FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BN/HNA/2023/0046**
Property	**:**	**1 Janson Road, London, E15 1TG**
Applicant	**:**	**Marble Properties (London) Ltd**
Applicant's representative	**:**	**Shebul Miah, a director**
Respondent	**:**	**London Borough of Waltham Forest**
Respondent's representative	**:**	**Riccardo Calzavara of counsel**
Type of application	**:**	**Appeal against a financial penalty**
Tribunal	**:**	**Judge Adrian Jack, Tribunal Member Appollo Fonka**
Date of decison	**:**	**15th January 2024**

DECISION

Procedural

1. This is an appeal brought against a notice of decision dated 18th May 2023 made by the respondent London Borough to impose a financial penalty on the applicant. The respondent was the property manager of 1 Janson Road, which was a house occupied by four men living as separate households. The penalty was imposed for breach of section 294A of the Housing Act 2004 by failing to ensure 1 Janson Road had a licence for a house in multiple occupation ("HMO") as required by section 72 of the 2004 Act. The offence was said to have occurred on 1st December 2021.

2. The financial penalty was in the amount of £12,000 with a discount to £9,000 if it was paid within 28 days. On the same day the local authority imposed a financial penalty of £4,000 on the landlord for whom the applicant acted. Although the landlord also appealed, this appeal was subsequently settled between the parties.

The offence and whether proven

3. There was little dispute about the facts. Mr Miah, a director of the applicant, who represented the company and gave evidence on its behalf said:

> 8. At the time of the alleged offence, the property was occupied by 4 persons who are not a family unit. The then borough-wide Selective licence expired on 31st March 2020. On 23rd March 2020 a national lockdown was imposed. At the time of Licence renewal, I was made aware that the requirements for an additional HMO licence in the Borough were different from when the Selective licence was first granted. We would need to carry out additional works to the property, namely installation of mains operated smoke alarm, heat detector and firefighting equipment, to comply with regulations. We could not however access the property because of Regulations under the Coronavirus Act of 2020. Our office was closed, we had staff self-isolating, we were not geared up for home working and it became difficult to operate a business under the restrictions. We had had a previous experience of making an application for a licence and the matter being put on hold until such works were carried out. With hindsight, we should perhaps have put in the application knowing it would be held but did not appreciate that the mere fact of applying, even when being aware that we could not comply with the necessary regulations was sufficient. At the time it seemed a waste of resources for both us and the Borough when we knew the application could not succeed.
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> 9. In or about April 2021 we were able to access the property and we installed smoke alarms, heat detectors and firefighting equipment. We also identified that Waltham Forest had Article 4 Direction in place which required planning consent to change the property from Use Class C3 (single family residence) to Class C4 (Houses in Multiple Occupancy) when applying for an additional HMO licence.
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> 10. We were uncertain of the planning process and tried to contact Waltham Forest, the Respondent, by telephone on numerous occasions with the first time around about October 2020 and more actively around about April and May 2021. At the time Waltham Forest's switchboard had a recorded message directing callers to their website and at times disconnecting after one ring. On one occasion when we managed to get a response on the telephone from the Waltham Forest, we were provided

with an email for enquiries as DCMail@walthamforest.gov.uk. After about two months we got a reply to this email advising the email was no longer monitored and were given a list of alternative emails. Unfortunately, we have not kept a copy of this email as it was a generic response.

11. We did access the Council website at that time regarding planning application for change of use, but could not find relevant information, although this may have been updated now. We also accessed the Planning Portal but could not find information about application for change of use between Use Classes. In addition, we have also called the Planning portal for advice but was referred to the Council.

12. ln or about June 2021, we did manage to make telephone contact with the Licensing department explaining our difficulty and were told we would receive a call back but did not hear anything further.

13. On the 14th September 2021 we emailed the Licencing department and received a response from Asim Shah advising the query had been passed to Lisa Lewis who would be in touch with us. We waited over a month for a response. We telephoned and were again advised Ms Lewis would contact us but again had no response. Unfortunately, during November and to the beginning of December we had staff off ill with COVID and were not able to follow up our enquires with Waltham Forest.

14. On the 10th December 2021 we eventually received an email from Sarah Jayne Christie who was helpful in answering most of our queries but was unable to assist with the issue about the planning application. She again directed us to the email which we already knew was not operative. Having got some form of clarification around planning after going back and forth, we were able to submit the licence application on the 28th January 2022.

15. It was not until February 2022 we were advised, to an extent, on how to proceed with the planning application by Unwana Essien from Planning department. Again, first part of her advice is correct as there is a ;Full Planning' option on the Planning portal, but no change of use.

16. During the period from March 2021 to January 2022 we were aware this was a live issue that had to be dealt with and we trying to resolve it but had great difficulty in obtaining information from either the Council's website or by telephone. Telephone calls were not returned as promised, emails were not responded to, and we were given inaccurate advice... The whole matter was very frustrating. If we had been advised at the beginning that we could, and should, put in the application to protect our position even though we could not comply with the

requirements, we would of course have done so. I understand the Council could have granted a temporary exemption whilst we sorted the matter out. We were not letting the matter lie but genuinely taking steps to deal with the issues that we thought would block our application.

17. I stress that from April 2021 the property itself was fully compliant and the tenants were not affected….

18. We were greatly concerned that some four months later when we had assumed the matter was closed that we received a letter date 31st May 2022 of the intention to impose a financial penalty.

19. A representation was lodged to the Waltham Forest within the given time frame on 2nd June 2022. However, the representation was not upheld and a response was received on 22nd June 2022.

20. The financial penalty was imposed on 18th May 2023, somewhat almost a year after the representation was rejected. We feel that this is unreasonable amount of time lapse and whether it is legitimately valid owing to the delay."

4. Section 72(5) of the 2004 Act gives a defence that the accused "had a reasonable excuse (a) for having control of or managing the house in the circumstances mentioned in subsection (1)…" Section 71(1) provides:

> "A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part… but is not so licensed."

5. It was accepted by Mr Miah that at the relevant time the property was required to be licensed. We are satisfied beyond reasonable doubt that the appellant was in breach of section 72(1). The live issue is whether the appellant has the defence of "reasonable excuse" under section 72(5). The burden of proving this defence is on the appellant, but it only needs to prove the defence on balance of probabilities.

6. Mr Calzavara analyses the appellant's case into six parts (and Mr Miah did not seek to expand on these):

> "First, it was unable to apply for a licence upon expiry of the previous selective licence by reason of COVID-19 restrictions. Second, it required the Council's advice in the making of the application and couldn't obtain it. Third, it received (unspecified) conflicting information from the Council regarding licensing and planning matters. Fourth, it was informed orally by Ms Christie after having applied for a licence that no further action would be taken. Fifth, the Property was compliant with fire safety requirements. Sixth, it assumed that the Council was

taking no further action because some time passed between the response to its representations and the final notice being served.

7. In our judgment, the fourth, fifth and sixth points are irrelevant to the question of whether the appellant could or should have applied for a licence.

8. We accept that Covid made difficult the carrying out of the works. We also accept that the appellant had difficulty sorting the planning position out.

9. The simple point made by the local authority in answer to this is that none of this prevented the appellant from making a licence application. As to Covid (point 1 above), the application process was entirely on-line. As to point 2 the online process did not require advice from the local authority. Instead, it was Mr Miah who anticipated difficulties from the need to carry out some minor works to make the property compliant and for the obtaining of planning permission. He made the decision not to apply. Likewise point 3, the absence of planning permission did not prevent applying for a licence. Making an application would have frozen the position and prevented the offence occurring.

10. We agree that the appellant could have made an application for a licence. Mr Miah was familiar with licensing requirements, as is shown by his knowledge of the works required and the planning consent needed. There was in our judgment no good reason for the appellant not to have applied for a licence. Accordingly, the defence of reasonable excuse is not made out.

The financial penalty

11. The local authority has, as central Government requires it to, a policy to ensure fairness in the size of financial penalties imposed. Penalties range from "moderate", band 1 £0-£4,999 and band 2 £5,000 to £9,999; "serious" band 3 £10,000 to £14,999 and band 4 £15,000 to £19,999; and "severe" band 5 £20,000 to £24,999 and band 6 £25,000 to £30,000.

12. The relevant parts of the policy are these:

> "Civil Penalties Matrix
> In determining the level of a civil penalty, officers will have regard to the matrix set out below, which is to be read in conjunction with the associated guidance. The matrix is intended to provide an indicative minimum 'tariff' under the various offence categories, with the final level of the civil penalty adjusted in each case, and generally within the relevant band, to take into account aggravating and mitigating factors. The indicative minimum tariff will normally be increased by up to, but not exceeding, £4999 for each aggravating factor identified to arrive at the final level of penalty. The Council may,

exceptionally, increase the penalty above the band maximum or, again exceptionally, decrease it below the minimum 'tariff'. In order to meet the objectives of this policy and of financial penalties in particular, however, including the need for transparency and consistency in the use of such penalties, the Council will exercise its discretion to increase or decrease a penalty beyond band limits in exceptional circumstances only [excluding any Discounts as set out below]. The Council will consider on a case-by-case basis, in light of the information with which it is provided, whether any such circumstances exist.

...

Generic aggravating features/factors

The Council will have regard to the following general factors in determining the final level of the civil penalty:

• A previous history of non-compliance would justify an increased civil penalty. Examples of previous non-compliance would include previous successful prosecutions [including recent convictions that were 'spent'], works in default of the landlord and breaches of regulations/obligations, irrespective of whether these breaches had been the subject of separate formal action

• Any available information regarding the financial means of the offender, not restricted to just rental income from the rented home[s]

...

Under the Council's policy the civil penalty for a landlord controlling one or two HMO dwellings, with no other relevant factors or aggravating features [see below] would be regarded as a moderate matter, representing a band 2 offence, attracting a civil penalty of at least £5000.

Where a landlord or agent is controlling/owning a significant property portfolio, and/or has demonstrated experience in the letting/management of property, the failure to license an HMO would be viewed as being a serious matter attracting a civil penalty of £15000 or above [a band 4 offence]

Aggravating features/factors specific to non-licensing offences

• The condition of the unlicensed property. The nature and extent of any significant hazards that are present would justify an increase in the level of the civil penalty. Equally, an HMO that was found to be poorly managed and/or lacking amenities/fire safety precautions and/or overcrowded would also justify an increased civil penalty

• Any demonstrated evidence that the landlord/agent was familiar with the need to obtain a property licence e.g. the fact that they were a named licence holder or manager in respect of an already licensed premises." (Square brackets in the original.)

13. The reference to "discounts" is to two reductions, which are automatic in the sense that the local authority gives itself no discretion. The first is a reduction in the original amount by 20 per cent where the offender

has fixed the relevant breach before the expiry of the time for making representations. The second is a further reduction of 20 per cent of the original amount, if payment is made within 28 days of the original notice.

14. In the current case, the initial notice and the final notice were prepared by Catherine Lovett, who gave evidence to us. It was, however, her superior who made the decision to issue the two notices and the amount of the financial penalty. Her decision followed the reasoning of Ms Lovett and it was common ground that Ms Lovett was able to give evidence about the local authority's reasons for imposing the £12,000 penalty.

15. She said that she treated the appellant as an experienced landlord, having been in the business since 2007. It thus "demonstrated experience in the letting/management of property [so that] the failure to obtain the necessary… Licence would be viewed as being a serious matter attracting a civil penalty of £15000 or above [a band 4 offence]." She had had regard to the length of time the licence was outstanding, but had not considered there were any particular aggravating features. She considered that there were no mitigating features at all, because the matters raised by the appellant did not relate to the failure to licence. Once the 20 per cent automatic discount for remedying the breach was applied, the financial penalty was reduced to £12,000 with a further reduction to £9,000 if swift payment were made.

16. The approach to be taken on an appeal against quantum is set out in the Lands Chamber decision in *Marshall v Waltham Forest LBC* [2020] UKUT 35 (LC), [2020] 1 WLR 3187, which held (reading from the headnote):

> "that the local housing authority had been entitled to adopt a policy about financial penalties pursuant to the Secretary of State's guidance so long as, in applying the policy, it did not fetter its discretion by applying the policy too rigidly; that, when considering a challenge to an administrative decision made in accordance with a local authority's policy, a court or tribunal had to start from the policy which underlay the decision and apply it as if it were standing in the shoes of the original decision-maker, giving proper consideration to arguments that it should depart from the policy; that, in doing so, it was required to pay proper attention to the decision under challenge and the reasoning behind it, although it could and should depart from the policy in certain circumstances, such as where it had been applied too rigidly; that the burden lay with the appellant to persuade the court or tribunal to depart from the policy and, in considering that matter, the court or tribunal had to look at the objectives of the policy and ask itself whether those objectives would be met if the policy were not followed; and that, further, an appellate court or tribunal was carrying out a rehearing, not a review, and while the original decision of an elected authority carried a lot of

> weight, the court or tribunal could vary the decision if, having given it that special weight, it disagreed with the local authority's conclusion

17. In the current case, we bear in mind that the Council's policy is not be treated as if it were a statute. Instead, it is a policy document and has to be read in that context.

18. Mr Calzavara submits that Ms Lovett did precisely what the policy required. She decided that this was an experienced managing agent. In accordance with the policy she therefore placed the offending in band 4 at £15,000. Even if she erred in considering that there was no mitigation, she could only have gone out of band 4 if there had been exceptional mitigation. Given there was no exceptional mitigation, the £15,000 start and end point was precisely right.

19. We see the logic of this submission, but do not agree with its substance. A key factor in both the central Government guidance and the local authority's policy is that consideration needs to be given to both aggravating and mitigating features of a case. Mr Calzavara's submission is that, if the starting point for a financial penalty is at the bottom of a band, it is never possible to reduce the financial penalty further, regardless of how good the mitigation might be, unless the mitigation was "exceptional".

20. In our judgment, this is to misread the relevant part of the policy. The policy provides that an offence such as the current one is "viewed as being a serious matter attracting a civil penalty of £15000 or above [a band 4 offence]." There are a number of elements to this. Firstly, the offence is to be treated as a "serious matter". Secondly, it attracts a penalty of £15,000 or more. Thirdly, it is a band 4 offence. A sensible reading of this is that the offence is a serious matter (and thus in band 3 or band 4), that it will be appropriate to make an award of £15,000 or more and that that will mean it falls in band 4. However, in deciding whether to take a starting point of £15,000, it is necessary in our judgment to take any mitigation into account before fixing the amount. If mitigation is not taken into account at the stage of fixing £15,000, then the award could never move out of band 4, unless the mitigation was exceptional. A case under the policy will only fall into band 4 if it is £15,000 or more, but the decision to award £15,000 or more must be made before the appropriate band is selected. If the local authority had wanted all awards to be in band 4, then the policy did not need to start with reference to the breach being "serious" and attracting a penalty of £15,000 or more. It just needed to say that the penalty must fall in band 4. (That might then raise issues, which we on our construction do not need to consider, as to whether such a direction fell into the "too rigid" category of exception to a policy identified in *Marshall*.)

21. In our judgment, taking the policy as a whole, it is legitimate to apply mitigation to the £15,000 before making a determination of the appropriate band. Here there is in our judgment very good mitigation.

Firstly, the only works required to the property were minor. This is not a case (as we so often see) in which the property was in a poor condition. Secondly, we accept that Covid made carrying out the minor works much more difficult. Thirdly, we note that the appellant is of exceptionally good character. Fourthly, we accept that Mr Miah took steps to try and regularise the position and was not helped by the local authority's planning department.

22. In our judgment these matters mean that the £15,000 is too high. The case therefore falls in the other band of "serious", namely band 3. Looking at the mitigating features and the absence of aggravating features in our judgment the appropriate financial penalty before discounts is £10,000.

The discounts

23. The discount to £8,000 is unproblematic. The appellant applied for a licence timeously.

24. The next discount to £6,000 is more difficult. We are aware that some local authorities take the view that this second discount should be available to a successful appellant and will voluntarily agree to give the discount if the appellant pays within 28 days.

25. Here Mr Calzavara takes an uncompromising position. The local authority will only give the second discount, if the money is paid in response to the local authority's own final notice. In the current case, therefore, in the events which have happened, the local authority will seek to recover the full £8,000 regardless of the speed with which the appellant pays the final penalty as allowed by us.

26. We are afraid that we find this an unacceptable stance to adopt. If the local authority had reached (what we have found to be) the right amount of the financial penalty, then the appellant would only have had to pay £6,000 (assuming it paid promptly). The local authority cannot in our judgment be better off for having had to be successfully appealed. To decide otherwise would be an afront to justice. Awarding £6,000 only means that the appellant has no incentive to pay quickly, but the local authority has put itself in this position by refusing to offer the discount voluntarily.

27. In these circumstances, we determine the amount of the financial penalty in the sum of £6,000.

DECISION

The appeal is allowed and the financial penalty is reduced to £6,000.

Judge Adrian Jack **15th January 2024**