



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

Case reference : LON/00BH/HNA/2022/0021

Property : 25 Essex Mansions, 1 Essex Road South,
London E11 1JP

Applicant : Highdorn Co Ltd (1)
Daejan Properties Ltd (2)

Representative : Kavish Shah, Counsel

Respondent : London Borough of Waltham Forest

Representative : Ricardo Calzavara, Counsel

Type of application : Appeal against a financial penalty

Tribunal member(s) : Judge D Brandler
Mr S Mason FRICS

Venue : 10 Alfred Place, London WC1E 7LR

Date of hearing : 27th October 2022

Date of decision : 14th November 2022

DECISION

Decision of the tribunal

(1) The appeal against the financial penalty notice issued on 17th March 2022 against Highdorn Co Ltd (“A1”) in relation to 25 Essex Mansions, 1 Essex Road South, London E11 1JP (“the property”) is dismissed. Highdorn Co Ltd is ordered to pay £15,000 as detailed in that notice.

(2) The appeal against the financial penalty notice issued on 17th March 2022 against Daejan Properties Ltd (“A2”) in relation to 25 Essex Mansions, 1 Essex Road South, London E11 1JP (“the property”) is dismissed. Daejan Properties Ltd is ordered to pay £15,000 as detailed in that notice.

The relevant legislative provisions are set out in an Appendix to this decision.

Reasons for the tribunal’s decision

Background

1. Each of the Applicants appeal against the imposition of financial penalties by the respondent, in relation to the same property, 25 Essex Mansions, 1 Essex Road South, London E11 1JP (“the property”) for the same period.

2. The identical financial penalties were dated 17/03/2022, each in the sum of £15,000, imposed by the Respondent. The Respondent asserts that the Applicants have committed a relevant housing offence. The reason given to the Applicants by the Respondent for imposing a financial penalty is as follows:

“You failed to ensure that the above property was licensed under the Council’s Selective Licensing Scheme, contrary to Part 3 section 95(1) Housing Act 2004”

3. The Respondent had a selective licensing designation requiring anyone privately renting out a property to hold a licence under Part 3 of the Housing Act 2004 in order to lawfully let the property. That initial selective licensing designation came into force on 1/04/2015 and expired on 31/03/2020. An application under that scheme was made on behalf of A2 on 10/06/2015. A licence was granted and expired with the scheme expiry on 31/03/2020.

4. On 01/05/2020 a new selective licensing designation came into force covering all wards in the respondent’s Borough excluding the Endlebury and Hatch Lane Wards. The property is in the Leytonstone Ward and therefore required a licence. A valid application for a licence for the property was made on 23/03/2022

5. Daejan Properties Limited (“A2”) holds the leasehold interest in the property and are the landlords named on the tenancy agreement for the property. Highdorn Co Limited (“A1”) is a property management company who manage the property on behalf of A2 and receive the rental payment on behalf of A2. Both A1 and A2 are part of the Freshwater Group of companies and share a correspondence address.

6. On 2/2/2021 the Respondent wrote to all previous licence holders who had not applied for a licence under the new scheme [12,83,175/R1]. That letter was sent to A2 only.

7. On 4/11/2021 a Notice of intent to impose a Financial Penalty was sent to A2 [43/R1] with proof of postage [52/R1]. On the same day a Notice of intent to impose a Financial Penalty for the same property for the same period in the same amount was sent to A1 [53/R1] with proof of postage [62/R1].

The grounds of appeal

8. A1 and A2 submit combined grounds of appeal as follows:

(a) The applicants assert that they have a reasonable excuse in accordance with s.95(4) of the 2004 Act based on:

(i) Non compliance by the respondent with Regulation 9(3)(b) of the 2006 Regulations, in particular that the respondent was required to send to A1 a copy of the Notice of Designation on the basis that it is an organisation which represents the interests of landlords

(ii) The Respondent had previously always contacted A1 about properties that required licences, and that no such communications were received in relation to the property.

(b) The Crown Prosecution Service public interest test, which is required to be considered, is not made out:

(iii) Whilst the Notices of Intention dated 4/11/2021 may be statutorily deemed served, the evidence shows they were not received. This in the context of the covid-19 pandemic, rolling lockdowns and postal service disruptions. Non receipt of those notices left the Applicants unable to take advantage of a crucial procedural protection in the imposition of a quasi-criminal sanction, and it cannot be in the public interest for such a sanction to be maintained in such circumstances

(iv) The lack of informal communications which would have allowed the Applicants to remedy the breach is a further factor mitigating against it being in the public interest for sanctions to be imposed. The lack of such communications show failings on behalf of the respondent.

(v) If the Tribunal find failings in compliance with Regulation 9(3)(b) of the 2006 Regulations, the Applicants aver that is further reason for the imposition of penalties not being in the public interest.

- (c) The imposition of penalties is not in line with the respondent's policy which requires informal communications to be carried out and alternative punishments suggested in the policy were not considered.
- (d) In relation to the level of penalties, this does not comply with the Statutory Guidance.
- (e) The Respondent has fettered its discretion. Its policy objectives would be met with lower penalties.
- (f) The Respondent has failed to consider the aggregate value of the penalties as it ought to have done.

THE HEARING

9. This has been a face to face hearing. The Applicants were represented by Mr Shah. He was accompanied by the witnesses for the applicants: Gabriella Capozzi, Olivia Houston and Steven Huntington. The Respondent was represented by Mr Calzavara. He was accompanied by Ms Harper, a trainee solicitor for Sharpe Pritchard LLP, and the witnesses for the Respondent: Sally Stewart, David Beach, Elaine Mahbeer and Anne Hillier. The Applicant provided a bundle of documents of [160] pages and a skeleton argument. Reference to pages in that bundle are referred in square brackets [page number/A]. The Respondent provided a first bundle of documents of [225] pages, and a second (response) bundle of documents of [205] pages. Reference to pages in those bundles appear as [page number/R1 or R2].

The Applicants' evidence

10. The Tribunal heard from Steven George Huntington who signed a witness statement on 26/08/2022 [A85]. He was asked to comment on the statement of Anne Hillier at paragraph 18 in which she reports that the Council's records indicate that four different Highdorn emails and one Freshwater-legal@highdorn.co.uk were added to the Private Sector Landlords and Agents group during 2020. She further states that all subscriptions of those emails were subscribed before 7/10/2020 and therefore would have received the electronic newsletter sent on that date and they would therefore have been aware of the licencing scheme and the opportunity to submit licence applications during the 'Early Bird' period which ended on 31/10/2020 [45/R2]

11. In response Mr Huntington states that Mark Jenner, who is named as one of the email addresses, had gone on gardening leave from September 2020 and then left the company in December 2020 and could not see how he would have subscribed to that email at that stage; that Maureen Arthur had left the company on 31/08/2020 and that he had put an out of office message on that email on 11/08/2020 to say she was away, but she never

returned after that date; in relation to the Area 11 email, that related to an office that was closed in August 2020 and staff moved to another location.

12. However, in cross examination he confirmed that the Freshwater legal email still existed and that a number of people have access to that email. Indeed, he confirmed that when speaking to the woman in charge of the Freshwater legal department about this issue, she had told him that she had received a newsletter but had just deleted it as she thought it had been sent in error. He further confirmed that he could not say whether emails were sent by the respondent. He could only say that they were not received if the email address was no longer live.

13. The Tribunal then heard from Gabriella Capozzi who signed a witness statement on 31/08/2022 [50A]. She is an Executive Assistant to Regional Control employed by A1. She is responsible for performing a wide variety of support duties to assist the Head of Residential Property Management and she works from Freshwater House, the Group's Head Office. She confirmed in oral evidence that she could not say whether emails containing the respondent's newsletter were sent. These were said by the respondent to have been sent to various email A1 addresses.

14. Ms Capozzi in her witness statement explained that she was responsible for directing the post. During lockdown someone was physically present in the office and they scanned and emailed all post to her. In oral evidence she reiterated her denial that the letter said to have been sent by the respondent on 2/2/2020 to A2 was received by the Applicants. She bases this assertion on her reliance on those physically in the post room who would scan and email all post to her. She was asked whether she had been in the office on 4/4/2021 but she could not remember. She was asked about the other 66 letters sent by the respondent to the applicants on the same day, and whether any of them had arrived. Her response was "*what letters*". She was referred to Anne Hillier's w/s at paragraph 13 where she refers to "*67 letters sent to Daejan Properties Limited on this date regarding properties in their portfolio which remained unlicensed*" [44,144/R2] having been sent to the applicants. Ms Capozzi had no knowledge of those other 66 letters.

15. The Tribunal then heard from Olivia Houston who signed a witness statement on 26/08/2022 [A97]. Her role includes providing administrative and secretarial support to the Residential Management Executive, supervising a team of administrators and providing office management services on a daily basis [97A]. She has been on the Respondent's mailing list since 15/12/2020. She was in receipt various emails from the Respondent about various properties that required licensing. In cross examination she was referred to the email of 21/10/2021 in which various properties were mentioned and which states "*I believe there are others, if you require further information about them, please email propertylicensing@walthamforest.gov.uk*" [184/R2]. She was also referred to the two properties in relation to which she made an application for licences on 11/11/2020 (neither of which were for the subject property). She told the Tribunal she was prompted to make those applications

because the properties in question were vacant and the property manager would have checked whether they needed a licence. She confirmed that she only made applications for licences if she was asked to do so by the property manager. She could not confirm whether or not the Notice of Intent dated 4/11/2021 to A1 and A2 [43,53/R1] had or had not been received. However, when she was referred to exhibit AH8 of Anne Hillier's witness statement [125/R2] she confirmed that her email address did appear against 8 more properties that had been licenced [43/R1]. She again stated that she would only have made those applications if asked to do so by the Property Manager. Unfortunately, the Property Manager who appeared to be in charge of this process had not produced a witness statement nor were they present at the hearing to clarify such issues.

The Respondent's evidence

16. The witness statement of Rachel Skinner, the tenant of the property, was admitted in evidence and was not opposed by the Applicants.

17. The Tribunal heard from Elaine Mahbeer who had signed a statement dated 2/10/2021 [81/R1]. She confirmed the proofs of postage dated 4/11/2021 [52/R1] to A2 and [62/R1] to A1 which demonstrates the posting of the Notices of Intent letter dated 4/11/2021 to both Applicants. She confirmed there was no proof of postage for the letter said to have been sent on 2/02/2021. Those letters, Ms Mahbeer confirmed, were sent out by the 'Admin' team and that they had not provided her with proof but she was resolute that the February letter would have been sent.

18. Ms Mahbeer could not comment on how often the newsletter from the respondent was sent out, nor could she comment on the content of the newsletter because that was not within her remit.

19. Ms Mahbeer had been the officer visiting the property on 6/05/2021 and she had been criticised for not using the contact details provided by the tenant, that was Maureen Arthur. However, having heard from Mr Huntingdon earlier, he had confirmed that Ms Arthur had left the employment of the Applicants on 31/08/2020 and so it would not have been possible for Ms Mahbeer to contact her at that stage.

20. The Tribunal then heard from Sally Stewart who signed a statement dated 8/7/2022 [11/R1]. There was a lengthy discussion about email addresses for A1: who subscribed those emails, how they were subscribed and when. The outcome of which was unhelpful.

21. Ms Stewart confirmed her belief that the letter dated 2/2/2021 to A2 was sent. When challenged as to the lack of proof of postage, Ms Stewart confirmed that this letter had been created by a mail-merge programme sending out 9000 letters to those previously having licenced their properties but who had not at that date yet applied for the new licensing scheme. She explained that mail-out was carried out in order to facilitate

and encourage landlords to comply. It was not possible to get proof of postage for 9000 letters. When asked if she had supervised the 9000 letters, Ms Stewart confirmed she was in the office during that period of Covid only one day per week on a rota basis. She was not aware whether she had been there on 2/2/2021.

22. In relation to the newsletter and the limited information said to be provided in it, Ms Stewart could not assist much other than to suggest a person's understanding of the newsletter would depend on whether they were an individual or a company dealing with properties.

23. Ms Stewart was referred to the Respondent's enforcement policy [22/R1]. It was suggested to her that the Respondent had not attempted informal communication with A1. In response Ms Stewart pointed out that a letter was sent to A2 as the landlord and as they were named on the previous licence. She also confirmed that the newsletter was sent to A1, and they should also be aware from the Landlord Forum about licencing requirements.

24. Ms Stewart confirmed that she was responsible for deciding the level of penalties, and that she considered that the landlord was aware of the requirements and that they did not have a reasonable excuse. She confirmed that the Respondent's enforcement policy was based on statutory guidance. It was put to her that the tenant in the property had not suffered harm. Ms Stewart's response was that the fact that a property is not licenced means that the property is not well managed and that the manager should be aware of licencing. In relation to the suggestion that there had been a duplicate levy as both companies were in the same group, Ms Stewart's position was that both companies were independent companies.

25. It was suggested that owning multiple properties does not make this breach worse. Ms Stewart disagreed. Her position is that if large property owners breach licencing conditions, it undermines the whole licencing system. Further that because the Applicants knew that they should have licenced the property, that had been an aggravating feature which, she suggests now, equates to a higher penalty of £19,999 each.

26. When asked whether Ms Stewart thought that this breach may have been a slip due to the effects of Covid, as no other penalties had as yet been issued against the Applicants, her response was that there were other properties in the pipeline.

27. The Tribunal heard from Anne Hillier whose witness statement is dated 20/09/2022 [42/R2]. In cross examination attempts were made to clarify issues of the A1 email addresses with which Ms Hillier could not assist. She was referred to some emails to and from the applicants with lists of properties that were not yet licenced. The property did not appear on any of those lists. [188-199/R2]. Ms Hillier stated this was because a letter had been sent.

28. The Tribunal heard then from David Beach who is an environmental health officer employed by the Respondent. He provided a statement signed on 28/09/2022 [19/R2]. He handed up the up-to-date enforcement policy drafted by him and in force at the relevant time, but which had not been included in the bundle of evidence. This late evidence was not opposed. Mr Beach explained that there is sufficient information in the newsletter to give landlords sufficient information to alert them to a change, providing a link for information, and providing contact details for clarification.

29. Mr Beach also referred the Tribunal to the Royal Mail's 'Quality of Service and Complaints Report' for Quarter 3 of 2021/22 [40/R2] which covers the period during which correspondence was sent to the Applicants. He relies on 'Table 1' of that report [33/R2] which reports "Percentage of Items Deemed Correctly Delivered" was 99.50%. However, in cross examination he did acknowledge that there had been some postal delays during Covid, but pointing out that did not mean items did not arrive at their destination.

30. Mr Beach also pointed out in cross examination that the Respondent's guidance has adopted the points from the statutory guidance, further that he agreed that there should have been an aggravating factor included in the penalty. That factor being that the applicants were aware of the new licensing policy. That aggravating feature means that the penalty should have risen to around £20,000.

Legal submissions and findings

31. The starting point is that there was an undoubted offence under section 95(1) Housing Act 2004.

Reasonable excuse

32. The Applicants maintain however they have a reasonable excuse under section 95(4) Housing Act 2004 for failing to apply for a licence between 01/05/2020 to 23/03/2022.

33. In essence their argument is that they were unaware of the need for a licence for the property.

34. The basis for this assertion is:

- a. A failure of the Respondent Authority to formally notify A1 of the licencing scheme in particular under Regulation 9(3)(b) of the Licensing and Management of HMOs etc (Miscellaneous Provisions) (England) Regulations 2006 ['2006 Regulations']
- b. A failure of the Respondent to otherwise contact the Applicants either formally or informally about the licence requirements
- c. The non-receipt of letters and emails about the licensing scheme

35. Regulation 9(3) of the 2006 Regulations states:

(3) Within 2 weeks after the designation was confirmed or made the local housing authority must send a copy of the notice to—

(a) any person who responded to the consultation conducted by it under section 56(3) or 80(9) of the Act;

(b) any organisation which, to the reasonable knowledge of the authority—

(i) represents the interests of landlords or tenants within the designated area; or

(ii) represents managing agents, estate agents or letting agents within the designated area; and

(c) every organisation within the local housing authority area that the local housing authority knows or believes provides advice on landlord and tenant matters, including—

(i) law centres;

(ii) citizens' advice bureaux;

(iii) housing advice centres; and

(iv) homeless persons' units.

36. The Applicants assert that A1 comes within Regulation 9(3)(1)(b) as an estate agency clearly 'represents' the interest of landlords or tenants. The Respondent asserts that 'represents' should be given a broad meaning as otherwise every estate agency in Waltham Forest would have to be personally contacted which cannot have been the intention of the Regulation.

37. The use of 'or' in Regulation 9(3)(b) is used to create separate categories. Were that not the case, the Applicants' reading of the section would be absurd in that not only should individual estate agents be notified but so should any umbrella group that represents them. The terms of Regulation 9(3)(c) are also consistent with an interpretation that the purpose of the Regulation is to notify umbrella organisations who can then notify their members.

38. The Tribunal finds the wording of the Regulation provides for organisations that represent agents to be notified not the individual agent.

39. The Tribunal therefore rejects that there was any requirement to specifically notify A1 under the 2006 Regulations.

40. As is clear from the summary of the evidence above, much of the hearing was concerned with the receipt or non-receipt of emails, letters and newsletters.

41. The burden of proof for the Applicants' argument of a reasonable excuse has to be satisfied on the balance of probabilities. [*I R Management Limited v Salford City Council* [2020] UKUT 81 (LC): [2020] HLR 24]

42. The Tribunal finds it incredible that the Applicants were unaware that there was a licensing scheme in operation.

- a. Licences were applied for other properties in November 2020 and this was done at the behest of a ‘property manager’
- b. The Tribunal accept that letters were sent to licence holders under the previous scheme and that 67 of those concerned properties in which A1 and A2 had an interest.
- c. Even if the one letter that related to the property was not received, there is no satisfactory answer from the Applicants about the other 66 letters and how they were dealt with.
- d. The Tribunal accept the evidence that an online account was created on 10/07/2020 by one of the Applicants’ employees to make licence applications
- e. The Tribunal accept that notices of intent were sent to both A1 and A2 in November 2021, notwithstanding the denial of receipt by the Applicants
- f. The Tribunal were not satisfied that A1’s email addresses could not have been accessed by the Applicants because at least in the case of the Shsempster email, Mr Huntingdon confirmed that he had accessed the email to put an “out of office” message on.

43. The Tribunal find that beyond any doubt the Applicants were aware of the licensing scheme and were informed about it by the Respondent. As a result, the issue of informal communication is not a relevant issue as to their knowledge of the licensing scheme

44. However, putting the Applicants’ case at its highest, would they have a ‘reasonable’ excuse for failing to licence the property even if they had not received any emails or letters relating to that particular property.

45. The Tribunal does not consider they would:

- a. Both A1 and A2 are large professional organisations.
- b. They can be expected to have procedures in place to monitor the legal requirements relating to their business
- c. They had previously licensed the property under the former scheme and the prevalence and conditions of licensing is not something that is new to them.
- d. Their case has not been advanced on the basis of an error or mistake in their processes in relation to this particular property but rather that any ‘fault’ is due to the Respondent.
- e. The issue of the effects of covid and the difficulties businesses faced as a result has not been advanced as a reason for A1 and A2 failing to licence the property but rather to question the accuracy of the Respondent’s processes and postal service disruption
- f. It cannot be the Respondent’s fault that the Applicants’ email accounts were not monitored or re-directed

46. The Tribunal has no evidence to suggest that A1 and A2 deliberately failed to licence this property but does find, at the least, that the failure was down to incompetence and or a lack of proper procedures in A1 and A2’s operations.

47. The Tribunal therefore rejects the defence of reasonable excuse.

48. The Applicants assert that the CPS public interest test is not made out because while the notices of intention were both deemed served, they were not received. As a result, and given the absence of any informal communication, the Applicants lost the advantage of procedural protection or the ability to remedy the breach.

49. The Tribunal are not convinced that this is a valid challenge. The requirement to consider the Crown Prosecution Service “*Code for Crown Prosecutors*” is in order for the Local Authority to assess whether there is sufficient evidence to secure a conviction in the Magistrate’s Court and whether prosecution would be in the public interest according to the criteria in paragraph 4.14 of that Code.

50. The Tribunal does not consider the requirement to consider the code in the Guidance is relevant. The Respondent made a determination to impose a civil penalty rather than prosecute and the Tribunal does not consider the decision to be irrational or taken without regard to relevant matters including their own policy at paragraph 7.8

Amount of penalty / absence of discretion

51. For the reasons in paragraphs 28-30 of the Applicants’ statement of reasons for the appeal [46A], the Applicants criticise the amount of the penalty imposed, criticise the policy that makes having a significant property portfolio an aggravating factor as irrational and has fettered their discretion

52. The Respondent relying, *inter alia*, on *Marshall v Waltham Forest London Borough Council* [2020] UKUT 35 (LC): [2020] WLR 1 3187 contends that:

- a. The Respondent is the primary decision maker and its decision must be afforded deference
- b. It is not open to the Applicants to challenge the content of the policy as that is a matter for the Administrative Court
- c. The burden is on the Applicants to justify deviating from the policy
- d. There has been no fetter, the decision maker applied the policy.

53. The Respondent also invites the Tribunal to increase the penalty to the maximum in band 4 to £19,999 because the Applicants were aware of the licensing requirement.

54. The Tribunal accept that it is not the correct forum to challenge the lawfulness of the policy. The Tribunal has to accept the policy and apply it but in doing so they are not prevented from departing from the terms of the policy. As stated in *Marshall v Waltham Forest London Borough Council* at paragraph 54:

“...The court can and should depart from the policy that lies behind an administrative decision, but only in certain circumstances. The court is to start from the policy, and it must give proper consideration to arguments that it should depart from it. It is the appellant who has the burden of persuading it to do so. In considering reasons for doing so, it must look at the objectives of the policy and ask itself whether those objectives will be met if the policy is not followed.”

55. The policy has a civil penalty matrix which provides for a band 4 penalty to range between £15,000 to £19,999. It states:

Where a landlord or agent is controlling/owning a significant property portfolio and/or has demonstrated experience in the letting/management of property the failure to obtain the necessary Selective Licence would be viewed as being a serious matter attracting a civil penalty of £15000 or above [a band 4 offence]

56. A £15,000 penalty is therefore the correct starting point in this case in compliance with the Respondent’s policy. According to that policy it is an aggravating feature that the Applicants were familiar with the need to obtain a licence.

57. The reason for the Respondent seeking an increase of £4,999 is in accordance with maximum allowable under their policy which states:

The indicative minimum tariff will normally be increased by up to, but not exceeding, £4999 for each aggravating factor identified to arrive at the final level of penalty. The Council may, exceptionally, increase the penalty above the band maximum or, again exceptionally, decrease it below the minimum ‘tariff’. In order to meet the objectives of this policy and of financial penalties in particular, however, including the need for transparency and consistency in the use of such penalties, the Council will exercise its discretion to increase or decrease a penalty beyond band limits in exceptional circumstances only

58. The Applicants consider that the factors in 3.5 of the Statutory Guidance have not been considered and no discretion has been exercised. The factors in the Statutory Guidance are repeated in the Respondent’s policy. The policy then states in relation to those factors:

The Council will consider the above factors when deciding where, within the relevant band of the Civil Penalties Matrix below, a particular offence and penalty fall. Further, the Council considers factors (d) to (g) above, inclusive, to be primary objectives of financial penalties and will attach particular weight to them when determining the appropriate level of penalty

59. Therefore, in relation to their policy the minimum possible penalty was £15,000 and consideration of the 7 factors in the Statutory Guidance

would not have reduced it further. It was only if there were exceptional circumstances when the Respondent's policy contemplates reducing the penalty below or above the band limits.

60. Given the penalty applied was the lowest the policy envisaged, apart from exceptional circumstances, it is difficult to see how the discretion of the decision maker was fettered. The decision maker applied the policy.

61. Are there circumstances for the Tribunal to deviate from the policy? The Tribunal has had regard to the points made in paragraph 28 a-f [46A] of the Applicants' statement of reasons for the appeal as invited to do so by Counsel in closing submissions. The Tribunal cannot see anything in those submissions that take this case out of the ordinary. Given the findings of the Tribunal in paragraph 46 above, this was a failure to licence without any excuse other than incompetent and or ineffective management systems. As such there is no reason to deviate from the banding in the policy. The Tribunal is not persuaded by the Applicants' arguments that it should deviate from the policy. The policy is intended to ensure compliance with licencing requirements and that will not be met in the circumstances of this case by a 'lenient' approach to the Applicants' failure.

62. However, the Tribunal is not prepared to increase the penalty as sought by the Respondent. There appears to be no dispute that there was no harm caused to the tenant and no evidence that the condition of the property was otherwise sub-standard. While the policy views failure of the Applicants to licence the property, notwithstanding knowing that they needed to, as an aggravating factor, the culpability and track record of the offender does not show that a greater penalty is required or that this offender needs deterring from repeating the offence, if they improve their systems. There is no financial benefit to the Applicants' other than the licence fee, which has now been paid, and the Tribunal has found the reason for the failure was unsatisfactory procedures. The imposition of a £15,000 fine reflects the seriousness of the offence but also should be sufficient to prevent repetition of the offence by encouraging the Applicants to improve their administrative processes.

63. The Tribunal upholds the imposition of the £15,000 penalty but the remaining question is whether or not this should have been imposed on both Applicants, aggregated between them or only imposed on one or the other.

Aggregate amount / double counting of penalty?

64. The Applicants maintain that the Tribunal should consider the aggregate value of the penalty as required by *Sheffield v Husain* [2020] UKUT 292 (LC); [2021] HLR 26 at paragraph 60. Further the Tribunal needs to be aware of double punishment *Sutton v Norwich City Council* [2021] 1 WLR 1691 at 1702C-D. The penalty imposed on A1 and A2 is double punishment and or too high when considering an aggregate value of the penalty: £30,000 being the highest available.

65. In response the Respondent maintains that the *Sheffield v Hussain* case is distinguishable as that was a single person who was subject to multiple penalties and the *Sutton v Norwich* case is distinguishable as it was also dealing with one person namely the shareholder and director. In this case there are two distinct legal entities one who has control and one management of the property.

66. Further in submissions it was argued that A2 had delegated the management functions to A1 and therefore A2 had a reasonable excuse and or lack of culpability.

67. The problem the Tribunal has with the argument that A2 was not culpable due to it delegating management to A1 was how the case has been run. At no point has A1 or A2 explained their management functions and who and how licensing issues would be managed. The whole approach has been that it is the Respondent's failures that have caused the failure to licence. Had A1 effectively fallen on its sword and accepted culpability for a lack of processes or inefficient management such as to absolve A2 of culpability, A2's position may have received a more nuanced approach. However, the respective management and control of the property has been opaque. Indeed, the Applicants' statement of reasons for the Appeal do not separate the Applicants' duties and roles. At paragraph 34 it is stated "*The Applicants aver that they are part of the same group of companies, and as their alleged failures are essentially the same conduct, the proportionality of the aggregate penalty imposed on them should be considered*" [48A].

68. While not referred to in argument, the Tribunal notes that there is a failure to comply with the evidential requirements that might have given rise to a defence of reasonable excuse set out in *Aytan & others v Moore & others* [2022] UKUT 27 (LC) at paragraph 40:

We would add that a landlord's reliance upon an agent will rarely give rise to a defence of reasonable excuse. At the very least the landlord would need to show that there was a contractual obligation on the part of the agent to keep the landlord informed of licensing requirements; there would need to be evidence that the landlord had good reason to rely on the competence and experience of the agent; and in addition there would generally be a need to show that there was a reason why the landlord could not inform themselves of the licensing requirements without relying upon an agent, for example because the landlord lived abroad.

69. In the absence of any evidence, the Tribunal rejects the argument made in submissions that A2 had a reasonable excuse by relying on A1.

70. Further, while the Applicants may belong to the same group of companies and share a correspondence address, they are for reasons best

known to them, distinct limited companies and therefore distinct legal entities.

71. As a result, the totality principle in paragraph 60 of *Sheffield v Hussain* does not apply. This is a single penalty imposed on two separate limited companies

72. In *Sutton v Norwich City Council* [2021] 1 WLR 1691 at 1702B-C, Newey LJ states:

In the circumstances, I do not consider that there is any rule that, when deciding what civil penalties to impose on a company and one or more of its directors under section 249A of the 2004 Act, a Court or Tribunal is bound to ask itself first what penalty the offence merits overall and then how that penalty should be apportioned. Whether or not Rollco might have been thought to support such an approach, the Court did not proceed on that basis in Western Trading, and in Patel Lord Bingham eschewed any "guiding principle independent of the facts of a given case". Equally, there is no rule as to how the penalty imposed on a company should relate to the penalty/penalties imposed on a director or directors. As Lord Bingham said in Patel, "It all depends on the facts".

73. The Tribunal agrees with the Respondent that the *Sutton* case dealt with the issue where a director or directors of a company and the company itself are subject to financial penalties. This is not the case in this appeal. Two distinct limited companies are being held responsible for failing to ensure that the property was licensed under the Respondent's Selective Licensing Scheme contrary to section 95(1) of the Housing Act 2004.

74. While again not referred to in argument the Tribunal notes the guidance given at paragraph 37 of *Gill v Royal Borough of Greenwich* [2022] UKUT 26 (LC)

When the FTT applied the respondent's penalty matrix in this case it did not differentiate between the appellants and treated them as equally culpable for the fact that the HMO was not licensed. But it is important that the penalty imposed on each joint landlord reflects his or her degree of responsibility, and a local authority or FTT should give separate consideration to the conduct of each person on whom a penalty is to be imposed. There may be cases where one of two joint landlords is responsible for the management of jointly owned property and where the other plays no part. There may be cases where one joint landlord has a relevant history of similar offences while the other does not. The proper response to cases of that sort will depend on the facts found. What is important is that the responsibilities, actions and circumstances of each landlord are separately assessed.

75. The Tribunal repeats its findings at paragraph 67 above. The Applicants' case was not argued on the basis of A1 and A2 having distinct responsibilities and roles and no evidence was put forward that A2 was reliant on A1 to comply with the licensing duties. This may have been because the Applicants wanted to argue against a double penalty because they were so closely linked. However, this argument has been rejected.

76. Notwithstanding the guidance in *Gill v Greenwich* above the Tribunal is unable to differentiate between A1 and A2's culpability, responsibility, actions or conduct because of the way in which their case has been presented.

77. As such a £15,000 penalty on each Applicant company is not double counting but distinct respective culpability and the Tribunal upholds the penalty against both A1 and A2.

Name: Judge D. Brandler **Date:** 14th November 2022

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.