



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

Case reference : **LON/00BB/HNA/2019/0076**

Property : **3 Essex Road, London E12 6RF**

Applicant : **Mr Richard Schwartz**

Respondent : **London Borough of Newham**

Type of application : **Appeal against a financial penalty –
Section 249A & Schedule 13A to the
Housing Act 2004**

Tribunal : **Tribunal Judge Dutton
Mr T W Sennett MA FCIEH
Tribunal Judge Brandler**

**Date and venue of
hearing** : **1st May 2019
10 Alfred Place, London WC1E 7LR**

Date of decision : **19th June 2019**

DECISION

The appeal is allowed on the ground that the Financial Penalty Notice the Respondent issued on 22nd October 2018 against the Applicant under section 249A of the Housing Act 2004 was invalid.

Reasons

1. The Applicant is the owner of 3 Essex Road, London E12 6RF (the Property). It is accepted by the Applicant that at the relevant time the Property should have been licensed as a House in Multiple Occupancy (HMO), but it was not. It is accepted that an offence under s72(1) of the Housing Act 2004 (the Act) had been committed.

2. Previously, on 24th January 2018 the Council carried out an inspection of the Property and ascertained that it comprised 4 bedrooms with 7 people residing there. An HMO licence had been granted on 27th June 2013 permitting the Applicant to rent the Property to 4 households consisting of 7 people. However, on 18th August 2016 the Council revoked the licence on the grounds that he was no longer " a fit and proper person" following conviction at Thames Magistrates Court. At that time the Applicant was registered licence holder of 8 properties in the Newham area.
3. It would appear that unsuccessful attempts were made to obtain a licence for the Property through the letting agents for the Applicant, Abbeynest Properties Limited, with an application finally being submitted on 9th June 2018.
4. Before then, on 31st May 2018, the Council issued a Notice of Intent to issue a Financial Penalty. This gave the Applicant until 28th June 2018 to make any written representations against a proposed penalty of £30,000. The time for such representations to be made was said to be "*not less than 28 days from the date of service of the notice*". Representations were made by email on 9th June 2018 and replied to by the Council on 7th August 2019
5. Following the representations, on 22nd October 2018 the Council sent a Financial Penalty Notice to the Applicant, for failing to licence the Property as an HMO under section 72(1) of the Act. The Notice sought to impose a financial penalty of £30,000, the maximum allowable under the Act. The Applicant has appealed the Notice and the matter came before us for a hearing on 1st May 2019, following an earlier adjournment on 20th March 2019. At the hearing of the appeal on 1st May 2019 the Tribunal raised a concern that the Final Notice was not valid.
6. The matter could not be considered at that hearing as neither party was in a position to make submissions on the issue raised by the Tribunal. Accordingly the matter was again adjourned with a proviso for Counsel on behalf of the Applicant and the Council, (Mr Cockburn for the Applicant and Ms Imam for the Council) to lodge submissions on two issues, the validity of the Final Notice and the level of the penalty to be imposed.
7. Counsel was allowed until 31st May 2019 to lodge submissions and to exchange them with each other. We have considered those submissions in reaching our decision. For the Applicant it is said that the mandatory language used in paragraphs 7 and 8 of Schedule 13A to the Act (the Schedule) is sufficient for us to conclude that the Final Notice is invalid and that the Council cannot impose a financial penalty on the Applicant.
8. It was said by Mr Cockburn that the strict interpretation of the Act flows from the fact that for the Council to be satisfied that an offence

has been committed the standard of proof is 'beyond reasonable doubt', the criminal standard. Indeed in issuing a Financial Penalty Notice the Council is dealing with the matter as a civil issue, when it could have created a criminal offence. The non-compliance with paragraph 7 of the Schedule is that the Council has given the Applicant only 28 days from the date of the Notice, whereas the Schedule provides that the period is to be 28 days beginning with the day after the notice was given.

9. Schedule 13A of the Housing Act 2004 provides:
 - 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.*
10. The Respondent uses notices in a standard format of its own devising. The second paragraph states,

You are required to pay a Financial penalty of [£XXXX] within 28 days of the date of this notice.
11. Paragraph 11 of the standard format Final Notice also states that further action will be taken in the event of non-payment "within 28 days of this notice".
12. This time period is important for the following of reasons:
 - (a) It shows the time within which the penalty should be paid.
 - (b) Its expiry triggers the right of the authority to enforce payment.
13. For the Council Ms Iman submitted that the error on the face of the Final Notice was immaterial to its validity. The authority of *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 was cited. This case involved an application for the right to manage and compliance with the statutory framework in respect of acquiring such a right.
14. It was said that the notice erroneously stating that the penalty was due on the same date as the last date on which the Applicant may appeal did not "*affect, obstruct or prevent the Applicant's ability to appeal nor the time within which to do the same*". It was said that the defect was trivial and as a matter of statutory construction, taking into account the actual or possible effect of non-compliance, the Tribunal was invited to find that the defect did not invalidate the Notice.
15. In the *Elim Court RTM Co Ltd* case Lewison LJ considered the consequences of non-compliance with statutory requirements and stated:

52. *The outcome in such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case ... The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole ... Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid ... One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity.*

16. As Ms Imam pointed out that there appear to have been no consequences flowing from the defect in the notices but we find that is irrelevant. At least two of the three “pointers” identified by Lewison LJ were in favour of the Applicants:
 - (a) The time period is particularised in the statute as opposed to being required by general provisions of the statute.
 - (b) It is also in the statute itself, not in subordinate legislation.
17. We are also satisfied that the third “pointer” is in the Applicants’ favour in that it had been open to the Respondent to withdraw the defective notice and issue a new one when they should have become aware of the issue. The Initial Notice was issued on 31st May 2018, well within the 6 month period allowed under paragraph 2(1) of the Schedule. That is now no longer an option as pointed out by Mr Cockburn.
18. These “pointers” though not necessarily conclusive strongly support our conclusion that the statutory notice requirements in this case are intended to be strict so that non-compliance in any respect invalidates the notice, irrespective of any proven consequences.
19. The statutory scheme is for the imposition of criminal sanctions without the intervention of a court. Such exceptional circumstances must be underpinned by strict compliance with the requisite procedural

protections. It is inappropriate to characterise any of the statutory requirements as lacking in importance, secondary or ancillary.

20. Therefore, the consequence of the defective nature of the notice in this case is that it is invalid and cannot impose any penalty on the Applicant. Accordingly it is not necessary for us to consider the submissions on the level of the penalty to be imposed.

Name: Tribunal Judge Dutton **Date:** 19th June 2019

ANNEX - 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.

Relevant legislation

s249A Financial penalties for certain housing offences in England

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

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

- (a) section 30 (failure to comply with improvement notice),
- (b) section 72 (licensing of HMOs),
- (c) section 95 (licensing of houses under Part 3),
- (d) section 139(7) (failure to comply with overcrowding notice), or
- (e) section 234 (management regulations in respect of HMOs).

(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4)The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5)The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—

(a)the person has been convicted of the offence in respect of that conduct, or

(b)criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6)Schedule 13A deals with—

(a)the procedure for imposing financial penalties,

(b)appeals against financial penalties,

(c)enforcement of financial penalties, and

(d)guidance in respect of financial penalties.

(7)The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8)The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

(9)For the purposes of this section a person's conduct includes a failure to act.

Schedule 13A

Notice of intent

1Before 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”).

2(1)The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2)But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—

(a)at any time when the conduct is continuing, or

(b)within the period of 6 months beginning with the last day on which the conduct occurs.

(3)For the purposes of this paragraph a person's conduct includes a failure to act.

3The 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.

Right to make representations

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”).

Final notice

5After 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.

6If the authority decides to impose a financial penalty on the person, it must give the person a notice (a “final notice”) imposing that penalty.

7The 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.

8The 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.