FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BH/HNA/2019/0132**
Property	**:**	**3A Abbotts Park Road London E 10 6HT**
Applicant	**:**	**Mr Joseph Edwards**
Respondent	**:**	**London Borough of Waltham Forest**
Type of application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge Carr** **Mr Ridgeway**
Date and venue of hearing	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**30th June 2020**

DECISION

The appeal against the Financial Penalty Notice issued by the Respondent on against the under section 249A of the Housing Act 2004 is dismissed.

The hearing

1. The hearing took place on 4th March 2020 at 10 Alfred Place, London WC1E 7LR.

2. The Applicant appeared and gave evidence. He was accompanied by Ms Natalie Tutill, his partner. He was represented by Mr Sebastian Cos, Counsel instructed by Anthony Gold Solicitors.

3. The Respondent was represented by Mr Riccardo Calzavara of Counsel. Mr Jon Fine Manager of the Private Sector Houisng and Licensing Team with the Respondent attended and gave evidence.

The factual background

4. The Applicant has owned 3A Abbotts Park Road since 21st January 2008. It is a two bedroom ground floor flat. The Applicant said that he began letting the property out after about three or four years of ownership.

5. The Respondent designated the whole of its area as subject to selective licensing within the meaning of Part 3 of the Housing Act 2003 with effect from 1st April 2015. Before and after doing so, it publicised the requirement to seek a licence. The consequence of the designation is that most privately rented homes in the borough, including 3A Abbotts Road had to be licensed.

The Respondent's actions

6. The Respondent informed the Applicant by letter dated 13th October 2017 that it had identified 3A Abbotts Road as a property which (i) required to be licensed and (ii) was not licensed. The letter invited the Appellant to make an application within 14 days.

7. The Applicant opened an account in the following few days but failed to make an application for a licence.

8. Warning letters were sent on 1st November 2017 and 24th May 2018 and 10th April 2019.

9. On 18th April Kwasi Acheampong, Licensing Enforcement Officer with the Respondent attended the property, having told the Appellant and the occupier of the property in advance of his attendance. Ms Ona Neverdauskiene informed Mr Acheampong that she was the tenant of the property, and had been for around 9 years, paying a monthly rent of £1100 to the Appellant.

10. The Appellant was also at the property and attended the appointment. He confirmed that he was aware of the need for a licence.

11. On 10th June 2019 Mr Acheampong and the Appellant spoke on the telephone about the Appellant's continuing failure to licence the property.

12. On 8th July 2019 Mr Jon Fine, Team Manager with the Respondent confirmed that he was satisfied as to the relevant statutory test and decided to impose a financial penalty within the meaning of s.249A of the Act. The decision was endorsed by the Service Manager on 18th July 2019.

13. On 22nd July 2019 the Respondent served on the Appellant its Notice of Intent within the meaning of the statute. This was sent together with supporting evidence.

14. No representations were received in response to the Notice of Intent and no application for a licence was received.

15. The Respondent issued a final notice on 20th August 2019 . The covering letter to the Final Notice stated on its face that the witness statements and exhibits provided at the Notice of Intent stage detailed the offence that the Respondent was satisfied had been committed.

16. A penalty of £5000 was imposed subject to a deduction for early payment. The penalty was imposed in line with the Council's policy.

17. In general the Applicant agrees with the sequence of events presented by the Respondent. He makes some additional observations. He says that he became aware of the selective licensing scheme in April 2019 when he was written to by the Respondent. He says that he made enquiries of the council before becoming a landlord and was told that there were no licensing requirements. He also says that following the visit of Mr Acheampong to the property, he rapidly followed his advice, replacing the batteries for the smoke detector in the kitchen which had been removed by the tenant and fitting a smoke detector in the hallway. He says that Mr Acheampong gave him his contact card and advised him to apply for a selective licence. He told the Applicant about the potential consequences of failure to apply but, the Applicant says, he did not tell him when the application had to be submitted by.

18. The Applicant says that he was unable to apply for a selective licence because he was unable to read and write and therefore could not complete the online application form until he had help. He was forced to rely on his partner Natalie Tutill for help but she was busy and when she was available there were questions he could not answer regarding the mortgage and gas appliances at the property. He and Ms Tutill decided to call the Respondent for assistance about how to proceed There was no help available from a person, nor was it possible to complete the application by post. The only option was completing the application form online.

19. The Applicant says that he understands that it took him a long time to complete the form, but he was relying on the assistance of others and he did not understand why the council was making it so difficult for him to complete the task. He states that on 9th September 2019 Ms Tutill told the council that the application was completed and told them that the Applicant suffered from dyslexia and she could not find the time to help him submit the application for m as she was working full –time and caring for four children.

20. The Applicant considers that he has been treated unfairly. He always wanted to apply for a licence as soon as he knew that he was supposed to. The Council were not flexible and did not make an adjustment to their usual way of working.

The Applicant's appeal

21. The Applicant appeals against the decision to impose a financial penalty and the amount of penalty imposed.

22. The reasons for his appeal are as follows:

- The applicant is illiterate and this provides a reasonable excuse for not obtaining a licence
- The Respondent applied the wrong standard of proof to the decision to impose a penalty
- The final notice has incurable defects
- The amount of the proposed penalty is excessive

Reasonable excuse

23. The Applicant argues that the extent of his reading disability is such that he would not have been able to read any of the Respondent's letters prior to the date of the offence on 18th April 2019. Nor would he have been able to read any of the newspaper and online publicity which the Respondent refers to. He was therefore unaware of the need to hold a licence.

24. The Applicant argues that this was a reasonable excuse for not obtaining a licence in the circumstances because

- He had made enquiries with the Respondent before the licensing scheme was introduced and he was unaware of the change of rules.
- All of the council's publicity about the licensing scheme was not accessible for the Applicant because he cannot read.
- The Applicant suffered bereavements and serious illness during and in the lead up to the alleged offence.

25. After 18th April 2019 the Applicant argues that he made substantial endeavours to apply for a licence but was practically unable to do so. The Respondent failed to make reasonable adjustments even though the Respondent was aware that the Applicant cannot read.

26. Both before and after April 2019 the Applicant' actions should be assessed in the context of the Respondent's duties under the public sector equality duty. The Applicant argues that it would be unfair and unlawful to impose a penalty for matters which were substantially caused by the Respondent's breach of duties toward the Applicant.

27. The Respondent points out that the offence is a strict liability offence, so being unaware of the need to obtain a licence does not give rise to a defence. There is no suggestion from the Applicant that the Respondent failed to comply with the statutory publicity requirements and it is inarguable to suggest that it had to personally inform the Appellant of the existence of the scheme.

28. The Respondent was unaware that the Applicant was illiterate.

29. The assertion by the Applicant that he did not know of the need to licence the property until 18th April 2019 is contradicted by the Applicant having created an online profile with the Respondent through which he could apply for a licence on 17th October 2017.

30. The Respondent argues that it is not reasonable for the Applicant to have ignored various letters from the Respondent. He has a partner who is willing to assist him and also he evidently knew of the appointment on 18th April 2019 which he could not have known about this without having read at least one of the Respondent's letters.

31. The Respondent does not accept that the death of two friends two years apart and/or the hospitalisation of the Applicant for 1 – 2 weeks two years apart gives rise to a reasonable excuse for not obtaining a selective licence.

32. The Respondent, replying to the argument about the Equality Act 2010, argues that it is trite law that the service provider must know of the relevant person's disability to be able to provide the reasonable adjustments required by the Act. It notes that what those reasonable adjustments were has not been specified. The Respondent also does not accept that the Applicant is disabled, but even if it were the case any point made in connection with the Public Sector Equality Duty must be brought in the county court within six months of the date of the act to which the claim relates.

33. Overall the Respondent makes the point that the Applicant has not made out that he had a reasonable excuse for not obtaining a selective licence

Incurable defect - Standard of proof

34. The Applicant argues that the Respondent recorded its decision to impose a Financial Penalty in the Civil Penalty Report Proforma. This shows that the evidential standard applied to the offence was 'the realistic prospect of conviction' test. The Applicant argues that it was this test that was being applied. He argues that the test is less stringent than the evidential requirement for a conviction and that section 249A of the Housing Act 2004 sets a much higher and differently structured test – the Local Housing Authority must be satisfied beyond reasonable doubt that the offence was committed. This includes an assessment of any apparent defence.

35. The Applicant argues that, in order to proceed with imposing a penalty, the local authority must be satisfied beyond reasonable doubt that the person's conduct amounts to a relevant housing offence. There is a subjective condition to be fulfilled: the local housing authority must actually be satisfied beyond reasonable doubt that all elements of the offence are proved. This means that the decision to impose a financial penalty is not lawful if, as here, the wrong legal test was applied.

36. The Respondent agrees that it was required to be satisfied beyond reasonable doubt that the offence had been committed in order that it could impose the

penalty. The Respondent says that the Respondent was satisfied to the relevant standard. It relies on evidence from Mr Fine in support.

37. Mr Fine provided evidence that where he used the word 'satisfied' on the documents in the Respondent's bundle pages 145 – 157 that this was a reference to being 'satisfied beyond reasonable doubt' that the relevant housing offence had been committed. He explains that the reason why the document at page 142 of the bundle applies a lesser test of whether there was sufficient evidence to provide a realistic prospect of conviction was because this is an internal pro-forma document used to breakdown and simplify the reasons for taking a variety of enforcement actions which can include prosecutions as well as civil penalties and which is then signed off by a Service Manager before further action is taken. However Mr Fine stated that the facts to which this test were applied were the same facts as were considered when he satisfied himself that the relevant housing offences had been committed beyond reasonable doubt.

Incurable defect – final notice

38. The Applicant argues that the final notice does not contain the reasons for imposing the financial penalty as required by paragraph 8(b) of Schedule 13A Housing Act 2004. The Applicant argues that the case *London Borough of Waltham Forest v Hasan Younis* UKUT 0362 (LC) does not apply because that case was concerned with a notice of intent. In the Applicant's case the issue is with the final notice that the defect cannot be cured by supporting documents because the supporting documents referred to were provided with the Notice of Intent and not provided with the Final Notice itself.

39. The Applicant argues that the defect cannot be cured at the appeal stage because the defect has taken place at Final Notice stage rather than at the subsidiary notice of Intent stage.

40. The Respondent argues that the practice of the Respondent is covered by the decision in *Younis* and cannot be distinguished. It referred the Tribunal to paragraph 49 of *Younis* when the Deputy Chamber President commented that , 'so long as the notice explains why a penalty is proposed it will have done what is required of it.' The Respondent argues that there is no reason that the principle should not also apply to a final notice.

Incurable defect - The time period

41. Further the Applicant argues that the Final Notice failed to give a sufficient period of notice and is therefore void. The Applicant argues that the Final Notice states that the time to pay and the time to appeal is 'within a 28 day period starting after the day of this notice'. The notice was dated 20th August 2019 and therefore the 28 day period given ran from 21st August 2019.

42. The Applicant argues that the covering letter sent with the notice was served by the Respondent by post on 20th August. The Applicant argues that if service was effected by first class post two working days are required to state that service was effected. That would mean that service of the final notice was effected on 22nd August 2019 and that date should have been the

commencement of the 28 day period. The Applicant submits that, in the absence of evidence of service of the final notice being effected before 22nd August 2019 insufficient notice was given. This renders the final notices invalid.

43. The Respondent argues that the time period is correct. The Applicant is mistaken in interpreting *given* in the same way as *served*. Before imposing a financial penalty under s.249A the authority must 'give' a notice of intent setting out the amount of the penalty, the reasons for proposing to impose it and information about the right to make representations. The recipient may respond within 28 days, beginning with the day after than on which the notice is given, following which the authority must consider those representations.

44. A document that must be 'given' under an Act is served by properly addressing, pre-paying and posting it and unless the contrary is proved, is deemed 'to have been effected at the time at which the letter would be delivered in the ordinary course of post' (s.7 of the Interpretation Act 1978).

45. Mr Fine confirmed to the Tribunal that the final notice of decision was sent out on 20th August 2019 via the first class post from the Council's Post Room.

The excessive penalty

46. The Respondent classified the alleged offence as moderate band 2 and imposed a penalty of £5000. The Respondent's policy applies because the Applicant is a landlord with five or fewer dwellings. The policy allows for an increase of the penalty where aggravating factor apply but no decrease for mitigating factors.

47. The Applicant argues that the Respondent failed to give any, or insufficient regard to the Applicant's circumstances mitigating factors

48. In particular

- The Applicant cannot read or write and this is at the very least a significant cause of failure to hold a licence
- The Applicant made repeated attempts to apply for a licence in good faith
- An application for a licence has now been made and the Respondent has indicated that it intends to grant a licence
- The property was kept in good condition and the tenant suffierd no harm as a consequence of the property not being licensed
- The Applicant has suffered bereavements of a close friend and colleagues during the period of the alleged offence and he has suffered serious illness.

49. Further the Applicant argues that the penalty imposed was expressed as £5000 with a discount of 20% available if it was paid within 28 days. The

Applicant argues that this is the equivalent of a penalty of £4000 which is increased if the recipient exercises their right of appeal. It is argued that this is not a legitimate basis for increasing a penalty.

50. The Respondent's starting point is that the Tribunal must have regard to and respect for the Respondent's policy.

51. The issues of illiteracy and bereavement are as addressed above.

52. The Respondent also notes that the grant of a licence allows an authority to impose management conditions, the absence of any particular concern equates to the absence of an aggravating featre rather than the presence of a mitigating feature and the mischief arises from the Applicant having received rent payments by commission of a criminal offence. This responds to the assertion by the Applicant that the tenant suffered no harm as a result of the failure to licence.

Decision of the Tribunal

53. The Tribunal determines to dismiss the appeal.

54. The reasons are as follows:

55. The Tribunal accepts the argument of the Respondent in connection with the lack of a reasonable excuse, the technical issues raised with the process and the level of the penalty imposed. It is not persuaded by the arguments of the Applicant.

56. The Tribunal considers that the Applicant was aware of the need to licence the property from at least mid October 2017 when he created an online profile with the Respondent. This means that there was a failure by the Applicant to licence the property from that date. It also notes that the Applicant was at the property following written notification of the attendance of the Respondent. This suggests that the Applicant was fully aware of the concerns of the Respondent at that point.

57. The Tribunal is sympathetic to the Applicant's illiteracy and his reluctance to acknowledge it. However the Applicant runs a successful business and must therefore have found mechanisms through which to manage the consequences of his illiteracy. It is not an acceptable excuse to say that the person who helps him was too busy to ensure he complies with his statutory obligations. He needed to comply.

58. The Tribunal notes that the Applicant only made an application for a licence 53 months after it was required and 23 months after the Respondent reminded him of the need to do so.

59. The Tribunal also notes the decisions of the Upper Tribunal in *Younis* briefly mentioned above and London Borough of Waltham Forest v Marshall[2020] UKUT 0035 where it was made clear that only in very particular circumstances can an FTT justify departing from the London Borough's policy and its penalty matrix. There are no such circumstances in this case.

60. For these reasons the Tribunal upholds the decision of the Respondent and dismisses the appeal.

Name: Judge Carr **Date:** 30th June 2020

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).