FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CJ/HNA/2021/0005 FVP**
Property	**:**	**223 Grace Street, Byker, Newcastle upon Tyne NE6 2RR**
Applicant	**:**	**Mr Terence Merrin**
Respondent	**:**	**Newcastle City Council**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal Members	**:**	**Tribunal Judge W.L. Brown** **Mr ID Jefferson, TD FRICS**
Date of Decision	**:**	**1 October 2021**

DECISION

DECISION: **The appeal is successful and the Tribunal varies the Penalty Charge imposed on the Applicant to £750.00.**

Hearing

A hearing took place on 29 June 2021. This was a remote hearing by video and audio which was not objected to by the parties. The Applicant attended. The Respondent was represented by Ms J Bagshaw, Solicitor and its witnesses were Ms G Smith, Team Manager of the Public Protection and Neighbourhoods Team, Mr J Guthrie, Senior Environmental Health Officer (Housing) and Mr T McFall, Senior Technical Officer (Housing). With the consent of the parties, the form of the hearing was by video and audio using the Tribunal video platform. A face to face hearing was not held because it was not practicable and all relevant issues could be determined in a remote hearing. The documents that we were referred to are in bundles prepared separately by each party, the contents of which we have recorded. (The parties were content with the process).

The Tribunal subsequently completed its deliberations.

Introduction

1. The Applicant made application dated 31 December 2020 (the "Application") to the Tribunal, received on 13 January 2021, appealing a financial penalty imposed on him by the Respondent in the sum of £6,000 (the "Penalty") made under section 249A of the Housing Act 2004 (the "Act"), set out in a Notice dated 16 December 2020. The Applicant has been the sole owner of the Property since 2012.

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 18 March 2021.

5. The Applicant was able to participate in the hearing only by telephone. However, he confirmed to the Tribunal, which checked with him periodically during the hearing, that he was able to fully engage in the proceedings.

6. The Tribunal understood the Property to be a terraced house..

Facts and Law

7. The Respondent provided a chronology of events leading up to the issuing of a Notice of Intention to issue a Financial Penalty Charge dated 16 October 2020 under s249A of the Housing Act 2004, followed by the Final Notice of its Decision to Impose a Financial Penalty, dated 16 December 2020. The Property was occupied by Mr Steven Carmichael from 17 March 2017 and continuing during the period to which this appeal relates. The Penalty Charge was imposed for the period 23 April 2020 to 16 October 2020. 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 the boundaries of the licensing scheme for Byker Old Town and Allendale Road South, running from 1 October 2016 to 30 September 2021 and applicable throughout the period to which this appeal relates. 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. The Applicant did not deny that the Property was affected by the selective licensing regime, nor that he resisted applying for and did not hold the requisite licence for the period at issue. The formalities leading to the issuing of the Penalty Notice were 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(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."

Evidence and submissions

9. The Applicant's stated that since 2012 he lived for the majority of the time in Spain and had been unaware of the selective licensing scheme affecting the Property, which he had inherited from his Parents. It had been the family home. He also owned a house on the same street where he lived himself from time to time. However, his position when he responded to the Notice of Intention, in his appeal and at the hearing was:

    (i) The occupier was a family friend who had been brought up by the Applicant's family since the age of 4, who had separated from his domestic partner and had accepted the Applicant's offer in 2017 to live in the Property, rent free. The occupation was as much for mutual benefit, providing the occupier a place of residence for which he paid the utility bills and Council Tax and the Applicant with greater security for the Property, reducing insurance cost;

    (ii) In his mind he was not a "landlord", but was providing a roof over the head of a friend, otherwise he would have sold the Property and he was not letting out other properties;

    (iii) Keeping the Property occupied achieved the Respondent's aim to reduce the number of unoccupied properties in the locality;

    (iv) He had attempted in any event after receipt of correspondence from the Respondent to fulfil the criteria for exemption from the need for a licence by issuing to Mr Carmichael a long tenancy (see following).

10. The Applicant maintained that he had sought guidance from Citizens Advice when he found himself at risk of a penalty if he did not apply for a licence. He had been advised to issue to the occupier a written tenancy. The Respondent accepted that if a tenancy in compliance with the Selective Licensing of Houses (Specified Exemptions) (England) Order 2006 (the Order) had been in existence the Applicant would not have been in breach of his licensing obligations. The relevant exemption is that set out in section 2(e) of the Order, which is:

    "a tenancy of a house or a dwelling where—

    (i) the full term of the tenancy is more than 21 years;

    (ii) the lease does not contain a provision enabling the landlord to determine the tenancy, other than by forfeiture, earlier than at end of the term; and

    (iii) the house or dwelling is occupied by a person to whom the tenancy was granted or his successor in title or any members of such person's family"

    The point at issue here was that sometime after 20 April 2020 following the Citizens Advice guidance the Applicant bought from a shop a model tenancy and he and Mr Carmichael agreed to enter into it. However, the term period entered in the document was "from MINIMUM to 10 YEARS". The Applicant stated that he was aware that the long-tenancy exemption required a term of not less than 21 years, but as he was 68 years old he could not envisage being around long

enough to sustain such a term. However, the absence of any consideration for the occupation and the reduced term meant that the purported tenancy was defective to permit exemption as not complying with the requirements of the Order and was rejected by the Respondent as being a defence to the alleged offence.

11. The Applicant also claimed that the penalty was excessive, as he was not a rogue landlord and did not take sufficient account of the Respondent's policy to avoid empty dwellings and vandalism to premises in the locality of the Property.

12. The Respondent began its correspondence with the Applicant on this matter with a letter dated 20 April 2020 (hence being the date from when it alleged breach of the licensing obligation for its Final Notice imposing the penalty). Written statements from each of the Respondent's witnesses were presented to the Tribunal. The Respondent recited its processes and detailed oral evidence was given in line with its calculation of the penalty as follows:

"The Financial Penalty was determined in line with Newcastle City Council's 'Private Sector Housing Civil Penalties Guidance' (Jan 2019), the Ministry of Housing Communities & Local Government guidance; 'Civil penalties under the Housing & Planning Act 2016' (April 2018) and the Housing and Planning Act 2016.

Culpability level: 'Medium'
The culpability level for this case was deemed as 'Very High', as there was a deliberate breach of or flagrant disregard for the law.

Harm Level: 'C'
The risk of harm was deemed to fall into the lowest category; 'Level C', as unlicensed property in a selective licensing area does not itself create serious harm.

Penalty level: '4'
The combination of 'Very High' level culpability and 'Level C' harm result in a penalty level 4, with a penalty band starting point of £6,000 and an upper limit of £15,000.

Offender's relevant income
As the penalty fell between bands 1-4, the Applicant's income was considered in the calculation of this civil penalty. As the Applicant receives no rental income from the property this was assessed as nil.

Offender's track record
The Applicant's track record was considered and none of the relevant matters in table 6 of Newcastle City Council's guidance document were deemed relevant. This result in no further additions to the level of the penalty.

Financial benefit from the offence
The cost of the licence fee was not added to the initial penalty fee calculation.

Civil Penalty amount
The Applicant's representations were taken into account before determining the final financial penalty.
No mitigation was provided to reduce the seriousness of the offence. The Applicant did not provide a copy of the tenancy agreement which he said he had entered into. No representations were made as to the level of the financial penalty.
The civil penalty amount therefore was calculated as £6,000. That being the lower band of a level 4 penalty."

Decision

13. The Tribunal understands that in accordance with the decision of the Upper Tribunal in London Borough of Waltham Forest v Allan Marshall [2020] UKUT 0035 (LC) UTLC the Tribunal is carrying out a rehearing not a review, but is starting from the decision-maker's policy (i.e. that of the Respondent) and has to pay proper attention to the Respondent's decision and the reasoning behind it.

14. Despite having sympathy with the position of the Applicant as having merely allowed a friend to be housed, rent-free, in the Property, the Tribunal found that the Respondent had properly determined that the "relevant housing offence" ((see paragraph 8) had been committed and continued to be committed throughout the time period specified in the Notice of Intention. The relevant facts leading to that conclusion are set out in paragraph 7. We further found that the Respondent had accurately determined that the long tenancy document - see paragraph 10- did not exempt the Property from the requirements of the selective licensing scheme for the time at issue for the reasons recorded in paragraph 10.

15. In consequence of our findings we determined that the Respondent acted appropriately in deciding that a penalty charge should be imposed. However, the Tribunal is able to review the amount of the penalty. In accordance with Schedule 13A of the Act, the Tribunal's powers are (paragraph 10(4)) "On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice."

16. 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. The Tribunal found that the Respondent's calculation formula and the matters to be taken into account at each stage were in line with the MHCLG Guidance.

17. The level of harm found by the Respondent was, in any event, the lowest possible under its calculation formula ("Level C").

18. The Tribunal found from the written and oral evidence from the Respondent's witnesses that the division of responsibility in the process leading to the penalty began with Mr McFall, who undertook the enquiries about the ownership and occupation of the Property. Next in the process, Mr Guthrie recorded in his statement that he:

"……collated the evidence collected and the mitigation provided regarding the potential offence under section 95(1) of the Housing Act 2004 and presented this together with the calculation of the civil penalty to the City Council Enforcement Panel which comprises the Team Manager and Senior Practitioners of the Public Protection and Neighbourhoods team to enable a decision to be made on the enforcement of this potential offence.

It was the decision of the panel to impose a civil financial penalty under section 249A (2)(c) and I served the notice of intention to issue the civil penalty in the amount of £6000.00 dated 16 October 2020…."

19. Ms Smith described her role:

"Part of my role includes reviewing recommendations from Environmental Health Officers (EHO) within the Team for the Service of a Financial Penalty for a breach of a relevant offence. I chair a panel which reviews the evidence and the calculation of the Penalty amount in line with Private Sector Housing Enforcement Policy, a document which includes the Civil Penalty Policy. Following this I will approve the Financial Penalty as recommended, approve with amendments, or reject the recommendation with alternative actions put in place."

There was a dispute referred to by Ms Smith about when the Applicant supplied to the Respondent the long tenancy agreement, , but given the Tribunal's determination that such document was ineffective as a defence this is found to have little weight, save that the Tribunal found it was evidence that the Applicant did not ignore the Respondent when it put him upon notice of the potential effect on him of its selective licensing scheme.

She confirmed the conclusion that the Applicant had not provided any mitigation or defence to the offence of failing to have a selective licence.

20. As to the Applicant's culpability the Tribunal disagreed with the Respondent that the Applicant had carried out both (our emphasis, as per the oral evidence of Mr Guthrie) "a deliberate breach of or flagrant disregard for the law" – the applicable test in accordance with the Respondent's process of assessment. On this point we found no clear record of what had been taken into account by Mr Guthrie, or of the basis of consideration by the City Council Enforcement Panel. We found that of particular relevance to the determination of culpability was the Respondent's own policy to minimise empty dwellings in the locality of the Property and in consequence lessen vandalism and anti-social behaviour (extracted from the aims described on page 4 of 25 of the Respondent's Private Sector Housing Enforcement Policy (January 2019)). We found that the Applicant had clearly contributed to those gaols by ensuring occupation by Mr

Carmichael and that the Respondent accepted the occupier had raised no complaints about the standard of the accommodation, so the Property was deemed to be safe in accordance with its policy.

21. Then, in its Private Sector Housing Civil Penalties Guidance document (January 2019), the Respondent sets out (page 6 of 34) that in assessing a landlord's culpability, their behaviour should be compared to the content of the table appearing ("very high" being as recorded in paragraph 12). It goes on to state "When assessing culpability, consider all of the evidence gathered as part of the investigation into the offence and identify any aggravating or mitigating factors which may be relevant to the assessment of culpability." There then follows a list of potential aggravating factors and mitigating factors (page D32 of the hearing bundle). The Respondent's position was that there were no aggravating factors and that mitigating factors were taken in to account but none were found. The Tribunal disagreed that any or sufficient weight had been attached by the Respondent to mitigation, not least the Applicant's good character (expressly acknowledged by Ms Smith), his honest but mistaken belief that no licence was required and his failed attempt to create an exempting tenancy, explained as due to a misunderstanding that its term could outlive him as landlord.

22. 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.

    The harm caused to the tenant.

    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.

23. 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'.

24. The Tribunal found that assessment of culpability as very high was incorrect. Relevant in this finding are the following. No evidence was presented that the Applicant lets out properties. He is not an experienced landlord and lived for some of the time out of UK, so was largely unaware of the selective licensing

regime imposed by the Respondent and had not previously had to engage with it on similar matters. The occupier of the Property was content with his accommodation. The arrangement between the Applicant and the occupier arose from many years of social association and keeping the Property occupied both helped the Applicant keep it safe but also fulfilled a number of the Respondent's social aims in its Private Sector Housing Enforcement Policy. The Applicant erroneously attempted to cure the breach by creating a long tenancy; his error being explained by a misunderstanding of the law. This was a one-off problem for the Applicant. We found no deliberate or flagrant disregard for the law.

25. Having taken into account the evidence, representations, the MHCLG Guidelines and the Respondent's own Guidance the Tribunal determined that the level of culpability of the Applicant should have been "Low" - "Offender did not fall far short of their legal duties; e.g. significant efforts were made to address the risk, breaches or offences, although they were inadequate on this occasion; they have offered a reasonable defence for why they were unaware of the risk, breach or offence; Failings were minor and occurred as an isolated incident."

26. Consequent upon the Tribunal's determination on the level of culpability, and the lowest level of harm, the corresponding band of penalty is "1" i.e. £600 – £1,200 (page 8 of 34 of the Respondent's Guidance). Having particular regard to the Respondent's policy to reduce empty dwellings the Tribunal's opinion was that the penalty should be at the low end of that bracket and it determined that the Penalty Charge should be varied to £750.

WL Brown
Tribunal Judge.
1 October 2021