



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/00CH/HNA/2023/0088**

Property : **217 Rectory Road, Bensham,
Gateshead, Tyne & Wear, NE8 4RQ**

Applicant : **Woodmere Assets Limited**

Representative : **Dominic Bayne (Counsel)**

Respondent : **The Borough Council of Gateshead**

Representative : **Thomas Parsons-Munn (Counsel)**

Type of Application : **Appeal against a financial penalty –
Section 249A & Schedule 13A-
Housing Act 2004**

Tribunal Members : **Tribunal Judge J. E. Oliver
Tribunal Member C. Snowball**

**Date of
Determination** : **20th November and 10th December
2024**

Date of Decision : **10th December 2024**

DECISION

Decision

1. The Final Notice, dated 23rd November 2023, being the subject of this appeal, is confirmed.

Background

2. This is an application by Woodmere Assets Limited (“Woodmere”), to appeal a financial penalty, dated 23rd November 2023 of £5433 issued by The Borough Council of Gateshead (“the Council”) pursuant to section 249A of the Housing Act 2004 (“the Act”) in respect of 217 Rectory Road, Bensham, Gateshead (“the Property”).
3. The financial penalty was imposed arising from Woodmere’s failure to obtain a licence for the Property that was in an area of selective licensing, pursuant to section 95 of the Act.
4. The Tribunal issued directions on 29th April 2024 providing for the filing of statements and bundles and for the matter to be determined at a hearing. The matter was thereafter listed for determination on 20th November 2024. The Tribunal reconvened, in the absence of the parties, on 10th December for a determination.

Chronology

5. Woodmere’s purchase of the Property was registered at HM Land Registry on 29th March 2022. At the time the Property was acquired it was a private residence. On 11th May 2022 Woodmere let it at a rent of £650 per calendar month.
6. The Property was in an area of selective licensing that commenced on 30th October 2018 and continued until 29th October 2023 when it expired.
7. Woodmere failed to secure a licence for the Property at the time it was let and did not do so until its managing agent KProperty Limited (“KL”) was contacted by an officer of the Council on 13th January 2023 to advise of the need for a licence.
8. KL applied for a licence on the following day, 14th January 2024. A licence was later granted.
9. On 19th June 2023 the Council served a Notice of Intent to impose a penalty of £7383. This comprised of 3 elements:
 - (1) A punitive penalty of £2500.
 - (2) The financial benefit of renting the Property whilst unlicensed of £4683.
 - (3) An investigation charge of £200.
10. On 11th August 2023 Woodmere made representations regarding the level of the penalty which was subsequently reduced to £6183.
11. The Council thereafter reduced the penalty further due an administrative error and on 23rd November 2023 issued a Final Notice for £5433 comprising:
 - (1) A punitive penalty of £750.
 - (2) The financial benefit of rent of £4683.
12. The investigation charge was removed following the decision of the Upper Tribunal in *Leicester City Council v Morjaria* [2023] UKUT 129(LC).

The Law

13. Section 249A (1) of the Act provides that “a local 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...”
14. Section 249 (2) sets out what amounts to a housing offence and includes at s.249(2)(c) an offence under s.95 of the Act, namely licensing. Section 95(1) states that a person commits an offence if managing or having control of a house that is required to be licensed but is not. Section 95(4) provides that a person does not commit the offence if he has a reasonable excuse for failing to comply with this requirement.
15. It is for the Council to prove, beyond reasonable doubt, that an offence has been committed.
16. It is for Woodmere to prove, on the balance of probabilities, that he has a reasonable excuse for failing to obtain a licence.
17. The maximum fine that can be imposed for each offence is £30,000.
18. Paragraph 10(3) of Schedule 13A of the Act provides that an appeal in respect of a financial penalty is by way of re-hearing.

Procedural requirements

19. Schedule 13A of the Act sets out the procedural requirements a local authority must follow when seeking to impose a financial penalty. Before imposing such a penalty, the local authority must give a person notice of their intention to do so, by means of a Notice of Intent.
20. A Notice of Intent must be given within 6 months of the local authority having sufficient evidence of the conduct to which the financial penalty relates. If the conduct continues beyond that date, then the Notice of Intent may be given at any time when the conduct is continuing or within 6 months of the day when the conduct last occurs.
21. The Notice of Intent must set out:
 - the amount of the proposed financial penalty
 - the reasons for imposing the penalty
 - information about the right to make representations regarding the penalty
22. If representations are to be made, they must be made within 28 days beginning with the day after that on which the Notice of Intent was given. At the end of this period the local authority must then decide whether to impose a financial penalty and, if so, the amount.
23. The Final Notice must set out:
 - the amount of the financial penalty
 - the reasons for imposing the penalty
 - information about how to pay the penalty
 - the period for the payment of the penalty
 - information about rights of appeal
 - the consequences of failure to comply with the notice

Guidance

24. A local authority must have regard to any guidance issued by the Secretary of State relating to the imposition of financial penalties. The Ministry of Housing issues such guidance (“the MHCLG Guidance”) in April 2018: *Civil penalties under the Housing and Planning Act 2016-Guidance for Local Authorities*. This requires a local authority to develop their own policy regarding when or if to prosecute or issue a financial penalty.
25. The Council has developed its own guidance (“the Gateshead Guidance”) that follows the MHCLG Guidance in setting out the criteria to be considered when determining the penalty:
- Culpability and track record of the offender
 - Harm caused to the tenant
 - Severity of the offence
 - The punishment of the offender
 - Whether it will deter others from committing similar offences
 - Whether it will remove any financial benefit the offender may have obtained as a result of committing the offence.
26. The Council uses a table of Punitive Charges to calculate a range within any penalty can be imposed dependent upon the level of culpability and harm.
27. When determining the level of any penalty the Council will then consider any mitigating and aggravating factors.
28. The examples of aggravating factors are given as follows:
- A poor history of compliance
 - Abuse of trust
 - Lack of remorse
29. The mitigating factors are exemplified as follows:
- Good history of compliance
 - Circumstances at the time of the offence
 - Mental or physical illness
 - Culpability of victim
 - Genuine remorse
30. The Gateshead Guidance gives examples as to how financial penalties are to be determined and Table 8 provides examples of these as follows:

Offence	Examples of potential financial benefit
Failure to comply with an Improvement Notice (section 30)	The cost of any works that were required to comply with the improvement notice
Offence in relation to licensing of HMO's (section 72)	Rental income whilst the HMO was operating unlicensed or where it was

	occupied by more than the number of persons authorised by the licence; the cost of complying with any work conditions on the licence; the cost of the licence application fee
Offences in relation to licensing of homes included in Selective Licensing areas (section 95)	Rental income whilst the property was operating unlicensed or where it was occupied by more than the number of persons authorised by the licence; the cost of complying with any work conditions on the licence; the cost of the licence application fee
Failure to comply with an overcrowding notice (section 139)	Rental income whilst the property is being occupied in contravention of the overcrowding notice
Failure to comply with management regulations in respect of HMO's (section 234)	The cost of any works that are required to avoid breaching the regulations

Hearing

31. At the hearing Woodmere was represented by Dominic Baynes, Counsel. The Council was represented by Thomas Parsons-Munn, Counsel. Mr Weaver, a Senior Environmental Officer attended as a witness for the Council.
32. It was accepted by Woodmere it had committed an offence pursuant to section 95 (4) of the Act in failing to obtain a licence for the Property that was in an area of selective licensing.
33. Woodmere further conceded it did not have a defence of reasonable excuse.
34. The parties agreed there was no dispute regarding the punitive level of the penalty of £750.
35. The issue was the element of the penalty that represented the rent earned by Woodmere whilst the Property was unlicensed. The Council included that element within the penalty in accordance with Table 8 in its Guidance upon the basis there should be no financial benefit arising from the offence.
36. At the outset of the hearing the Tribunal asked for clarification of how the punitive penalty was calculated in the sum of £750.
37. Mr Weaver confirmed that the starting point for any penalty on the Council's matrix was the level of harm and culpability. Here, those had both been assessed as low. This gave the range for the penalty of £1000-£3000. The Council's starting point is the median point of the range i.e. £2000. Here, it determined there were 3 mitigating factors. These were that this was a first offence, Woodmere had taken action to stop the offence continuing and had expressed remorse. This gave a reduction of 25%, being £500. The rent of £4683 was then added giving a total penalty of £6183 in the Final Notice.
38. The rent of £4683 was calculated upon the basis the relevant period was 35 weeks. The monthly rent of £650 was subject to a management charge of £70.20, reducing the net rent to £579.80 per month. This equated to a weekly rent of £133.80, totalling £4683 over the 35-week period.

39. Mr Weaver explained the Final Notice was revised. Woodmere notified the Council that although their documentation stated the range of penalty was £1000-£3000, a different range was given on their website. The range there was £0-£3000. The Council therefore amended the starting point to £1500, being the median point on that range. The calculation for the penalty is done by computer and for a reason which Mr Weaver could not explain a reduction of 50% was then given for the 3 mitigating factors. This resulted in the punitive penalty of £750.
40. Mr Weaver confirmed the error on the Council's website had been corrected, but it had not sought to change the amount of £750.
41. Mr Bayne, on behalf of the Applicant, advised the Tribunal that whilst it was admitted by KL that it had let the Property without a licence, when it was notified by the Council of this, it had taken immediate steps to rectify the matter. KL was notified on Friday 13th January 2023. It had applied for the licence on the following day.
42. It was submitted Woodmere had not derived any financial benefit from the Property during the period it did not hold a licence. Mr Bayne referred the Tribunal to the MCCLG Guidance, paragraph 3.5 which states:

“Local authorities should consider the following factors to help ensure that a civil penalty is set at an appropriate level:

...

***(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 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.”*

This is repeated in the Gateshead Guidance at paragraph 2.27(g).

Mr Baynes argued the Council had misinterpreted this paragraph and had taken it as meaning any rent derived during an unlicensed period was a financial benefit. The correct interpretation was to consider whether it had been cheaper for Woodmere to offend and it had not; there was therefore no financial benefit. In letting the Property without a licence, Woodmere did not derive any greater income than if it had had a licence; the rent received was the same in both circumstances. It had received the same income had it applied for the licence on time. It had not saved the cost of the licence, since this had been applied for. Consequently, there was no financial benefit to Woodmere and it was wrong for the amount of £4683 to be included in the penalty.

43. Mr Bayne submitted that to determine if a person has benefited financially, the Tribunal should compare the financial position they are in when compared with the position they would have been in, had they not committed the offence. This was referred to as the ‘Counterfactual Position’.
44. In considering the Counterfactual Position the following factors should be considered:
 - i. The state of mind of the offender,
 - ii. The reason they committed the offence

- iii. Their ability to obtain a licence
 - iv. The condition of the Property.
45. It follows that when answering the questions, the only reasonable conclusion is:
- i. The reason for the offence was an oversight by KL.
 - ii. Had KL appreciated the need for the licence, they would have applied for one when the property was first let.
 - iii. A licence applied for in those circumstances would have been granted.
 - iv. Consequently, had the offences not have been committed and had the Applicant behaved as he ought, the Property would have been let for the same rent over the same period as it was let.
46. Mr Parsons-Munn, for the Council, also referred the Tribunal to the Gateshead Guidance at paragraph 2.27 (g). Here, an offence had been committed under s.95 of the Act. No licence had been acquired for the Property as required. It should therefore not have been let and rent received. It was therefore appropriate the rent gained during the unlicensed period was part of the financial penalty.
47. It was further submitted there had to be a deterrent element to any penalty. Whilst this Applicant did not pose a risk, other landlords do, penalties should be at a level to ensure compliance with selective licensing.

Determination

48. The Applicant did not challenge the Council's compliance with the procedural requirements of Schedule 13A of the Act and, from the documents provided, the Tribunal accepted those requirements were met.
49. The imposition of a financial penalty can only be upheld by the Tribunal if it is found, beyond reasonable doubt, the Applicant's conduct amounts to an offence under section 95 of the Act. In ***Opara v Olasemo [2020] UKUT 0096(LC)*** it was said:
- “For a matter to be proved to the criminal standard it must be proved “beyond reasonable doubt”; it does not mean “beyond any doubt at all”. At the start of a criminal trial the judge warns the jury not to speculate about evidence they have not heard, but also tells them it is permissible for them to draw inferences from the evidence they accept”*
50. The Applicant admitted it had failed to apply for a licence for the Property, as required under the selective licensing scheme and therefore an offence had been committed.
51. The Tribunal notes that Woodmere is an experienced landlord that owns 19 properties within the Gateshead Council area and they, or their agents, hold

29 licences dating back to 2012. From the evidence, it seems that they have never been subject to any enforcement action and consequently the Tribunal considers Woodmere do not fit comfortably within the description of rogue or criminal landlord as envisaged by the MHCLG Guidance.

52. It appears, from the evidence provided, it is accepted that the offence occurred due to an administrative error by KL. This was remedied within a day of being alerted to the issue by the Council. Given Woodmere's previous history of compliance, it is perhaps arguable the Council could have dealt with the matter informally. However, no argument was advanced upon this point and, noting the Property was let whilst unlicensed for 35 weeks, the Tribunal accepts, on balance, that it was not unreasonable for the Council to take formal action in this case.
53. There is a defence of reasonable excuse, for which the standard of proof is the balance of probabilities. In ***IR Management Services v Salford [2020] UKUT 0081 (LC)*** the UT observed:

"The issue of reasonable excuse is one which may arise on the facts of a particular case without an appellant articulating it as a defence (especially where an appellant is unrepresented). Tribunals should consider whether any explanation given by a person ... amounts to a reasonable excuse whether or not the appellant refers to the statutory defence."

54. The Applicant accepted it did not have a reasonable excuse for the offence and none was pleaded. If the Applicant had raised such a defence the Tribunal does not consider one would have been found, on the facts presented to it.
55. The issue for determination by the Tribunal was therefore the level of the financial penalty imposed by the Council.
56. The application before the Tribunal is by way of a rehearing and it should make its own decision as to the appropriate amount of any financial penalty and apply the Gateshead Guidance as referred to in paragraphs 25-30 above.
57. In ***Sutton & Another v Norwich City Council [2021] UKUT 0090 (LC)***:

"It is an important feature of the system of civil penalties that they are imposed in the first instance by local housing authorities, and not by courts and tribunals. The local authority will be aware of housing conditions in its locality and will know if particular practices or behaviours are prevalent and ought to be deterred".

The Upper Tribunal continued to state that the starting point should be to apply the local authority's policy. It stated:

"If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision".

58. This view was endorsed by the Upper Tribunal in ***London Borough of Waltham Forest v Marshall & Another [2020] UKUT 0035(LC)***. This decision stated the Tribunal could depart from the Council's policy but

only in certain circumstances, for example, where it had been applied too rigidly. It should also afford great respect to the decision and a Tribunal should be slow to disagree with any decision that is made in accordance with the local policy. Despite this, the Tribunal is conducting a rehearing and not a review and can vary any decision where it disagrees with it.

59. In considering the punitive element of the penalty, the Tribunal noted both parties agreed the amount of £750 and did not seek to challenge it. The Tribunal considered the Council had determined both harm and culpability to be low and had included 3 mitigating factors and no aggravating factors. The Tribunal agreed with this. The Council had started at a median figure of £2000 as set out in the matrix but this was subsequently adjusted to £1500 due to an error on the Council's website. The Council could not explain why a greater allowance had been made for the mitigating factors after other adjustments had been made, than in an earlier calculation.
60. The Tribunal considered that if the punitive element was now recalculated, it would result in a higher amount, given the error on the website had now been amended. The starting point of calculation would be £2000 rather than £1500. However, the Tribunal determined that would be inequitable. Accordingly, the punitive element of £750 is confirmed.
61. The Tribunal thereafter considered the matter of the rent. In this, it was not persuaded by the Applicant's arguments. It was said there was no financial benefit to it, despite having failed to apply for a licence. Its income was the same with or without a licence. It had not gained anything by not paying for the licence application fee, since that had been paid.
62. If this argument were to be followed, it effectively negates any financial benefit of the penalty in these circumstances. The Tribunal considered the factors which the Applicant referred to at paragraphs 44-45 above. Those suggest that where there is a failure to apply for a licence and the property is well maintained the rent earned whilst unlicensed is the same as if there had been a licence and there is therefore no benefit.
63. Mr Bayne submitted that had the Applicant failed to apply for a licence the financial penalty would have been the same. The Tribunal did not accept this; if the Applicant had failed to apply for the licence the punitive element of the financial penalty would have been greater.
64. It was further submitted that it was in the Council's interests to leave notification of an unlicensed property to a landlord since it would derive a greater income from the ensuing financial penalties. The Tribunal did not accept this argument; the Council's objectives was to protect tenants.
65. The Tribunal does not accept there is no benefit to the Applicant. It accepts the Council's submissions that if the Property was unlicensed it should not have been let. The Applicant did let the Property and derived an income during the unlicensed period.
66. The Tribunal, whilst not bound by the Gateshead Guidance, in following the MHCLG Guidance, accepts the Council has established a clear policy for its determinations on a case-by-case basis. It is clear from that where there has been an offence, no benefit should be derived from it. The Tribunal considered Table 8, being the Council's examples of financial benefit and noted that, when determining the financial penalty, it had followed the policy. The Tribunal did not find this to be unreasonable. It did not consider the Council had been too rigid in its application of the Gateshead Guidance, such to justify the Tribunal departing from it.

67. The financial penalty imposed by the Council upon the Applicant of £5433 is confirmed.