FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/HNA/2022/0096**
Property	**:**	**Flat 29, Cazenove Mansion, 79 Cazenove Road, London N16 6AR**
Applicant	**:**	**Mr Jacob Posen (Aka Yackov Aharon)**
Representative	**:**	**Mr Martin Reifer**
Respondent	**:**	**London Borough of Hackney**
Representative	**:**	**Mr Alexander Campbell – Counsel together with Mr M Olise of the Council**
Type of Application	**:**	**Appeal against the financial penalty, section 249A and schedule 13A to the Housing Act 2004**
Tribunal Members	**:**	**Judge Dutton** **Mr A Parkinson MRICS**
Date of Hearing	**:**	**17th May 2023**
Date of Decision	**:**	**2 June 2023**

DECISION

DECISION

The Tribunal allows in part the appeal of Mr Jacob Posen, the Applicant against the imposition of a financial penalty imposed by the London Borough of Hackney (the Council) initially in the sum of £7,500 and reduces the sum payable to £4,500 for the reasons set out below. The said penalty is payable within 28 days of the date of this decision.

BACKGROUND

1. This is an appeal by Mr Posen the Applicant against the imposition of a financial penalty (FP) under the provisions of section 249A of the Housing Act 2004 by the London Borough of Hackney (the Council). The notice of financial penalty is dated 31st October 2022 and follows from an initial notice which was dated 18th August 2022 indicating an intention to impose a penalty of £7,500 but confirming that if the penalty was paid within 28 days of the final notice the sum claimed could be reduced to £6,000. The application to appeal against the Council's decision is dated 28th November 2022 and shows Mr Reifer as being Mr Posen's representative.

2. Before the hearing we were provided with two bundles of papers. The first was submitted by the Applicant running to 104 pages, the second from the Respondent Council running to 100 pages and some additional pages of correspondence lodged in the days before the hearing. There were also provided to us skeleton arguments on behalf of the Applicant and Respondent and in both cases certain authorities, which we will refer to as necessary were included. We would like to thank both Mr Campbell and Mr Reifer for these skeleton arguments, which were of assistance to us.

3. The brief circumstances of the case are as follows. Mr Posen appears to have acquired the freehold of the property at Flat 29 Cazenove Mansions, 79 Cazenove Road, London N16 6AR (the Property) on 2nd August 2012. On the 23rd August 2021 Mr Posen entered into an assured short hold tenancy agreement with Mr Abraham Breuer and Mrs Rifka-Breuer. The tenancy was to run for a period of 12 months from 23rd August 2021 with a weekly sum payable of £375.

4. Before this tenancy agreement was entered into and in October of 2018, the Council had entered into a selective licensing arrangement, which included the area in which the subject property was to be found.

5. On 22nd March 2022 as stated by Mr Olise in his witness statement, he carried out an unannounced visit following complaints of suspected breaches of the selective licensing requirements. It seems he managed to speak to a tenant at the Property who confirmed that they were renting. He made checks and determined that there was no licence for the use of the Property and the matter proceeded from there. On 11th August 2022 a warning letter was issued and seven days later notice of intent was also issued by Mr Olise on behalf of the Council. Responses to that were received but they did not change the Council's position and on 31st October 2022 a final notice was issued imposing the penalty of £7,500.

6. Mr Posen through Mr Reifer sought to argue that the letting was to a relative as defined under section 258 of the Housing Act 2004 (the Act) and in particular that Mr and Mrs Breuer were his cousins and accordingly were relatives for the purposes of the Act. In fact, it appears to be agreed that Mr and Mrs Breuer are either third cousins once removed or fourth cousins of Mr Posen. In support of this assertion family trees were produced indicating the relationship between Mr Posen and his tenants.

7. In the bundles before us were statements of Mr Posen and Joshua Breuer, the father of Mr Abraham Breuer. In a witness statement he says that Mr Posen is his cousin. Mr Breuer did not attend the hearing. Mr Posen who did attend the hearing and confirmed that Mr Breuer and his father were third cousins removed.

8. For the Respondent Mr Olise had provided a witness statement dated 1st February 2023 the contents of which we have noted and he did attend the hearing.

HEARING

9. The hearing was on 17th May 2023. It had originally been listed for a date in April but was postponed. The directions which were issued on 15th December 2022 had been complied with.

10. At the start of the hearing we asked the parties to confirm the issues. Mr Reifer on behalf of Mr Posen confirmed there were three matters. The first was a procedural issue as to whether or not the final notice was correct and therefore enforceable.

11. The main plank of the argument on behalf of the Respondent, however, was the definition of cousin and whether or not the tenants were cousins for the purposes of the Act.

12. The final matter to be considered by us, depending on our findings in respect of the earlier two, is the level of penalty involved and the mitigation in respect thereof.

13. We heard from Mr Reifer who confirmed that insofar as the procedural issues are concerned, he was of the view that the final notice which was at PDF page 35 of the bundle, incorrectly referred to a notice of intent dated 10th March 2022. In fact, as we have indicated above, the notice of intent is dated 18th August 2022. Mr Reifer's argument was that this failure rendered the final notice void.

14. In response Mr Campbell, it having been confirmed by Mr Olise that this was a typographical error, asserted that this could not and did not invalidate the notice. Mr Posen does not dispute that he was served with the initial and final notice and no prejudice was caused to him. He also referred to schedule 13A of the Act paragraph 8 that sets out what the final notice must include. His submission was that the typographical error in the final notice was not sufficient to render it void.

15. For the sake of completeness, we will address that issue at this time.

16. **FINDINGS ON THE ALLEGED PROCEDURAL ISSUE**: Our findings are that as confirmed to us by Mr Olise, the date shown in the final notice was clearly a typographical error. It is on the evidence before us several days before Mr Olise even visited the Property. There can be no doubt that Mr Posen was fully conversant with the reasons behind the initial notice and final notice and he has been able to fully represent himself through Mr Reifer in these proceedings. We therefore dismiss the suggestion that the final notice is void as a result of some form of procedural irregularity.

17. We turn then to the more substantial part of the Applicant's case. That is the question as to the definition of cousin. The family tree is accepted as being accurate by the Council. The Council's case is what is the definition of a cousin ? By reference to his skeleton argument, Mr Campbell relied on various matters to support the Council's point of view that cousin would generally mean a first cousin. This he said found support in the case of Stoddard v Nelson when the Lord Chancellor found that in the context of a will, the term cousin referred to first cousin only. This was consistent with the Master of the Rolls' decision in the case of Stevenson and Abingdon. Both cases it must be said are of historic context. Reference also made to the Sexual Offences Act 2003 where the definition of cousin meant child of an aunt or uncle.

18. Mr Campbell addressed some of the evidence adduced by Mr Posen; in particular email correspondence that had been generated with other local authorities. For example, an email was received from Newham on 13th March 2023 where it was said by an Assistant Licensing Officer that whether it was their first or fourth cousin it did not matter as a cousin is a relative. This did seem to be, however, on the basis that a signed declaration to that effect was provided. Redbridge also indicated that provided there was evidence that there was a fourth cousin, no selective licence would be required. Finally, there was submitted to us on the Friday before the hearing, email exchanges between Mr Reifer and the Property Licensing department at Hackney which on the 25th April 2023 in response to enquiries about fourth cousins as relatives of family the response received was *"In response to this enquiry for the purposes of HMI licensing; cousins fall within the definition of a family"*.

19. It was Mr Campbell's assertion that to allow the definition of cousin to extend to fourth, fifth or even further removed cousins would create significant if not insurmountable difficulties for the Council. It was put by Mr Campbell that if Mr Posen could argue that the word cousin extended to third or fourth cousins then is there any reason why it wouldn't be tenth, eleventh etc. His concern was that a burden of proof is showing a licensing offence had been committed was on the local authority, which they must proof beyond reasonable doubt. If Mr Posen were correct in his interpretation of the word cousin then the local authority would require a level of genealogical and historical research going back many generations rendering a prosecution unworkable and logistically impossible. That he said was plainly not the intention of the Secretary of State in his definition of cousin.

20. In response Mr Reifer relied on the evidence that Mr and Mrs Breuer were married which was not denied by the Council. He relied on Mr Olise indicating

that he was not satisfied that there was proof that they were cousins, which in turn in Mr Reifer's view meant that if the burden of proof to substantiate they were cousins could be overcome then that would resolve issues. He relied on the responses from various other London Boroughs.

21. It was his submission that the intention of the local authority was to improve housing conditions. It was his submission that if the parties were related and close enough to be able to evidence their genealogy the Council should be prepared to accept the position, as related parties would provide accommodation which would be of an acceptable standard thus meeting the primary purpose of the legislation. It was his submission that the onus rested with the landlord or indeed the tenant and not the local authority to prove the relationship in this case, which he submitted had seemingly been satisfied by the documentation so far produce.

22. He indicated that if the Secretary of State had thought to limit the definition of 'cousin' they could have used the definition of first cousin if they wished to do so and on the morning of the hearing produced an extract from the Family Law Act 1996 which in the interpretation under section 63 did just that by naming a relative as a first cousin.

23. It seems appropriate at this stage to deal with our findings in relation to this particular point. Clearly, they are relevant as to whether or not we then move on to deal with the penalty imposed and any mitigation that may be available to Mr Posen.

24. **FINDINGS ON DEFINITION OF COUSIN:** We were impressed with Mr Reifer's submissions and who represented his client as fully as he could. However, we find that Mr Campbell's arguments are the more persuasive. If one considers the definition of relatives within this section of the Act it is quite clear in our findings that a relative is in a primary relationship. Relative at section 258 of the Act means parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin. The definition of cousin is, in our finding, the child of one's uncle or aunt. We take Mr Campbell's point that if the definition of cousin is extended to third or fourth cousins what is to stop it going beyond there. In this case the Applicant has been able to show by means of family trees that there is this relationship. However, the imposition imposed on the local authority in investigating submissions of this nature would be extensive and would in our view potentially defeat the object of the legislation. The extent to which cousin can be defined needs to be limited and in our finding it is limited at first cousin being the child of an aunt or uncle.

25. For these reasons we do not accept the Applicant's submissions that the Property was exempt from licensing under the selective licensing scheme because the tenants were third or fourth cousins. Accordingly, we find that the Respondent has beyond all reasonable doubt committed the offence of failing to licence the property under the provisions of s95 of the Act.

26. **THE LEVEL OF PENALTY**: The next matter that we turn to relates to the penalty that was imposed. At the hearing Mr Olise told us that he had agreed to

reduce the financial penalty to £6,000 to reflect the personal difficulties that Mr Posen had faced following the sad death of his wife and his own illness.

27. We asked Mr Olise how the original figure of £7,500 had been reached.

28. The Hackney matrix was at page 21 (PDF) of the bundle that Hackney had provided. Mr Olise took us to this and started with the guidance in relation to failure to license a property under a selective licensing scheme which says as follows: *"Failure to license a property under a selective licensing scheme would usually be regarded as a moderate matter and therefore meriting a band 2 penalty of £7,500 CPN charge average as a starting point see table 1 unless there are mitigating factors to reduce or aggravating factors to increase the proposed CPN charge."* We considered table 1 which is headed the Hackney PSH Civil Penalty Notice Band, which under 'moderate' at 1A had the range of £0.00 to £4,999 and at 2B the sum of £5,000 to £9,999. He told us that he had applied the figure set out in the matrix of £7,500. He was asked in what circumstances might the lower starting range of £0 to £4,999 be applied and his response was that if a licence application had been made even though it may not have gone through, before the initial notice was issued and also whether the number of applicants were limited, it may fall into that lower bracket. It should be noted that Mr Posen had attempted to apply for a licence it seems in or about September of 2022 but had been unsuccessful.

29. Mr Olise also made the point that if a licence had been applied for, it would have resulted in inspection and the Council would then have been able to ensure that the Property was in good order and that there were, for example, gas and electrical certificates. None of that was available to the Council and this he considered was a factor to take into account when assessing the level of financial penalty to be imposed.

30. It was accepted that Mr Posen had not previous convictions and also that sadly his wife had died in 2020, he himself had been seriously ill the following year and of course there had been the Covid lockdown which had impacted on his ability to proceed with the licensing. In addition, he had concerns in looking after his family as the sole parent.

31. We were also reminded that it was Mr Posen's understanding given to him by several other London authorities albeit after the event, that they would have accepted the argument that a fourth cousin meets the criteria of section 258 of the Act. This therefore was said to give a reasonable excuse and in support thereof Mr Reifer relied on the Upper Tribunal case of *D'Costa v Paolo D'Andrea reference [2021]UKT144* where the question of reasonable excuse was considered.

32. In this case it was accepted by Mr Posen that he knew the Property was the subject of selective licensing but that he was of the opinion that because the tenants were distant members of his family licensing was not required. He did not check the position with Hackney. The fact that other local authorities may take a different view is obviously a matter for them and it is a great pity that there is not some consistency. Mr Campbell told us that one other local authority, we think Waltham Borough although no evidence was adduced to show this, took the

same view as Hackney did. It is clearly an area where it may be of benefit to the local authorities to decide how they wish to define cousin. We have made our findings in this case.

33. We take into account the examples of mitigating factors included within the Council's guide. In particular the health reasons, no previous convictions, vulnerability and good character. There is no evidence, as Mr Olise did not inspect the subject Property, that the Property was in anything other than good condition. Certainly the tenants have made no complaints. There is no evidence that Mr Posen is anything other of good character and has no previous convictions. We do however understand Mr Posen's concerns that certain local authorities would not have required him to license whereas Hackney did. However, as we have indicated above, it seems to us it was necessary for him to have made enquiries with Hackney when he knew that selective licensing applied to all accommodation in the area of the Property and would thus have avoided these problems. He did not do so and the evidence of the local authority's position was gained after the initial notice and indeed final notice had been issued. It cannot therefore have said to have impacted on his decision not to license.

34. In those circumstances we think that there is probably some room for manoeuvre on the question of the quantum of the penalty, this being a re-hearing. Mr Olise has already reduced it by 20% to £6,000 and we think a further reduction of 20% to reflect those matters we have referred to above would be reasonable. In those circumstances we consider that the appropriate penalty in this case is £4,500 which should be settled within the next 28 days. Mr Posen will presumably continue with his application for a selective licence.

35. As we have indicated above we were grateful to Mr Campbell and Mr Reifer both for their skeleton arguments and for their assistance throughout the case. Mr Reifer hinted at the possibility of an application for costs under Rule 13 of the Tribunal Procedure Rules but we would suggest to him that that is not an appropriate course of action given our findings. There were no other claims for costs made.

Judge: Andrew Dutton

A A Dutton

Date: 2 June 2023

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. 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.

3. If the application is not made within the 28-day time limit, such application must include a request to 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.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie 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.