



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER (RESIDENTIAL  
PROPERTY)**

<b>Case Reference</b>	<b>:</b>	<b>MAN/00CG/HNA/2022/0036 MAN/00CG/HNA/2022/0037</b>
<b>Property</b>	<b>:</b>	<b>1-10 Bank Apartments, 13a Gateford Road, Sheffield S7 1TE</b>
<b>Applicant</b>	<b>:</b>	<b>Adrian Russell Holmes &amp; Holmes Residential Property Limited</b>
<b>Representative</b>	<b>:</b>	<b>In person</b>
<b>Respondent</b>	<b>:</b>	<b>Sheffield City Council</b>
<b>Representative</b>	<b>:</b>	<b>Catherine Ferguson, Solicitor</b>
<b>Type of Application</b>	<b>:</b>	<b>Appeal against a financial penalty – Section 249A &amp; Schedule 13A to the Housing Act 2004</b>
<b>Tribunal Members</b>	<b>:</b>	<b>Tribunal Judge J. E. Oliver Tribunal Member S.A Kendall</b>
<b>Date of Determination</b>	<b>:</b>	<b>24<sup>th</sup> January 2023</b>
<b>Date of Decision</b>	<b>:</b>	<b>23<sup>rd</sup> February 2023</b>

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**DECISION**

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## **Decision**

1. The Final Notices dated 20<sup>th</sup> April 2022 are each varied to substitute the amount of the penalty of £1155 with £825.

## **Application**

2. This is an application by Adrian Russell Holmes (“Mr Holmes”) and Holmes Residential Homes Limited of which Adrian Russell Homes is a director, (“the Company”) to appeal financial penalties in the total sum of £2,310 issued by Sheffield City Council (“the Council”) pursuant to section 249A of the Housing Act 2004 (“the 2004 Act”) in respect of 1-10 Bank Apartments, 13a Gatefield Road, Sheffield (“the Properties”).
3. The Council issued the financial penalties for housing offences arising from the failure to licence the Properties as required by Section 95 of the 2004 Act.
4. The Final Notices dated the 20<sup>th</sup> April 2022, imposed a financial penalty for the Properties upon both Mr Holmes and the Company respectively for each of the Properties in the sum of £1155.00.
5. The Tribunal gave directions providing for the filing of statements and bundles and for the matter to be listed for a hearing on 24<sup>th</sup> January 2023. The Tribunal did not undertake an inspection of the Property; it was not necessary for the determination of the appeal.

## **The Law**

6. Section 249A (1) of the Act provides that a local authority may impose a financial penalty, where it is satisfied, beyond reasonable doubt, that the person’s conduct amounts to “a relevant housing offence”.
7. Section 249 (2) sets out what amounts to a housing offence and includes at s 249(c) an offence under section 234 of the Act, namely a failure to licence.
8. Section 249 (3)-(4) further provides that only one financial penalty can be imposed for each offence and that cannot exceed £30,000. The imposition of a financial penalty is an alternative to criminal proceedings.

## **Procedural requirements**

9. Schedule 13A of the Act sets out the procedural requirements a local authority must follow when seeking to impose a financial penalty. Before imposing such a penalty, the local authority must give a person notice of their intention to do so, by means of a Notice of Intent.
10. A Notice of Intent must be given within 6 months of the local authority becoming aware of the offence to which the penalty relates, unless the conduct of the offence is continuing, when other time limits are then relevant.

11. The Notice of Intent must set out:
  - the amount of the proposed financial penalty
  - the reasons for imposing the penalty
  - Information about the right to make representations regarding the penalty
12. If representations are to be made, they must be made within 28 days from the date the Notice of Intent was given. At the end of this period the local authority must then decide whether to impose a financial penalty and, if so, the amount.
13. The Final Notice must set out:
  - the amount of the financial penalty
  - the reasons for imposing the penalty
  - information about how to pay the penalty
  - the period for the payment of the penalty
  - information about rights of appeal
  - the consequences of failure to comply with the notice

## **Guidance**

14. A local authority must have regard to any guidance issued by the Secretary of State relating to the imposition of financial penalties. The Ministry of Housing issued such guidance (“the HCLG Guidance”) in April 2018: *Civil penalties under the Housing and Planning Act 2016- Guidance for Local Authorities*. This requires a local authority to develop their own policy regarding when or if to prosecute or issue a financial penalty.
15. Sheffield City Council has developed its own guidance (“the Policy”) that follows the HCLG Guidance in setting out the criteria to be considered when determining any penalty:
  - severity of the offence
  - culpability and track record of the offender
  - the harm caused to the tenant
  - punishment of the offender
  - deterrence of the offender from repeating the offence
  - deterrence of others from committing similar offences
  - removal of any financial benefit the offender may have obtained by committing the offence
16. The Policy further sets out how they determine the level of any financial penalty. This is done in 3 steps:  
**Step 1**  
Assess the culpability and track record of the offender and the level of harm, or potential harm, to the occupiers.  
**Step 2**  
Adjust any penalty after considering any aggravating or mitigating circumstances  
**Step 3**  
Make any final adjustments to ensure the level is fair and proportionate but in all instances as punishment, a deterrent and removes any benefit of the offence.

17. The Policy provides examples of culpability on three levels being high, medium, and low:

**High level of culpability**

- they have a history of non-compliance
- despite a number of opportunities to comply they have failed to comply
- have been obstructive as part of the investigation
- are an experienced landlord/agent with a portfolio of properties who would be expected to have known their responsibilities
- serious and systematic failure to comply with their legal duties

**Medium level of culpability**

- it is a first offence-with no high level of culpability criteria being met
- the landlord/agent had systems in place to manage risk or comply with their legal duties, but they weren't sufficient or complied with on this particular occasion

**Low level of culpability**

- no or minimal warning given to offender
- the breaches are minor
- the offence is an isolated occurrence
- a significant effort has been made to comply but was inadequate in achieving compliance

18. The same categories apply to harm and the following are given as examples:

**High**

- actual harm to an individual
- high risk of harm to an individual
- serious risk of overcrowding
- serious effect on individual(s) or widespread impact

**Medium**

- adverse effect on an individual
- moderate risk of harm to an individual(s) or broader impact

**Low**

- minimal adverse effect on individual(s)
- low risk of harm to an individual
- limited impact or effect on occupiers

19. Once the appropriate levels have been determined a schedule is given to fix the level of penalty. The Policy then goes onto to give examples of aggravating factors and mitigating factors from which the Council may choose to deviate from the prescribed level of penalty.

20. The aggravating factors are given as follows:

- Previous convictions having regard to the offence to which it relates and the time elapsed since that offence
- Landlord motivated by financial gain
- Obstruction of the investigation
- Deliberate concealment of the activity/evidence
- Number of items of non-compliance-greater the number the greater the potential aggravating factor
- A record of letting substandard accommodation
- A poor management/inadequate management provision
- Lack of a tenancy agreement/paid in cash.

21. The mitigating factors are exemplified as follows:

- Co-operation with the investigation e.g. attends the PACE interview
- Any voluntary steps taken to address issues e.g. submits a licence application
- Acceptance of responsibility e.g. accepts guilt and remorse for the offence(s)
- Willingness to undertake training
- Health reasons preventing reasonable compliance-mental health, unforeseen health issues, emergency health concerns
- has no previous convictions
- Vulnerable individual(s) where their vulnerability is linked to the commission of the offence
- Previous good character and/or exemplary conduct

## **Appeals**

22. A final notice under Schedule 23A of the 2004 Act requires the financial penalty to be paid within 28 days beginning with the day after it was given. A person filing an appeal against the final notice must do so within 28 days after the notice was sent. The effect of such an appeal is to suspend the final notice until such time as the appeal has been either determined or withdrawn.

23. An appeal is by way of re-hearing of the Council's decision, although the Tribunal may consider matters of which the Council was unaware when fixing the penalty. The Tribunal may confirm, vary or cancel the notice. However, the Tribunal cannot vary a final notice to impose a financial penalty of more than the local authority could have imposed.

## **Background**

24. The Properties are a purpose-built block of apartments completed in 2019.

25. It is a matter of dispute between the parties whether the Properties fall within an area of selective licensing that relates to London Road, Abbeydale Road and Chesterfield Road Sheffield.

26. On 2<sup>nd</sup> July 2018 the Council, in exercising its powers under Section 80 of the 2004 Act, designated sections of the arterial routes of London Road, Abbeydale Road and Chesterfield Road as a Selective Licensing Area. This came into force on 1<sup>st</sup> November 2018 for a period of 5 years.
27. The Council stated they wrote to Mr Holmes between 3<sup>rd</sup> July 2020 and 23<sup>rd</sup> July 2021 advising him of the need to licence the Properties. There followed extensive correspondence between the parties as to whether the Properties fell within the designated areas.
28. Mr Holmes argued the selective licensing scheme applied to Abbeydale Road. The address of the Properties had been changed by the Council, upon his application, to 13a Gatefield Road, Sheffield and, as such, fell outside the postal addresses covered by the scheme.
29. Mr Holmes did not argue the Properties were exempt from the scheme in accordance with The Selective Licensing of Houses (Specified Exemptions) (England) Order 2006
30. When no agreement could be reached, the Council inspected the Properties on 8<sup>th</sup> October 2021 to confirm they were occupied and thereafter determined to issue financial penalties.
31. Notices of Intent were served upon both Mr Holmes and the Company suggesting a penalty of £2887.50 for each Property. The Council, in obtaining copies of the tenancy agreements for the Properties, found the Landlord on the tenancy agreements was either Mr Holmes or the Company. The Council therefore adopted the view that any penalty for each of the Properties should be divided equally between Mr Holmes and the Company, such there would be no double charging as referred to in ***Sutton v Norwich City Council [2020] UKUT 90 (LC)***.
32. The Council calculated this penalty in accordance with the Policy that is referred to above. In the matrix adopted within their policy, the Council determined that Culpability was High and Harm was Low. This gave a penalty of £7500. The Council then added 10% for Aggravating Factors, this being the change of address application granted by the Council on 22<sup>nd</sup> September 2022. The Council then made a reduction of 30%, being 10% for three mitigating factors. These were that Mr Holmes had been open and responsive to all communications, had no known previous convictions and is believed to be of good character. This reduced the penalty to £5775, which, when divided equally between Mr Holmes and the Company, was £2887.50.
33. Mr Holmes did not make any representations in respect of the Notices of Intent.
34. On 15<sup>th</sup> December 2021 the Council wrote to Mr Holmes and advised that should he submit a licensing application this would be a mitigating factor when determining any final penalty.
35. The Council received a licensing application on 19<sup>th</sup> January 2022. Draft licences were issued on 8<sup>th</sup> March 2022 and final licences on 29<sup>th</sup> March 2022.
36. The Council thereafter recalculated the penalties. It considered there to be additional mitigating factors and further reduced the penalty by 60%. The mitigating factors were that the Properties were now licensed (25%), a late payment fee had been charged for each of the licences increasing the payment from £750 to £1500 for each licence (25%) and

- from the receipt of the licensing application there had been total co-operation (10%).
37. The effect of this was to reduce each penalty from £2887.50 to £1155.
38. The Final Penalty Notices were issued on 20<sup>th</sup> April 2022.

### **Submissions and Hearing**

39. At the hearing Mr Holmes attended in person and on behalf of the Company. The Council was represented by Catherine Ferguson, Solicitor and Mr Baxter, a Senior Private Housing Standards Officer, appeared as a witness for the Council.
40. The Council argued the Properties fall within the selective licensing area. The Properties are built on a site between 534 and 546 Abbeydale Road Sheffield. This address is included within the selective licensing scheme, the addresses being 2-666 Abbeydale Road.
41. When a planning application was made for the development, it was described as "Land between 534 and 546 Abbeydale Road". When built, the address was 536 Abbeydale Road. On 21<sup>st</sup> February 2019, the Council issued a letter confirming the "Allocation of Official Addresses" for the Properties, all of which were for Abbeydale Road.
42. The Council advised they had written to Mr Holmes and the Company on 4 occasions regarding the need to apply for a licence. One of these was by e-mail on 4<sup>th</sup> September 2020. On 8<sup>th</sup> September 2020 an application was then made by Mr Holmes for the address of the Properties to be changed to 13a Gatefield Road, Sheffield. The application was granted on 22<sup>nd</sup> September 2020.
43. The change of address resulted in the Properties falling outside the addresses referred to in the selective licensing scheme.
44. The Council submitted the application for the change of the address was done for the sole purpose of avoiding the scheme.
45. The Council provided photographs of the Properties, including one of the entrance on Abbeydale Road, showing the numbers "536" and another one showing those numbers removed following the change of address.
46. Mr Holmes advised he owned another block of apartments on Gatefield Road, and the Properties had been built on the same plot. The tenants of the Properties use the rear entrance from the car park as the main entrance, rather than the one on Abbeydale Road. The car park has a barrier entrance with a call system that visitors can use. The car park covers both apartment blocks; the car parking spaces serve approximately 2/3rds of the apartments. He advised the application to the Council for a change of address was due to complaints from the postman regarding deliveries and did not relate to the selective licensing scheme.
47. Mr Holmes submitted it was the Council's responsibility to correctly plot the geographical location of the Properties to determine whether they fell either wholly, partly or outside the selective licensing scheme and this had not been done. Consequently, they had not proved beyond reasonable doubt they fell within the scheme.

48. The Council argued the burden of proof regarding the geographical location for the Properties rested with Mr Holmes and the Company.
49. In respect of the level of the penalties imposed, Mr Holmes submitted he had been fined twice. This was because the penalties had been imposed against him personally and his company for the same offences. Further, he had been charged twice the normal licensing application fee; the fees for the licensing application had totalled £1500, rather than £750.
50. He further submitted the calculation of the penalties was unfair; whilst culpability was set at high, there were no safety issues with the Properties. It had been confirmed by Mr Baxter they are of a very high standard, and he has a good reputation with the Council as a landlord. Further, the Council had assumed the fines could be afforded without seeking any financial information from him.
51. The Council stated that it had made the decision to serve financial penalties on both Mr Holmes and the Company because the tenancy agreements relating to the Properties named them both as Landlords. However, there had been no double charging since the penalty had been calculated and then divided equally. Mr Holmes and the Company had been given the opportunity to make representations before the Final Notice had been issued and he had not done so.
52. It was queried how the Council could determine the issue of affordability in respect of the fines. The Council confirmed it had looked at Mr Holmes' portfolio on his website that had shown either he or the Company had at least 6 apartment blocks. The Council had also calculated the rental income for the period when the Properties were unlicensed and that was approximately £160,000. Mr Holmes argued this was the wrong approach and the accounts for the Properties should be used. This showed significant loans relating to the cost of building; the rental income was probably half that estimated.
53. The Council submitted it was for Mr Holmes and the Company to provide information to support his contention the penalties were unaffordable, and he had failed to do so. The Council had significantly reduced the penalties after the licences were granted, considering the mitigating factors. In the circumstance, the penalties are reasonable.

## **Determination**

### **Relevant housing offences**

54. The Tribunal must determine, beyond reasonable doubt, Mr Holmes and the Company have committed the relevant housing offence under section 95(1) of 2004 Act before a financial penalty can be imposed.
55. It was argued the Council has failed to prove the Properties fall within the area covered by the selective licensing scheme, either at all or in part.
56. The Tribunal finds the Properties do fall within the scheme and should have been licensed under Part 3 of the 2004 Act. They were not so licensed. The Tribunal does not find Mr Holmes, or the Company had a reasonable excuse for failing to licence the Properties and consequently they both have committed a housing offence under section 95(1).



57. In reaching this decision, the Tribunal considered the evidence provided by both parties. There was no argument between the parties that when planning permission was sought, the description of the Properties was Abbeydale Road and this description, including the allocation of official addresses, remained the same until an application was made for the change of address. The Properties were said to be built on land between 534 and 546 Abbeydale Road.
58. It was stated it was the Council's responsibility to show the Properties fell within the selective licensing area, by means of the "geographic coordinate system". This would show definitively where the Properties fell. The Tribunal accepted it had been provided with the plans submitted to the Council when applying for planning permission and the plan delineating the area of selective licensing. It was not possible from these for the Tribunal to confirm the Properties completely fall within the licensing area, but a large proportion does.
59. The Tribunal did not accept Mr Holmes' assertion that it was the Council's responsibility to show the Properties fall within the licensing area. The Properties have been described and signed as being on Abbeydale Road until September 2021, some 3 years after the selective licensing scheme had become effective. He had applied for the change of address and whilst, in evidence, he argued the Council had changed the address, this was not entirely the true picture. The Council would not have changed the address had the application not been made. In these circumstances, the presumption was the address was and had been, for some time, Abbeydale Road and it was for Mr Holmes and the Company to rebut this presumption. It was their responsibility to provide evidence the Properties fall outside the boundaries of the scheme.
60. The Tribunal was not persuaded by Mr Holmes' argument the address had been changed from Abbeydale Road to Gatefield Road because of complaints by the postman. It considered the change of address was effected for the purpose of defeating the requirements of the licensing scheme. The Tribunal found it compelling the application to change the address was made a few days after the Council had again contacted the Mr Holmes and the Company about the scheme.
61. The Tribunal determined that whilst it was unclear whether all or most of the Properties fell within the licensing scheme, it was impractical to differentiate between them. If the matter was determined by a geographic location system, as suggested by Mr Holmes, then part of an apartment could be in the scheme and part outside it. This was unrealistic.

### Financial Penalties

62. The Tribunal finds that having determined Mr Holmes and the Company have committed a housing offence, it is appropriate to impose financial penalties.
63. When considering the amount of any penalty, it is for the Tribunal to make its own determination as to the amount, having regard to the evidence available to it, the HCLG Guidance and the Policy referred to in paragraphs 16-22 above.

64. The Tribunal considered the submissions made by Mr Holmes regarding the affordability of any penalty, namely the Council should not look at rental income but should consider the loans secured against the Company. Whilst the Tribunal accepts this is a factor, it finds it is for Mr Holmes and the Company to provide evidence to show the penalties are unaffordable and this has not been done. No evidence was produced to the Tribunal to show the actual income of the Company, nor of Mr Holmes' personal finances. In those circumstances the Tribunal cannot take affordability into account.
65. In determining the penalty, the Council found culpability to be high and harm low. When fed into the Policy's matrix, this gave a penalty of £7500. The Tribunal does not disagree with this assessment. In relation to the issue of culpability, it had contacted Mr Holmes and the Company on several occasions beginning in 2020, but no application for a licence was made until 2022. There is no evidence to suggest Mr Holmes and the Company are not responsible Landlords; indeed, the Council has used this as a mitigating factor when assessing the penalties. However, the Tribunal is not persuaded by the explanation given for the failure to apply for a licence and has found the change of address was done for the purpose of trying to avoid the selective licensing scheme.
66. The Tribunal agrees with the Council's finding that the level of harm is low. No evidence was provided to suggest the Properties to be anything other than good and this was confirmed by Mr Baxter in his evidence.
67. When applying the matrix this gives a financial penalty for each of the Properties of £7500.
68. The Tribunal, when considering the aggravating factor noted the Council had applied 10%, equivalent to an additional £750, for the steps taken to change the address of the Properties. The Tribunal agrees with this and finds it to be justified. It has found the step was taken to defeat the licensing system.
69. When considering the mitigating factors, the Tribunal notes this was done in two steps by the Council, the first was when issuing the Notice of Intent. There a deduction of 10% was given for each of the factors, namely there were no convictions, Mr Holmes and the Company were of good character and had been open and responsive. Thus, this deduction of 30% resulted in a penalty of £5775, which, when divided equally between Mr Holmes and the Company, imposed a penalty upon each of £2887.50
70. There were then additional deductions made when issuing the Final Notice to reflect that a licensing application had been made. This resulted in the penalties being reduced by 60% to reflect the licensing application had been made and a higher fee had been charged for this; £1500 for each licence rather than the normal fee of £750(25%). A further 25% was given for the Properties having been licensed and 10% was then given for co-operation. This gave a final penalty of £1155.
71. The Tribunal, when considering the mitigating factors within the Policy, accepts the starting point for the reduction in the financial penalty should reflect that of good character of both Mr Holmes and the Company and that they are responsible Landlords providing good accommodation. This is a reduction of 25%.

72. The Tribunal also accepts the Council's position that a further reduction should be given to reflect that a licensing application was made. In this, the Tribunal has considered the higher fees paid for the licensing applications. The result of the higher fees amounted to an additional payment of £750. This is a further reduction of 35%.
73. The Council allowed a further reduction of 20% for co-operation being 10% when the Notice of Intent was issued and a further 10% when the Final Notice was issued with which the Tribunal agrees. This is a further 20%.
74. The Tribunal therefore determines the penalty for each of the Properties is £1650.
75. The Tribunal considered the submissions made by Mr Holmes that a charge against both him and the Company amounted to a double penalty, especially in view of the additional fees paid for the licensing application. The Tribunal does not find this to be the case. The Council has consciously apportioned the penalties between Mr Holmes and the Company which reflects the decision in ***Sutton v Norwich City Council*** as referred to above. This is reasonable given the tenancy agreements relating to the Properties have both Mr Holmes and the Company as Landlords. There has also been an allowance given in the mitigating factors to reflect the higher fees paid for the licensing application.
76. The Final Notices are accordingly varied. The effect of the variation is to amend the amount of the financial penalty imposed to by each notice to £825.

**Tribunal Judge J Oliver**  
**23 February 2023**