FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00DA/HNA/2021/0076**
Date of Hearing	**:**	**26 January 2023**
Property	**:**	**81 Bayswater Road, Leeds LS8 5NW**
Appellant	**:**	**Mr David Howarth**
Respondent	**:**	**Leeds City Council**
Type of Application	**:**	**Housing Act 2004, Section 249A & Sch. 13A**
Tribunal Members	**:**	**Mr Phillip Barber (Tribunal Judge)** **Mr Huw Thomas (FRICS)**
Date of Decision	**:**	**07 February 2023**
Date of Determination	**:**	**23 February 2023**

DECISION AND REASONS

Decision

We have decided that the appropriate financial penalty under section 249A of the Housing Act 2004 for the offence of failing to comply with an improvement notice under section 95(1) of the Housing Act 2004 is £4000.

Reasons

Introduction

1. This Decision and Reasons relates to 1 appeal against the imposition by the Respondent of a financial penalty under section 249A of the Housing Act 2004 ("the Act") in relation to 1 property owned by the Appellant, Mr David Howarth. The property is 81 Bayswater Road, Leeds LS8 5NW ("the property").

2. We held an oral face to face hearing of this appeal. The Appellant came to the hearing with his friend and lay representative, Ms K Spencer, who has been helping him throughout these proceedings and for the purposes of these proceedings stands as representative under rule 14 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. Unfortunately, shortly after the start of the hearing, the Appellant became too ill to remain and had to go home. He wanted Ms Spencer to remain to represent his interests at the hearing and we were content that that should happen. The Respondent did not object and having considered the overriding objective in rule 3 of the Procedure Rules, the Tribunal was content to continue in the absence of the Appellant. Ms Spencer proved herself to be a competent and effective representative who presented a well-prepared appeal, and we were grateful for her involvement in the proceedings.

3. The Respondent was represented by Mr Machin, of Counsel. We heard evidence from Mr Richardson, Letting Agent from Letsby Avenue, on behalf of the Respondent; Mr Paul Seddon and Mr Jason Murray, Principal (Senior) Housing Officers and we heard from Ms Jemma Jarrett (former employee at Letsby Avenue) and Ms Howarth (the Appellant's sister) on behalf of the Appellant.

4. There was no inspection of the property by the Tribunal, which was unnecessary, and we had a bundle of documents from the Respondent and a bundle of documents from the Appellant.

Findings of Fact

5. The Appellant is the registered owner of the Property which he rents out to paying tenants. He has owned the property since 29 August 2003 and since then has let the property to paying tenants. The Appellant owned at least 7 properties at the relevant time and in this regard can properly be described as a professional landlord. At various points the properties have been managed by the Appellant himself and at other points by his preferred letting agent, "Letsby Avenue".

6. On the 06 January 2020 the Harehills area of Leeds (as designated in a map) became a selective licensing area. The full designation is set out on pages 52 to 61 of the Respondent's bundle and the Property is situated in that area. Prior to the designation, the Respondent carried out an extensive city-wide consultation and advertisement campaign starting in August 2018 which we are satisfied was in accordance with Government guidance and sufficient for the purposes of a public awareness campaign and for public consultation.

7. In November 2020, following investigation by the Respondent into properties in the designated area, potentially occupied by tenants but without a licence, contact was made with the occupiers and a copy of the tenancy agreement was provided. The property was identified as owned by the Appellant with Letsby Avenue as agents.

8. Following further enquiries, the Respondent determined that an offence had been committed under section 95(1) of the Act by Mr Howarth and that he should be liable to a financial penalty.

The Legal Framework

9. By section 249A of the Housing Act 2004:

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

10. Section 95 of the Act provides that "(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part…but is not so licensed."

11. Subparagraph 95(4) provides that "it is a defence that he has a reasonable excuse (a) for having control or managing the house in the circumstances mentioned in subsection (1)…".

12. Section 263 defines the term “person having control” as the “person who receives the rack-rent” and “person managing” means the “the person, who, being an owner…receives (whether directly or through an agent…) rents…from persons who are in occupation as tenants…”.

13. By subsection (4) of section 249A the maximum penalty is £30,000 and subsection (6) provides that the procedure for imposing such a fine and for an appeal against the financial penalty is as set out in schedule 13A to the Act.

14. Paragraphs 1 to 3 of Schedule 13A set out the provisions in relation to a “Notice of Intent” which must be served before imposing a financial penalty. Paragraph 2 provides that the notice must be served within 6 months unless the failure to act is continuing (which is the case in this appeal) and paragraph 3 sets out the information which must be contained within the Notice.

15. After service of the Notice of Intent and following consideration of any representation made, paragraph 6 provides for the service of a “Final Notice”, which must set out the amount of the financial penalty and the information required in paragraph 8: i.e., the amount, the reasons, how to pay and information about the right of appeal.

16. Paragraph 10 of schedule 13A sets out the provisions in relation to such an appeal:

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

17. Accordingly, the Tribunal, in this appeal, has jurisdiction over the decision to impose a penalty; the amount of the penalty and can confirm, vary or cancel the final notice including increasing, if it so determines, the amount of the penalty. The appeal is by way of a re-hearing, which we have conducted.

18. We had to be satisfied beyond reasonable doubt that the conduct of the Appellant amounts to a "relevant housing offence" under section 95 of the Act – i.e. that Mr Howarth failed to comply with the licensing requirements under Part 3 of the Housing Act 2004.

Our Assessment of the Appeal

19. This is a re-hearing of the decision to impose a financial penalty for a purported offence committed by the Appellant as a result of contravening section 95 of the Housing Act 2004.

20. We find as fact that the Notice of Intent and Final Notice were properly served and that they contained the proper statutory information. There were no procedural irregularities.

21. There was no dispute that the property was not licensed under the selective licensing requirements and that Mr Howarth owned the property at the relevant time. Mr Howarth's claim is that the property was managed by Letsby Avenue at the relevant time and that they failed to inform him of the licensing requirements and also that, in any event, the advertising and information provided by the Local Authority was insufficient to bring the licensing requirements to his attention. His case is that it he did not wilfully fail to apply for a licence, that he applied and was granted a licence as soon as he knew about the requirement and would have done so earlier, had he known.

The Evidence of Mr Richardson

22. We found Mr Richardson to be a most unimpressive witness. Apparently, he has no written agreement for the management of properties with the property owners, instead relying on a verbal arrangement and a piece of paper with standard written terms on. He also told us that all of his documents and correspondence in relation to this property was not available as the software he uses was recently changed. He has produced no financial evidence in relation to his receipt of rents and when they stopped (i.e. to substantiate the fact that he ceased to manage the property over the few months when selective licensing became a requirement). He also claims to have sent an email on the 08 June 2020 advising Mr Howarth of the selective licensing requirements for the property. We were told at the hearing that the Respondent had asked for a copy of this email on several occasions, but it had not been sent. We were subsequently told

at the hearing by Mr Richardson that he hadn't looked for this email. Mr Richardson's evidence concerning dates is implausible. When asked about the fact his witness statement states that he commenced managing the property in November 2019 whereas the tenancy agreement is dated February 2019, and later on in the statement he states that he would regularly speak with Mr Howarth about selective licensing frequently between June and December 2019, his explanation seemed to be that they could not commence management in February due to some issue about rent – it was not entirely clear.

23. On the whole we found Mr Richardson to be a completely unreliable witness and we reject the fact that he told Mr Howarth about the licensing requirements at all until an email was sent by a member of his staff on the 21 October 2020. We also reject the claims made in his witness statement about the character of the Appellant and his sister (in evidence to us today). In our view, we think that Mr Howarth was not made aware of the licensing requirements by Letsby Avenue until after the visit to the property by the Respondent. Whilst ultimately the Appellant remains liable for a financial penalty under the Act, in our view, had Mr Richardson properly carried out his functions as a letting agent back in late 2019/early 2020, then it is likely the Appellant would have applied for a licence at that time. That fact, however does not absolve Mr Howarth from liability for reasons we explain below.

The Evidence of Mr Seddon and Mr Murray

24. Mr Seddon gave evidence and Mr Murray listened in, it being unnecessary to hear from him as his evidence supported that of Mr Seddon. Mr Seddon explained that at the relevant time he was of the view that as owner, the Appellant was a person who came within the definition in section 263 as either a "person having control" or a "person managing" or both and that as owner and landlord of an unlicensed property, the Appellant had committed an offence. Mr Seddon also gave evidence in relation to the extent of advertising adopted for the purpose of bringing the licensing requirements to the attention of landlord, tenants and the general public.

25. Apart from an alteration to the level of culpability (dealt with below), we accept Mr Seddon's (oral and written) and Mr Murray's (written) evidence entirely. We think Mr Seddon correctly identified the Appellant as a "person managing" the premises and we also accept the evidence that the advertisement campaign goes above what might ordinarily be expected of a Local Authority in bringing a new scheme to the attention of landlords, tenants and the general public. Mr Seddon has carried out a thorough and well-informed investigation into the breach and has utilised his expertise and experience in establishing where culpability should lie. For reasons given below we disagree with his view (and it follows the Respondent's view) as to the level of culpability but otherwise we find his reasoning to be sound.

The Evidence of Ms Howarth and Ms Jarrett

26. Ms Jarrett made a witness statement in these proceedings and gave oral evidence at the hearing. We accept her evidence entirely, although nothing significant turns on her evidence. There was some initial misunderstanding about whether Letsby Avenue were managing the property at the time selective licensing came in, but Ms Jarrett confirmed, and we accept that the property was managed during this period by Letsby Avenue. We think that the evidence of Ms Jarrett supports our view that Letsby Avenue did not inform the Appellant about selective licensing at the time it came in and not until after the visit by the Respondent.

27. Ms Howarth did not provide a witness statement, but we allowed her to address the Tribunal in any event. The Respondent did not object. Unfortunately, Ms Howarth became upset at the start of giving evidence and had to leave and subsequently went home to collect her children. Ms Howarth's evidence did not take the matter any further but we accept her evidence that she helped her brother (the Appellant) with his buy-to-let business and that he did not purposefully fail to obtain a licence.

28. In light of the issues raised in this appeal we need to consider in more detail where culpability lies.

Person Having Control or Person Managing

29. We cannot find that at the relevant time the Appellant was a person having control as we are unclear as to whether he received the rent or whether the rent was received by Letsby Avenue. We are, however, satisfied that the Appellant can properly be defined as a "person managing" within the definition of that phrase: he is the owner, and he received the rent for the property from tenants (either directly or through Letsby Avenue), none of that was in dispute. The Local Authority was correct, therefore, to identify him as a person who has potentially committed an offence under section 95(1).

30. It follows therefore that in order to avoid a penalty, the Appellant would have to bring himself within the scope of a defence under section 95(4) as having a reasonable excuse for the failure to apply for a licence.

Reasonable Excuse

31. In our view, neither of the Appellant's grounds of appeal amount to a reasonable excuse.

32. Firstly, we think the advertisement campaign was sufficient to bring the scheme to the attention of landlords, tenants, letting agents and the general public. Mr Machin in this regard relies upon the judicial review decision in *R(on the application of Croydon Property Forum Ltd) v Croydon London Borough Council* [2015] EWHC 2403 (Admin) which deals with the consultation requirements under section 80(9) of the 2004 Act. By any reasonable view, the use of leaflets, newspaper advertisements, bus and billboard advertising, writing to estate agents and such like undertaken by the Respondent in the lead up to the designation and set out

extensively in the witness statement of Mr Seddon must be sufficient for the purposes of bringing the scheme to widespread public attention and accordingly the fact that that Mr Howarth did not know about the scheme does not, and cannot be a reasonable excuse.

33. Secondly, the claim by the Appellant that Letsby Avenue, who were involved with managing the property (at least to some extent) at the relevant time, did not inform him about the requirement to apply does not amount to a reasonable excuse. Mr Machin in this regard referred the Tribunal to the decision in the Lands Tribunal of *Aytan v Moore* [2022] UKUT 27 where a similar claim was rejected as being capable of giving rise to a reasonable excuse. Whilst we have made findings that in our view Mr Howarth was not told about the requirement to obtain a licence until probably October 2020, this does not amount to a reasonable excuse under section 95(4). As was pointed out in *Aytan*:

> a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themself of the licensing requirements without relying upon an agent, for example because the landlord lived abroad.

34. We do not find that any of these factors are made out in the appeal before us.

35. It follows that we are satisfied beyond reasonable doubt that an offence has been committed under section 95(1) of the Act and that there is no defence of reasonable excuse for that offence. The only outstanding matter is in relation to the amount of penalty, and this is where we differ slightly from the Respondent's assessment.

The Amount of the Penalty

36. The starting point is the Respondent's policy in relation to civil penalties which has been provided in the Respondent's bundle. The policy document generally requires consideration of a matrix comprising of the level of culpability set against the level of harm. There are three levels of culpability ranging from high (intentional or reckless) through to medium (negligence) down to low (no fault) and likewise, three levels of harm, high (serious effect/vulnerability), medium (adverse effect that is not high) and low (low risk of harm or potential harm).

37. The policy thereafter sets out a harm/culpability matrix in which the level of harm is assessed in line with the level of culpability so as to provide a

starting point banding with a starting point within which a range of financial penalties might be expected. That starting point can then be increased or reduced within that range by reference to aggravating and mitigating factors.

38. The Respondent has set out in both the final notices its reasons and conclusions in respect to the policy and the factors leading up to the assessment of the level of harm.

The Offence

39. Taking account of the Respondent's Civil Penalty Policy, and assessing the issues anew, we do not agree with the Respondent's view that the level of culpability is high. The benchmark for a high level of culpability is intentionality or recklessness and for the reasons set out above, we do not think the Appellant has failed to comply recklessly. Instead, we think that the appropriate level is medium culpability which occurs when a "landlord commits an offence through an act or omission a person exercising reasonable care would not commit". Notwithstanding his reliance upon letting agents, in our view the Appellant as a professional landlord would be obliged to make himself aware of any laws pertaining to the control and management of properties within his portfolio and had the Appellant exercised "reasonable care" in this regard he would not have committed the offence. Conversely, we do not think that culpability could properly be classed as low as this would suggest little or no fault on the part of the Appellant, which we have not found.

40. In relation to harm, we again agree with the Respondent that this is properly classed as low harm.

41. It follows that as the level of culpability is medium and the level of harm is medium, the appropriate starting point is £5000.

Aggravating/Mitigating Factors

42. We disagree with the Respondent's assessment of aggravating factors. There is no evidence that the Appellant was motivated by financial gain and we have found as fact that if he had been informed of the selective licensing requirements early on, he would have applied.

43. We agree with the Respondent that the lack of previous convictions, issues with reading and writing and the voluntary steps the Appellant took to address the issue are all rightly mitigating factors. To these, however, we also add the fact that the Appellant has a degree of health issues and that he relied upon a letting agent to help him manage the property who failed to advise him, in a timely manner, about the requirement for a selective license. We think this should also be a mitigating factor. Each mitigating factor is worth 5% of £5000.

44. In those circumstances from the initial fine of £5000 we deduct £1000 (4 x £250) to arrive at £4000.

Conclusion

45. The result is that in relation to the offence with a starting point of £5000 we take off £1000 for mitigation to give a financial penalty of £4000. We accordingly determine the appropriate financial penalty to be £4000 which we think is "fair and proportionate but in all instances should act as a deterrent and remove any gain as a result of the offence".

Signed  Dated 07 February 2023

Phillip Barber, Judge of the First-tier Tribunal