allen was paid into an account in the joint names of the Applicant and Dr Silver, the joint account was created solely for practical purposes, however, the income from the Property belonged to Dr Silver and his accountants would be able to confirm the same.

40. Following the hearing, at the Tribunal's request, the Applicant provided a copy of the management agreement with Walton & Allen for the Property, which was signed by Dr Silver in September 2020 and confirmed that he was the landlord. The Applicant also provided a Statement of Account in Dr Silver's name from Walton & Allen for the rent received from Ms Amadi and a letter from BDO LLP (the Applicant and Dr Silver's accountants) which confirmed that the rental income for the Property belonged to Dr Silver.

41. Miss Cockerton on behalf of the Respondent, in her Statement of Reasons, submitted that, having considered the evidence gathered during the investigation including the tenancy agreement of the Property, the Respondent concluded that the Applicant was the "*person having control*" of the Property under section 263(1) of the Act. She stated that a "*person having control*" did not need to be the owner of the Property under the Act, but the person who received the rack-rent, whether on their own account or as an agent or trustee of another person.

42. She stated that it was the Applicant who had previously submitted applications for TENs for multiple properties within the building, including the Property, suggesting she was a person having control and that she had also been the main point of contact for the Respondent regarding the Property through numerous telephone calls and emails.

43. Miss Bashir, at the hearing, also pointed to invoices submitted by the Applicant in her bundle relating to maintenance of the Property – an invoice from Stoneyard and RMG Plumbing – being addressed to the Applicant. She suggested that this too evidenced that the Applicant had a greater control over the maintenance of the Property than was being suggested by Ms Silver.

44. Miss Cockerton did confirm, at the hearing, that the application received for the selective licence had been made in Dr Silver's name. She also accepted that, although the emails received by the Respondent were received from the Applicant's email address, that the majority of the emails from March 2021 were detailed as being sent from Dr Silver not the Applicant.

Reasonable Excuse

45. Ms Silver submitted that if the Applicant had committed an offence, she had a reasonable excuse for doing so for two reasons. Firstly, the Applicant had not been made aware that the Property was no longer exempt from requiring a licence and, secondly, that Walton & Allen had been appointed to manage the Property and the obligation to obtain a licence had been delegated to them.

46. In relation to the temporary exemptions, Ms Silver submitted that the Applicant had not received notice that the temporary exemption for the Property had expired until February 2021, when a letter was sent to Dr Silver stating the same. Ms Silver stated that the Applicant, who was 79 years old and not computer literate, had not received either of the Notices for the temporary exemptions sent by email by the Respondent. She also stated that the temporary exemption application forms failed to state that only two exemptions were allowed.

47. In addition, Ms Silver stated that the letter sent to Dr Silver on 24 February 2021 confirmed that he could either make a licence application or make an application for a temporary exemption and that, following this, Dr Silver had emailed Miss Cockerton to confirm that Walton & Allen would be making contact regarding making a temporary exemption application. Ms Silver stated that no reply was received to this email and that the following letter sent to Dr Silver, dated 23 March 2021, again, gave links for both licence applications and temporary exemption applications.

48. Ms Silver stated that Walton & Allen also corresponded with the Respondent and that, despite contacting the Respondent in March 2021 regarding making an application for a TEN, they did not receive a reply from the Respondent confirming that such an application was no longer available for the Property until June 2021. Ms Silver stated that this information was not forwarded on to either the Applicant or Dr Silver and that the further letters they both received from the Respondents, in October and November 2021, both referred to being able to make an application for a temporary exemption, again providing links for the same. As such, Ms Silver submitted that at no point prior to November 2021 was it made clear to the Applicant that a further temporary exemption could not be obtained for the Property.

49. In relation to the instruction of the managing agents, Ms Silver submitted that as Dr Silver lived some distance from the Property, Walton & Allen were instructed to fully manage the Property, which included dealing with communications, collecting rent, maintenance queries and licence applications.

50. Ms Silver referred to the decisions of the Upper Tribunal in *D'Costa v D'Andrea & Others* [2021] UKUT 144 (LC) and *Ekweozoh v London Borough of Redbridge* [2021] UKUT 0180 (LC) ('*Ekweozoh*'). Ms Silver submitted that the Upper Tribunal in those cases confirmed that the defence of 'reasonable excuse' could be available when a landlord had employed professional organisations with knowledge about licensing to deal with the management of the property. She referred to the comments of the Upper Tribunal in *Ekweozoh*, in which it was stated that engaging "*the services of an agent, as a responsible landlord in her circumstances would have done, is a highly relevant consideration*". Ms Silver submitted that Walton & Allen were respected agents in Nottingham and that Dr Silver had acted responsibly by instructing them to manage the Property due to the distance he lived away from it.

51. In addition, referring to the decision of the Court of Appeal in *Palmview Estates v Thurrock Council* [2021] EWCA Civ 1871, Ms Silver stated that it was clear that Dr Silver had taken "*simple steps*" to avoid committing the offence, such as immediately contacting the Respondent and informing them that Walton & Allen would be dealing with any applications required.

52. Finally, Ms Silver referred to the decision of the High Court in *R v Waltham Forest LBC (DC)* [2020] EWHC 1083 (Admin), in which it stated that the absence of the defendant knowing that they were in control of a licensable property could be relevant to the defence of reasonable excuse. Ms Silver submitted that, in this case, the Applicant was under the impression that an exemption could be

obtained and that Walton & Allen were dealing with the Respondent in respect of obtaining the same.

53. With regard to the management of the Property, Miss Bashir, on behalf of the Respondent, submitted that the Applicant had applied for TENs for both the Property and other properties in Nottingham. As such, she submitted that the Applicant was fully aware of the Respondent's licensing scheme and relevant exemptions, despite living in London, and that this matter was, therefore, clearly distinguishable from the facts in *Ekweozoh*, in which the appellant had been absent from the country for 10 years and was unaware of the licensing regime.

54. Miss Bashir also did not accept that the Applicant was not computer literate, as she stated that much of the correspondence between the Applicant and the Respondent had been made via email, including the temporary exemption applications made by her.

55. In relation to the temporary exemptions, Miss Bashir stated that the Respondent had emailed copies of the TENs to the Applicant, the second of which clearly stated that the exemption would expire on 12 February 2020 and that no further exemptions could be granted.

56. Miss Cockerton accepted that there were errors in the letters sent to both Dr Silver and the Applicant, in that references to temporary emptions were made, however, stated that the Respondent had spoken to the Applicant over the telephone on numerous occasions and it had been explained to her that no further TENs could be granted. Miss Cockerton confirmed that she did not have transcripts of the telephone calls, nor had the Respondent provided any witness statements from the call handlers.

57. Following the hearing, at the Tribunal's request, the Respondent provided copies of the emails enclosing the TENs which they stated had been sent to the Applicant in 2019.

Decision to Impose Financial Penalty

58. In relation to the decision to impose a financial penalty, Ms Silver stated that the Property had not been without a licence for an extended period, which the Respondent contended was from August 2018 until 16 December 2021, but that Dr Silver had only been made aware that the exemption period had expired in February 2021. In addition, as the Property was tenanted from August 2021, Ms Silver submitted that the Property was only without a licence for a period of four months prior to the application being made.

59. Ms Silver also submitted that the Respondent had not complied with the Guidance which related to targeting rogue and criminal landlords letting out unsafe and substandard accommodation. Ms Silver stated that the offence was not severe – the Property having only been unlicensed for a short period, that the Applicant had committed no previous offences nor had a history of non-compliance, that there was no evidence of any potential harm to the tenant, the

Property was in a very good condition and that the Applicant had received no financial benefit as she was not the owner of the Property.

60. In addition, Ms Silver submitted that, in the Respondent's Civil Financial Penalties Policy (version 2.0) ('the Respondent's Penalties Policy') it stated that the Respondent would consider imposing a financial penalty as an alternative to prosecution. The Respondent's Penalties Policy also stated that, prior to considering a civil penalty, the Respondent had to be satisfied that there was sufficient evidence to provide a realistic prospect of conviction and that it would be in the public interest.

61. Ms Silver submitted that the public interest case had not been made out in this matter as the imposition of a penalty was not proportionate, no harm had been caused to the tenant, the offence was not serious and the Applicant and Dr Silver had not deliberately flouted any rules. As such, Ms Silver submitted that there was not even a need to impose a penalty as a deterrent to other landlords.

62. In addition, in relation to the Respondent's own Housing Enforcement and Compliance Guidance, version 9 ('the Respondent's Enforcement Guidance') [a copy of which was contained within the Applicant's bundle], Ms Silver stated that civil penalties were referred to as the highest form of enforcement action and should only have been considered where a landlord had a history of non-compliance or had failed to comply with initial and/or substantive enforcement action. In this case, Ms Silver submitted that there had been no informal action with the Applicant in relation to the application for a licence. The first letter the Applicant had received relating to the licence application was on 1 November 2021 and the second letter on 15 November 2021. Upon receipt of both letters, Ms Silver stated that the Applicant had been in touch with the Respondent and that, following a short delay due to problems with transferring funds to Walton & Allen (which the Respondent had been made aware of) the application had been made within a month.

63. Miss Bashir stated, at the hearing, that version 9 of the Respondent's enforcement policy was outdated and that there was no requirement in the Respondent's Penalties Policy stating that informal action needed to take place prior to a penalty being imposed. That being said, she stated that informal action had been ongoing for almost two years prior to the licence application being made, as letters and notices had been sent to the Applicant and Dr Silver in February 2021, March 2021, October 2021 and November 2021, confirming that the Respondent could take enforcement action against them.

64. Miss Bashir stated that the Applicant had been contacted on multiple occasions regarding temporary exemptions and, therefore, was aware of the licensing scheme. She also stated that, when the Respondent visited the Property in October 2021, the tenant had reported issues with the washing machine and the sink, which suggested that the Property was not being kept to a high standard as submitted by the Applicant. Miss Bashir accepted that all certifications were in place for the Property and that a 5% reduction was given for the same when calculating the amount of the financial penalty.

65. When questioned, Miss Cockerton confirmed that she accepted that the Property was in a satisfactory state of repair in October 2021.

66. The Respondent's bundle did not contain the Respondent's Enforcement Guidance but did include a copy of the Respondent's Penalties Policy.

67. Following the hearing, at the Tribunal's request, the Respondent provided the Tribunal with copies of the Nottingham City Council – Enforcement Policy and the Housing Enforcement Guidance referred to in Paragraph 1.2 of the Respondent's Penalties Policy (paragraph 1.2 confirmed that the Respondent's Penalties Policy was intended to work in accordance with both of these documents). Contrary to Miss Bashir's assertion at the hearing, the enforcement policy was still the version 9 copy which had been referred to by Ms Silver and which was contained within the Applicant's bundle.

Level of Penalty Imposed

68. Ms Silver submitted that the level of the penalty at £2,880 was excessive and that the Respondent had not followed its own policy when calculating the same. She submitted that the culpability should have been set at 'Low' as the failings were minor, the Property only having been unlicensed for a period of four months and the Applicant not having been aware that a licence was required (rather than a TEN) until November 2021. Ms Silver also stated that the Respondent did not take into account the fact that the Applicant was elderly with significant health issues and that the Property was being fully managed by Walton & Allen.

69. Ms Silver accepted that the seriousness of harm was 'Level C' and, consequently, submitted that the Penalty Band should have been between £600 and £1,200, with a starting point of £900.

70. Ms Silver stated that aggravating factors, such as the Applicant being aware of the licensing scheme since August 2018 were simply not true and that the Applicant had received no rental income for the Property as it belonged to Dr Silver. Ms Silver also submitted that there were several service charges which should have been deducted from the gross rental income. As such, Ms Silver submitted that the penalty should have been reduced to zero or set at the minimum sum.

71. The Respondent submitted that the calculation of the penalty was correct. The Respondent stated that the culpability level was 'Medium', as the Applicant had been aware of the licencing since August 2018 and had received a number of written warnings and reminders since that date. The Respondent also confirmed that mitigating factors, such as this being the Applicant's only property and the Property having the relevant certifications were taken into account when calculating the amount of the penalty.

72. The Respondent confirmed that expenses and fees were not deducted from the gross rental income, in accordance with their policy.

The Tribunal's Deliberations and Determinations

73. The Tribunal, under paragraph 10 of Schedule 13A to the Act, may confirm, vary or cancel a final notice, determining the matter as a re-hearing of the local housing authority's decision.

74. In reaching its determination the Tribunal considered the relevant law and all of the evidence submitted, written and oral, briefly summarised above.

Person Having Control

75. Under section 249A of the Act, a local housing authority may only impose a financial penalty on a person if it is satisfied "*beyond reasonable doubt*" that that person's conduct amounts to a relevant housing offence. The Final Notice stated that the financial penalty had been imposed on the Applicant as she being a "*person having control*" of the Property had failed to license it under section 85 of the Act, which the Respondent stated was an offence under section 95(1) of the Act.

76. Although it was clear that the Property was not licenced in August 2021 and that an application for a licence was not received by the Respondent until 16 December 2021, in order for the Applicant to have been guilty of the offence stated, she needed to have been a "*person having control*" of the Property.

77. Section 263 of the Act defines a "*person having control*" as being a person who "*receives the rack-rent of the premises (whether on his own account or as an agent or trustee of another person)*".

78. The Tribunal noted that the Respondent considered that the Applicant's previous dealings with the Property in relation to making applications for the TENs in 2019, together with her being detailed as the landlord of the Property on an unsigned tenancy agreement and her corresponding with the Respondent in relation to the Property, was sufficient evidence for them to determine that she was a person having control of the Property.

79. This was despite the Respondent having obtained Office Copy Entries in February 2021 detailing Dr Silver as the owner of the Property and the Respondent corresponding with Dr Silver, not the Applicant, in both February and March 2021. Following receipt of these letters, correspondence contained within the Applicant's bundle demonstrated that, although the emails were sent from the Applicant's email address (which the Tribunal accepted was an email address used by both the Applicant and her husband), the vast majority of these emails were detailed as being sent by Dr Silver.

80. In addition, the Tribunal noted that the Respondent had been informed by the tenant, Ms Amadi, that she paid the rent to Walton & Allen and that they were responsible for all of the repairs to the Property, that the tenancy agreement had not been signed and that in the representations sent following the Initial Notice, Dr Silver had made it clear that the Applicant was not legally responsible for the Property.

81. The Tribunal considered that all of these factors should have raised doubts with the Respondent as to whether the Applicant was, in fact, a "*person having control*" of the Property.

82. Following the hearing, the Tribunal received the management agency agreement made between Dr Silver and Walton & Allen, as well as a Statement of Account (which detailed Dr Silver as the account holder with them) and a letter from BDO LLP, which confirmed that the full rental income and expenditure for the Property was detailed in Dr Silver's tax returns.

83. The evidence indicated that the rent was collected from the tenant by Walton & Allen, that it was placed into an account with them in Dr Silver's name and that the Applicant's only dealings with it was when the income was transferred to Dr Silver by Walton & Allen into a joint account that she held with him. The Tribunal found that the placing of the money into a joint account did not amount to the Applicant having *received* the rent and that, consequently, the Applicant was not a "*person having control*" of the Property. As such, the Applicant was not guilty of an offence under section 95 of the Act and a financial penalty could not be imposed on her.

84. Accordingly, the Tribunal determines that the Final Notice should be cancelled.

Other Grounds of Appeal

85. Although the Tribunal determines that the Final Notice should be cancelled, for the benefit of the parties, it has briefly considered the other grounds of appeal raised by the Applicant.

86. Had the Tribunal found that an offence had occurred, the Tribunal would have considered that the Applicant had a reasonable excuse for having control of an unlicensed property under section 95(4) of the Act.

87. The Tribunal did accept that the Applicant had not realised that she was no longer able to obtain a temporary exemption for the Property, as all of the recent correspondence between Miss Cockerton and Dr Silver (in February 2021, March 2021 and October 2021), with Walton & Allen (in March 2021 and October 2021) and with the Applicant (in November 2021) had mistakenly referred to the ability to obtain both a licence or a temporary exemption. The letters had failed to point out that no further TENs could be applied for the Property, as it had already been exempted twice, and emails sent to the Respondent indicated that Dr Silver and Walton & Allen were actively seeking a further TEN.

88. In addition, although the Respondent informed Walton & Allen, in an email of 7 June 2021, that no further TENs could be applied for the Property, there was no evidence that Walton & Allen had passed this information on to either Dr Silver or the Applicant. The Tribunal considers that this too could amount to the Applicant having a reasonable excuse for controlling an unlicensed property, as intimated in the decision by the Upper Tribunal in *Ekweozoh*.

89. In relation to whether a financial penalty should have been imposed even if an offence had occurred and the Applicant had no reasonable excuse, the Tribunal considers that, in the circumstances of this case, based on the Respondent's own enforcement guidance, it should not.

90. Although the Respondent stated that the Applicant had, during various telephone conversations, been informed that she was not able to obtain a further TEN for the Property, the Respondent had failed to provide any corroborating evidence of those conversations and the letters sent to the Applicant indicated otherwise. The Property was without a licence for a period of four months and the first letter sent to the Applicant regarding the proposal to impose a financial penalty was sent on 1 November 2021, with a final letter being sent on 15 November 2021.

91. The Tribunal did not consider that the offence on its own was serious enough to warrant the imposition of a financial penalty, nor that the Respondent had shown that the Applicant had a history of non-compliance or had failed to respond to initial or substantive enforcement action. It was clear from the evidence that Dr Silver had tried to contact Miss Cockerton following receipt of his letter in March 2021 and, again, following receipt of the Applicant's letter in November 2021. The Applicant had also informed the Respondent of the difficulties that she was having in relation to the online application in November, she had paid for a paper application to be sent to her at the end of November and the licence application had been submitted by Walton & Allen on 16 December 2021, some six weeks after the Applicant had received the initial correspondence from Miss Cockerton. As such, there was no evidence of a failure to respond.

Order under Rule 13

92. Although, as previously stated, the Applicant's application for costs has been stayed pending this decision, the Tribunal can, on its own initiative, under Rule 13(2) "*make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party…*". In this matter, the Applicant had paid an application fee of £100 and a hearing fee of £200.

93. Having found that the Respondent should have had some doubts as to whether the Applicant had committed an offence in the first instance and, then, should have queried whether the imposition of a financial penalty was the appropriate type of enforcement action in this case, especially considering the mistakes made on multiple letters between the Respondent and both the Applicant and Dr Silver, the Tribunal finds it appropriate to make an order under Rule 13(2) and orders the Respondent to reimburse the Applicant the sum of £300.

Appeal Provisions

94. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M K GANDHAM

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Judge M K Gandham