FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BH/HNB/2023/0012**
Property	**:**	**Flat 12 Churchbank, 1 Teresa Mews, Cairo Road London E17 3BE**
Appellants	**:**	**Mrs Lisa John and Mr Michael John**
Representative	**:**	**In person**
Respondent	**:**	**London Borough of Waltham Forest**
Representative	**:**	**Sharpe Pritchard LLP**
Type of application	**:**	**Appeal against a financial penalty - Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge Pittaway** **Mr S Mason FRICS**
Date of hearing	**:**	**15 August 2024**
Date of decision	**:**	**30 September 2024**

Decision

1. The tribunal finds that the appellants are separately liable for the offence and the respondent is entitled to impose separate penalties.

2. The tribunal finds that the appellants, having committed an offence under s95(1) of the Housing Act 2004 (the '**2004 Act**'), did not have a reasonable excuse under s95(4(a) of the 2004 Act.

3. The tribunal finds that the appropriate financial penalty on Mr John to be £4000, subject to the Council's automatic discount of 20% if paid within 28 days of this decision.

4. The tribunal does not consider that any financial penalty is appropriate in Mrs John's case.

Application

5. By an application dated 16 May 2023 the appellants seek to challenge the imposition by the London Borough of Waltham Forest (the '**Council**') of a financial penalty of £5,600 on Michael John and £4,000 on Lisa John imposed in relation to their failure to have a selective licence for Flat 12 Churchbank, 1 Teresa Mews, Cairo Road London E17 3BE (the '**property**').

The hearing

6. The appellants appeared in person at the hearing. The respondent was represented by Mr Riccardo Calzavara of counsel.

7. The tribunal had before it a bundle of 32 pages from the appellants and a bundle of a bundle of 331 pages from the respondent.

8. The tribunal heard evidence from Ms Burdis, Ms Walkes, Mr John and Mrs John. It heard submissions from Mr and Mrs John and Mr Calzavara.

Background

9. The property is described in the application as a one-bedroom flat with a kitchen, front room and separate bathroom.

10. Mrs Lisa John is the registered leaseholder of the property.

11. On 1 April 2015 the Council designated its area as subject to selective licensing until March 2020. On 30 November 2016 Mr Michael John applied for a licence for the property, describing himself as owner, giving the property as his address for correspondence and his e mail address as lisaelcomb@hotmail.com. The licence was granted on 4 January 2017 to expire in March 2020

12. On 1 May 2020, the Council redesignated most of its area as a selective licensing area. The property lies within the area.

13. Ms Burdis gave evidence that the Council inspected the property on 21 September 2022 and met the tenant occupier Mr S Lintern, who has been in occupation since 2015.

14. On 21 November 2022 the Council sent a notice under s.235 of the 2004 Act addressed to Mr John at his Seaford address and to the e mail address referred to above, having ascertained the Seaford address from HM Land Registry by 22 September 2022.

15. On 1 December 2022 the applicants commenced but did not submit a licence application in which they were both listed as leaseholders.

16. On 17 February 2023 the Council sent the applicants notice of its intention to impose penalties of £7,000 on Mr John and £5,000 on Mrs John.

17. On 4 March 2023 the applicants applied for a selective licence. On 6 March Mr John made representations in respect of the proposed penalties.

18. The penalties were imposed on 29 November 2023 reduced from the figures referred to above to £5,600 and £4,000 because an application for a licence had been made.

Issues

19. The appellants accepted that they should have had a selective licence for the property.

20. Mr Calzavara submitted that the issues for the tribunal to determine were
    - Did the appellants had committed an offence did they have a reasonable excuse?
    - If the appellants did not have a reasonable excuse, what was the appropriate penalty?

21. In light of the submissions made by the appellants the tribunal has also considered whether it was correct that a financial penalty should be ordered against both appellants.

Reasons for the tribunal's decision

22. The tribunal makes the determinations in this decision based on the documents in the bundles before it at the hearing, the evidence before it and the submissions made. As appropriate these are referred to below. The relevant sections of the 2004 Act the tribunal has considered are set out below.

23. The relevant law is set out in the Appendix to this decision.

Against whom the financial penalty/ penalties should be made

24. The tribunal determines that the Council is permitted to impose separate financial penalties on each of the appellants.

25. Mrs John is the sole registered leaseholder of the Property.

26. The Tribunal heard evidence that the application under the previous licensing scheme referred to Mr John as the owner of the property, and he was the licence holder under that scheme. The e mail address given by Mr John contains Mrs John's first name. Ms Burdis had sent the section 235 notice to Mr John at his Seaford address. The application which was not completed listed both Mr and Mrs John as leaseholders. In her witness statement Ms Burdis, while having referred to Mrs John as the sole registered proprietor, refers to the Council Tax records showing Mr John to be the owner of the property.

27. Mr John stated that the rent for the property was paid into the joint account held with Mrs John. Mrs John also stated that the rent was paid into a joint account held with Mr John. She said, '*we are one person'*. Mr John submitted that the Council should not have ordered two financial penalties.

28. Having heard evidence that the rent is paid into an account in the joint names of the appellants Mr Calzavara submitted that Mrs John both controlled and managed the Property while Mr John as a person jointly receiving the rack rent for the property, was a person having control of the Property. It was therefore correct that a financial penalty had been ordered against each appellant.

29. Mr Calzavada referred the Tribunal to the decision in *Shorr v L B Camden* [2024] UKUT 202 (LC) (‘***Shorr’***). In *Shorr* the Upper Tribunal held that where an unlicensed HMO was jointly owned by spouses but let and generally managed by the wife civil penalties might be imposed on each spouse for failure to license the property.

30. In this case the property is owned solely by Mrs John. The rent is paid into a joint account of Mr and Mrs John.

31. Under section 263 (3) of the 2004 Act a person who is the owner of a property and receives rent from the tenants is a person managing the property. The tribunal therefore finds that Mrs John is managing the property for the purposes of the 2004 Act, even though in practice her husband has undertaken most of the responsibilities associated with the letting.

32. Under section 263(1) of the 2004 Act a person who receives rent for the property is a ‘person having control’. As the rent is paid into the appellants’ joint account the tribunal finds that both Mrs John and Mr John are persons having control of the property.

33. While the facts of *Shorr* differ from those in this case it is clear from that decision, and from that in *Gill v L B Greenwich* [2022] UKUT 26 (LC) referred to in *Shorr,* that the council is entitled to impose financial penalties on both the appellants.

Did the appellants have a reasonable excuse for committing the offence?

34. Section 95 (4)(a) of the 2004 Act provides that in proceedings against a person for an offence under Section 95(1) of the 2004 Act it is a defence that he had a reasonable excuse for having control of or managing the house in the circumstances mentioned in subsection (1).

35. The tribunal has reviewed the evidence before it and the appellants’ submissions as to whether they had a reasonable excuse, and finds that they did not have a reasonable excuse for not having a selective licence.

36. In reaching its decision the Tribunal has had regard to paragraph 81 of the decision in *Perrin v HMRC* [2018] UKUT 156 (TCC) approved by Deputy Chamber President Martin Rodger KC in *Marigold and others v Wells* [2023] UKUT 33 (LC)

“81. When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

37. The Tribunal has also had regard to paragraph 47 of the decision in *AA v Rodriguez & ors*[2021] UKUT 0274 (LC)

> *'47. The view has generally been taken that it is the responsibility of someone who wishes to let their property to find out whether any relevant regulatory restrictions exist and that ignorance of the need for a licence will not normally provide a reasonable excuse (although it may be relevant to culpability and therefore to the amount of a financial penalty to be imposed under section 249A). But there is no hard and fast rule and, just as much as any other defence, a reasonable excuse defence based on ignorance of the need for licensing will always require a careful evaluation of all the relevant facts.'*

38. Mr and Mrs John submitted that Ms Smith of the Council, with whom they dealt in 2016, had known that their home address was in Seaford even though Mr John had given the address of the Property in his application for the licence. As for the emails that Ms Burdis gave evidence had been sent to the email address which Mr John had given, the appellants stated that they had never received them.

39. The property had had a selective licence until March 2020, so that on its expiry Mr John should have investigated whether the selective licensing regime was continuing or not but had not done so.

40. The Tribunal heard evidence from Ms Burdis, a Licensing Enforcement Officer with the Council, as to the steps that the Council took to publicise its decision in 2020 that selective licences were required for privately rented homes occupied by single family households. Ms Burdis gave evidence that because the property had previously had a

licence which had not been renewed the Council had written to Mr John at the property in February 2021 about the possible need for a new selective licence. Ms Burdis visited the property on 21 September 2022 and established that as it was tenanted by Mr S Lintern it was one which required a selective licence. Ms Burdis stated that she had contacted Mr John by telephone and email (to the email address referred to above) on 22 September 2022, and again by text message on 6 October 2022 but received no response from him. The Council's system showed that Mr John had signed up to its electronic newsletter in June 2018 at the e mail address given above.

41. Ms Burdis gave evidence that by 22 September 2022 she knew, from the Council's Council Tax records that, that the appellants address was in Seaford, Brighton, which was the address she used when she sent the notice under section 235 of the 2004 Act to Mr John.

42. Mr and Mrs John submitted that when they had applied for the original licence they had dealt with Ms Sian Smith of the Council who had told them that selective licensing was being trialed and might not be renewed. Mr John submitted that while the property address had been given on the original licence application Ms Smith had known that they live in Seaford. Mr John submitted that he had not received the various e mails that Ms Burdis said that had been sent to him, and that he did not believe that his tenant had received any correspondence at the property as he normally forwarded to them any correspondence addressed to them received at the property. Mr John submitted that any correspondence should have been sent to the appellants at their Seaford address.

43. In their statement of case the appellants also referred to the serious health issues that they have had with their son during the period in question which meant that they had been distracted from investigating whether the selective licensing regime had continued.

44. Mr Calzavara submitted that the Council had tried to bring the need for a licence to the attention of Mr John, to the addresses that he had given to it. The need for a new licence arose before the incidence of their son's ill-health, which had not been brought to the attention of the Council until it issued the Notice of Intent.

45. While the Tribunal finds that the appellants do not have a reasonable excuse it considers below the appellants' submissions in the context of culpability.

The amount of the financial penalty

46. The appeal is by way of a re-hearing of the respondent's decision to impose the penalties and/or the amount of the penalties. The Tribunal may therefore have regard to facts that were not known to the Council when it made its decision.

47. The Tribunal had a copy of the Council's Housing and Licensing Team Enforcement Policy dated 11 February 2020 in the bundle before it. This deals with the administration and enforcement of selective licensing of privately rented homes. This sets out the possible courses of enforcement open to the Council, which include the imposition of a financial penalty.

48. Mr Calzavara submitted that the appellants had not suggested that the Council's policy had been misapplied, nor that an alternative sanction should have been applied.

49. The Tribunal finds on the evidence before it that the appellants did not challenge the imposition of a financial penalty/financial penalties. The appellants challenged that there were two penalties and the amounts.

50. The Tribunal therefore finds that the Council was entitled to impose a financial penalty/financial penalties.

51. In ascertaining the level of penalty to be charged the Tribunal should have regard to the Council's policy and whether it was followed by the Council. While not referred to in the hearing this approach is consistent with the Upper Tribunal decision in *Waltham Forest LBC v Marshall* [2020] 1 WLR 3187).

52. The Policy provides, at paragraph 7.8, that the level of civil penalty will be calculated in accordance with the matrix and guidance set out in its Appendix 1. Appendix 1 sets out the following factors to be taken into account when setting the level of the penalty, being those set out in the statutory guidance under Schedule 9 of the 2016 Act. These are

    (a) Severity of the offence
    (b) Culpability and track record of offender
    (c) The harm caused to the tenant
    (d) Punishment of the offender
    (e) Deter the offender from repeating the offence
    (f) Detering others from committing similar offences
    (g) Remove any financial benefit the offender may have obtained as a result of committing the offence.

53. The policy also states that the Council will exercise its discretion to increase or decrease a penalty beyond the band limits in exceptional circumstances, considered on a case-by-case basis. The policy provides for automatic 20% discounts where the offender complies with the identified breach within the representation period at the 'Notice of Intent' stage or where the offender pays the penalty within a specified time period, normally 28 days.

54. The Council did not provide any evidence to the Tribunal of what consideration it had given to the factors listed above in relation to this particular case. It simply referred the Tribunal to its policy and stated that it had not identified any mitigating factors.

55. On the evidence before it and with regard to the submissions made the Tribunal finds it appropriate to give detailed consideration to the listed factors, with reference to the guidance contained in the Guidance from the Ministry of Housing Communities & Local Government, and to consider whether there are mitigating factors to be taken into account in this particular case.

56. As the Council's policy also states that the Council will exercise its discretion to increase or decrease a penalty beyond the band limits in exceptional circumstances, considered on a case-by-case basis the Tribunal have therefore considered whether there are exceptional circumstances in this case.

57. The only offence in this case is renting the Property without a selective licence.

58. The Council treated this a moderate offence within its Band 2, attracting a penalty of between £5000 and £9999.

59. The Tribunal accepts, as the Council policy states, that failure to obtain a selective licence is significant, but this does not address the severity of the offence as against the other offences in respect of which a financial penalty may be made, nor the seriousness of the offence within its particular category.

60. The Tribunal has taken into account that that proper enforcement of licensing requirements against all landlords, good and bad, is necessary to ensure the general effectiveness of licensing system and to deter evasion, and the seriousness of the offence.

61. The Tribunal finds that the offence is not the most serious type of offence for which a financial penalty may be imposed. In reaching this decision the Tribunal has had

regard to the decision in *Daff v Gyalu*i [2023] UKUT 134 (LC), which also recognised that there can be more or less serious offences within each category.

62. The Tribunal, in assessing the seriousness of the offence within the category of renting a Property without a selective licence has had regard to the fact that the Council had previously granted Mr John a selective licence for the Property, and that once the appellants had properly appreciated the need for a selective licence they applied for one.

63. The Tribunal has had regard to paragraph 47 of the decision in *AA v Rodriguez & others*[2021] UKUT 0274 (LC), referred to above.

64. On the evidence before it the Tribunal finds the culpability of Mrs John to be low. It was Mr John who was primarily responsible for dealing with the Property. Mrs John was not contacted by the Council as to the need for a selective licence. It contacted Mr John. Mrs John has no previous record of committing any offence.

65. The Tribunal finds the level of culpability of Mr John to be greater than that of Mrs John. The tenant of the Property since 2015 refers to Mr John as his landlord in his letter of 5 April 2023. Mr John had previously obtained a selective licence for the Property and he should have investigated the need for a new selective licence when the previous selective licence expired. There is no record of Mr John having committed a previous offence.

66. The appellants submitted that there was no evidence of harm caused to the tenant through the absence of the selective licence. The same tenant, Mr S. Lintern, had occupied the property since April 2015 and in April 2023 wrote a letter commending Mr John as an exceptional landlord. The Council did not allege that the absence of the selective licence caused harm to the tenant of this Property.

67. The Council's policy states that it views the offence of failing to ensure that a rented home is licensed under its selective licensing scheme as a significant issue. As to factors (d) to (g) listed above the Council's policy states that these factors are considered by the Council to be the primary objectives of financial penalties.

68. The Tribunal heard evidence from Ms Walkes that the Council regarded the failure as a moderate Band 2 offence under its Civil Penalty Matrix, attracting a civil penalty of at least £5,000. Ms Walkes referred the Tribunal to the 'Prosecution/Civil Penalties Report Pro-forma' for Mr John and Mrs John in the bundle. In both the reason given for imposing a financial penalty is that it is in the public interest to impose the financial penalties, to reduce anti-social behaviour associated with the private rented

sector, to ensure that homes are safe and suitable for occupation and that failure to apply for the selective licence has meant that the tenants of the Property have not been afforded the same level of protection as tenants of landlords who have complied with the requirement.

69. There was no evidence before the Tribunal of anti-social behaviour at the Property, or that the home was not safe and suitable for occupation.

70. The Tribunal heard evidence from Ms Walkes that having fixed the penalty for each appellant at £5000 it was considered that Mr John's knowledge that a licence was required was an aggravating feature and the penalty was therefore increased to £7,000 for him. As Mr John subsequently applied for a licence the Council discounted both penalties by 20%.

71. Ms Walkes stated that the Council had not been informed of any mitigating factors to be taken into account. It had endeavoured to inform Mr John of the need to re-licence the Property, using the addresses it had on record for him. Mr Calzavara submitted that the appellants' son's ill health was only drawn to the attention of the Council once the appellants had received the Notice of Intent.

72. The Tribunal considers it appropriate to vary the financial penalties imposed by the Council, to reflect severity of the offence, the respective culpability of the two appellants, the lack of harm to the tenant, that punishing one appellant is effectively punishing both.

73. Given that both the Council and the tenant treated Mr John as primarily responsible for the Property the Tribunal finds that there should have been a distinction made in the level of basic penalty imposed on each of the appellants.

74. The Tribunal adopts the Council's starting point of a moderate offence Band 2 for Mr John of £5,000. It finds that the aggravating factor of failing to ascertain that the property needed a new selective licence is mitigated by Mr John applying for a licence once he appreciated that it was required. It also finds that the ill-health of the appellants' son is a mitigating factor as to the delay in applying for the new selective licence.

75. The Tribunal finds the appropriate financial penalty for Mr John to be £4,000.

76. In the event that Mr John pays the penalty within 28 days of this decision it should be subject to the automatic 20% discount offered by the Council where the offender pays the penalty within a specified time period.

77. The Tribunal finds that the Council did not sufficiently consider the different level of culpability of Mrs John, given that she had little or no involvement in the actual management of the Property. It notes that in *Shorr* no penalty was awarded against Mr Shorr by the Upper Tribunal. In paragraph 73 Deputy President Martin Rodger KC said,

    ' *I do not consider that any financial penalty is appropriate in Mr Shorr's case. He did not enter into any contractual relationship with Ms Ro's tenants and he was not their landlord. He therefore owed them no contractual obligations and it was not unreasonable for him to leave management entirely to his wife.'*

    In that case Mr Storr was a joint registered proprietor of the property and had a joint bank account with Ms Ro.

    In this case Mrs John was the sole registered proprietor of the Property but the tenant viewed Mr John as his landlord and the person with the contractual obligations. From the evidence before the Tribunal it finds that Mr John was entirely responsible for the day-to-day management of the Property.

    The Tribunal therefore finds that it is not appropriate to award a financial penalty against Mrs John.

Name: Judge Pittaway **Date:** 30 September 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix

Housing Act 2004

Section 95 Offences in relation to licensing of houses under this Part

(1)A person commits an offence if he is a person having control of or managing a housewhich is required to be licensed under this Part (see section 85(1)) but is not so licensed.

(2)A person commits an offence if—

(a)he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and

(b)he fails to comply with any condition of the licence.

(3)In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a)a notification had been duly given in respect of the house under section 62(1) or 86(1), or

(b)an application for a licence had been duly made in respect of the house under section 87, and that notification or application was still effective (see subsection (7))

(4)In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—

(a)for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b)for failing to comply with the condition,

as the case may be.

263Meaning of "person having control" and "person managing" etc.

(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.

(4)In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5)References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

Section 249A

(1)The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

(2)In this section “relevant housing offence” means an offence under—

(a)section 30 (failure to comply with improvement notice),

(b)section 72 (licensing of HMOs),

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

(d)section 139(7) (failure to comply with overcrowding notice), or

(e)section 234 (management regulations in respect of HMOs).