FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CH/HNA/2019/0047**
Property	**:**	**15 Saltwell Street Gateshead NE8 4QX**
Applicant	**:**	**Mr Stuart Riley**
Respondent	**:**	**Gateshead Council**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal Members	**:**	**Judge W.L. Brown** **Mr I R Harris MBE FRICS**
Date of Determination	**:**	**30 October 2019**
Date of Decision	**:**	**12 November 2019**

DECISION

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Determination: The Tribunal varies the Penalty Charge, determining that the correct sum is £5,160.52

Introduction

1. The Applicant made application (the "Application") dated 20 April 2019 to the Tribunal appealing a financial penalty imposed on him by the Respondent in the sum of £6,080.52 (the "Penalty") made under section 249A of the Housing Act 2004 (the "Act"), set out in a Notice dated 3 April 2019. The Applicant is the spouse of the owner of the Property, Helen Riley.

2. The Housing and Planning Act 2016 introduced Civil Penalties from 6th April 2017 as an alternative to prosecution for certain offences under the Act. The maximum penalty is £30,000. Local housing authorities are expected to develop their own policy on when to prosecute and when to issue a civil penalty and should decide which option it wishes to pursue on a case-by-case basis in line with that policy. The amount of the penalty is to be determined by the local housing authority in each case, which determination is subject to the right of appeal to the Tribunal.

3. The procedures for imposing financial penalties and appeals against them are set out in Schedule 13A of the Act. The appeal is by way of a re-hearing of the Respondent's decision, as the relevant local housing authority, to impose the penalty. Statutory guidance under section 23(10) and Schedules 1 and 9 of the Housing and Planning Act 2016 (the "MHCLG Guidance") was issued in April 2018 by Ministry of Housing, Communities and Local Government. Local housing authorities must have regard to this guidance in the exercise of their functions in respect of civil penalties. The Guidance provides that in determining an appropriate level of penalty, local housing authorities should have regard to the Guidance at paragraph 3.5 which sets out the factors to take into account when deciding on the appropriate level of penalty. Only one penalty can be imposed in respect of the same offence. 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. While the Tribunal is not bound by it, it will have regard to the MHCLG Guidance.

4. Directions were made by the Tribunal on 30 May 2019.

5. Neither party requested a hearing and the Tribunal convened to make its determination on 2 September 2019 at SSCS Manorview House, Newcastle upon Tyne. The Applicant and Respondent presented written representations and produced their bundles of documents. The Applicant also referred to letter dated 20 April 2019 from Mrs Helen Riley.

6. The Tribunal understood the Property to be a 2 bedroom ground floor pre-1919 flat, with yard to rear and on street parking. It had been occupied by a tenant, Ms Guest, since 2017.

Facts and Law

7. The Respondent provided a chronology of events which was not in dispute. The Property fell within the scope of Section 79(2)(1) and (b)(i) of Act to which Part 3 licensing powers applied and an application for a licence was required under Section 85(1). The Property is situated within both the former licensing area that ran from 2012 – 2017 and within the boundaries of the existing scheme, that running from 30 April 2018 – 29th April 2023. The basis for the issuing of the Penalty was the alleged offence by the Applicant under Section 95 of the Act in having control or managing a property which is required to be licensed. None of the statutory defences were relied upon. The Applicant did not deny that the Property was affected by the selective licensing regime, nor that he did not hold the requisite licence for the period at issue. The process of the formalities leading to the issuing of the Penalty Notice was not in dispute.

8. The Respondent determined to impose on the Applicant a financial penalty under Section 249A of the Act which states:

"*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.*"

The "relevant housing offence" alleged is that under Section 95.

Evidence and submissions

9. The Applicant stated that the Property had been bought by his spouse while working as a paramedic in Newcastle upon Tyne. It had been retained and let out after she relocated with the Applicant. He maintained that despite a confusing and time-consuming application process he had held a 'Selective Landlord License' for the Property during the first phase of the licensing scheme, from 18th March 2013 to 17th May 2017.

10. During May 2017, while undertaking his profession as a paramedic he was attached and sustained physical injuries. His father died shortly after and he took several weeks off work. In a depressed state he had been unable to deal promptly or appropriately with correspondence from the Respondent.

11. The Property had been in a very good condition when the tenant Ms Guest moved in, but she had later damaging and removing door frames, smashed plug sockets, damaged the front door and kitchen cupboards. The hob and oven had never been cleaned and the drains were blocked with beer cans and other rubbish. Animals had been kept in the Property and all of the fitted carpets were soiled and had to be replaced; there was also vandalism throughout the property. On 5 March 2019 Ms Guest ended her tenancy.

12. The Applicant asserted that the amount of the penalty is excessive and/or incorrect. He recorded that repair work had been undertaken following Ms Guest's departure and also had to spent over £5,400 to renovate the flat to a good condition. Together with loss of rental income for the last two months, he and his spouse had suffered a deficit of almost £2,300 over the financial year. He also stated that he had already paid the Respondent £1,190 for the licence subsequently obtained by his spouse of which £640 was a fine for the late application.

13. The Respondent set out the sequence of events surrounding failed attempts between May and November 2018 by the Applicant to apply for the appropriate licence. On 18 December 2018 (33 weeks after licensing scheme commencement) using powers under Section 88 of Act, the Respondent began proceedings to refuse the Applicant's licence application on the basis that it was not duly made and had not been submitted in accordance with the Respondent's specified requirements.

14. On 4 January 2019 the Respondent received a call from the Applicant's spouse, Helen Riley, who repeated the personal difficulties outlined by the Applicant as described above and she explained that she had only recently become aware of the situation in relation to the licence application and confirmed that the Applicant had been on sickness leave from 1 January 2018 until 26 May 2018. A duly made licence application was received from Mrs Riley on 9 January 2019. The Respondent's adopted additional fee for a late application is £250

15. The period of the offence has been calculated from scheme start (30 April 2018) to the date Mrs Riley submitted a duly made application (9 January 2019) - 36 weeks.

16. The Respondent used its "Checklist for Assessing Prosecution vs Civil Penalty Charge Notice" document to determine that a Financial Penalty was a suitable method of enforcement action. The Checklist considers: the seriousness of the offence; this includes the vulnerability of the occupiers of the property and any proven harm outcome on them or on the neighbourhood because of the offence; the culpability of the landlord; this includes the effort made by the landlord to comply with requirements prior to formal action being taken, any mitigating factors that the landlord could demonstrate in his defence of not complying with requirements, any relevant unspent convictions, the landlord's track record in respect of complying with housing legislation in Gateshead and nationally, the landlord's experience; such as the length of time the landlord has managed privately rented homes, and the size of the property portfolio, and membership of any recognised landlords association. The consideration of these factors led to the decision to impose a civil penalty charge as an alternative to a prosecution.

17. The Respondent contended that the Property had been let out for 36 weeks in the absence of a properly completed licence application. The evidence provided in relation to the former licensing scheme in the same area running from May 2012 – May 2017, demonstrated a similar pattern

of failure by the Applicant in presenting a duly made application in a timely manner.

18. The civil penalty is made up of two components. The first is the penalty calculation; this is where the severity of the offence, the landlord's culpability and track record and the landlord's income (if deemed appropriate) are considered. The second considers the amount of financial benefit, if any, which the landlord obtained from committing the offence. These two components are then added together to determine the final penalty amount that will be imposed on a landlord.

19. The culpability of the Applicant was assessed as being 'medium level' – negligent behaviour/failure to take reasonable care. The MHCLG guidance states that in terms of 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 obligations. Landlords are running a business and should be expected to be aware of their legal obligations'.

20. As to the seriousness of harm risked by the offence this was assessed at the lowest level as no direct harm was caused to the tenant or the community as a result of the non-application for the licence.

21. The resulting penalty band range was between £2,000 - £4,000 (upper limit) with a starting point of £3,000 and a confirmed 'moderate' Level 1 penalty level.

22. For mitigating factors, the maximum reduction from the starting point is £1,000 – a maximum 20% in this matter. Here, the penalty charge was reduced by £750 from the starting point of £3,000 on the basis that it was the first occasion that the Applicant had been subject to formal action by the Respondent's Private Sector Housing Team, that a fully made application had since been made and also due to the Applicant's declared health issues.

23. Eight factors were taken into consideration to determine whether there were aggravating factors that would cause the financial penalty to increase from the amount calculated back towards the penalty band maximum amount. These consider track record of the offender within Gateshead and nationally. No aggravating factors were applied to the calculation due to the Applicant's previous positive track record.

24. The Respondent determined the financial gain element to be the rental income earned from the letting of the unlicensed property. By reference to the rent sum of £425 rent per calendar month recorded in a tenancy agreement for the Property in 2018 the Respondent calculated rental income at £98.07 per week, applied over 36 weeks, to be added into the penalty charge - £3,530.52. It made no allowance for the cost to the Applicant of property maintenance and insurance and mortgage

payments as being business expenses expected to have been budgeted for.

25. The cost band for this financial penalty was assessed as medium - £300 - which the Respondent adopted when drafting its policy as a reasonable and proportionate representation of the costs associated with imposing a financial penalty.

26. Therefore the total charge was:

Penalty Charge Starting Amount	+£3000
Changes due to offender's track record mitigating factors	-£ 750
Financial Benefit gained during offence period	+£3,530.52
Costs	+£ 300
	£6,080.52

27. The Applicant had not been penalised already for the offence. The standard licence application fee of £750 commenced on 30 April 2018 (there was a discount for early applications). After 28 days from commencement of licensing applicable to the Applicant, the fee increased by £100 and the late application was subject to an additional levy of £250, in accordance with published guidance for applicants.

Decision

28. The same criminal standard of proof is required for a civil penalty as for prosecution. This means that before taking formal action, a local housing authority should satisfy itself that if the case were to be prosecuted in the Magistrates Court, there would be a realistic prospect of conviction. In order to actually achieve a conviction in the Magistrates Court, the local housing authority would need to be able to demonstrate beyond reasonable doubt that a relevant offence has been committed. Similarly, where a civil penalty is imposed and an appeal is subsequently made to the Tribunal, the local housing authority needs to be able to demonstrate beyond reasonable doubt that the offence had been committed. The Applicant did not deny that he did not hold an appropriate licence for the Property between 30 April 2018 to the date Mrs Riley submitted a duly made application on 9 January 2019. Prima facie there is the commission of a relevant housing offence and the Tribunal finds on these facts that the Applicant committed an offence under Section 95 of the Act. The Property was subject to compulsory selective licensing and was rented for 36 weeks in the absence of an appropriate licence. The Applicant did not deny that he was in control of the Property in the relevant period. The Respondent is justified in imposing a sanction. Therefore the first limb of the Applicant's appeal – that no penalty should have been imposed – fails. The Respondent's decision to issue a penalty charge rather than prosecuting is to the benefit of the Applicant in avoiding a conviction.

29. Therefore the question for the Tribunal is the level of the penalty.

30. The Tribunal considered the MHCLG Guidance at paragraph 3.5 which sets out the factors to take into account when deciding on the appropriate level of penalty. Those factors are:

> Severity of the offence.
>
> Culpability and track record of the offender.
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> The harm caused to the tenant.
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> Punishment of the offender.
>
> Deter the offender from repeating the offence.
>
> Deter others from committing similar offences.
>
> Remove any financial benefit the offender may have obtained as a result of committing the offence.

31. The Tribunal reviewed the Respondent's policy on assessing the level of culpability. The MHCLG Guidance states that in terms of 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 obligations. Landlords are running a business and should be expected to be aware of their legal obligations'. The Tribunal found that assessment as 'medium level' – negligent behaviour/failure to take reasonable care - was appropriate. The Applicant did make an effort to submit an application, although it remained unduly made for 36 weeks. The Applicant was a former licence holder and so was aware of his legal obligations, or ought to have known. The Applicant expressed his understanding of the legal requirements and the urgency to stop the offence. The Respondent had made multiple requests and reminders had been issued to confirmed addresses and email accounts over a prolonged period. Also, the Applicant had failed to apply for a licence in a timely manner previously in the former licensing scheme. In consequence the Tribunal was prepared to accept that the appropriate band for the facts of this matter to be medium level of culpability.

32. As to the severity of the behaviour the Tribunal found no persuasive evidence that the level should be otherwise than low, as decided by the Respondent, meaning the banding is £2,000 - £4,000, a 'moderate' Level 1 penalty.

33. The Tribunal considered the Respondent's policy of having a starting point in the middle of each band of penalty – i.e. £3,000 here. The Applicant made no representation against that approach and in this case in the absence of persuasive representations to the contrary the Tribunal is prepared to accept the position, the reasoning would appear to be that doing so permits for adjustment for aggravating and mitigating factors, while staying within the band.

34. There are no aggravating factors.

35. The Guidance states that it is reasonable that each mitigating factor may justify a reduction. The Respondent's policy regarded £1,000 for this factor in total from the starting point for the penalty as appropriate. The Tribunal accepts the Respondent's findings of mitigation and reduction of £750 cumulative for mitigating factors, being in particular the effort to apply for a licence, the spouse's subsequent application, albeit some 30plus weeks after the triggering of the need for a licence and ill-health of the Applicant (although noted as not corroborated by medical evidence).

36. As to the financial benefit to the Applicant during the period in which the offence was being committed the Tribunal noted from the papers that housing benefit was paid for the tenant of the Property between 8 November 2017 and 27 February 2019 of £6,905.71. The Notice of Intention to impose a penalty was issued by the Respondent on 29 January 2019, some 39 weeks after the compulsory licensing for the area in which the Property is located began, on 30 April 2018. The Respondent worked on the basis of 36 weeks income from the rent. Therefore the Respondent's evaluation is not unreasonable, taking account of and adding into the penalty the sum of £3,530.52 for such benefit.

37. The Tribunal determined the ongoing expenses incurred by the Applicant in managing the Property – insurance, general maintenance, mortgage cost - were not items for which there should be a reduction in the penalty. They were expenses arising ordinarily on the capital investment in the Property and there is an indirect benefit in paying off a debt, increasing equity in the property and receiving an income. However, the Respondent had declined to make a reduction for the damage caused by the tenant. The Tribunal agreed with the Respondent that the tenant's behaviour did not prevent the Applicant applying for the necessary licence.

38. Of relevance, however, is the remedial cost to the Applicant arising from the damage caused to the Property by the tenant. The Tribunal found from the evidence that the Applicant had been put to extraordinary expense in consequence. Having regard to the itemised list from the Applicant, the Tribunal found that the relevant expenses were for repair to drains, carpets, new kitchen door fronts, plinths, oven and hob and waste removal. Although no receipts were provided, the total expense was expressed to amount to £ £1,840, which the Tribunal found not to appear to be exaggerated. Giving credit for an element of improvement in the works which we assess at 50% the Tribunal determines that the Applicant should have the sum attributed to financial benefit to be reduced by half of that expense, i.e. £920.

39. The Tribunal found that the licence application fees (see paragraph 27) were not part of the penalty and should not be taken into account. Those charges relate to the administration process for licence application and not punishment for commission of a relevant housing offence. Therefore no adjustment to the penalty should be made.

40. Recovery of the Respondent's fixed costs in connection with the penalty process of £300 was found by the Tribunal to be reasonable, both as to payability, arising from the offence and as to amount, being reasonable.

41. In consequence of the adjustment set out in paragraph 38 the Tribunal amends the penalty charge in this matter from £6,080.52 to £5,160.52.

WL Brown
Tribunal Judge
12 November 2019