FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BB/HIN/2024/0003**
Property	**:**	**First Floor Flat, 18 Victoria Avenue, London, E6 1EY**
Applicant	**:**	**Mr. Paul Adelusi**
Representative	**:**	**In person**
Respondent	**:**	**London Borough of Newham**
Representative	**:**	**Mr. Sirica (Counsel)**
Type of application	**:**	**Appeal against a financial penalty under s.249A Housing Act 2004**
Tribunal member(s)	**:**	**Judge Sarah McKeown** **Mr. Antony Parkinson MRICS**
Date and Venue	**:**	**27 November 2024 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**27 November 2024**

DECISION

Decisions of the tribunal

(1) The decision by the Respondent dated 3 October 2023 to impose a financial penalty is quashed. The appeal made by the Appellant against the imposition of a financial penalty imposed by the Respondent against it, under s.249A and schedule 13A of the Housing Act 2004, is therefore allowed.

Documentation

1. The Applicant has provided a bundle of 179 pages. Pages within that bundle are referred to as "A…".

2. The Respondent has provided a bundle of 172 pages. Pages within that bundle are referred to as "R…".

3. The Respondent has also provided a "Brief Supplementary Reply".

4. On 25 November 2024, the Respondent filed an application asking to vacate the hearing and for an order for the appeal to be upheld. It said that the Respondent had reviewed its case and it did not wish to contest the appeal. The Tribunal informed both parties that the hearing remained listed as it took the view that the Applicant may wish to ask for a costs order. Later the same day, the Applicant did file a response to the application, making an application for costs pursuant to r.13(1) Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Application – A3

5. The "Property" is the First Floor Flat, 18 Victoria Avenue, London, E6 1EY. The Applicant is the leaseholder.

6. The Applicant appeals against the imposition of a financial penalty imposed by the Respondent pursuant to s.249A Housing and Planning Act 2016.

7. The civil penalty of £20,000 was imposed on the Applicant as owner of the Property by reason of the Applicant's failure to licence a house under Part 3 Housing Act 2004 and an offence was committed under s.95(1) Housing Act 2004.

8. The Application states that the Grounds for Appeal are as follows:
(1) The Property was occupied by a very difficult tenant who refused to grant entry to the Respondent or his agent to effect repairs, despite many attempts;
(2) The sitting tenant has been given notices to quit three times so that the Property would be vacant for repairs, and ignored them;
(3) The sitting tenant has been caused anti-social behaviour and pollution and has been reported by neighbours;
(4) Proceedings have been commenced for possession;
(5) All repairs and licences will be done as soon as the Applicant gains entry and possession.

9. There is a letter (A11) which sets out the basis of the appeal. It is said, among other things, that the tenant has refused entry, sublet, run a commercial business, over-crowded, all without the Applicant's consent. There have been complaints of anti-social behaviour. There had been contact from the Respondent but they advised the tenant to stop paying rent, resulting arrears.

10. There is also "An expanded statement of the reasons for the appeal" (A13). In summary this states:
(a) the Respondent did not establish a valid selective licensing scheme and the Tribunal cannot find that an offence was committed – reference is made to LON/00AN/HMF/2024/0005;
(b) No offence was committed as there is a statutory defence under s.95(3)(a) - the Applicant's section 86(1) notification (made orally at first and later via emails on 08.06.2022 (A82), 09.06.2022 (A84), and 25.05.2023 (A86)) for a Temporary Exemption Notice (TEN) and which was still "effective" (s.95(7)(a)) at the time the offence was alleged as the Respondent failed to make a decision on it on the false premises (made on Page 1 of 810.07.2024 (A93)) that the Respondent's internet portal should have been used to apply for the TEN and that the Applicant's notification by over the phone and email did not mention seeking for TEN. The Respondent has a reasonable excuse not to use the Respondent's internet portal to file the s.86(1) notification until 12 July 2024 (A95) because the Respondent only informed the Applicant to do so on 10 July 2024 (A93) and by this time the Property was no longer tenanted and TEN was no longer issued (s.70) for the reason given by the Respondent on 18 July 2024 (A97);
(c) The amount of the penalty was miscalculated, and it should have ben £1,000.

11. There is also a witness statement from the Applicant (A21).

The Respondent's case

12. There is a Response to the Grounds of Appeal (R9) which sets out the Respondent's position which is, in summary, as follows:
(1) there was no need for the Applicant to have access to the Property to apply for licence and, in any event, some access was given R160);
(2) the Respondent could not give the Applicant more time to apply for a licence until the tenant was evicted;
(3) the Respondent's email of 25 May 2023 did not request a TEN.

13. The Respondent has also provided a "Brief Supplementary Reply" which also sets out the Respondent's position, in summary:

(a) the Applicant has no "reasonable excuse" defence;
(b) access to the Property is not required to apply for a licence;
(c) the repair issued have no connection to licensing;
(d) a TEN was not requested until July 2024;
(e) service of a Notice to Quit does not negate the need for a TEN;
(f) The designation of an area for selective licensing came into force on 23 June 2023;.

14. The Respondent's bundle also contains a witness statement from Ms. Alabi (R3), who is a Senior Environmental Health Practitioner. Among other things:
(a) she exhibits the Financial Penalty Matrix – R44, R140;
(b) she exhibits the DCLG Guidance – R49;
(c) she states that the designation of an area for Selective Licensing came into force in 2018 – R70;
(d) she states that warnings letters were sent to the Applicant - R101, also R104, R123;
(e) she states that quantum was arrived at using matrix calc:
    (i) Deterrence and prevention – warning letters were sent, there was no application for a TEN, the Applicant did not respond to letters - score of 10;
    (ii) Removal of financial incentive – the Applicant owns one property which is rented – score of 1;
    (iii) Offence and history – previous enforcement notices – score of 10;
    (iv) Harm to tenants – there were hazards and no documents in place to check the condition – score of10
    Total - 41
(f) she states that he tenant moved out in April 2024;
(g) she states that the consultation and details of the scheme was widely advertised the details of which can be found on the Council's website here: https://www.newham.gov.uk/landlords-newham/rented-property-licensing/11
(h) she states that as a landlord who has previously obtained a property licence from the Council (although it expired in 2014), the Applicant should have been aware of the legal requirements of the licensing scheme once his property was privately rented or at the very least obtained professional advice on the position. He clearly failed to carry out the necessary due diligence as a professional landlord.

Directions

15. Directions were given on 17 June 2024 (A173).

16. The Tribunal wrote to the Respondent on 27 June 2024 (A89) stating, among other things, that the application was only in relation to the failure to licence. The Tribunal wrote on 2 July 2024 (A90) stating that the only clearly identified financial penalty was that relating to the

s.95(1) offence and that the Tribunal would consider the application to apply to that FPN and that alone.

Hearing

17. On 26 November 2024, the Applicant sent an amended version of his Costs Submissions, which corrected some typographical issues. He attended the hearing with his friend, Mr. Ade Oadeokedina.

18. The Respondent attended the hearing, represented by Counsel.

19. The Tribunal started by confirming that the Respondent did not contest the appeal. It was clarified during the hearing that it recognised that there was an issue in respect of the email of 25 May 2023 and whether it constituted an application for a TEN and whether it should have been acted upon by the Respondent.

20. Mr. Sirica confirmed to the Tribunal that the Respondent needed some more time to respond to the costs application. He said that the Respondent had tried to get the information together the day before the hearing, but had not managed to do so. The Tribunal said to the Applicant that, given the need for the Respondent to respond to the application, it would be minded to give it some time to do so, and the Applicant did not oppose this.

21. Counsel for the Respondent then said that it wished to rely on some documents to oppose the costs order. He said that the Respondent accepted that there was a representation by a council officer to the effect that the Respondent was not obliged to comply with reg. 19c of the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 (it appears that this is a mistaken reference to reg. 19 when it should have been reg. 9). Mr. Sirica said that this was not correct and the Respondent did have to comply. He said that this had become a major issue in the case, and that it would not normally be incumbent on the Respondent to produce evidence of compliance with every single requirement. He also noted that the Property was now licensed. Further, it was said that the Applicant asserted that the licensing scheme was invalid, and that the Tribunal was not conducting a judicial review and so this was beyond its scope.

22. The Tribunal pointed out that the standard directions for a r.13 costs application do permit the Respondent to provide details of any relevant documentation relied on with copies attached. It also pointed out to both parties that the Tribunal was, in determining the costs application, concerned with whether there had been unreasonable behaviour. It was not re-opening the substantive application.

23. The Applicant's friend then addressed the Tribunal with a couple of points the Applicant wished to make. The first was that he said that the email of 25 May 2023 should have been taken as a request for a TEN and if the Respondent had acted on that, would not have been any fine. He said that the Respondent insisted it had complied with the necessary requirements and had done nothing wrong – both in terms of the publication requirements and in respect of the request for a TEN. On either of those two points, there had been a serious error.

The Law

24. By s.80 Housing Act 2004, a local housing authority may designate the area of their district or an area in this district as subject to selective licensing, subject to the requirements of subsections (2) and (9) being met.

25. Section 83 Housing Act 2004 provides, among other things:
(2)As soon as the designation is confirmed or made, the authority must publish in the prescribed manner a notice stating—
(a)that the designation has been made,
(b)whether or not the designation was required to be confirmed and either that it has been confirmed or that a general approval under section 82 applied to it (giving details of the approval in question),
(c)the date on which the designation is to come into force, and
(d)any other information which may be prescribed.

26. The relevant delegated legislation is the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 (SI 2006 No 373), which provides:
"9(1) A local housing authority that is required under section 59(2) or 83(2) of the Act to publish a notice of a designation of an area for the purpose of Part 2 or 3 of the Act must do so in the manner prescribed by paragraph (2).
(2) Within 7 days after the date on which the designation was confirmed or made the local housing authority must—
(a) place the notice on a public notice board at one or more municipal buildings within the designated area, or if there are no such buildings within the designated area, at the closest of such buildings situate outside the designated area;
(b) publish the notice on the authority's internet site; and
(c) arrange for its publication in at least two local newspapers circulating in or around the designated area—
(i) in the next edition of those newspapers; and

(ii) five times in the editions of those newspapers following the edition in which it is first published, with the interval between each publication being no less than two weeks and no more than three weeks.
(3) Within 2 weeks after the designation was confirmed or made the local housing authority must send a copy of the notice to—
(a) any person who responded to the consultation conducted by it under section 56(3) or 80(9) of the Act;
(b) any organisation which, to the reasonable knowledge of the authority—
(i) represents the interests of landlords or tenants within the designated area; or
(ii) represents managing agents, estate agents or letting agents within the designated area; and
(c) every organisation within the local housing authority area that the local housing authority knows or believes provides advice on landlord and tenant matters, including—
(i) law centres;
(ii) citizens' advice bureaux;
(iii) housing advice centres; and
(iv) homeless persons' units.
(4) In addition to the information referred to in section 59(2)(a), (b) and(c) or 83(2)(a), (b) and(c), the notice must contain the following information—
(a) a brief description of the designated area;
(b) the name, address, telephone number and e-mail address of:
(i) the local housing authority that made the designation;
(ii) the premises where the designation may be inspected; and
(iii) the premises where applications for licences and general advice may be obtained;
(c) a statement advising any landlord, person managing or tenant within the designated area to seek advice from the local housing authority on whether their property is affected by the designated; and
(d) a warning of the consequences of failing to licence a property that is required to be licensed, including the criminal sanctions.

27. In LON/00AN/HMF/2024/0005 (A147), a decision concerning a Rent Repayment Order, the Tribunal said (on the interpretation of section 83(2)):
"6. In order to establish a selective licensing scheme, the local authority has to follow the requirements of section 83(2) of the 2004 Act. The relevant delegated legislation is the Licensing and Management of House in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006 (SI 2006 No 373), which provides:

> '9(1) A local housing authority that is required under section 59(2) or 83(2) of the Act to publish a notice of a designation of an area for the purpose of Part 2 or 3 of the Act must do so in the manner prescribed by paragraph (2).
> (2) Within 7 days after the date on which the designation was confirmed or made the local housing authority must-

(a) place the notice on a public notice board at one or more municipal.....

7. In the current case the tenant has adduced no evidence that all of these requirements for the making of a selective licensing scheme were satisfied. (Whilst a breach of regulation 9(3) might not be fatal to the validity of a scheme, regulation 9(2)(a) and (c) is probably different. The public advertisement of the scheme is an important protection for landlords. Those not on the internet, as significant numbers may not have been in 2006, would otherwise had no means of leaning of their obligation to obtain a licence). The burden of proving the validity of the scheme was on the tenant, however, Ms. Kelly for the landlord took no point on this...".

28. Section 85 Housing Act 2004 states, among other things:
(1) Every Part 3 house must be licensed under this Part unless-
(a) it is an HMO to which Part 2 applies (see section 55(2)), or
(b) a temporary exemption notice is in force in relation to it under section 86, or
(c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.

29. A Part 3 house is defined (s.79) as one which is in an area that is for the time being designated under section 80 as subject to selective licensing, and the whole of it is occupied either: (i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4); or (ii) under two or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence under subsection (3) or (4).

30. Section 95 Housing Act 2004 provides, among other things – A128:
(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.
(2) ...
(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)).

31. Section 249A of the 2004 Act provides – A130:
(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—

...
(c) section 95 (licensing of houses under Part 3),
...
(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.
(4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.
(5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—
(a) the person has been convicted of the offence in respect of that conduct, or
(b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.
(6) Schedule 13A deals with—
(a) the procedure for imposing financial penalties,
(b) appeals against financial penalties,
(c) enforcement of financial penalties, and
(d) guidance in respect of financial penalties.
(7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.
(8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.
(9) For the purposes of this section a person's conduct includes a failure to act.

32. The procedure for issuing a financial penalty is set out in Schedule 13A Housing Act 2004.

33. The Tribunal is mindful of two decisions of the Upper Tribunal. In *Waltham Forest LBC v Marshall and Ustek* [2020] UKUT 0035 (LC) the Tribunal examined at some length the approach to be taken by tribunals on appeals against financial penalties imposed by the local housing authorities under s.249A. Judge Cooke appears to have identified the following principles-

(i) The First-tier Tribunal is not the place to challenge the policy about financial penalties;
(ii) In applying its financial penalty policy, the local housing authority must not fetter its discretion: it must not apply the policy so rigidly as to reject the possibility of departing from the policy;
(iii) The Tribunal can and should give proper consideration to arguments that it should depart from the policy. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed;

(iv) As an appeal under para. 10 Sch. 13A is by way of a re-hearing, the Tribunal must make its own decision. However, in doing so, however, it must afford the local authority's decision particular weight, described variously by Judge Cooke as "special weight", "considerable weight" and "great respect". If, having heard evidence, it disagrees with the decision, it may vary it.

34. These principles were endorsed and applied in *Sutton v Norwich City Council* [2020] UKUT 90(LC).

35. The appeal is a re-hearing. In *Ekweozoh v London Borough of Redbridge* [2021] UKUT 0180 (LC) the Upper Tribunal considered LHA Enforcement Policy and matrix. The UT considered the FTT's jurisdiction and approach on appeal at [4-6]:

"It is often a sensible precaution near the start of its decision for any court or tribunal to inform the parties, and to remind itself, of the basis of its jurisdiction. In this case the FTT did not refer to paragraph 10 of Schedule 13A or explain on what basis it was determining the appeal. Its decision contains several indications that it may have approached its task as if it was required to review the respondent's decision, rather than to remake the decision and reach its own conclusions on the critical issues."

Determination

36. The brief background is as follows:

37. On 23 June 2023 (A35), the Respondent wrote to the Applicant stating that it had introduced another 5 years selective licensing scheme from 1 June 2023.

38. On 25 August 2023 (A37), the Respondent wrote to the Applicant stating that the Property remained unlicensed, that an offence had been committed and the Respondent had decided to impose a Financial Penalty. The letter stated that the Applicant had to right to make representations. A Notice of Intent (A38) accompanied the letter. It states that the Respondent had considered:

(a) Warning letters were sent on 12 September 2019, 3 October 2019 but no response was received;
(b) A complaint was received on 14 January 2022 about a water leak and the Property was inspected on 2 February 2024. It was occupied but unlicensed;
(c) Further warning letters were sent on 26 June 2023 and 20 July 2023;

(d) An officer spoke to the Applicant on 4 August 2023 and he was advised to submit an application (and enforcement action would be taken if one was not received by 21 August 2023).

39. No representations were made (A43) and the Applicant was notified on 3 October 2023 that a penalty of £20,000 had been imposed (A43).

40. In order to impose a financial penalty, there must be a "relevant housing offence' committed by the person served with the notice.

41. The "relevant offence" relied on in this case is s.95(1) Housing Act 2004.

42. The questions the Tribunal must consider are:

(a) Whether the Tribunal is satisfied beyond reasonable doubt that the offence has been committed;
(b) If an offence is found to have been committed, the question then arises as to whether, on the balance of probabilities the Applicant has a defence;
(c) There then must be consideration of whether the financial penalty has been properly imposed by reason of the requirements in s.249A and para. 1-8 of Sch. 13 A of the 2004 Act;
(d) The final consideration is whether the penalty imposed is for an appropriate sum.

43. In view of the concessions by the Respondent (in its application and as put forward at the hearing) and the position it now takes, in not contesting the appeal, the Tribunal is not satisfied beyond reasonable doubt that an offence under s.95(1) Housing Act 2004 has been committed. The appeal is therefore allowed and the decision of the Respondent (dated 3 October 2023) to impose a financial penalty is quashed.

Costs

44. The Applicant asks for its costs pursuant to rule 13(1)(b) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. That application was made (by way of Costs Submissions) sent by email to the Tribunal and the Respondent at 16:40 on 25 November 2024 (after the Respondent had filed its application to vacate the hearing).

45. Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, provides:

Orders for costs, reimbursement of fees and interest on costs

13.—(1) The Tribunal may make an order in respect of costs only—

(a)under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b)if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i)an agricultural land and drainage case,

(ii)a residential property case, or

(iii)a leasehold case; or

(c)in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a)must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b)may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5)An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a)a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b)notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a)summary assessment by the Tribunal;

(b)agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");

(c)detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 199 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.
(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

46. The application was only made after 4:30pm on 25 November 2024 (the Tribunal makes clear, this is no criticism of the Applicant – as set out above, the Respondent's application was only made on 25 November 2024). The Respondent has said that it needs some further time to gather the information it wishes to rely upon in response to the application. The Tribunal notes the need (as stated in rule 13(6)) for the Tribunal to allow the Respondent an opportunity to make representations. In view of this, the Tribunal has not heard or determined the costs application, but has issued separate directions for the determination of that application.

Judge Sarah McKeown
27 November 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)