FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BC/HNA/2023/0085**
Property	**:**	**61 Brancaster Road, Ilford, London, IG2 7EP**
Applicant	**:**	**John Rajakulendran**
Representative	**:**	**Alannah Kavanagh (Counsel)**
Respondent	**:**	**London Borough of Redbridge**
Representative	**:**	**Victoria Osler (Counsel)**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A of the Housing At 2004**
Tribunal Members	**:**	**Judge Robert Latham** **Stephen Mason FRICS**
Date and Venue of Hearing	**:**	**20 June 2024 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**2 July 2024**

DECISION

Decision of the Tribunal

(i) The Tribunal increases the Financial Penalty imposed on the Applicant from £5,000 to £10,000 in respect of the offence under section 95(1) of the Housing Act 2004. This sum is to be paid by 19 July 2024.

(ii) The Tribunal makes no order for the refund of the tribunal fees paid by the Applicant.

(iii) The Tribunal makes no order for costs against the Applicant pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Application

1. On 12 September 2023, Mr John Rajakulendran, the Applicant, issued this application appealing against a Financial Penalty imposed by the London Borough of Redbridge ("Redbridge") under Section 249A & Schedule 13A of the Housing At 2004 ("the Act"). The Final Notice to impose a Financial Penalty is dated 17 August 2023. The offence specified is one under section 95(1) of the Act, namely an offence of control or management of an unlicenced house at 61 Brancaster Road, Ilford, London, IG2 7EP ("the Property"). The Notice imposed a penalty of £5,000.

2. On 6 February 2024, the Tribunal gave Directions (amended on 13 March 2024) pursuant to which:

   (i) On 18 March, the Respondent filed a Bundle (98 pages) containing the material on which they seek to rely in support of their decision to impose the Financial Penalty. Reference to this Bundle will be prefixed by "R.__".

   (ii) On 19 April, the Applicant filed his Bundle (81 pages) containing the material on which he seeks to rely in support of his appeal. He was acting in person at this time. Reference to this Bundle will be prefixed by "A.__".

   (iii) On 9 May 2024, the Respondent filed a Reply (8 pages) drafted by Ms Victoria Osler (Counsel).

3. In his application, the Applicant challenged both the imposition of the Financial Penalty and the quantum of the fine. The grounds of appeal were that: (i) the Respondent had not provided proof that it operated a selective licensing scheme; and (ii) the review of the decision to impose a Financial Penalty was procedurally unfair.

4. On 18 March, the Respondent filed a response to this claim. In his Bundle, the Applicant appeared to raise further grounds of appeal: (i) the designation of a selective licensing scheme was wrong in law; (ii) the scheme was not properly monitored; and (iii) allegations of harassment by Redbridge officers.

The Hearing

5. Ms Alannah Kavanagh (Counsel) instructed by Law & Co (Solicitors) appeared for the Applicant. She was accompanied by Mr Mohsin and a paralegal from her instructing solicitor. She adduced evidence from Mr Rajakulendran.

6. Ms Osler, instructed by Redbridge Legal Service, appeared for the Respondent. She adduced evidence from Ms Coral Harrey (Senior Housing Manager) and Ms Norma Pink (Housing Standards Enforcement Officer). She was accompanied by Ms Pule Chisokwa, Ms Cheryl Hart and Ms Nurten Yusuf, all of whom are housing officers.

7. Both Counsel provided Skeleton Arguments. The Applicant had only instructed lawyers shortly before the hearing. Ms Kavanagh's Skeleton Argument addresses the grounds of appeal that the Applicant now wished to pursue:

(i) The decision to impose a Financial Penalty was challenged on two grounds: (a) the Appellant had a reasonable excuse for not for having control of or managing the Property without a licence as he had made reasonable requests for information about the Selective Licencing Scheme, but these appeared to have been "purposefully ignored; and (ii) it was not in the public interest to impose a Financial Penalty; and

(ii) The amount of the Financial Penaly was excessive, particularly in the light of the difficulties faced by the Applicant in dealing with Redbridge and the fact the "scheme was to be scrapped" on 30 September 2023.

8. The Tribunal referred the parties to the decision of the Upper Tribunal in *Marigold v Wells* [2023] UKUT 33 (LC); [2023] HLR 27. The Deputy Chamber President, Martin Rodger KC, at [48], suggested that any "reasonable excuse" defence could usefully be approached in the following way: (i) what facts does the landlord assert give rise to a reasonable excuse; (ii) are those facts proved; and (iii) do these proven facts amount objectively to a reasonable excuse. When asked to specify what facts the Applicant asserted as amounting to a reasonable excuse, Ms Kavanagh reconsidered her position, and withdrew "reasonable excuse" as a ground of appeal.

9. The Tribunal granted the parties a short adjournment to consider the Redbridge policy document "Private Sector Housing Enforcement Policy 2019-2022". Redbridge had not included this in their bundle.

10. The Tribunal permitted both the Applicant and Ms Harrey to give evidence, albeit that neither had provided witness statements. They did no more than explain the material in the bundles. Ms Kavanagh cross-examined both Ms Harrey and Ms Pink and subjected the decision making process to forensic examination, albeit that this was a rehearing.

11. Mr Rajakulendran was unable to provide any adequate explanation as to why he had failed to apply for a licence. He noted that the current Selective Licencing Scheme expired on 30 September 2023. However, a new scheme came into force on 8 April 2024. He has still not applied for a licence in respect of any of the four properties that he manages in Redbridge.

The Law

12. The Housing Act 2004 ("the 2004 Act") introduced a new system of assessing housing conditions and enforcing housing standards. Part 2 of the Act relates to the licencing of Houses in Multiple Occupation ("HMOs") whilst Part 3 relates to the selective licensing of other residential accommodation.

13. Part 2 of the Housing and Planning Act 2016 introduced a raft of new measures to deal with "rogue landlords and property agents in England". Chapter 2 allows a banning order to be made against a landlord who has been convicted of a banning order offence and Chapter 3 for a data base of rogue landlords and property agents to be established. Section 126 amended the 2004 Act by adding new provisions permitting local housing authorities ("LHAs") to impose Financial Penalties of up to £30,000 for a number of offences as an alternative to prosecution.

14. In *Jepsen v Rakusen* [2012] UKUT 298 (LC)), the Deputy President considered the policy of Part 2 of the 2016 Act. He noted (at [64]) that "the policy of the whole of Part 2 of the 2016 Act is clearly to deter the commission of housing offences and to discourage the activities of "rogue landlords" in the residential sector by the imposition of stringent penalties. Despite its irregular status, an unlicensed HMO may be a perfectly satisfactory place to live. In the Court of Appeal (reported at [2021] EWCA Civ 1150; [2022] 1 WLR 32), Arnold LJ endorsed these observations. At [36], he noted that Part 2 of the Act was the product of a series of reviews into the problems caused by rogue landlords in the private rented sector and methods of forcing landlords to either comply with their obligations or leave the sector. Part 2 is headed "Rogue landlords and property agents in England". At [38], he noted that the Act conferred tough new powers to address these problems. At [40], he added that the Act is aimed at "combatting a significant social evil and that the courts should interpret the statute with that in mind". The policy is to require landlords to comply with their obligations or leave the sector.

15. Part 3 of the 2004 Act gives LHAs a discretion to adopt a selective licensing designation within their district if certain statutory criteria are fulfilled (section 80). Once a designation is in force, every Part 3 house must be licensed unless it is an HMO or a temporary exemption notice or management order is in force (section 85(1)). Part 3 applies to "houses" if, inter alia, they are located in an area subject to a selective licensing, and if either (i) the whole house is occupied under a single tenancy; or (ii) the whole of it is occupied under two or more tenancies in respect of different dwellings contained within it (section 79).

16. Section 95 (1) creates an offence of having control or management of an unlicenced house". Section 263 provides:

> "(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.
>
> (2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.
>
> (3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–
>
> (a) receives (whether directly or through an agent or trustee) rents or other payments from–
>
> (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and
>
> (ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or
>
> (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
>
> and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

It is to be noted that there may be more than one person who may commit an offence under section 95 as having control of or managing an unlicenced house.

17. By section 95(5), a person who commits an offence under section 95(1) is liable on summary conviction to an unlimited fine. Alternatively, by section 249A, a LHA may impose a Financial Penalty of up to £30,000:

> "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. This includes … offences under section 72 (licencing of HMOs)".

18. Schedule 13A deals with the procedure for imposing Financial Penalties and appeals against them. Paragraph 10 of Schedule 13A provides for a right of appeal:

"(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."

19. Paragraph 12 of Schedule 13A requires a LHA to have regard to any guidance given by the Secretary of State about the exercise of its functions under s.249A. The current guidance issued by the Secretary of State, is set out in a document "Civil penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities" (April 2008). LHAs are expected to develop and document their own policy on when to prosecute and when to issue Financial Penalties and should decide which option they wish to pursue on a case-by-case basis in line with that policy.

20. The Tribunal highlights the following passages from the Guidance:

(i) The amount of the penalty is to be determined by the LHA in each case, having regard to the Guidance ([1.11]);

(ii) LHAs are expected to develop and document their own policies about when to prosecute, when to penalise and how to determine the appropriate level of a penalty ([3.3], [3.5]);

(iii) Higher penalties are required when the recipient's actions are deliberate, or if they ought to have known that they were in breach of their legal obligations ([3.5(b)]); and

(iv) It is important that the penalty is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities ([3.5(d)]).

21. In *Hussain (Nasim) v Waltham Forest LBC* [2023] EWCA Civ 733; [2024] KB 154, the Court of Appeal gave importance guidance on the scope of any appeal. The task for this tribunal is to determine whether the decision under appeal had been wrong when it had been taken. In this context, "wrong" meant that the tribunal disagreed with the decision under appeal despite having accorded it the deference or special weight appropriate to a decision involving the exercise of judgment by the body tasked by Parliament with the primary responsibility for making licensing decisions. In reaching its decision, the tribunal could have regard to matters of which the LHA had been unaware, including matters arising after the LHA's decision, provided those matters were relevant to the assessment of whether that decision had been right or wrong at the time it was taken (see Andrew LJ at [63]).

22. At [70], Andrew LJ added the following gloss:

> "It is not impossible to conceive of scenarios in which matters arising after the decision might be relevant in that sense, though they may rarely arise. For example, suppose the authority has decided that someone is not a fit and proper person to be a licensee, and after the decision is made, that person is convicted of an offence of dishonesty committed before the decision was made. The conviction might serve to endorse the view formed by the authority about that person's fitness and propriety at the time when the licensing decision was taken, even though it could not have been part of the material that was considered at that time."

Redbridge's Policy

23. Redbridge policy is set out in a document "Private Sector Housing Enforcement Policy 2019-2022". This is not included in their bundle. Redbridge have subsequently updated their policy, but this was not applicable at the time of this decision.

24. Financial Penalties are addressed at Section 7.1. The Policy follows the statutory guidance issued by the Secretary of State. Prosecutions may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past. The maximum penalty of £30,000 demonstrates that serious offences can be dealt with by way of a Financial Penalty. To ensure consistency and transparency, a decision matrix has been produced, but this is not intended to fetter Redbridge's discretion.

25. Appendix B sets out a "Civil Penalty Matrix" which was used by Redbridge in assessing the Financial Penalty in this case (at R.67-74). The factors to be taken into account, mirror those set out in the statutory guidance (at [3.5]):

> (i) Severity of the offence. The more serious the offence, the higher the penalty should be.

(ii) Culpability and track record of the offender. A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations.

(iii) The harm caused to the tenant. This is a very important factor when determining the level of penalty. The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty.

(iv) Punishment of the offender. A civil penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities.

(v) Deter the offender from repeating the offence. The ultimate goal is to prevent any further offending and help ensure that the landlord fully complies with all of their legal responsibilities in future. The level of the penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.

(vi) Deter others from committing similar offences. While the fact that someone has received a civil penalty will not be in the public domain, it is possible that other landlords in the local area will become aware through informal channels when someone has received a civil penalty. An important part of deterrence is the realisation that (a) the local housing authority is proactive in levying civil penalties where the need to do so exists and (b) that the civil penalty will be set at a high enough level to both punish the offender and deter repeat offending.

(vii) Remove any financial benefit the offender may have obtained as a result of committing the offence. The guiding principle here should be to ensure that the offender does not benefit as a result of committing an offence, i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

The Background

26. Mr Rajakulendran lives in Ilford and works in computer science. He also owns two houses and two flats in Redbridge all of which are rented out to tenants. All require licences under Redbridge's Selective Licencing Scheme. None have been licenced. Despite this appeal, the properties remain unlicenced.

27. In November 2004, Mr Rajakulendran acquired the Property at 61 Brancaster Road. This is a three bedroom house. He initially lived there with his family. Since 23 October 2013, he has rented the property to Mr and Mrs Zinca. The tenancy agreement is at R.47. The initial rent was £1,400 pm. Redbridge is currently paying £1,125.89 every four weeks in respect of housing benefit (see R.46). Mr Rajakulendran described Mr and Mrs Zinca as being in their mid-50s.

28. On 1 October 2018 (at R.35), Redbridge introduced a Selective Licencing Scheme. Under this scheme, the Property required a licence. Mr Rajakulendran did not apply for a licence. He states that he was unaware that it had been introduced. The Tribunal would have expected any landlord with a portfolio of four rented properties in Redbridge to inform themselves of Redbridge's requirements by visiting their website.

29. On 24 February 2023, Redbridge sent a letter to "The owner, 61 Brancaster" stating that their records indicated that the Property required a licence under its Selective Licencing Scheme. The website link was provided to their scheme. The recipient was required to make a valid application for a licence within 14 days. Mr Rajakulendran stated that this letter was not brought to his attention.

30. On 7 March 2023, Ms Pink inspected the Property. Redbridge had received a complaint that children were playing on the corrugated fibre cement sheet roof of a garden shed which was in a poor state of repair. There was a concern that the roof covering contained asbestos. She spoke to Mr Zinca who gave a short pro forma statement (at R.43). He stated that he had been living there for 10 years and was paying £1,100 pm to "John" which was being paid direct by housing benefit. She noted some items of disrepair which we discuss below.

31. On 21 March 2023 (at R.44), Redbridge's Licencing Team wrote to Mr Rajakulendran at his home address, stating that no response had been received to its letter of 24 February. The matter had therefore been referred to the Redbridge Enforcement Team. Mr Rajakulendran was required to apply for a licence within 7 days. He was warned that a failure to licence the Property could result in a prosecution or a Financial Penalty of a maximum of £30,000. The letter explained how Mr Rajakulendran could apply for a licence. He was invited to contact the Licencing Team if he needed further advice or information.

32. Mr Rajakulendran accepted that he had received this letter on 24 March. On 28 March (at A.24), he responded. He stated that he had not received the letter, dated 24 February. He had looked at the Redbridge website. However, rather than apply for a licence, he wanted to be satisfied that the scheme was valid. He questioned why the scheme existed. The public notice about the scheme had not stated the reasons for the scheme. He also sought evidence that the operation of the scheme was being monitored.

33. On 31 March (at R.53), Redbridge send a "Final Reminder" letter warning Mr Rajakulendran that failure to comply may lead to an unlimited fine or conviction. He was again required to apply for a licence within 7 days. He was given a further warning that a failure to licence the Property could result in a prosecution or a Financial Penalty of a maximum of £30,000. The letter explained how Mr Rajakulendran could apply for a licence. He was invited to contact the Licencing Team if he needed further advice or information. Mr Rajakulendran accepted that he received this letter. He did not apply for a licence.

34. Ms Park explained to the Tribunal that she, quite understandably, was unable to answer these questions which Mr Rajakulendran had raised in his letter of 28 March. She had therefore sought advice within Redbridge and had copied and pasted the response into her second letter to Mr Rajakulendran. This letter (at A.25), dated 6 April, explained that the scheme was discretionary and had been introduced following public consultation in 2016 and was subsequently approved by the Secretary of State. It came into force on 1 October 2018. Redbridge had published a Public Notice for both the designation and the implementation in the local press, on its website and in public libraries. Redbridge had written to all letting agents and landlords then known to it.

35. On 19 April (at R.58), Ms Pink informed Mr Rajakulendran that he still had not applied for a licence. As a result, the case would now be passed to the enforcement team for formal action. Mr Rajakulendran accepted that he received this letter. He did not apply for a licence.

36. On 21 April (at R.59), Mr Rajakulendran rather responded to the letter, dated 6 April, asserting that his specific questions had not been answered, particularly relating to the monitoring of the scheme.

37. On 3 May (at R.61), Ms Pink sent a fourth letter giving him 7 days to apply for a licence. In bold, the letter stated: "No further warning will be issued". The letter is wrongly dated 29 February 2024.

38. Ms Park had also been concerned about the conditions at the Property. On 21 March (at A.21), she wrote about three matters:

    (i) There was a hole in the kitchen ceiling. This seems to have been a historic problem from water leaking from the bathroom above.

    (ii) The corrugated roofing to the garden shed which was considered to be a safety risk. Mr Rajakulendran was asked to arrange for a competent contractor to assess whether it contained asbestos. Mr Rajakulendran stated that he obtained a report which conformed that there was no asbestos. He did not provide a copy of this report to Redbridge. He replaced the roof as it was in disrepair.

    (iii) Defects to the laminated timber flooring which created a trip risk in a number of rooms. Mr Rajakulendran stated that he was uncertain which areas were considered to require attention.

39. On 18 May, Ms Pink carried out a full inspection having served a Notice of Entry (at A.46). On 22 May (at A.55), Ms Pink wrote to Mr Rajakulendran listing a number of further defects. We were told that no statutory notice has been served. It seems that these matters have now been resolved informally.

The Imposition of the Financial Penalty

40. On 7 June, Redbridge convened a Licencing and Enforcement Panel to consider what statutory action was appropriate. The Panel consisted of Coral Harrey (Senior Housing Manager), Pule Chisokwa (Housing Manager) and Patricia Henry (Housing Manager). Ms Harrey told the Tribunal that the Panel had been convened in accordance with their policy to ensure consistency and transparency.

41. Ms Pink had produced a draft copy of the Notice of Intention to Issue a Financial Penalty which is at R.46-74. She had also prepared a Statement and Reasons, a later version of which is at R.14-19. The Panel was satisfied beyond reasonable doubt that Mr Rajakulendran was the "person managing" the Property as he was in receipt of the rents. He had committed an offence under section 95(1) of managing a house which required a licence under Redbridge's Selective Licencing Scheme but was not licenced.

42. The matrix setting out the assessment that led to a Financial Penalty of £5,000 is at R.67-74:

> (i) Severity of the offence: This was considered to be a moderate offence (a score of 10);
>
> (ii) Culpability and track record of the offender: (a) History of compliance: A low score of 2.5 was assessed, the criteria being "No response to informal action; but there have been no previous warnings or civil penalties issued. (b) Size of Portfolio: a mid-score of 5 was assessed, the criterion being "Portfolio landlord, 4-49 properties or local managing agent"
>
> (iii) The harm caused to the tenant. A low score of 5 was assessed, the criterion being "potential for Class II or III harm".
>
> (iv) Punishment of the offender: (a) Severity of Offence: this was considered to be a "moderate offence" scoring 5; (b) History of Offending: a low score of 2.5 was assessed, the criterion being "no previous warnings or civil penalties issued".
>
> (v) Deter the offender from repeating the offence: a mid-score of 5 was assessed, the criterion being "a moderate financial penalty will deter repeat offending".

(vi) Deter others from committing similar offences: a mid-score of 5 was assessed, the criterion being "some publicity through informal channels would deter others from offending".

(vii) Remove any financial benefit the offender may have obtained as a result of committing the offence: a mid-score of 5 was assessed, the criterion being "some benefit gained from operating illegally or substandard accommodation".

This resulted in a total score of 45. The penalty of £5,000 was payable for a score of 41-50. The Panel decided to confirm Ms Pink's decision to serve a Notice of Intention to Issue a Financial Penalty in the sum of £5,000.

43. On 16 June (at pR.62-74), Redbridge sent the Notice of Intention to Mr Rajakulendran. The reason for imposing the Financial Penalty was stated at R.65. The Property was subject to the Selective Licencing Scheme and there was no valid licence in respect of the Property. Mr Rajakulendran was invited to make any representations within 28 days. If the Applicant chose to enter into a dialogue with a view to accepting the offence, Redbridge was willing to reduce the penalty by up to 50%.

44. On 20 June (at R.78), Mr Rajakulendran responded inquiring whether the matter would be terminated if he registered for a licence that week. On 21 June (at R.80), he repeated this request. He also stated that he was still awaiting a response to his letter, dated 21 April.

45. On 26 June (at R.81), Ms Pink reiterated that Mr Rajakulendran had the right to submit representations within 28 days of the Notice. On 30 June (at R.82), Mr Rajakulendran asked for the whole email chain to be treated as his representations. He noted that Ms Pink had not answered the simple questions put to her. This seemed to relate to his request for particulars relating to the monitoring of the Scheme. He requested "the results of the latest doggy (sic) 'consultation' on extending this awful scheme". At the hearing, Mr Rajakulendran stated that he had intended to say "dodgy".

46. In his email of 30 June, Mr Rajakulendran stated that he trying to register for a licence online but was unable to progress beyond Stage 3. By return, Redbridge offered to assist him in making his application (see R.84-94). On the same day, Redbridge offered assistance in completing the form (see R.86). Mr Rajakulendran failed to progress his application. On 13 February 2024, the Respondent closed the application.

47. On 11 July (at R.96), Ms Pink informed Mr Rajakulendran that he needed to specify the reasons why he was appealing against the Notice of Intention. On 12 July (R.96), Mr Rajakulendran responded that his emails clearly identified the reasons why he was appealing. He added that he had made a formal complaint against both Ms Pink and her line manager on how the matter had been handled and her behaviour. Neither Ms Pink nor her line manager should contact him. Rather, a colleague should communicate with him.

48. On 26 July, the Licencing and Enforcement Panel met again. Having considered the representations, the Panel decided to proceed with the Final Notice. On 17 August (at R.24-27), Redbridge sent the Final Notice to Mr Rajakulendran. Redbridge stated that the reasons for imposing the Financial Penalty were:

(i) The property is subject to the Selective Licensing Scheme which was introduced on 1 October 2018. On the date and time that the offence was witnessed (7 March 2023 and ongoing), the Local Authority did not have a valid selective licencing application in respect of the property.

(ii) As of 17 August 2023, a selective licencing application had not been submitted.

The Grounds of Appeal

49. In her Skeleton Argument, Ms Kavanagh stated that the Applicant's primary submission was that the Redbridge should not have imposed a Financial Penalty as he had a reasonable excuse. Upon finding out about the Scheme, Mr Rajakulendran had made reasonable requests for information about the Scheme that appeared to "have purposively been ignored". In addition, he was subject to ongoing harassment and threats about disrepair which seem to have been used as a tactic to make him apply for a licence. When referred to *Marigold v Wells* and asked to specify what facts the Applicant asserted gave rise to the defence of reasonable excuse, Ms Kavanagh conceded that this ground of appeal could not succeed.

50. She rather pursued an argument that it had not been in the public interest to issue a Financial Penalty. She relied on the same facts, namely the failure of Redbridge to provide the information that had been requested and the suggested harassment.

51. Ms Osler denied that there had been any misconduct by Redbridge. In his grounds of appeal, Mr Rajakulendran had described Ms Pink as a "rogue member of staff" (at A.14 and A.31); "dishonest" (A.44); "stupid" (A.44); "corrupt and dishonest" (A.45); a teller of "a pack of lies and tricks" (A.59) and a "serial liar" (A.61). He had described the Financial Penalty as "just made-up garbage without any merit" (A.64). In imposing the penalty, Redbridge had acted as an "illegal profiteer" (A.74).

52. Ms Kavanagh did not repeat any of this choice language in her written or oral submissions. However, Mr Rajakulendran offered no apology for the language that he had used.

53. Ms Kavanagh also argued that the Financial Penalty was too high. Applying Redbridge's Financial Penalty Matrix, she suggested a score of 16 which would have resulted in a fine of £750. Redbridge had imposed a Financial Penalty of £5,000. We will consider Ms Kavanagh's arguments when we apply the matrix.

The Tribunal's Decision

54. The Tribunal did not find Mr Rajakulendran to be a satisfactory witness. Ms Osler described his behaviour as "trenchant" and "truculent". We were struck by his arrogance. He demonstrated a total failure to recognise his obligation to licence his properties, despite the fact that this had been explained to him time and time again.

55. It is apparent that Ms Pink found Mr Rajakulendran to be an extremely difficult person with whom to deal. Rather than act upon her advice that he should apply for a licence, he sought to impose conditions to his obligation to do so. He has a disingenuous view of the rule of law. He considers that he is only obliged to obey it if those who enforce it satisfy him that it is appropriate for him to do so. His approach to life is that he expects others to dance to his tune.

56. The Tribunal is satisfied beyond reasonable doubt that Mr Rajakulendran committed the offence of control or management of an unlicenced house contrary to section 95(1) of the Housing Act 2004 over the period 1 October 2018 (when the Selective Licencing Scheme was introduced) until 17 August 2023 (the date on which the Financial Penalty was imposed). Mr Rajakulendran was both the "person having control" of the house in that he received the rack-rent, and the "person managing" the house in that he received the rent from the tenants (see [16] above).

57. The Tribunal is also satisfied beyond reasonable doubt that he has been renting out three other properties in Redbridge which have required a licence and have not been licenced. We note that Mr Rajakulendran has yet to apply for a licence in respect of any of these properties. We give limited weight to this as we are primarily concerned with the factual situation at the time that Redbridge imposed the Financial Penalty (see [21] above).

58. We reject the Applicant's suggestion that it was not in the public interest to impose a Financial Penalty. The alleged disrepair is not relevant to this issue. Since 1 October 2018, the Property required a licence. A house requires a licence, even if it is in an excellent condition. The policy of the Act is to deter the commission of housing offences and to discourage the activities of "rogue landlords". The Act requires landlords to comply with their obligations or leave the sector (see [14] above). Mr Rajakulendran has demonstrated a wilful refusal to comply with his obligations as a landlord. Such wilful defiance can only put him in the category of a "rogue landlord".

59. The Tribunal found it difficult to follow Ms Kavanagh's argument that it was not in the public interest to impose a Financial Penalty. Mr Rajakulendran has demonstrated a wilful refusal to comply with his statutory obligations. Prior to Redbridge service the Notice of Intention on 16 June 2013, he had been warned on four occasions that he should apply for a licence: 21 March 2023 (R.44); 31 March 2023 (R.53); 19 April 2023

(R.58) and 3 May 2023 (R.61). Against this background of wilful defiance, Redbridge had no option but to serve a Notice of Intention.

60. The Notice of Intention gave him the option of admitting that an offence had been committed. In such circumstance, Redbridge offered to reduce the penalty of £5,000 by up to 50%. Mr Rajakulendran refused to engage. He rather chose to make formal complaints against Ms Pink and her line manager. We have seen no substance to these complaints.

61. Mr Rajakulendran also had a further opportunity to apply for a licence. No application had been made when the Financial Penalty was imposed on 17 August 2023, some two months after the Notice of Intention had been served.

62. It is not open to a landlord to impose pre-conditions to his obligation to apply for a licence. The Act required him to apply for a licence. He failed to do so. It is always open to a landlord to apply to the Administrative Court if he wishes to contend that a Selective Licencing Scheme is unlawful. In such circumstance, a landlord takes a big risk if he fails to apply for a licence in anticipation that the Scheme may be declared to be unlawful. The Tribunal has seen no evidence of such illegality.

63. The Tribunal is satisfied that Ms Pink did her best to answer the points raised by Mr Rajakulendran, albeit that these may not have been answered to his satisfaction. The Tribunal is also satisfied that the action taken in respect of the housing defects was quite separate from any obligation on Mr Rajakulendran to licence his Property. The choice language that Mr Rajakulendran has used to insult Ms Pink does not impress the Tribunal. However, this arose after the Financial Penalty was imposed.

64. The Tribunal is satisfied that Mr Rajakulendran's conduct should be reflected by a penalty that is more serious than that found by Redbridge. We are satisfied that the offence was committed from 1 October 2018 to 17 August 2023, rather than from 7 March 2023. Further, Mr Rajakulendran has demonstrated a wilful refusal to comply with his obligation to licence the Property. Any penalty must sufficiently large to deter a landlord from adopting such an attitude. We also have regard to Mr Rajakulendran's failure to licence three other properties in Redbridge to be a serious aggravating feature.

65. We therefore turn to Redbridge's matrix. We have regard to the following factors:

(i) Severity of the offence: Redbridge assessed this to be a moderate offence (a score of 10). Ms Kavanagh argued for a score of 5, this being a minor offence. We agree with Redbridge's assessment, albeit that this could be considered unduly lenient given the period of time over which the offence was committed.

(ii) Culpability and track record of the offender:

(a) History of compliance: Redbridge assessed a low score of 2.5, the criteria being "No response to informal action; but there have been no previous warnings or civil penalties issued. Ms Kavanagh argued for 0.5 ("Offender not aware of the offence but ought to have known; but there is no history of offending"). She argued that Mr Rajakulendran was justified in continuing to manage an unlicenced house because Redbridge had failed to answer his queries to his satisfaction. This is not mitigation. Mr Rajakulendran should have applied for a licence; he failed to do so. We confirm Redbridge's assessment, albeit that we again consider that this is favourable to Mr Rajakulendran. Redbridge had given four warnings before the Notice of Intention was imposed.

(b) Size of Portfolio: Redbridge assessed a mid-score of 5, the criterion being "Portfolio landlord, 4-49 properties or local managing agent". Ms Kavanagh agreed with this assessment.

(iii) The harm caused to the tenant. Redbridge assessed a low score of 5, the criterion being "potential for Class II or III harm". Ms Kavanagh argued for a score of 1 ("Potential for C IV harm"). Ms Pink stated that she had particular regard to the absence of any smoke detectors. We have regard to the defects identified at the Property. We are satisfied that the score of 5 is justified.

(iv) Punishment of the offender:

(a) Severity of Offence: Redbridge assessed this to be a "moderate offence" scoring 5. Ms Kavanagh argued for a score of 2.5 on the ground that this was a minor offence. We confirm Redbridge's assessment, albeit that we consider that this is favourable to Mr Rajakulendran, given his wilful refusal to comply with the law.

(b) History of Offending: Redbridge assessed a low score of 2.5, the criterion being "no previous warnings or civil penalties issued". Ms Kavanagh argued for the lowest score of 0.5, the criterion being "no previous history". We confirm Redbridge's assessment, albeit that we consider that this is favourable to Mr Rajakulendran who was managing three other properties without licences.

(v) Deter the offender from repeating the offence: Redbridge assessed a mid-score of 5, the criterion being "a moderate financial penalty will deter repeat offending". Ms Kavanagh argued for a score of 0.5, the criterion being that "any financial penalty will deter repeat offending".

We are satisfied that both these scores are too low. We assess a score of 10 ("only a significant financial penalty will deter repeat offending"). Mr Rajakulendran has demonstrated a wilful refusal to comply with his obligation to licence the Property. Any penalty must be sufficiently large to deter a landlord from adopting such an attitude. We also have regard to Mr Rajakulendran's failure to licence three other properties in Redbridge.

(vi) Deter others from committing similar offences: Redbridge assessed a mid-score of 5, the criterion being "some publicity through informal channels would deter others from offending". Ms Kavanagh argued for 0.5 ("no benefit to publicising the penalty through informal channels"). We confirm Redbridge's assessment, albeit that we consider that this is favourable to Mr Rajakulendran. It could be argued that significant publicity should be given to show that a deterrent penalty will be imposed where a landlord demonstrates a wilful defiance of the law.

(vii) Remove any financial benefit the offender may have obtained as a result of committing the offence: Redbridge assessed a mid-score of 5, the criterion being "some benefit from operating illegally or substandard accommodation". Ms Kavanagh argued for a score of 1 ("no financial benefit from operating illegally or substandard accommodation"). She argued that Redbridge had failed to explain how it determined the financial benefit obtained by Mr Rajakulendran. Ms Pink explained that this reflected the fact that Mr Rajakulendran had saved himself the cost of a licence (£604), not supplying smoke detectors and failing to address the other defects.

We are satisfied that this score should be increased to 10 ("moderate benefit gained from operating illegally or substandard accommodation"). Between 1 October 2018 and 17 August 2023 (the date of the Financial Penalty), Mr Rajakulendran was illegally renting out the Property without a licence. Over a period of five years, he was collecting a substantial rent. The contractual rent was £1,400 per month; Redbridge was paying housing benefit of £1,125.89 every four weeks (namely £1,219.71 per month).

66. The Tribunal has increased Redbridge's score from 45 to 55. Applying the matrix (at p.74), this merits a fine of £10,000. We are satisfied that this increase is fully justified to reflect that Mr Rajakulendran has acted in wilful defiance of the law. The manner in which he has treated the Redbridge officers is indicative of his approach to the law and to those who enforce it.

67. Ms Kavanagh took every point that she could on behalf of her client. However, we reject her suggestion that Mr Rajakulendran's failure to licence his Property was mitigated by the conduct of Ms Pink or her line manager. Ms Pink did her best to address the points raised by Mr Rajakulendran. Mr Rajakulendran knew that the Property was in the area of a Selective Licencing Scheme. He had a clear choice: either to apply for a licence or to defy the law. He took the later course. There has been no suggestion that the Property did not require a licence.

68. Both Mr Rajakulendran and other landlords in Redbridge must understand that any landlord renting out a property in an area with a Selective Licencing Scheme must apply for a licence without any "ifs or buts". We note that we are considering an appeal against a decision made by Redbridge and must have regard to the factual situation at the time that Financial Penalty was imposed (17 August 2023). We heard the appeal

some 10 months later. Mr Rajakulendran has yet to apply for a licence for this Property of the other three properties that he manages. During that period, he has demonstrated further ill will towards those who are tasked with enforcing the law. The Financial Penalty would have been significantly higher had we been having regard to the factual situation at the time of the hearing. A more substantial deterrent penalty would have been merited to make it clear to Mr Rajakulendran and to other landlords that the law must be obeyed. We would urge Mr Rajakulendran to licence his properties at the earliest opportunity. Redbridge will not be able to turn a blind eye to his failure to do so.

Application for Costs

69. In her Skeleton Argument, Ms Osler applies for a penal costs order pursuant to rule 1 of the Tribunal Procedure (First-tier) Tribunal (Property Chamber) Rules 2013. The Tribunal is entitled to make such an order if satisfied that "(b) a person has acted unreasonably in bringing, defending or conducting proceedings". Ms Osler accepts that this Tribunal is usually a 'no-costs' jurisdiction, but argues that this is an exceptional case.

70. First, Ms Osler argues that this appeal should never have been brought as it had no reasonable prospect of success. She notes that only having instructed lawyer at the last minute, has the appeal been reframed into "something approaching sensible". She suggests that the defence of reasonable excuse was manifestly ill-founded given that it relied solely on the Respondent's alleged failure to give to the Appellant information which was irrelevant in any event.

71. Secondly, Ms Osler argues that the Appellant's conduct in pursuing this appeal has been entirely reprehensible. She refers to Mr Rajakulendran's intemperate and entirely inappropriate language (see [51] above). She suggests that a local authority officer seeking to enforce the law should not be subjected to "such unwarranted, splenetic abuse". The Tribunal should mark its disapproval of the Appellant's "nasty prosecution of his appeal" with an order for costs.

72. In *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (LC); [2016] L&TR 34, the Upper Tribunal (at [28]) adopted a three-stage approach. The first stage is to consider the reasonableness of the conduct. The second stage is whether in the light of the unreasonable conduct, the Tribunal ought to make and order for costs and the third is the terms of any costs order. The Tribunal is satisfied that this is not an appropriate case for a penal costs ward.

73. The Upper Tribunal gave detailed guidance on what constitutes unreasonable behaviour:

> 22. In the course of the appeals we were referred to a large number of authorities in which powers equivalent to rule 13(1)(b) were

under consideration in other tribunals. We have had regard to all of the material cited to us but we do not consider that it would be helpful to refer extensively to other decisions. The language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in *Ridehalgh v Horsefield* [1994] Ch 205. We therefore restrict ourselves to mentioning *Cancino v Secretary of State for the Home Department* [2015] UKFTT 00059 (IAC) a decision of McCloskey J, Chamber President of the Upper Tribunal (Immigration and Asylum Chamber), and Judge Clements, Chamber President of the First-tier Tribunal (Immigration and Asylum Chamber). Cancino provides guidance on rule 9(2) of the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which is in the same terms as rule 13(1) of the Property Chamber's 2013 Rules. In it the tribunal repeatedly emphasised the fact-sensitive nature of the inquiry in every case.

23. There was a divergence of view amongst counsel on the relevance to these appeals of the guidance given by the Court of Appeal in *Ridehalgh* on what amounts to unreasonable behaviour. It was pointed out that in rule 13(1)(b) the words "acted unreasonably" are not constrained by association with "improper" or "negligent" conduct and it was submitted that 10 unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous. We were urged, in particular by Mr Allison, to adopt a wider interpretation in the context of rule 13(1)(b) and to treat as unreasonable, for example, the conduct of a party who fails to prepare adequately for a hearing, fails to adduce proper evidence in support of their case, fails to state their case clearly or seeks a wholly unrealistic or unachievable outcome. Such behaviour, Mr Allison submitted, is likely to be encountered in a significant minority of cases before the FTT and the exercise of the jurisdiction to award costs under the rule should be regarded as a primary method of controlling and reducing it. It was wrong, he submitted, to approach the jurisdiction to award costs for unreasonable behaviour on the basis that such order should be exceptional.

24. We do not accept these submissions. An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level. We see no reason to depart from the guidance given in *Ridehalgh* at 232E, despite the slightly different context. "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's

> "acid test": is there a reasonable explanation for the conduct complained of?
>
> 25. It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context, but we think it unlikely that unreasonable conduct will be encountered with the regularity suggested by Mr Allison and improbable that (without more) the examples he gave would justify the making of an order under rule 13(1)(b). For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable.
>
> 26. We also consider that tribunals ought not to be over-zealous in detecting unreasonable conduct after the event and should not lose sight of their own powers and responsibilities in the preparatory stages of proceedings. As the three appeals illustrate, these cases are often fraught and emotional; typically those who find themselves before the FTT are inexperienced in formal dispute resolution; professional assistance is often available only at disproportionate expense. It is the responsibility of tribunals to ensure that proceedings are dealt with fairly and justly, which requires that they be dealt with in ways proportionate to the importance of the case (which will critically include the sums involved) and the resources of the parties. Rule 3(4) entitles the FTT to require that the parties cooperate with the tribunal generally and help it to further that overriding objective (which will almost invariably require that they cooperate with each other in preparing the case for hearing). Tribunals should therefore use their case management powers actively to encourage preparedness and cooperation, and to discourage obstruction, pettiness and gamesmanship.

74. This appeal was issued by a litigant in person. Mr Rajakulendran has subsequently instructed solicitors. Ms Kavanagh argued his case with conviction. The facts that the appeal has failed and the Tribunal has decided to increase the fine does not mean that the appeal should not have been brought. The Act affords a landlord the right to have a rehearing of a LHA's decision to impose a Financial Penalty. It would be wrong for this Tribunal to penalise the Applicant from pursuing such a right. To do so, would have a chilling effect on access to justice.

75. The Tribunal has found that Mr Rajakulendran has used intemperate language. A housing officer seeking to uphold the law should not be subject to such gratuitous abuse. In so far as this has been indicative of his wilful refusal to comply with the law, this has been reflected in the Financial Penalty. Ms Kavanagh did not repeat any of this choice language in her written or oral submissions. This appeal has been handled by

Redbridge's legal department. There is no suggestion that this conduct has had any impact on the manner in which Redbridge has responded to this appeal. It has not increased the costs of the appeal. The Tribunal has given Directions; the Applicant has complied with them. In these circumstances, the Tribunal does not consider that the intemperate and highly offensive language that Mr Rajakulendran has used in framing his appeal justifies a penal costs order.

76. Given our decision on the appeal, it is not appropriate to make any order for the refund of the tribunal fees paid by the Applicant.

Judge Robert Latham
2 July 2024

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 Tribunal 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 for 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 (i.e. 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.