FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**MAN/00CH/HNA/2020/0028**
Property	**38 Brinkburn Avenue, Gateshead, Tyne and Wear, NE9 4JT**
Applicant	**Patrick Blee**
Representative	**Mulcahy Smith, Solicitors**
Respondent	**Gateshead Council**
Type of Application	**Appeal against a financial penalty Section 249A & Schedule 13A of the Housing Act 2004**
Tribunal Members	**Tribunal Judge Professor C Hunter** **Tribunal Member W Reynolds**
Date and venue of Hearing	**Determined without a hearing on 4 December, 2020**
Date of Decision	**16, December 2020**

DECISION

Summary Decision

1. The Tribunal:

   a. Confirms the decision to extend time to appeal for the applicant, Mr Blee;

   b. Decides that the penalty should be reduced by £1,000 to £6,088.30.

Background

2. This is an application by the applicant, Mr Patrick Blee, against a financial penalty of £7,088.30 imposed on him by Gateshead Council ('the Council') under the Housing Act 2004 ('the Act'), s.249A. The penalty arose because of a failure of Mr Blee to apply for a licence under section 85 of the Act in a designated area of selective licensing. The penalty was made of a number of elements as follows:

Penalty Charge Starting Amount	+£4000
Changes due to offender's income	£0
Changes due to offender's track record	-£500
Financial Benefit gained during offence period	+£3288.30
Costs	+£300
	£7088.30

3. The penalty was imposed on Mr Blee on 13 February 2020. Under the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, r.27 the time limit for filling an appeal was 28 days from the date the notice was sent. It is accepted by Mr Blee that the appeal was out of time. His expanded statement of reasons states that the appeal was lodged with the Tribunal on 30 March 2020, ie 18 days out of time. In fact, the papers provided by Mr Blee dates the appeal at 1 April 2020. The date stamp from the Tribunal indicates that it was received by the Tribunal on 6 April 2020.

4. Unfortunately, on receipt of the appeal the Tribunal failed to send a notice to the Council as would normally happen. That form asks the Council to indicate if it intends to oppose the appeal.

5. On 2 September, 2020 the Tribunal confirmed that it would extend time to date of receipt of the appeal (as it was entitled to do under the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, r.6(3)(a)).

6. Directions were provided by the Tribunal on 3 September. However, because the intention to oppose notice had not been sent to the Council, it was not made aware of the appeal until 15 September. In the light of this, a new set of directions were made on 1 October 2020. Those directions did not include a decision on whether the appeal was allowed

out of time. When this was queried by the Council, an email was sent out the Tribunal on 1 October to it stating:

"A Tribunal Judge agreed to accept this application out of time and extended the deadline to apply to the date of receipt. This should have been conveyed in the directions and Tribunal apologises for the omission."

7. The Council responded in the same day by email :

"Thanks for the clarification Garry

I'm just wondering if the Tribunal Judge provided an explanation as to why the appeal was permitted to be accepted when it was so late? For our records more than anything?"

8. In the appeal, Mr Blee does not dispute that he failed to apply to for a licence as required. The appeal is about the amount of the penalty. The Council seeks to uphold the penalty and also requests that we reconsider the decision to extend time to appeal for Mr Blee.

Chronology

9. We set out here a chronology of core events over the period from the proposal to designate the area for selective licensing notification to Mr Blee's appeal.

March 2017	Applicant advised of proposal to designate area for selective licensing. Notification and invitation to comment sent to address previously provided as Applicant's point of contact for Council Tax.
25/01/2018	Respondent approves scheme for selective licensing to take effect for 5 years from 30 October 2018. An 8-week period of advertisement followed involving Facebook, Twitter, Council News, Local/National Landlord Associations, Posters on lamp posts in SLL area, Posters in shops within SLL area & Letter drop to all residents.
02/02/2018	Applicant advised of approval and designation of area selective for licensing together with invitation to apply. Notification sent to address previously provided as Applicant's point of contact for Council Tax.
March 2018	Addressee at Applicant's previous point of contact for Council Tax contacts the Respondent and requests removal of his contact information from the record for the subject property identifying that the information should be replaced by reference to the Applicant stating his address to be 32 Rouskey Road, BT82 0SF.
02/08/2018	Respondent sends a letter advising of the requirement to apply for a Licence to the Applicant at 32 Rouskey Road, BT82 0SF. Correspondence identifies that application fees are discounted if an application is received before the date the scheme comes into effect.
30/10/2018	Selective Licensing Scheme comes into effect.

30/11/2018	First Warning letter sent by Respondent to Applicant at 32 Rouskey Road, BT82 0SF advising no application received and operating without a licence.
05/12/2018	Respondent receives telephone call from Applicant confirming receipt of warning letter. Applicant advises 32 Rouskey Road BT82 0SF is his mothers' address. Applicant requests all correspondence be sent by e-mail and is advised this cannot be guaranteed. Importance of applying for a Licence stressed to Applicant.
05/12/2018	Email sent to Applicant by Respondent including link to the Licensing Scheme/ application form and online information platform.
17/12/2018	Email received by Respondent from Applicant. Applicant does not agree that all landlords should have to pay a fee to improve the area. Applicant says he was not aware of the scheme but described the warning letter of 30th Nov as 'the second letter'. Applicant requests discount associated with early application licence fee.
18/12/2018	Email to Applicant advising response to Applicants email of 17/12/2018 will follow in New Year.
04/01/2019	Respondent e-mails Applicant in response to Applicants e-mail of 17/12/2018. Respondent advises that Selective Licence application fee of £85 is due to increase to £1,000 from 11 January 2019 but in view of Respondents slight delay in reverting to Applicant over the Christmas period, Respondent will hold fee at £850 for a further week if application received by 18 January 2019.
09/01/2019	Respondent writes to Applicant reminding Applicant that the scheme had been in place for more than two months and no application has been received
21/01/2019	Email from Applicant who advises he would need considerable time to make an application and has some questions.
21/01/2019	Email to Applicant from Respondent encouraging Applicant to speak to a licensing officer in relation to form completion giving contact details.
14/05/2019	Letter to Applicant inviting him to attend for a PACE interview at 10am on 12/06/19, for the offence of operating without a licence.
23/05/2019	E-mails to Applicant from Respondent including a copy of Respondents letter dated 14 May 2019 and the Schedule of Works required at the property.
23/05/2019	Telephone call from Applicant who advises he is overwhelmed by the size of the License application form and requests assistance. Applicant confirms receipt of PACE letter.
23/05/2019	E-mail from Applicant to Respondent. Applicant believes interview not necessary as he intends to apply for Licence and also wants to do repairs identified.
03/06/2019	Email from Respondent to Applicant advising that the invitation for interview still stands.
05/06/2019	Email from Respondent to Applicant advising still required for interview to ask questions relating to ongoing absence of licence
05/06/2019	Email from Applicant advising unable to attend interview on 12th June and proposing 1 July instead. Is leaving 32 Rouskey Road as address in application. Wishes to go paperless.
06/06/2019	Email to Applicant from Respondent. Invitation letter for interview at 2pm Monday 1 July 2019 will be sent to address in application. Applicant advised change of address is required to be given as a

	licence condition by way of a variation once the licence has been issued.
06/06/2019	Respondent writes to Applicant at 32 Rouskey Road, BT82 0SF inviting him for interview at 2pm Monday 1 July 2019.
17/06/2019	Email from Respondent to Applicant with copy of PACE letter invitation and Guidance for persons attending interview.
01/07/2019	Email from Applicant. Applicant has missed his flight and cannot attend interview. He wants to re-arrange.
01/07/2019	Email from Respondent to Applicant requesting Applicant makes contact to re-arrange PACE interview.
02/07/2019	Telephone call from Applicant. Applicant agrees to attend interview on Thursday 8 August at 2pm
03/07/2019	Letter sent by Respondent to Applicant at 32 Rouskey Road BT82 0SF concerning PACE interview on Thursday 8 August at 2pm.
08/07/2019	Licence Application received by Respondent. Applicants address within Licence Application given as 32 Rousky Road, BT82 0SF.
08/08/2019	PACE Interview
10/10/2019	Notice of Intention and Financial Penalty Calculation served by first class post with copy also sent by e-mail.
5/11/2019	Mulcahy Smith write to Respondents with representations made on behalf of the Applicant.
11/11/2019	Respondent writes to Mulcahy Smith acknowledging receipt of representations. Respondent also emails Applicant requesting email address for Mulcahy Smith.
13/02/2020	Service of Final notice Imposing a Financial Penalty with enclosures including response to representations, financial penalty calculation and invoice. Notice served by first class post, e-mailed to Applicant and served by hand on Applicants representative.
06/04/2020	The Tribunal receive an Appeal made by the Applicant.

The Law

Housing Act 2004

10. Section 249A (1) of the Act provides that a local authority may impose a financial penalty where there has been "a relevant housing offence".

11. Section 249 (2) sets out what amounts to a housing offence and includes at, section 249(b) an offence under section 95 of the Act, namely a failure to licence a property. Section 249 (3)-(4) further provides that only one financial penalty can be imposed for each offence and that cannot exceed £30,000. The imposition of a financial penalty is an alternative to criminal proceedings.

12. Section 95 of the Act provides:

Offences in relation to licensing of houses under this Part

(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.

(2) A person commits an offence if—

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and

(b) he fails to comply with any condition of the licence.

(3) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time—

(a) a notification had been duly given in respect of the house under section 62(1) or 86(1), or

(b) an application for a licence had been duly made in respect of the house under section 87,

and that notification or application was still effective (see subsection (7)).

(4) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for failing to comply with the condition,

as the case may be.

...

(6A) See also section 249A (financial penalties as alternative to prosecution for certain housing offences in England).

(6B) If a local housing authority has imposed a financial penalty on a person under section 249A in respect of conduct amounting to an offence under this section the person may not be convicted of an offence under this section in respect of the conduct.

...

Procedural requirements

13. 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.

14. A Notice of Intent must be given be given within 6 months of the local authority becoming aware of the offence to which the penalty relates,

unless the conduct of the offence is continuing, when other time limits are then relevant.

15. 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

16. If representations are to be made, they must be made within 28 days from the date 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.

17. 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

18. A local authority must have regard to any guidance issued by the Secretary of State relating to the imposition of financial penalties: 2004 Act, Sched.13, para.12. The Ministry of Housing issued 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 its own policy regarding when or if to prosecute or issue a financial penalty.

19. The MHCLG 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.

20. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, Gateshead Council has adopted its own Guidance and Matrix for the use of Civil Penalties ('Gateshead's Guidance'). We make further reference to this policy later in these reasons.

Appeals

21. 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).

22. 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.

23. 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.

24. A number of decisions of the Upper Tribunal have established the questions that should be addressed when considering an appeal against a financial penalty. Those are *London Borough of Waltham Forest v Younis* [2019] UKUT 0362 (LC), *London Borough of Waltham Forest v Marshall & Another* [2020] UKUT 0035 (LC), *IR Management Services Ltd v Salford City Council* [2020] UKUT 0081 (LC), *Sutton & Another v Norwich City Council* [2020] UKUT 0090 (LC) and *Thurrock Council v Daoudi* [2020] UKUT 209 (LC).

25. The Tribunal's task is not simply matter of reviewing whether the penalty imposed by the Final Notice was 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 regard to the seven factors specified in the MHCLG Guidance as being relevant to the level at which a financial penalty should be set (see paragraph 19, above).

26. The Tribunal should also have particular regard to Gateshead's Guidance (see paragraph 20, above). As the Upper Tribunal (Lands Chamber) observed in *Sutton & Another v Norwich City Council* [2020] 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 or tribunals. The local housing 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."

27. The Upper Tribunal went on to say that the local authority is well placed to formulate its policy and endorsed the view that a tribunal's starting point in any particular case should normally be to apply that policy as though it were standing in the local authority's shoes. It offered the following guidance in this regard:

"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."

28. Upper Tribunal guidance on the weight which tribunals should attach to a local housing authority's policy (and to decisions taken by the authority hereunder) was also given in another recent decision of the Lands Chamber: *London Borough of Waltham Forest v Marshall & Another* [2020] UKUT 0035 (LC). Whilst a tribunal must afford great respect (and thus special weight) to the decision reached by the local housing authority in reliance upon its own policy, it must be mindful of the fact that it is conducting a rehearing, not a review: the tribunal must use its own judgment and it can vary such a decision where it disagrees with it, despite having given it that special weight.

Submissions

29. In his original and expanded statement of reasons, Mr Blee has 5 grounds of appeal:

- Ground 1: Notice Invalid
- Ground 2: Incorrect categorisation of culpability
- Ground 3: Wrong to apply rental income in full as addition additional penalty
- Grounds 4 & 5: Failure to consider 'proportionality' of the penalty & penalty excessive in the circumstances

Ground 1: Notice Invalid

30. Mr Blee's argument is also linked to the issue of whether his appeal is out of time and we will deal with them together.

31. Mr Blee in his Ground of Appeals has two reasons for the delay:

a. The Final Notice did not contain the necessary information on deadline for issuing an appeal, and

b. The outbreak of the coronavirus pandemic had a significant effect on the ability of those representing Mr Blee to prepare this appeal.

32. On the second reason no evidence has been provided, although of course it is matter of public record that the pandemic has created difficulties for all business to a greater and lesser extent.

33. The first reason is based on the requirement for "information about rights of appeal" (2004 Act, Sched. 13, para. 3.8(c)) to be included in the Final Notice. Mr Blee argues the Notice is invalid because it fails to state the timeframe or deadline of the appeal. The Notice did refer to regulations that did contain the timetable, but the regulations mentioned were the wrong regulations and it is argued for Mr Blee that, in any case, that is not sufficient to comply with the statute.

34. In response the Council notes that the Final Notice advised Mr Blee to appeal without delay. Although the reference to the regulations was incorrect, those regulations refer to a 28 days limit, which is correct.

35. We are of the view the statute does not require the Council to set out more than is in the notice. The notes to the Notice set out the grounds to appeal and how to appeal through the Tribunal. Even if we are wrong on this, we note the decision in *London Borough of Waltham Forest v Younis* [2019] UKUT 0362 (LC) where the Lands Tribunal says at para. 74:
"Those characteristics of the statutory scheme suggest that the reasons given in a notice of intent should be clear enough to enable the recipient to respond, but they also suggest that if those reasons are unclear or ambiguous, Parliament would not have intended that the notice of intent should invariably be treated as a nullity. The seriousness of the offences for which civil penalties can be imposed, the relative shortness of the time available to a local authority to take action, and the availability of a right of appeal on the merits before an independent tribunal, are all features of the statutory scheme which militate against the adoption of an excessively technical approach to procedural compliance."

36. There is no evidence that Mr Blee was prejudiced by the failure to set out the statutory provisions concerning the time limit for an appeal. The Final Notice was sent not just to him but also to his solicitors, who had acted for him in the matter since the Notice of Intent was sent in November 2019.

37. We are of the view that there is no merit in the first ground of appeal. The Final Notice is valid. However, that does not deal with the decision of the Tribunal to allow the appeal of time. We note that was a decision open to the Tribunal when it was made in September 2020. The Deputy Regional Tribunal Judge Laurence Bennett who made that decision was very experienced and aware of how the Tribunal was dealing with applications in the light the pandemic. We have no basis to change that decision in the light on the submission we have received.

Ground 2: Incorrect categorisation of culpability

38. Mr Blee's argument here is that the Council decision is wrong in finding Mr Blee as 'reckless' rather than 'low' or 'negligent'. The Council's Guidance does not provide much detail as to different levels. For example, for 'negligent' it states:

- Offender fell short of their legal duties in a manner that falls between descriptions in 'high' and 'low' culpability categories.
- Systems were in place to manage risk or comply with legal duties, but these were not sufficiently adhered to or implemented."

39. For Mr Blee, the facts relied upon on culpability include:

a. The Appellant owns only one property in the Respondent's area;

b. The tenant is very happy at the property and no harm was caused to her;

c. The Appellant takes his responsibilities to the tenant seriously;

d. The Appellant was not initially aware of the selective licencing scheme because he is not resident in the area and is not a 'professional landlord';

e. The Appellant had had issues with receiving communications from the Council and there was no simple 'on-line' portal;

f. The Appellant is a farmer and was dealing with lambing season.

40. In their response to the appeal the Council set out a number of reasons why they consider Mr Blee's conduct was reckless. These include:

a. Mr Blee stating under caution that he became aware of his legal responsibilities at the beginning of December 2018;

b. Multiple reminders and warning being issued to confirmed addresses and email accounts over a prolonged period that he ignored or did not act upon;

c. The application for licencing not being forthcoming until 8 July 2019, some 35.5 weeks after scheme went live.

41. On the issue of ignorance of the need to obtain a license in *Thurrock Council v Daoudi* [2020] UKUT 209 (LC) the UT said it may be relevant in a financial penalty case in at least two different ways. There may be cases in which an ignorance of the facts which give rise to the duty to obtain a licence may provide a defence of reasonable excuse under sections 72(5) (HMO licencing) or 95(4) (selective licensing). The Tribunal considered the case of *I R Management Services Ltd v Salford City Council* [2020] UKUT 81(LC) when an experienced letting agent responsible for the management of a property comprising only two bedrooms mounted a reasonable excuse defence on grounds that he had been unaware that the property had come to be occupied by more than one household, making it an HMO. It concluded that:

"Short of providing a defence, ignorance of the need to obtain a licence may be relevant to the issue of culpability. Although, as the Government's Guidance points out, a landlord is running a business and ought to be expected to understand the regulatory environment in which that business operates, not all businesses are the same. A decision maker might reasonably take the view that a landlord with only one property was less culpable than a landlord with a large portfolio."

42. On balance, our decision is that the starting place is that the culpability of Mr Blee was negligent rather than reckless and that the starting point should have been £3000 not £4000.

Ground 3: Wrong to apply rental income in full as additional penalty

43. Mr Blee argues that the Council incorrectly applied the MHCLG Guidance by calculating his financial benefit as being the total rent received during the unlicensed period and then adding that to the amount determined at stage 1.

44. The Guidance issued by MHCLG, 'Remove any financial benefit the offender may have obtained as a result of committing the offence' is but one of 7 factors the Local Authority should consider. 'The guiding principle here should be to ensure that 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' however, this must also to be considered alongside other factors that the Local Authority should consider including 'Punishment of the offender' , 'Deter the offender from repeating the offence' and 'Deter others from committing similar offences'.

45. It its Guidance the Council have set out very clearly how it considers any financial benefit that the landlord may have obtained from committing the offence – see page 15 of the Guidance. In doing so, in our opinion it did not incorrectly apply the MHCLG guidance nor is it outwith the MHCLG guidance.

46. The issue for the Tribunal is whether we are of the view that the application of the Council's guidance is appropriate. We note that the total rent received during the unlicensed period to the penalty was reduced by 5 weeks to allow for the fact that the Council accept it is possible that Mr Blee was unaware of the requirement for a licence until 5 December. Was the addition of the remaining gross rent reasonable?

47. The Tribunal had some doubts whether the gross rent should be automatically applied. However, in the absence of detailed evidence of Mr Blee's out-goings on the property and in the light on our decision on culpability (at para. 42 above), we do not propose to change this element of the penalty.

Grounds 4 & 5: Failure to consider 'proportionality' of the penalty & penalty excessive in the circumstances

48. We do not consider that these grounds add any more. The maximum penalty that the Council could impose by law is £30,000 however, the MHCLG guidance states that level of penalty should generally only be reserved for the very worst offenders. The Council's original penalty at £7,088.30 (23.6% of the maximum penalty possible) is not disproportionate.

Decision

49. As we set out in para. 8, Mr Blee's the appeal is about the amount of the penalty. The Council seeks to uphold the penalty and also requests that we reconsider the decision to extend time to appeal for Mr Blee.

50. On the amount of the penalty, our decision is that the penalty should be reduced by £1000 to £6,088.30 for the reasons set out in para. 42.

51. We confirm the previous decision to extend time to appeal for Mr Blee.

Professor C Hunter
Tribunal Judge
16 December 2020