FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BH/HNA/2023/0059.**
Property	**:**	**2 Peasmead Terrace, London E4 6NU.**
Applicant	**:**	**Top Support Estate Agent Limited**
Representative	**:**	**Kendra Mottoh (director)**
Respondent	**:**	**London Borough of Waltham Forest**
Representative	**:**	**Riccardo Calzavara (Counsel)**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A of the Housing At 2004**
Tribunal Members	**:**	**Judge Robert Latham** **Mel Cairns MCIEH**
Date and Venue of Hearing	**:**	**11 October and 22 November 2024 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**9 December 2024**

DECISION

Decision of the Tribunal

(i) The Tribunal confirms the Financial Penalty of £12,000 which was imposed on the Applicant on 19 June 2023 in respect of an offence under section 95(1) of the Housing Act 2004. This sum is to be paid by 10 January 2025.

(ii) The Tribunal makes an order for the Respondent to refund to the Applicant the tribunal fees of £320 which they have paid. This sum should be set off against the Financial Penalty which the Applicant is required to pay.

Summary

1. On 19 June 2023, the London Borough of Waltham Forest ("the Respondent") imposed a Financial Penalty on Top Support Estate Agent Limited ("the Applicant") in the sum of £12,000. The reason for imposing the Financial Penalty was stated to be: "You failed to ensure on 20 September 2022 that the premises was licenced under Section 95(1) Housing Act 2004 Part 3". On 8 March 2023, the Respondent had served a Notice of Intent which had described the offence in similar terms. The offence related to a two storey terraced property at 2 Peasmead Terrace, New Road, London E4 6NU ("the House").

2. On 6 July 2023, the Tribunal received an application from the Applicant appealing against the Financial Penalty. Their reason for appealing was "we are not the landlord of the Property". They provided a copy of their management agreement with the landlord and argued that it imposed the licencing obligation on the landlord.

3. The offence under section 95(1) of the Housing Act 2004 ("the Act") is not one of failing to licence a house. A person rather commits an offence "if he is the person having control of or management of a house which is required to be licenced … but is not so licenced. The concepts of "control of or management of a house" are highly technical. The substance of the offence in this case is that the Respondent are a firm of managing agents who received the rent from the tenant on behalf of the landlord. Under the Act, whilst the landlord would be treated as the "person managing" the House, the Respondent could be treated as both the "person managing" and the "person having control" of the House.

4. The Tribunal has been required to determine whether the Notice of Intent and the Final Notice are void, given the deficiencies in the reasons given for imposing the penalty. This is an issue which was left open by the Upper Tribunal in *Welwyn Hatfield BC v Wang* [2024] UKUT (LC); [2024] HLR 27 (see [95] below). We conclude that these deficiencies are cured by the current application which is a rehearing of the decision to impose a Financial Penalty. This Tribunal is able to remedy any prejudice suffered by the Applicant.

5. Had the Respondent accurately defined the offence and explained why they had concluded that the Applicant was guilty of the offence, it may be that this appeal would not have been brought. It is for this reason, that we are satisfied that the Respondent should refund to the Applicant the tribunal fees of £320 which they have paid.

6. We must then go on to consider whether the Respondent has satisfied us beyond reasonable doubt that the Applicant is guilty of the offence of being a person having control of or management of a house which was required to be licenced, but which was not so licenced.

7. The Applicant contend that their management agreement with the landlord provided them with a complete defence as the obligation to licence the house was the sole responsibility of the landlord. This is based on a misunderstanding of the law. Both the landlord and the managing agent may be treated as either the person "having control" or "management" of the House. However, the Tribunal must consider whether the Applicant has a defence of reasonable excuse in that they reasonably believed that they had no obligation to licence the House.

8. We reject the defence of reasonable excuse and are satisfied that on 20 September 2022, the Applicant was both the "person having "control" and the "person managing" the House which was required to be licenced, but which was not so licenced. We confirm the Financial Penalty of £12,000 which was imposed by the Respondent.

The Application

9. On 3 August 2023, the Applicant issued this appeal. The Grounds of Appeal (at A.7) are:

> "We are not the landlord of the property. The fine is issued when we no longer manage the property. Although we used to manage the property, there was no licence required when we took over the property. But during the management period, it became mandatory to obtain a licence but that is landlord problem not us."

10. On 10 May 2024, the Tribunal gave Directions (amended on 18 June 2024) pursuant to which:

(i) The Respondent has filed a Bundle (292 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) The Applicant has filed his Bundle (45 pages) containing the material on which they seek to rely in support of his appeal. Reference to this Bundle will be prefixed by "A.___".

11. The Respondent has filed a Statement of Case (at R.4-7). This concludes (at [14]):

> "It follows that there is only one issue: Was the Applicant the person managing the Property? The Applicant says that it was not because it was neither the landlord nor did it manage the Property

when the penalty was imposed. Neither point bears even the most superficial scrutiny. While the landlord is (ordinarily) susceptible to the imposition of a penalty in respect of the non-licensing of licensable property, he is not the only person so susceptible. There is no dispute that the Applicant received rent on behalf of the Landlord, and passed it on to her. It follows that it was, at the material time, the person managing the Property. The fact that the Applicant no longer managed the Property at the time the final notice was served is nothing to the point; the question is whether it so managed at the time of the alleged offence. It did."

12. The Directions alerted the parties to the procedure for the appeal:

(i) The appeal would be by way of a re-hearing of the decision of the local housing authority ("LHA") to impose the penalty and/or the amount of the penalty, but it may be determined having regard to matters of which the Respondent was previously unaware;

(ii) The Tribunal would consider whether to confirm, vary or cancel the final notice imposing the financial penalty;

(iii) The Tribunal would consider: (a) whether it is satisfied beyond reasonable doubt that the applicant's conduct amounts to the relevant housing offence; (b) whether the LHA has complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty; and (c) whether the financial penalty is set at an appropriate level.

(iv) Witnesses would be expected to attend the hearing to be questioned about the evidence unless their statement had been agreed by the other party.

(v) The proceedings would be governed by the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules").

The Hearing

13. On 11 October 2024, the appeal was listed before this Tribunal. The Applicant was represented by Mr Kendra Mottoh who is the sole director. The Respondent was represented by Mr Riccardo Calzavara (Counsel).

14. At the beginning of the hearing, the Tribunal alerted the parties that we were concerned that the Notice of Intent and the Final Notice might be invalid as they failed to give the Applicant sufficient information to enable him to answer the charge against him. In particular, the Notices failed to explain why the Applicant, as managing agent, was obliged to licence the premises, namely as a person "having control of" or "managing" the House. The Tribunal gave the parties a short adjournment to consider this point. Mr Calzavara made detailed submissions on why the notice was valid,

relying on the decisions of *Waltham Forest LBC v Younis* [2019] UKUT 362 (LC); [2020] HLR 17; *Maharaj v Liverpool CC [2022] UKUT 140 (LC)*; and *Welwyn Hatfield BC v Wang*. Having heard these submissions, the Tribunal indicated that it would hear the appeal and then issue a decision addressing both the validity of the Notice and, if satisfied that the Notice was valid, the merits of the appeal. Mr Calzavara urged us to give a ruling on the preliminary issue, before embarking on the appeal. We declined to do so. We are satisfied that the Notices should not be considered in isolation, but rather in the context of the wider information that was available to the Applicant.

15. Mr Calzavara presented the Respondent's case, calling evidence from Ms Lisa Smith and Ms Stacey Walkes:

(i) Ms Smith is an environmental health enforcement officer. Her statement, dated 7 December 2022, exhibits a number of documents. She gives details of the two relevant Selective Licencing Schemes. The first Scheme was introduced on 1 April 2015 and had expired on 31 March 2025. The second Selective Scheme was introduced on 1 May 2025 for a term of five years. There had been short gap between the two schemes because of the delay of the Secretary of State in confirming the second scheme (see R.147-148). Both schemes had been widely advertised before they were introduced. Ms Smith first visited the House on 26 January 2022. She describes her involvement with the property and her contact with the landlord, Ms Chioma Ene, and the tenant's wife, Ms Roseline Kayuwa. She inspected the House on 20 September 2022, the date of the relevant offence. She spoke to Ms Kayuwa who confirmed that she was paying rent to the Applicant. She provided a copy of her tenancy agreement. Ms Ene applied for a licence on 5 December 2022 (R.281-288). There had been no licence in place prior to this date. Ms Smith had no contact with the Respondent apart from one telephone conversation on 26 January 2022 when she reported the absence of heating/hot water. The person to whom she spoke, agreed to attend to the issue.

(ii) Ms Walkes is the Respondent's Private Sector Housing and Licencing Team Manager. Her statement is dated 24 May 2024. She also exhibits a number documents to her statement. Ms Walkes reviewed the evidence presented to her by Ms Smith, including her witness statement. She was responsible for serving both the Notice of Intent on 8 March 2023 and the Final Notice to impose the Financial Penalty on 19 June 2023. Her Note which recorded her decision to impose the Financial Penalty is at R.25-28. She explains how she computed the Financial Penalty of £12,000 having regard to the Respondent's policy. She finally responds to the Applicant's appeal. She does not address the effect of management agreement between the Applicant which was only provided as part of the appeal.

The Tribunal has no hesitation in accepting the evidence of both these witnesses.

16. The Respondent also sought to adduce two witness statements from Ms Roseline Kayuwa dates 20 July 2022 (R.289-90) and 20 September 2022 (at p.291-292). She was occupying the house at the material times paying a monthly rent of £1,300 to the Applicant. She was not called to give evidence. Mr Mottoh confirmed that the content of these witness statements was not in dispute.

17. Mr Mottoh then gave evidence on behalf of the Applicant. By 16.50 on the first day, it was apparent that Mr Calzavara would be unable to complete his cross-examination within a reasonable time. The Tribunal therefore had no option but to adjourn the case part heard. Mr Calzavara indicated that a further day would be required.

18. On 11 October 2024, the Tribunal issued Further Directions. The Tribunal permitted both parties to make written submissions on the preliminary issue. Mr Calzavara has provided further written submissions.

19. On 22 November 2024, the Tribunal concluded the hearing. Mr Calzavara cross-examined Mr Mottoh for a further two hours. We did not find Mr Mottoh to be a satisfactory witness. Mr Calzavara described his responses as "loquacious". Rather than answer the question put to him, Mr Mottoh embarked upon long responses which seemed to be no more than a smoke screen erected to avoid answering the question that had been put to him. He seemed willing to say whatever he thought would best assist his case. Mr Calzavara suggested that Mr Mottoh was not a witness of truth.

20. The adjournment put Mr Mottoh at a disadvantage as he was unable to recall what he had said on the previous occasion. On 11 October, he had been definite that he had not received the Notice of Intent, despite it have been both posted and emailed to him. He had therefore been unable to respond to it. On 22 November, he rather admitted that he had received the Notice. He had not responded as he did not consider it his responsibility to licence the House. He had contacted the landlord rather than the Respondent.

21. Mr Mottoh stated that he had been managing properties for some 15 years. In September 2022, he was managing some 10 properties, most of which seemed to require licences. He also employed a mortgage broker. The firm had signed up to one of the government's redress schemes. The Applicant was only managing one other property in Waltham Forest. He did not manage any HMOs.

22. The Tribunal categorise Mr Mottoh as being "misguided", rather than "a rogue managing agent". His inability to answer questions directly did not endear him to the Tribunal. He did not manage the House with the care and degree of attention that we would expect from a professional managing agent. He did not keep an adequate record of correspondence. He felt able to ignore correspondence which was addressed to the landlord and was merely copied to him. However, any managing agent is entitled to

know the substance of any criminal charge that they are required to answer.

The Law

Selective Licencing

23. The Housing Act 2004 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.

24. 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.

25. 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.

26. 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).

27. Section 95 (1) creates the offence of having control or management of an unlicenced house (emphasis added):

> "(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.
> …
>
> (3) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time……
>
> > (b) an application for a licence had been duly made in respect of the house under section 87, and that …. 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)…."

28. 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."

29. The concepts of "control of or management of a house" are technical and date back to the Public Health (London) Act 1891. There may be more than one person who may commit an offence under section 95 as having control of or managing an unlicenced house. Thus, in the current case:

(i) the landlord as the owner received rent through the managing agent would be the "person managing" the premises.

(ii) The Applicant could be either be (a) the "person having control" of the premises as the agent who receives the rack rent on behalf of the landlord; or (b) the "person managing" the premises as the person who received the rent on behalf of the owner".

30. However, only one person may hold the licence. In deciding to whom to grant the licence, section 88(3) requires a LHA to consider whether "the proposed licence holder (i) is a fit and proper person to be the licence holder, and (ii) is, out of all the persons reasonably available to be the licence holder in respect of the house, the most appropriate person to be the licence holder".

31. 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 95 (licencing of houses under Part 3)".

The Defence of Reasonable Excuse

32. Mr Mottoh sought to argue that he had a complete defence to the offence, and did not need to rely on the defence of reasonable excuse. A tribunal is required to consider whether the facts raised could give rise to a defence of reasonable excuse even if the defence has not been specifically raised by the applicant (see *IR Management Services Ltd v Salford* [2020] UKUT 81 (LC). It is for the applicant to make out the defence to the civil standard of proof (the balance of probabilities).

33. The defence was recently considered by the Upper Tribunal in In *Marigold & Ors v Wells*. Martin Rodger KC, the Deputy Chamber President, stated at [40]:

> "The offence of having control of or managing an unlicensed HMO contrary to section 72(1) of the 2004 Act is a continuing offence which is committed by the person having control or managing on each day the relevant HMO remains unlicensed. To avoid liability for the offence the person concerned must therefore establish the defence of reasonable excuse for the whole of the period during which it is alleged to have been committed."

34. In assessing whether a respondent has established the defence of reasonable excuse for the whole of the period during which the offence is alleged to have been committed, the Upper Tribunal endorsed the approach of the Upper Tribunal, Tax and Chancery Chamber, in *Perrin v HMRC* [2018] UKUT 156 (TCC) at [81]. Applying this to the context of landlord and tenant:

> (i) First, establish what facts the landlord asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the landlord or any other person, the landlord's own experience or relevant attributes, the situation of the landlord at any relevant time and any other relevant external facts).
>
> (ii) Second, decide which of those facts are proven.
>
> (iii) 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.

35. In doing so, a tribunal should take into account the experience and other relevant attributes of the landlord and the situation in which the landlord found himself at the relevant time or times. It might assist the tribunal, in this context, to ask itself the question "was what the landlord did (or omitted to do or believed) objectively reasonable for this landlord in those circumstances?

36. The Tribunal, in *Perrin*, then dealt with a particular point which is regularly encountered in licensing cases and which therefore merits attention:

> "82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of

judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

Financial Penalties

37. Schedule 13A deals of the Act with the procedure for imposing Financial Penalties (emphasis added):

> "1. Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").
> .....
>
> 3. The notice of intent must set out—
>
> (a) the amount of the proposed financial penalty,
> (b) the reasons for proposing to impose the financial penalty, and
> (c) information about the right to make representations under paragraph
>
> 4. (1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.
>
> (2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ("the period for representations").
>
> 5. After the end of the period for representations the local housing authority must—
>
> (a) decide whether to impose a financial penalty on the person, and
> (b) if it decides to impose a financial penalty, decide the amount of the penalty.
>
> 6. If the authority decides to impose a financial penalty on the person, it must give the person a notice (a "final notice") imposing that penalty.
>
> 7. The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.
>
> 8. The final notice must set out—

(a) the amount of the financial penalty,
(b) the reasons for imposing the penalty,
(c) information about how to pay the penalty,
(d) the period for payment of the penalty,
(e) information about rights of appeal, and
(f) the consequences of failure to comply with the notice."

38. Paragraph 10 provides for a right of appeal to this tribunal:

> "(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."

39. 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]).

The Current Guidance

40. 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 section 249A.

41. 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). A copy is provided at R.57-76). 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.

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

(i) The maximum penalty is £30,000. The amount of the penalty is to be determined by the LHA in each case, having regard to the Guidance ([1.11]);

(ii) Where both the letting agent and landlord can be prosecuted for failing to obtain a licence for a licensable property, then a civil penalty can also be imposed on both the landlord and agent as an alternative to prosecution. The amount of the civil penalty may differ depending on the individual circumstances of the case ([2.5]);

(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]);

43. Section 3.5 suggests that LHAs should consider the following factors to help ensure that the civil penalty is set at an appropriate level:

"(a) Severity of the offence. The more serious the offence, the higher the penalty should be.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

(f) 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.

(g) 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."

Waltham Forest's Policy

44. The Respondent's policy is set out in a document "Standard Operating Procedure: Housing and Licencing Team Enforcement Policy" (11 February 2020). A copy of this policy is at R.29-56. The policy for Civil Penalties are set out in Appendix 1.

45. The Policy (at p.10) stresses the need for transparency and consistency. Thus, those managing and having control of rented properties in the borough (a) should know how the Council will generally penalise relevant offences and (b) are assured that, generally, like cases will be penalised similarly, and different cases penalised differently. The Respondent will only depart from its policy in exceptional circumstances. At p.11, the Respondent sets out the statutory guidance which is summarised at [43] above.

46. The Respondent apply a matrix (at p.12) with 6 bands with a range from £0 to the statutory maximum £30,000. Licencing offences are considered at p.14-16. The Respondent consider the offence of failing to ensure that a rented home was licensed under its Selective Licensing Scheme as a significant issue, meaning that the tenants and wider community are not protected by the additional regulatory controls afforded by licensing.

47. The suggested penalty for a landlord controlling five or less dwellings, with no other relevant factors or aggravating features would be regarded as a moderate band 2 offence, attracting a civil penalty of at least £5,000.

48. Where a landlord or agent is controlling/owning a significant property portfolio and/or has demonstrated experience in the letting/management of property the failure to obtain the necessary Selective Licence would be viewed as being a serious matter attracting a civil penalty of £15,000 or above (a band 4 offence).

49. The following are identified as aggravating features:

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

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

(iii) Generic features (at p.13) which include a previous history of non-compliance and the financial means of the offender, including the rent received from the relevant premises.

50. The Respondent (at p.20), will automatically apply 20% discounts in the following discounts:

(i) The offender has applied for a licence within the representation period at the 'Notice of Intent' stage; and

(ii) If the penalty is paid within a specified time period (normally 28 days).

The Background

51. The House at 2 Peasmead Terrace is a two storey terraced property with three bedrooms. On 19 June 2006 (R.170), Ms Chioma Ene was registered as the freehold owner. On 23 October 2013 (R.174), Ms Ene granted an assured shorthold tenancy to Mr Pascal Santa for a term of 6 months at a monthly rent of £1,300. The landlord's address was given as "c/o Top Supports Estate Ltd, 251 Oxlow Lane, Dagenham, RM10 7YR". Clause 22 provided that this was the address at which any notices should be served. Mr Mottoh witnessed the tenant's signature.

52. Mr Mottoh stated that he had signed a management agreement with Ms Ene. He did not provide a copy of this but stated that this was in similar terms to that signed on 23 October 2013. At this time, the Respondent did not have any licencing scheme.

53. At the time of the alleged offence on 20 September 2022, Ms Roseline Kayuwa was occupying the house with her three children (see her statement at R.291). It is understood that Mr Santa is her husband. She

was still paying a rent of £1,300 per month to the Applicant by bank transfer.

54. On 1 April 2015, the Respondent introduced its first Selective Licencing Scheme which applied to the house. This scheme lapsed on 30 March 2020. No application was made for a licence under this scheme.

55. On 23 October 2019 (at A.25-30), the Applicant signed a management agreement with Ms Ene. It was signed by Mr Mottoh on behalf of the Applicant Company. This document was not drafted with any care. The agreement purported to be for a minimum period of 8 weeks, albeit that the Applicant had been managing the House for six years. The term and length of the relevant tenancy agreement are not specified.

56. Mr Mottoh did not explain why he felt it necessary to sign an agreement at this time. However, it was apparent that this provided for the Applicant to have full management rights over the House at a fee of 10% of the gross rent. The Applicant was authorised to instruct essential repairs and renewals up to the sum of £200. This would be insufficient to cover the fee of £1,000 which the Respondent require for a licence application.

57. Mr Mottoh highlights two clauses:

(i) Clause 10.6 provides: "The Landlord confirms that where a property is a House in Multiple Occupation (HMO) if has (if necessary) been registered as such with the local housing authority and that the property complies with all relevant regulations".

(ii) Clause 12.1 is a Declaration: "I the landlord(s) or authorised representative(s) warrant that I have title and power to enter into a tenancy agreement and that all necessary licences and consents (if any) have been obtained".

58. Mr Mottoh argued that this agreement placed any licencing obligation on Ms Ene, as landlord. Mr Calzavara argued that Clause 10.6 made no reference to the licencing of a house, and that clause 12.1 did not extend to licences under the Act. In any event, it would not provide the Respondent with a defence.

59. The Tribunal suspects that the agreement was based on a template downloaded from the internet. We suspect that the reference to "registration" in clause 10.6 is more likely to relate to earlier legislation which sought to control the conditions in multi-occupied housing (e.g. Housing Act 1985). Clause 12.1 is not intended to apply licences under the 2004 Act, but rather to where a licence or consent is required from a superior landlord or a mortgagee.

60. The Applicant sought to argue, despite the clear reference only to HMO registration, that this clause covered all future licensing obligations. The Tribunal must consider whether this could afford the Applicant with a defence. At the date on which the licence was signed, the Respondent had

introduced a Selective Licencing Scheme. Mr Mottoh was asked whether he had sought to satisfy himself that Ms Ene had obtained a licence under this Scheme. He confirmed that he had not raised the issue with the landlady. Indeed, he was unaware of the Scheme.

61. On 1 May 2020 (R.147), the Respondent introduced the current Selective Licencing Scheme. Ms Smith describes how the Respondent took extensive steps to publicise it before it was introduced. This did not apparently come to the attention of either Mr Mottoh or Ms Ene.

62. On 25 January 2022, the Respondent received a complaint from Ms Kayuwa that her roof was leaking and that she had had no hot water for over a week. On 26 January, Ms Smith visited the House and was admitted by Ms Kayuwa. She confirmed that she was paying a rent of £1,300 pm to the Respondent by bank transfer. Ms Smith took the pro form statement at R.289-290. Ms Kayuwa provided a copy of the tenancy agreement. Ms Smith identified a number of items of disrepair. There was also evidence of mice droppings. This led the Respondent to serve statutory notices on Ms Ene. However, somewhat surprisingly, this was not relevant to the size of the Financial Penalty which the Respondent imposed on either Ms Ene or the Applicant.

63. On 26 January 2022, Ms Smith telephoned the Mr Mottoh on his mobile number. She told him about the lack of heating and hot water. Mr Mottoh responded that an engineer was to attend that day. He agreed to provide an update. This was the only direct contact that Ms Smith had with Mr Mottoh. There was no discussion of the need for a licence.

64. On 27 January 2022, Ms Smith wrote to both the Applicant (at R.224-5) and Ms Ene (at R.222-3). The letter was sent to the Applicant at 251 Oxlow Lane, the address given by the Applicant on both the application form and the tenancy agreement. Mr Mottoh stated that he did not receive this letter. The Tribunal is satisfied that he did. The letter alerted the Applicant to the Additional Licencing Scheme which had been introduced on 1 May 2020 and stated that a licence was required. The letter concluded by stating that the failure to licence an applicable property is an offence under the Act. On 28 January, Ms Smith followed this up with a text message (R.226). Again, Mr Mottoh denied that he had received this. We accept that he did. Mr Mottoh did not respond to either communication.

65. On 9 February 2022, Ms Smith sent further letters to both the Applicant (R.231-234) and Ms Ene (R.227-230). Mr Mottoh stated that he did not receive this letter. The Tribunal is satisfied that he did. The majority of the letter related to the defects which had been identified at the inspection. However, Ms Smith noted (emphasis added) that the House was unlicenced and warned them that where a landlord fails the "fit and proper person" test, it may not be possible "for them to be involved as the licence holder or manager of any privately rented address in the Borough".

66. On 11 February 2022 (R.237-238), Ms Ene sent an email to Ms Smith stating that a gas engineer had attended the House and that a pest control

company had been booked. On 28 April (R.238), Ms Smith sent Ms Ene a letter arranging an inspection on 4 May. Ms Ene was present at the inspection. Some of the defects had been remedied, but a number were outstanding. Ms Ene stated that she was not aware of the licencing regime and that her agent should have been aware.

67. On 10 May 2022 (at A.16), Ms Ene sent Mr Mottoh a text message about the visit. There was no reference to the need for a licence. On 31 May (R.242), Ms Smith sent an email to Ms Ene which was copied to Mr Mottoh. This reminded her of the need to apply for a licence and stated "this must be done by 8 June to prevent further action taken against you and your agent". Details was provided on the Respondent's website link. Mr Mottoh stated that he would have ignored the email as it had been sent to Ms Ene.

68. On 8 September 2022 (R.242), Ms Smith sent a further email to Ms Ene, in similar terms, which was copied to Mr Mottoh. This reminded her of the need to apply for a licence and stated "This must be done by 23 Sept to prevent further action taken against you and your agent". Mr Mottoh accepted that he had received this email. He had not responded as he was pushing Ms Ene to apply for a licence. He adduced no evidence of the steps that he had taken to ensure that Ms Ene applied for a licence.

69. On 20 September 2022, Ms Smith visited the House. This is the date of the alleged offence. She spoke to Ms Kayuwa who provided a further pro form statement (at R.291-2) which confirmed that she was paying rent of £1,300 per month to the Applicant by bank transfer. Ms Smith noted that a number of the "deficiencies" were still present.

70. On 5 October 2022 (R.271-280), the Respondent served an Improvement Notice on Ms Ene. The Respondent sent a copy of this to the Applicant (R.271). On 5 December 2022 (R.17-24), Ms Ene applied for a licence. The Tribunal was not told whether the licence had been granted.

71. On 7 December 2022 (R.123-288), Ms Smith made her detailed witness decision. This informed Ms Walkes' decision to serve a Financial Penalty.

The Imposition of the Financial Penalty

72. On 8 March 2023 (R.78-87), the Respondent served the Notice of Intent on the Applicant. This was posted to the Applicant at 251 Oxlow Lane. The certificate of posting is at R.80. The Notice (at R.81) notified the Applicant of the Respondent's intention to impose a Financial Penalty of £12,000 in respect of the following offence:

> "you failed to ensure that the premises was licenced under the Council's Selective Licencing Scheme, contrary to Part 3 section 95(1) Housing Act 2004 Part 3 [see attached schedule]."

The Applicant was invited to make any representations within 28 days. The Notice referred to the Schedule at R.82-83. The Tribunal considers the validity of this Notice under Issue 1.

73. The Tribunal was told that the Respondent also served a Notice of Intent on Ms Ene in respect of a proposed fine of £4,000 for the same offence. This was subsequently reduced to £3,000 when Ms Ene paid the penalty within the specified period of 28 days.

74. At the hearing on 22 October 2022, Mr Mottoh stated that he had not received this. However, at the adjourned hearing on 22 November, his evidence was that he had received the Notice. He stated that the Applicant had not made representations to the Respondent as he was pursuing Ms Ene to apply for a licence.

75. On 9 March 2023 (A.15), Mr Mottoh sent Ms Ene a text message:

> "Good morning, Ada, it has come to our attention that you still haven't dealt with the linceing (sic) of 2 Peasmead Terrace, New Road, London E4 6NU. We are given you 7 days to sort out and forward a valid license for the above-mentioned property otherwise we will seize from managing the property on your behalf. I have told you previously what to do to secure one. As it is now an immediate an immediate payment for the licence is required. Please contact the council now and deal with it ASAP. After our notice lapse and nothing is done, we will stop managing the property as we said. Thanks for your understanding Kendra Mottoh for Top Supports."

76. On 13 March 2023 (A.15), Ms Ene responded:

> "Amazing. I read you clearly. Surely, everything that has a beginning must have an ending. Thank you for your support so far."

77. On 3 April 2023 (A.18), Mr Mottoh texted Ms Ene to state that they were no longer her managing agent. On the same day (A.43), ABBA Property Services ("ABBA") notified the Applicant that they had been appointed to manage the House. On 5 April (R.77), Ms Ene notified the Respondent that ABBA were now managing the House.

78. Mr Mottoh sought to argue that he had taken all reasonable steps to urge Ms Ene to apply for a licence. The Tribunal did not accept this. He has adduced no correspondence to support this contention. The text message on 9 March 2023 is the first occasion on which he pressed Ms Ene to apply for a licence. The Tribunal is satisfied that this was a kneejerk reaction to the Notice of Intent that he had just received. Had there been any previous communication between the parties, Mr Mottoh would have known that Ms Ene had applied for a licence on 5 December 2022.

79. On 19 June 2023 (R.78-87), the Respondent served their Final Notice imposing a Financial Penalty of £12,000. This was served by post (certificate of posting at R.90) and emailed to Mr Mottoh (R.96). The

Respondent also sent Ms Smith's witness statement and the evidence pack (at R.123-292). The Final Notice is at R.91 and reads:

> "The reason for the Council's imposition of the financial penalty detailed in the above paragraph is that it is satisfied that you have committed the following offence in respect of the address: 2 Peasmead Terrace, New Road London E4 6NU.
> - You failed to ensure that the premises was licenced under Section 95(1) Housing Act 2004 Part 3".

80. The Notice was accompanied by the letter at R.88. This stated the reasons for imposing the financial penalty in slightly different terms:

> "The Council's is satisfied that you have committed 'a relevant housing offence' in that:
> - You failed to ensure that the premises was licenced under Section 95(1) Housing Act 2004 Part 3
> - The date of the offence is 20 September 2022.
>
> The Council is satisfied that its decision to impose a financial penalty and the amount of the financial penalty are in accordance with the relevant statutory provisions and its adopted policy."
> Details were provided of the web link for the relevant policy.

81. The Notice also provided the requisite particulars, namely (i) information about how to pay; (ii) the period for payment; (iii) information about the right to appeal; and, (iv) the consequences of failing to comply with it.

82. On 21 June 2023 (R.99), Mr Mottoh returned the papers to the Respondent. In his letter, he stated:

> "We received your letter dated 19th June 2023 regarding the above property. Am afraid we no longer manage that property. We and the landlord has decided to part our ways.
>
> The landlord could not meet up our requirements for us to continue managing the above property. She was unable to provide us with a current licence that is required despite several attempts made. We also have problems of adequate refurbishment of the property.
>
> We are very responsible agent and we respect regulations that is why we are known in different borough regarding property licensing. We include few licences for verification purposes only. At end of the day, it is really the landlord that is responsible to pay and provide us a licence, all we can do is to assist which we usually do if the landlord pays for it.
>
> We also include a letter from the current managing agent of the property. We suggest you send them these documents for them to be aware of the licence required. Also included are our conversation with the landlord to prove that we demanded for the licence but she

said she has no money for it. We strongly believe that we have no case here and you should address the landlord for her responsibility.

Please WE are hopeful that you do the right thing and address the rightful owner of the property [and gave details of ABBA]."

83. Mr Mottoh provided copies of the text messages with Ms Ade (at A.15-18) and four licences in respect of properties that he managed (at A.21-24). In two cases, the licence holder was the landlord. He told the Tribunal that he held the licence in respect of the property at Goresbrook Road (at A.23) as the landlord had died. Mr Mottoh stated that he would only have been able to submit a licence application on behalf of Ms Ene, if she had put him in funds.

The Tribunal's Decision

Issue 1: Were the two statutory notices lawful?

1. 1 The Issues

84. At the beginning of the hearing, the Tribunal alerted the parties that we were concerned that both Notices might be invalid as they failed to give the Applicant sufficient information to enable them to answer the charge against them. The Notices specified an offence of "failure to ensure that the premises were licenced". No such offence exists in law. The offence under section 95(1) of the 2004 Act is rather one of "having control of or management of a house which is required to be licenced, but is not so licenced". The Notices did not explain to the Applicant why they were to be treated a person having "control" or "management" of the House.

85. Mr Calzavara argued that it was not open to the Tribunal to take this point as it had not been raised by the Appellant. He then made detailed submissions on why the notice was valid, relying on the decisions of *Waltham Forest LBC v Younis*; *Maharaj v Liverpool CC;* and *Welwyn Hatfield BC v Wang*.

86. The Tribunal is satisfied we are obliged to consider the validity of the two Notices. The Notice of Intent and the Final Notice are important procedural steps which lead to the imposition of a financial penalty which is an alternative to a criminal prosecution. There are three issues that we need to consider:

(i) Was the Notice of Intent invalid/deficient in that it failed to give sufficient "reasons for proposing the financial penalty"?

(i) If the Notice of Intent was invalid/deficient, was it saved by the additional information supplied by the Respondent, or available, to the Applicant?

(iii) If the Notice of Intent was invalid/deficient and was not so saved, is the Final Notice a nullity? This is an issue left open by the Deputy President in *Welwyn Hatfield BC v Wang*

1.2 The Relevant Authorities

87. The Tribunal first considers the facts of these three cases. In *Waltham Forest LBC v Younis,* the LHA had imposed a Notice of Intent for failure to comply with a condition of a Selective Licence contrary to section 95 of the Act. The First Tier Tribunal ("FTT") FTT found that the Notice was invalid because (a) it did not specify which provision of condition was being relied on; (b) It failed to set out what steps the appellant should have taken to prevent the anti-social behaviour; (c) It did not contain a date on which it was said the offence had been committed; (d) it did not include sufficient detail of the offence to enable the appellant to make representations; and (e) It contained no explanation as to how the amount of the penalty had been calculated. The LHA appealed to the Upper Tribunal ("UT") contending that: (i) the Notice had been valid; and alternatively, (ii) even if it was invalid, a financial penalty could still be imposed on the appellant. The UT (Martin Rodger KC, the Deputy President) allowed the appeal holding that in considering the validity of the Notice, the FTT should have had taken into account documents accompanying the Notice. These provided sufficient details of the offence which was believed to have been committed. The UT noted (at [58]) that the form of notice was nonetheless far from ideal and it would be better if it was not used by authorities in the future. Particulars of the offence should be provided by a concise statement of the facts rather than by enclosing lengthy witness statements.

88. In *Maharaj v Liverpool CC*, the LHA had imposed two Financial Penalties in respect of failure to comply with conditions in a Selective Licence. The UT, HHJ Hodge KC, allowed the appeal against the first Notice on the ground that the particulars in the Final Notice had not accurately specified the relevant offence. The Notice had specified the offence as "the failure to produce a copy of a valid gas safety certificate by 13 June 2019, when the appellant had been requested to do so within seven days by Mr Farey's letter dated 5 June 2019". The actual offence which the FTT had found proven was "the failure to supply a valid gas safety certificate for the year ending 4 July 2018 within the time limit required by licence condition 1.2, namely by 4 July 2018". HHJ Hodge (at [18]) did not regard this point as a mere technicality because it gave rise to the risk that a landlord might be found guilty of a non-existent offence; or of one that has not been properly identified to the landlord; or because in the present case it had has fed seamlessly into the FTT's second error, which was to fail to identify the fact that the offence which it did find to have been proved was in fact time-barred.

89. In *Welwyn Hatfield BC v Wang*, the LHA imposed two financial penalties in respect for her for failure to comply with the Management of Houses in Multiple Occupation (England) Regulations 2006. The UT (the Deputy President) found that the Notices of Intent were vague and did not clearly identify the facts which amounted to the offence being alleged. The only description of the regulation 4 offence was that "numerous fire safety

deficiencies were identified at the premises", while the regulation 7 offence was described only as "poor management and disrepair, and poorly maintained deficiencies". However, the UT went on to conclude that any reasonable person with the knowledge available to the applicant would have been in no doubt that the deficiencies observed by the authority's officer which were referred to in the Notices of Intent. These deficiencies had been listed in a detailed schedule of works, photographs of the defects which had been supplied the schedule; together with a covering letter. The Notices of Intent, taken in isolation, were incapable of informing the applicant in sufficient detail of what it was that was being alleged against her, the requirements of paragraph 3 of Schedule 13A would not have been met (at [78]). However, taken in conjunction with the other material made available, the Notices of Intent were not invalid and complied with the LHAs' duty to give reasons. They depended on their validity on this detailed information that had been provided (at [85]).

90. The decision of the Deputy President in *Welwyn Hatfield BC v Wang* is the most recent decision of the UT and sets out the principles which this Tribunal should apply. At [18], the Deputy President considered the modern approach to compliance with procedures laid down by statute and the effect of non-compliance on the validity of subsequent proceedings is quite different. It was summarised by Males LJ in *DPP v McFarlane* [2020] 1 Cr. App. R. 4, at [25], as follows (emphasis added):

> "That approach is, broadly speaking, that the effect of procedural defects does not depend upon whether the requirements in question should be classified as mandatory or directory but on what Parliament intended to be the consequences of non-compliance. Parliament should not be taken to have intended that the consequences of non-compliance will be to render the proceedings a nullity, except in clear cases, and, in particular, should not be taken to have so intended when that would defeat the purpose of the legislation in question and when the non-compliance has caused no injustice to the defendant."

91. The Deputy President (at [25]) restated what he has said in *Waltham Forest LBC v Younis*:

> "73. The purpose of a notice of intent is to inform the recipient of the reasons why the authority is contemplating the imposition of a financial penalty. The notice also performs the important function of limiting the scope of the subsequent procedure. But the notice of intent does not represent the last word on any issue. Not only does the recipient of the notice have the opportunity to respond to it, but the authority also has the obligation to think again before making a final decision. Once that decision has been conveyed in a final notice, the recipient has the right to appeal to the FTT, where they may rely on matters which were not known to the authority.
>
> 74. Those characteristics of the statutory scheme suggest that the reasons given in a notice of intent should be clear enough to enable the recipient to respond, but they also suggest that if those reasons are unclear or

ambiguous, Parliament would not have intended that the notice of intent should invariably be treated as a nullity. The seriousness of the offences for which civil penalties can be imposed, the relative shortness of the time available to a local authority to take action, and the availability of a right of appeal on the merits before an independent tribunal, are all features of the statutory scheme which militate against the adoption of an excessively technical approach to procedural compliance."

92. The Deputy President went on to observe (at [26]):

> "In *Younis*, the Tribunal did not say that a defective notice of intent could always be relied on or that it would never be appropriate for the FTT to treat it as a nullity, requiring that any penalty imposed in reliance on it be discharged. As the Divisional Court had ruled in *Nash v Birmingham Crown Court* [2005] EWHC 228, the question in each case will be whether "the requisite information was given to the appellant in good time for her to be able fairly to meet the case against her".

93. "The Deputy President went on to consider the decision *Maharaj v Liverpool* City Council and approved the following passages from the judgment of HHJ Bridges (at [31] – [32]):

> "17. By paragraph 3(a) of Schedule 13A, the notice of intent must set out "the reasons for proposing to impose the financial penalty". Those reasons must be sufficiently clearly and accurately expressed to enable the recipient landlord to exercise the right conferred by paragraph 4 to "make written representations to the local housing authority about the proposal to impose a financial penalty", thereby enabling it to decide whether to impose a financial penalty on the landlord and, if so, the amount of such penalty (as required by paragraph 5). Similarly, by paragraph 8(b) of schedule 13A, the final notice must set out "the reasons for imposing the penalty". These too must be sufficiently clearly and accurately expressed to enable the recipient landlord to decide whether to exercise the right of appeal to the FTT conferred by paragraph 10 against the decision to impose the penalty or the amount of that penalty. In the Tribunal's judgment, those reasons must be directly referable to the condition of the licence in relation to which it is said that there has been a failure to comply on the part of the landlord; and those reasons must identify clearly, and accurately, the particular respects in which it is said that there has been non-compliance on the landlord's part."
>
> 18. Local housing authorities must bear firmly in mind that the imposition of a financial penalty is an alternative to a criminal prosecution; and it must be treated with the same level of seriousness and transparency."

94. The Deputy President went on to give the following guidance:

> "74. I do not believe it is productive to compare the terms used by different decision makers to describe the requirements of a sufficient notice of intent. What is important is that the notice should equip the recipient with the information they require to enable them to answer the charge against

them. In my judgment the only important distinction is between a notice which achieves that purpose and one which does not.

75. How precise or particular the contents of a notice must be to achieve that requirement will depend on the circumstances of the case which may include the recipient's knowledge of other facts. As Lord Steyn explained in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749, at 767D, the validity of a notice is to be assessed objectively, by asking how a reasonable recipient would have understood it. In considering that question the reasonable recipient is taken to be aware of what Lord Steyn called "the relevant objective contextual scene". That scene will include matters known to the actual recipient which would influence their understanding of the notice. Those matters are taken to be within the knowledge of the notional reasonable recipient."

95. As the Deputy President had found that the Notices of Intent were not insufficiently precise, in view of the previous communications between the parties, it was not necessary for him to consider the consequences of an invalid Notice. However, he made the following observations:

"88. The answer to the question of principle is supplied by *Younis*. A notice of intent is not necessarily void if it provides an insufficiently clear or precise statement of the reasons for proposing the financial penalty. If the only information supplied by the Council had been the statements in the notices themselves, and if the schedule of work and photographs of the defects had not been provided, it is likely that I would have concluded that the notices were of no effect and that the penalties should be discharged because it would not have been possible for the respondent to mount an informed defence before the Council took its decision to confirm the penalties by serving final notices. In the event, the respondent had the information she required but chose not to make representations.

89. I leave one point open. That is whether the effect of a notice of intent must be determined on the basis of the material available to the recipient before the time for making representations against it expires, or whether an invalid notice can be cured by information supplied with a final notice, or in the context of an appeal to the FTT. The hearing of an appeal by the FTT takes the form of a rehearing, so it might be said that information supplied at that stage puts the recipient in a position to mount an effective defence. On the other hand, it might be argued that there is prejudice to the recipient of a defective notice, sufficient to justify treating a defective notice as a nullity, if they have to persuade the FTT to take a different view from that taken by the authority. I prefer to say nothing about that point and to leave it for decision on another occasion if it arises."

The Tribunal's Decision on Issue 1

96. The Notice of Intent is at R.81. We are satisfied that this should be read in the context of the covering letter at R.78-80 and the Schedule at p.82-87. We are satisfied that it is deficient as it fails to give sufficient as required paragraph 3 of Schedule 13A (see [37] above). The Notice of Intent states that the

Respondent is satisfied that the Respondent has committed the following offence:

> "you failed to ensure that the premises was licenced under the Council's Selective Licencing Scheme, contrary to Part 3 section 95(1) Housing Act 2004 Part 3 [see attached schedule]."

The offence under section 95(1) of the Housing Act 2004 ("the 2004 Act") is not one of failing to licence the House. A person rather commits an offence "if he is the person having control of or management of a house which is required to be licenced … but is not so licenced.

97. The concepts of "control of or management of a house" are highly technical and are by section 263 of the Act (see [28] above). The LHA is required to notify the offender of the reasons why they have imposed the penalty. At a minimum, the Tribunal would have expected the Respondent to have described the offence correctly and to give their reasons for concluding that an offence had been committed. This could be expressed in simple terms:

> "The Council is satisfied that you have committed the offence of having control of or managing a house which required a Licence under the Council's Selective Licencing Scheme but was not so licenced". The reasons would have explained why the Applicant was considered to be the person having control of or managing the house as defined by section 263 of the Act, for example that the Respondent were to be treated as the person "managing the house", as they were in receipt of the rents from the tenant as agent of the owner. It would have been desirable, but not essential, for the period of time over which the offence was alleged to have been committed to have been specified.

98. The Tribunal notes that the schedule, at R82, states "as a person who is in control and/or managing 2 Peasmead Terrace, London E4 6NU you failed to licence the property, you have committed and offence under Section 95(1) Housing Act 2004". Whilst this correctly defines the offence, it does not explain why the Applicant fell to be so classified and thereby liable for the offence.

99. The Tribunal is satisfied that the Notice of Intent was deficient (a term which we prefer, rather than "invalid"). The Notice did not give sufficient "reasons for proposing the financial penalty", in that it did not provide sufficient explanation as to why the Respondent considered that the Applicant had committed an offence under section 95(1) of the Act. We are further satisfied that the Applicant was prejudiced by the defect. We accept that Mr Mottoh believed that the offence was that the Applicant had failed to licence the House. Despite his experience as a managing agent, we are not satisfied that he was familiar with the technical language of section 263 of the Act. The Applicant did not make representations in response to the Notice as Mr Mottoh did not believe that it was the Applicant's responsibility to licence the House. He rather required Ms Ene to apply for a licence. It seems that he was unaware that Ms Ene had already applied for a licence on 5 December 2023. The Tribunal has found that the Respondent was casual in the manner in

which they managed their affairs. However, this makes it no less important for the Notice of Intent to alert the recipient of the particualrs of the criminal offence which they are required to answer.

100. The Final Notice to Impose a Financial Penalty is at p.91. We are satisfied that this should be read in the context of the covering letter at R.88 and the Schedule at p.82-87. We are again satisfied that it was deficient as it fails to give sufficient as required paragraph 8 of Schedule 13A (see [37] above). The Final Notice states:

> "The reason for the Council's imposition of the financial penalty detailed in the above paragraph is that it is satisfied that you have committed the following offence in respect of the address: 2 Peasmead Terrace, New Road London E4 6NU.
> - You failed to ensure that the premises was licenced under Section 95(1) Housing Act 2004 Part 3".

101. The Notice was accompanied by the letter at R.88. This stated the reasons for imposing the financial penalty in slightly different terms:

> "The Council's is satisfied that you have committed 'a relevant housing offence' in that:
> - You failed to ensure that the premises was licenced under Section 95(1) Housing Act 2004 Part 3
> - The date of the offence is 20 September 2022.
>
> The Council is satisfied that its decision to impose a financial penalty and the amount of the financial penalty are in accordance with the relevant statutory provisions and its adopted policy."

102. The Final Notice was accompanied by Ms Smith's witness statement and the evidence pack (at p.123-292). The Tribunal is satisfied that we must consider whether the Final Notice is saved by this additional information. In his written submissions, Mr Calzavara highlights the following passages in the witness statement of Ms Smith (at R.123-130): (i) the House is in a selective licensing area [6]); (ii) the correspondence to the Applicant about the need to license the Property ([25] – [26] and [28]) and (iii) the assertion that the occupier paid rent to the Applicant [38]). However, there is no reference to any assertion that the Financial Penalty had been imposed because the Applicant was considered to be the person having control of or managing the House as they were in receipt of the rents from the tenant as agent of the owner.

103. The Tribunal is therefore satisfied that the Final Notice was deficient. We are further satisfied that the Applicant suffered prejudice in the context of his appeal. He believed that the Financial Penalty had been imposed because the Applicant had failed to licence the house. The whole basis of his appeal was that this was the responsibility of the landlord.

104. We must finally consider whether these defects render the Final Notice a nullity. We conclude that they do not. We have had regard to the recent

decision of the Supreme Court in *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd* [2024] UKSC 27; [2024] 3 WLR 601 (at [58]). Where there is no express statement of the consequences of a failure to comply with a statutory procedural requirement, the correct approach is to infer what consequences Parliament had intended non-compliance to have by looking at (a) the purpose served by the requirement as assessed in the light of a detailed analysis of the statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process was affirmed notwithstanding non-compliance with the requirement.

105. We are satisfied that the service of the Notice of Intent is an important procedural step. The statutory purpose is to afford the recipient with the opportunity to make representations before the Financial Penalty is imposed and thereafter to be able to exercise an appeal to this tribunal. The overriding objective in rule 3 of the Tribunal Rules requires the Tribunal to deal with the appeal "fairly and justly". We have subjected the decision-making process to anxious scrutiny. The policy objective behind the legislation is to ensure that any premises that require a licence are licenced, whether by the landlord or the managing agent. We are satisfied that no substantive prejudice has been caused. Had the Applicant made representations in response to the Notice of Intent, we are satisfied that the Financial Penalty would have been affirmed. The Applicant was guilty of the requisite offence of having control of or management of a house which required to be licenced but was not so licenced. The penalty was correctly assessed in accordance with the Respondent's policy. This appeal has been able to cure any defect in the Final Notice. However, we are satisfied that the Respondent should refund the tribunal fees paid by the Applicant. He may not have brought this appeal had he fully understood the basis upon which the Financial Penalty been imposed.

2. Issue 2: The appeal against the Financial Penalty of £12,000

106. The Tribunal is satisfied beyond reasonable that the Applicant is guilty of the offence under section 95(1) of the Act in that they were a person having control of or managing a house which is required to be licensed under Part 3 of the Act, but was not so licenced. We are satisfied that the offence was committed between 1 April 2015 to 4 December 2022, apart from the period 1-30 April 2020 when there was no Selective Licencing Scheme in place.

107. The Tribunal is satisfied of the following:

(i) The Respondent had Selective Licencing schemes which required the House to be licenced from 1 April 2015 to 31 March 2020 and 1 May 2020 to date.

(ii) The House required a licence under this Scheme.

(iii) The House was not licenced. On 5 December 2022, Ms Ene applied for a licence. This provided a defence from that date (see section 95(3)(b) of the Act).

(iv) The Applicant had "control" of the House as they received the rack rent from the tenant, as agent for Ms Ene. The rent of £1,300 per month being paid by the tenant was a rack rent.

(v) The Applicant was also "managing" the House, in that they were receiving the rent.

(vi) Ms Ene would also be a person "managing" the House in that she was the lessee who was in receipt of the rents which were being collected by the Applicant.

108. We reject any defence of "reasonable excuse" which seems to be the substance of the Applicants defence. Applying *Perrin v HMRC* (see [34] above), we would formulate his defence as follows:

(i) The facts which Mr Mottoh contends constitute as a reasonable defence are that he did not believe that the Applicant was responsible for licencing the House. The responsibility was rather that of the landlord. This was reflected in the terms of the management agreement. He knew that the Respondent had also written to Ms Ene requiring her to apply for a licence. On 5 December 2022, Ms Ene had applied for a licence.

(ii) The Applicant has established those facts on a balance of probabilities.

(iii) When viewed objectively, these amount to a reasonable excuse.

109. The Tribunal accept, on balance, that Mr Mottoh believed that the management agreement imposed the licencing obligation on the landlord. We also accept that he considered that Ms Ene was the person who should apply for a licence. A fee of £1,000 was required which the Applicant could only pay if they were put in funds by the landlord. We also accept that at no stage did the Respondent inform the Applicant that they had responsibility to apply for a licence as in law they were to be treated as a person having "control" or "management" of the House. However, we reject Mr Mottoh's suggestion that he was pushing Ms Ene to apply for a licence prior to 20 September 2022. He has adduced inadequate evidence to support this contention. The only text message that he was able to produce was that of 9 March 2023. We find that Mr Mottoh sent this text as a kneejerk reaction to the Notice of Intent that he had just received. We have regard to the exchange of text messages between Mottoh and Ms Ene after the Respondent's visit to the House on 4 May 2022. There was no suggestion by Mr Mottoh than Ms Ene should apply for a licence.

110. The Tribunal remind ourselves that the Respondent have found the offence of control or management of an unlicenced house to have been committed on 20 September 2022. No application for a licence had been made by that date. We are satisfied that a managing agent needs to keep up to date with the regulatory requirements in respect of any property that they manage. The management agreement on which Mr Mottoh relies is dated 23 October 2019. We accept that it is open to a managing agent to impose any licencing obligation on the landlord. However, if they do so, they must satisfy themselves that the landlord has obtained any necessary licence. In the

absence of this assurance, they put themselves at risk of a criminal offence if they agree to manage a property which requires a licence, but which is not so licenced. The Tribunal accepts that no licence was required when the tenancy was granted on 23 October 2013. The licencing requirement first arose on 1 April 2015. The Applicant, as a firm of managing agents, should have been aware of this and notified the landlord of the requirement. The Applicant should also have raised the issue on 23 October 2019, when the second management agreement was signed. We note that the Applicant was only managing one property in Waltham Forest. However, Mr Mottoh was familiar with the licencing regimes which had been introduced in other boroughs and should have kept up to date with the regulatory requirements in Waltham Forest. The therefore conclude that the Applicant has failed to objectively established a defence of reasonable excuse.

111. The Tribunal must next consider the appeal against the Financial Penalty of £12,000. Ms Walkes (at R.25-28) which has led her to impose a Financial Penalty of £12,000. She has correctly applied the Respondent's policy. She was satisfied that the Respondent is an experienced managing agent (see [48] above). Her starting point was therefore £15,000. She reduced it by 20% because Ms Ene had applied for a licence.

112. The Tribunal has had regard to the financial penalty of £3,000 which was imposed on Ms Ene. At first sight, it might seem that the Applicant has been dealt with unduly harshly when compared with the landlord who had the primary obligation to licence the House. However, the Tribunal is satisfied that the Respondent has correctly applied their policy. The statutory guidance (at [42] above), advises that where a penalty is imposed on both landlord and managing agent, it should reflect the individual circumstances of each person. Under their policy, the Respondent treat a landlord with five or less dwellings, less severely than a managing agent with a demonstrated experience in managing property. Ms Ene benefitted from two 20% discounts, namely for (i) applying for a licence; and (ii) paying the penalty within the requisite period of 28 days.

113. The Tribunal considers whether the penalty of £12,000 is excessive, giving due deference to the statutory guidance and the Respondent's policy. We are satisfied that the Respondent has correctly applied its policy and the penalty cannot be considered to be excessive. The evidence which we have heard, but which was not known to Ms Walkes, is that the Applicant has a significant property portfolio and has been managing properties for some 15 years. Ms Walkes did not consider that there were any aggravating features. It would have been open to her to do so having regard to (i) the length of time over the offence had been committed; (ii) the rent received over that period; and (iii) the condition of the House. In the circumstances we have no hesitation in confirming the Financial Penalty of £12,000 imposed on the Applicant.

114. Further, we are satisfied that the Applicant was not prejudiced by the deficiencies in the Notice of Intent. Had the Applicant been provided with proper reasons for the decision to serve the Notice of Intent and had he exercised his statutory right to make representations, there is no real prospect

that the Respondent would have either cancelled or reduced the Financial Penalty that they were minded to impose.

Tribunal Fees

115. Given the deficiencies which we have identified in the Notice of Intent and the Final Notice, we are satisfied that the Respondent should refund to the Applicant the tribunal fees of £320 which he has paid. Had the Applicant understood the basis on which the Financial Penalty been imposed, he might not have exercised his statutory right of appeal.

Judge Robert Latham
9 December 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.