



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

Case Reference : **BIR/00FK/HNA/2019/0013**

Premises : **260a Normanton Road
Derby DE23 6WD**

Appellant : **Mr Amar Afzal**

Respondent : **Derby City Council**

Representative : **Mr J Millington Counsel**

Type of Application : **Housing Act 2004 – Schedule 13A,
paragraph 10**

Tribunal Members : **Mrs A J Rawlence
Mr R Chumley-Roberts MCIEH J.P.
Mrs K Bentley**

**Date and venue of
Hearing** : **11 November 2019
Derby Justice Centre**

Date of Decision : **20 November 2019**

DECISION

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DECISION

The Appeal by Mr Afzal, the Applicant, is in part successful in that the Tribunal varies the financial penalty by reducing the amount to the figure to £12,000.

REASONS

INTRODUCTION

The appeal

1. On 23 July 2019, Mr Amar Afzal appealed to the Tribunal against a financial penalty imposed on him by Derby City Council (“the Council”) under section 249A(1) of the Housing Act 2004 (“the 2004 Act”). The financial penalty related to an alleged housing offence in respect of premises known as 260A Normanton Road, Derby DE23 6WD.
2. The notice dated 4 June 2019 comprises:
 - Final Notice imposing a financial penalty of £20,500 for conduct amounting to an offence under section 30 of the Act namely failure to comply with an Improvement Notice.

LAW AND GUIDANCE

Power to impose financial penalties

3. New provisions were inserted into the 2004 Act by section 126 and Schedule 9 of the Housing and Planning Act 2016. One of those provisions was section 249A, which came into force on 6 April 2017. It enables a local housing authority to 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.
4. Relevant housing offences are listed in section 249A(2). They include the offence, under section 30 of the 2004 Act, failure to comply with an improvement notice.
5. Only one financial penalty under section 249A may be imposed on a person in respect of the same conduct. The amount of that penalty is determined by the local housing authority (but it may not exceed £30,000), and its imposition is an alternative to instituting criminal proceedings for the offence in question.

Procedural requirements

6. Schedule 13A to the 2004 Act sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under section 249A. Before imposing such a penalty on a person, the local housing authority must give him or her a notice of intent setting out:
 - the amount of the proposed financial penalty;
 - the reasons for proposing to impose it; and
 - information about the right to make representations.
7. Unless the conduct to which the financial penalty relates is continuing, that notice must be given before the end of the period of six months beginning on the first day on which the local housing authority has sufficient evidence of that conduct.
8. A person who is given a notice of intent has the right to make written representations to the local housing authority about the proposal to impose a financial penalty. Any such representations must be made within the period of 28 days beginning with the day after that on which the notice of intent was given. After the end of that period, the local housing authority must decide whether to impose a financial penalty and, if a penalty is to be imposed, its amount.
9. If the local housing authority decides to impose a financial penalty on a person, it must give that person a final notice setting out:
 - the amount of the financial penalty;
 - the reasons for imposing it;
 - information about how to pay the penalty;
 - the period for payment of the penalty;
 - information about rights of appeal; and
 - the consequences of failure to comply with the notice.

Relevant guidance

10. A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions in respect of the imposition of financial penalties. Such guidance (“the HCLG Guidance”) was issued by the Ministry of Housing, Communities and Local Government in April 2018: *Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities*. It states that local housing authorities are expected to develop and document their own policy on when to prosecute and when to issue a financial penalty and should decide which option to pursue on a case by case basis. The HCLG Guidance also states that local housing authorities should develop and document their own policy on determining the appropriate level of penalty in a particular case. However, it goes on to state:

“Generally, we would expect the maximum amount to be reserved for the very worst offenders. The actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the landlord’s previous record of offending.”

11. The HCLG Guidance also sets out the following list of factors which local housing authorities should consider to help ensure that financial penalties are set at an appropriate level:
 - a. Severity of the offence.
 - b. Culpability and track record of the offender.
 - c. The harm caused to the tenant.
 - d. Punishment of the offender.
 - e. Deterrence of the offender from repeating the offence.
 - f. Deterrence of others from committing similar offences.
 - g. Removal of any financial benefit the offender may have obtained as a result of committing the offence.
12. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, the respondent has adopted civil penalties as an alternative to prosecution under the Housing and Planning Act 2016 and this was approved by their Cabinet on 1 October 2017 together with the process for determining the level of penalty. We make further reference to this policy later in these reasons.

Appeals

13. A final notice given under Schedule 13A to the 2004 Act 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. However, this is subject to the right of the person to whom a final notice is given to appeal to the Tribunal (under paragraph 10 of Schedule 13A).
14. Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within 28 days after the date on which the final notice was sent to the appellant. The final notice is then suspended until the appeal is finally determined or withdrawn.
15. The appeal is by way of a re-hearing of the local housing authority’s decision but may be determined by the Tribunal having regard to matters of which the authority was unaware. The Tribunal may confirm, vary or cancel the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than the local housing authority could have imposed.

BACKGROUND FACTS

The Premises

16. The Tribunal inspected the property on 11 November 2019 and noted the following:

The premises comprise living accommodation over three floors to the rear and above a retail unit at 260 Normanton Road.

Access is to the rear of the property, across a yard with entrances both via a backdoor into the Kitchen and newly installed patio doors to the Living Room.

At first floor are three Bedrooms and a Bathroom.

The fourth bedroom is in the attic and is now not used with the access to the stairwell locked.

The property has the benefit of a new gas boiler to the existing central heating and two wired in smoke detectors.

The property was vacant at the time of inspection.

History of the Premises

17. The Property had been in the ownership of the Appellant since 1993 and had been occupied by his parents, himself and his wife and their family.
18. The property was subsequently rented and in 2016 the tenants had contacted the Council about hazards at the property. In 2017 the Appellant had worked with the Council to carry out remedial work. The Appellant had believed that the works had been 'signed off' but on 16 January 2018 the property was re-inspected, and a number of hazards were noticed.
19. On 26 January 2018 the Appellant was notified of an intention to serve an Improvement Notice in respect of these hazards and the Improvement Notice dated 7 February 2018 was duly served. The terms of the notice were that the remedial work was to be started by 12 March 2018 with varying completion dates, according to the nature of the hazard, the last being 14 May 2018.
20. No appeal against the Improvement Notice was made by the Appellant at that time. (See paragraph 28).
21. The Council inspected the property on 20 July and 12 September 2018 and noted that the works required to be carried out had not been done. The Appellant was invited to attend an interview under caution on two occasions but did not do so.
22. On 18 December 2018 the Council wrote to the Appellant informing him that as he had not complied with the Improvement Notice dated 7 February 2018, the Council were intending to impose a financial penalty under section 249a of the Housing Act. Formal notice of

intention to impose a financial penalty was attached to the letter. The amount of the proposed financial penalty was £20,500.

23. On 20 January 2019 the Appellant responded to the notice – see his grounds of appeal paragraphs 29 to 34. The Council replied on 7 February 2019 extending the period of the right to make written representations to 21 February 2019. The Appellant wrote on 21 February with his representations.
24. On 4 June 2019 the Council, having considered the Appellant's representations, still proposed to issue the financial penalty and a final notice imposing the penalty was served.

THE HEARING

The hearing

25. On 11 November 2019, a hearing was held at the Derby Justice Centre. Mr. Afzal represented himself at the hearing, and the Council was represented by Mr. Joe Millington of counsel.
26. The Tribunal heard oral evidence given by Mr. Afzal and by a witness Mr. Ziemacki for the Council: (Housing Standards Officer employed by the Council). In addition, written statements given by a number of additional witnesses for the Council were admitted and a witness statement for Applicant. The parties had also each submitted bundles of documentary evidence in support of their respective cases.
27. At the hearing Counsel provided the Respondents' Skeleton Argument, extracts from the Housing Act 2004 and a case London Borough of Haringey v Katie Goremsandu should the issue of reasonable excuse for non-compliance be entertained. The Tribunal adjourned to allow time to read the skeleton argument but expressed concern about the late submission of the legal case report. In the event the latter was not referred to.

Grounds for the Appeal

28. At the hearing the Appellant confirmed that he accepted the Improvement Notice. He had made an appeal against the Notice in error in July 2019 and his late Appeal against the final penalty dated 23 July 2019 was accepted by the Tribunal.
29. He had worked with the Council in 2017 to rectify hazards at the building and believed that no further works needed to be carried out.
30. The Appellant advised that he had not received rent for the Property for a period of 22 months starting December 2017 and that the tenants had denied him access to carry out works and had caused damage themselves to the property.

31. He had experienced major family events in 2018 and these events plus his full-time job for a housing association had taken its toll. In July 2018 he had the impression that the Council were going to go ahead with the works in his default, as they had arranged an inspection with a contractor.
32. He felt that the starting point of £20,000 for the fine was too high and that the maximum risk should be assessed as Medium according to the “matrix“ developed by the Council to determine the correct level of financial penalty.
33. He further commented that his level of culpability should be Low or No culpability as he had worked with the Council in 2017 and thought there was no further works to be carried out. Much of the damage had been caused by the tenants and they had refused to allow him access.
34. He disputed the adjustments used in connection with the “matrix” in compiling the penalty. He stated that the assets listed in the witness statement of 6 September 2019 were incorrect and he provided a financial statement.

The Council’s Response

35. The Council stated that the penalty was imposed because the Appellant had committed a relevant housing offence, namely he failed to comply with an Improvement Notice, contrary to s.30 of the Act.
36. Attempts were made to engage with the Appellant during 2018 and the Council also inspected the property on more than one occasion that year.
37. The Appellant failed to respond to two requests for interviews under caution. The Council served notice of intention to impose a financial penalty on and the template relevant to this appeal notice was provided in the bundle.
38. The Council stated that the deficiencies record on the “matrix” indicated a high level of harm. Factors to be considered when determining the level of penalty were punishment, deterrence, removal of financial benefit, severity of offence, culpability and history and harm.
39. The Council concluded that the penalty was correctly imposed, and that the Appellant had sufficient financial interests to meet the Penalty.

DISCUSSION AND CONCLUSIONS

Relevant housing offences

40. In respect of the Final Notice which is the subject of this appeal, the Council's decision to impose a financial penalty can only be upheld if the Tribunal is itself satisfied, beyond reasonable doubt, that the Appellant's conduct amounts to the relevant housing offence specified in that notice (i.e. to an offence under section S30 of the Act – failure to comply with an improvement notice.).
41. Upon being questioned, the Appellant confirmed that he had not complied with the Improvement Notice and pointed to the difficult year he had experienced in 2018 (see paragraph 31 above).
42. He agreed with the Tribunal that he had not in fact received formal notice of intention to carry out works in default by the Council on his behalf but only an indication that this might occur.
43. The Tribunal finds that it is appropriate to impose a financial penalty on the Appellant for failure to comply with an Improvement Notice. It notes the grounds for the appeal and comments further on this at paragraph 49.

Amounts of the financial penalties

44. The Tribunal's task is not simply a matter of reviewing whether the penalties imposed by the Final Notice were reasonable: the Tribunal must make its own determination as to the appropriate amount of the financial penalty having regard to all the available evidence. In doing so, the Tribunal should have particular regard to the seven factors specified in the HCLG Guidance as being relevant to the level at which a financial penalty should be set (see paragraph 11 above).
45. We also consider it appropriate to have regard to the Council's Policy which guided the Council's decision-making process in this case (see paragraph 12 above). Although we do not consider ourselves bound to adopt the Council's Policy for the purposes of this appeal, we consider it to provide a sound basis for quantifying financial penalties on a reasonable, objective and consistent basis. We are therefore content to use the Policy as a tool to assist in our own decision-making.
46. Derby City Council's Policy is itself based on the relevant factors specified in the HCLG Guidance, as stated above. It places particular emphasis – rightly, in our view – on an assessment of the seriousness of the relevant conduct in terms, firstly, of the harm it caused (or its potential for harm) and, secondly, on the culpability of the offender. Harm is given a rating of very high, high, medium and low. Culpability is given a rating of deliberate, reckless, negligent or low or no culpability. The interrelation between harm and culpability then feeds into a matrix which determines which band the penalty should fall into. (See paragraph 4 of the matrix)

Assessment of culpability and harm

47. In determining the harm and culpability of the conduct in question, the Council's starting point was £20,000 on the basis that the seriousness of the offence was reckless with a high level of harm.
48. The importance of failing to comply with an Improvement Notice should not be understated. The Tribunal understands and agrees with the Council that this non-compliance undermines its regulatory role and poses a potential for harm. Nevertheless, given that the premises in question were occupied by tenants who refused the Appellant access, together with the fact that the Appellant had worked with the Council in 2017, we find the appropriate harm classification to be medium and not high risk.
49. We find that the Council correctly classified the Appellant's culpability as being reckless, however. The Appellant worked for a housing association, was aware of the necessity to manage a rented property as a responsible landlord and did not engage with the Council for 12 months, until he received the notice of intention to impose a financial penalty.

Aggravating and mitigating factors

50. We do not agree with the Council's assessment that there are aggravating factors in this case which would justify increasing the amount of financial penalty by £2,000.
51. Work had not been carried out by default on the property, the history of non-compliance was not proven as the landlord had worked with the Council during 2017, and there was no evidence of previous tenants complaining though this was accepted by the Council as actually to read previously tenants had complained i.e. in 2017.
52. The statement from the tenant dated 12 September 2018 referred to her being scared as security of the property was bad with lots of people coming into the garden. However, the Council remarked that on one inspection in the summer of 2018, it was evident that several people lived at the property including a couple on the top floor. The Council had not seen the tenant and the Appellant believed that she had moved out to live with her daughter.
53. We agree with the Council with regard to the question of mitigating factors which justify reductions from a starting point. In order for the Council to arrive at its final assessment of £20,500 as the appropriate amount for the financial penalty, it discounted its initial figure of £20,000 by £1,500 to reflect the fact that the Appellant had no previous relevant convictions, there were no previous penalty charges and there was no previous record of obstruction.

54. We find that the starting figure for the financial penalties in this case to be £15,000 – reckless with medium harm. We have made deductions of £1,500 (see paragraph 53) This results in a reduction in the financial penalty from £20,500 to £13,500.
55. At this point we considered whether the financial penalty met, in a fair and proportion way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence. The Tribunal notes that no rents were received for the property after January 2018 and it makes a further deduction of £1,500.
56. We considered the statement of assets proved by the Council and from comments made during the hearing note that the Appellant owns the subject property, another property and has a half share in a third property. The Appellant provided evidence of his income and expenses which included a monthly rental income of £1,400. We see no reason why the financial penalties should be reduced because of his financial situation.

OUTCOME

57. Our findings and conclusions in this case lead to the variation of the Final Notice, the effect of which is to amend the amount of the financial penalty imposed by the notice to £12,000.

RIGHTS OF APPEAL

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case

number), state the grounds of appeal and state the result the party making the application is seeking.

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