



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

Case Reference : **MAN/00CH/HNA/2021/0099 & 0100**

Property : **115 and 117 Westbourne Avenue, Gateshead,
NE8 4NQ**

Applicants : **City Estate Holding Limited**

Respondent : **Gateshead Council**

Type of Application : **Appeal against financial penalty: section 249A,
Housing Act 2004**

Tribunal Members : **A M Davies, LLB
P Mountain**

Date of Decision : **10 May 2022**

DECISION

The Final Notice Imposing a Financial Penalty issued by the Respondent to the Applicant on 28 July 2021 in relation to each Property is cancelled.

REASONS

BACKGROUND

1. On 6 April 2020 Mr Michael Kosmas purchased two run-down houses in a troubled part of Gateshead through his company City Estate Holdings Limited, the Applicant. Mr Kosmas owns several companies through which he has purchased properties across the north of England for renovation and letting.
2. At the time of purchase, the houses to which this application relates were within a Selective Licensing Area designated as such by the Respondent on 30 October 2018.
3. The Applicant had the houses renovated at a cost, Mr Kosmas told the Tribunal, of some £100,000. 115 Westbourne Avenue was let on 20 July 2020 and number 117 was let on 10 August 2020. The Applicant did not inform the Respondent of its purchase, and did not report when the properties were let. It did not apply for a selective landlord licence for either property.
4. Following the tenants' registration for council tax, the lettings were reported to the Respondent's Housing Team. By letter dated 23 November 2020 the Applicant was informed that letting the houses without first obtaining a licence to do so was an offence under the Housing Act 2004 ("the 2004 Act"). The Applicant applied online for a licence on 26 November. After the usual checks to ensure that the Applicant was an appropriate landlord the Respondent granted it a selective landlord licence for each house on 22 December 2020.
5. The Respondent called Mr Kosmas for an interview under caution, which took place on 23 February 2021. Prior to the interview Mr Kosmas supplied a written statement explaining that he had not been aware of the Selective Licensing Scheme when he let the houses, or indeed until he was told about it in November 2020. The Respondent concluded that an offence had been committed. On 26 March 2021 the Respondent issued a Notice of Intention to impose a financial penalty for each house. The proposed penalties were £5871.26 for 115 Westbourne Avenue and £5353.40 for 117

Westbourne Avenue, the difference being the amount of rent received for each property from the date it was let until a licence was applied for, which was assessed by the Respondent to be the Applicant's financial benefit from committing the offence.

6. Through its solicitors, the Applicant made written representations following which the penalties were reduced. On 28 July 2021 Final Notices were issued imposing penalties of £4871.26 for 115 Westbourne Avenue and £4353.40 for 117 Westbourne Avenue.
7. On 23 August 2021 the Applicant appealed to this tribunal against both penalties on the ground that it had a reasonable excuse for failing to obtain licences, and had therefore not committed an offence. The representations of the parties are the same for both houses, and the applications have been heard together.

THE LAW

8. Section 95(1) of the 2004 Act creates an offence where a person has control of or manages without a licence a house which is required to be licensed. On summary conviction the offender is liable to a fine.
9. Section 95(4) provides
"In proceedings against a person for an offence under subsection (1) it is a defence that he had a reasonable excuse –
(a) for having control of or managing the house [without a licence]"
10. Section 249A of the 2004 Act provides an alternative to prosecution as follows:
"(1) 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." An offence under section 95(1) is a relevant housing offence. Schedule 13A to the 2004 Act provides for the administration of financial penalties under this section.

11. It is for the landlord to show on a balance of probabilities that he had a reasonable excuse for failing to apply for a licence. If he does so, no offence has been committed and no financial penalty can be imposed. The local housing authority is therefore required firstly to ascertain beyond reasonable doubt whether a licence should have been applied for but was not applied for, and secondly whether the landlord has shown that were he to be prosecuted he would be able, on a balance of probabilities, to establish the statutory defence. If the answer to the second point is yes, no financial penalty may be imposed.
12. The government has issued guidance to local housing authorities as to how their financial penalty powers are to be exercised. Each council has published its policy in relation to housing offences, including the factors which it will consider when establishing the offender's level of culpability and the harm which has been caused by the offence, and a matrix for calculating the appropriate level of penalty after taking into account additional mitigating or aggravating circumstances.
13. On an appeal against a financial penalty, this tribunal is required to make its own finding as to the imposition and/or amount of a financial penalty and may take into account matters which were unknown to the council when the Final Notice of Penalty was issued. The tribunal must make its decision in accordance with the Respondent's published policy unless there are compelling reasons to depart from it.

THE RESPONDENT'S POLICY

14. The Respondent's "Civil Penalties Enforcement Guidance" states at paragraph 1.6 *"the Council must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the landlord and that the public interest will be properly served by imposing a civil penalty"* and at 1.7 *"the Council will consider Civil Penalties for all landlords that are in breach of one or more of the sections of the 2004 Act.... Enforcement action will be considered on a case-by-case basis in line with Gateshead Council's Communities and Environment Enforcement Policy and any specific enforcement guidance made thereunder."*
15. The Communities and Environment Enforcement Policy referred to seems to be a document produced to the tribunal and referred to by Ms Wilkie when giving

evidence for the Respondent, titled “Gateshead Private Sector Housing Team Enforcement policy, Selective Landlord Licensing”. It states

“The policy sets out the broad principles and processes which Officers.... will follow when delivering landlord licensing.....

Enforcement in the context of this policy is not limited to formal enforcement action such as serving notices or prosecution but includes.... the provision of advice, support and guidance....

It must be stressed that as a rule we believe in gaining the desired result through effective engagement with the parties involved, however we will take enforcement action if the criteria of the enforcement policy has (sic) been satisfied....

The Council will follow the principles of good enforcement and ensure that enforcement decision are made..... in line with the provision of [among others]

Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities”.

16. The Guidance for Local Housing Authorities issued by the Government in April 2018 provides non-mandatory advice and recommendations as to the preparation of a civil penalty policy. The foreword states:

“The Government wants to support good landlords who provide decent well maintained homes and is keen to strike the right balance on regulation in order to avoid stifling investment in the sector.”

17. Reflecting this, the Respondent’s Civil Penalties Enforcement Guidance also states:

“Once we have established that action needs to be taken.... wherever possible an informal approach will be adopted.

Consideration will be given to...

Whether informal action may compromise the object or whether there is a serious breach of legislation. For example, where an imminent risk to public health exists and removal of the risk is only guaranteed through a formal approach...

The initial decision to take informal or formal action will be made by the enforcement officer...

Informal action includes -

Issuing verbal advice or instruction...

The provision of advisory written information; examples are.... informal warning/reminder letters to submit a licence application...

Guidance, information and advice to licence holders advising them on their responsibilities....” (Underlining added).

THE HEARING

18. The application was heard by video link on 10 May 2022. Due to problems with technology the tribunal and all other participants could hear but not see either Mr Levisur counsel for the Applicant or Ms Wilkie who gave evidence for the Respondent. Mr Levisur and Ms Wilkie could see and hear all other participants in the hearing except for each other, whom they could hear but not see. While this caused some awkwardness during Mr Levisur’s cross examination of Ms Wilkie, Mr Currie counsel for the Respondent, Mr Levisur and the parties chose to continue the hearing under these conditions rather than adjourn to a different date which appeared to be the only alternative.

THE APPLICANT’S CASE

19. Mr Kosmas representing the Applicant told the tribunal that his role in the business of his property companies was to choose properties to buy after having assessed the cost of renovation, to instruct contractors to bring houses up to tenantable standard, and to ensure compliance with regulations such as the provision of safety certificates. He described himself as a professional landlord but acknowledged that he was unlikely to be able to keep up with the changing regulations applicable to rented properties. He explained that he employed reputable professional advisers to do this and relied on them to carry out their work competently.

20. He purchased the subject houses at auction, having instructed MS Law of Manchester to prepare a report on the properties beforehand to enable him to decide whether to bid for them. The firm holds itself out as experienced in advising clients who are building a property portfolio. They had acted for Mr Kosmas before in purchasing investment property.

21. As is usual in the case of a property auction the seller’s solicitors – in this case Irwin Mitchell, who had also previously acted for Mr Kosmas – prepared an information pack for potential bidders. This included the result of a local authority search carried

out by agents for Irwin Mitchell. The standard enquiries in such a search do not include any enquiry as to whether the property for sale may be within a selective landlord licensing area. The search form includes optional additional enquiries, one of which mentions in small print under the misleading heading “Houses in Multiple Occupation” the possibility that a property might be within a selective licensing area. This optional enquiry was not made by Irwin Mitchell, and no information on this point was provided by the seller.

22. The Applicant’s lawyers did not make the enquiry either. Mr Currie for the Respondent suggested that they would not be expected to do so unless specifically instructed. The tribunal does not accept this. The Applicant’s solicitors knew that the properties would be purchased for renovation and letting. They could have discovered online in a matter of minutes that both houses fell within a selective licensing area, a point very relevant for the Applicant and one which Mr Kosmas could properly have expected to be included in his solicitor’s pre-auction report on the properties.

23. Mr Kosmas told the tribunal that he was unaware of the existence of selective licensing schemes outside the regulation of houses in multiple occupation. Consequently this was an enquiry he could neither have been expected to make himself nor to instruct his solicitors to make. A search of the Respondent’s website does not readily disclose the selective licensing areas unless the term “selective licensing” is included in the search. Ms Wilkie for the Respondent suggested that Mr Kosmas should have contacted the Council prior to the auction to discuss his plans for the properties. Mr Kosmas said that it was not his practice to do this.

24. The Applicant argued that in the circumstances it had a reasonable excuse for failing to apply for a licence until November 2020, and that no offence had been committed.

THE RESPONDENT’S CASE

25. Ms Wilkie is a technical officer within the Respondent’s Private Sector Housing Team. She told the tribunal that the Respondent had determined that there was sufficient evidence of an offence to justify formal action. Asked what informal action had been

considered, she said that the Respondent had considered issuing a caution. However she had concluded that formal action – ie prosecution or a civil penalty - was required because of the length of time (3 – 4 months) between the letting of the houses and the application for a licence. The Respondent considered that Mr Kosmas’ evidence that he was unaware of the selective licensing scheme did not amount to a reasonable excuse for failing to apply. The Respondent took the view that the Applicant had a duty to carry out adequate due diligence prior to its purchase, and had failed to do so due to “lack of foresight and wilful blindness”. Ms Wilkie also investigated other properties recently purchased by Mr Kosmas’ companies outside Gateshead and found that although some of them fell within selective licensing areas no licence applications had been made. She reported this finding to Newcastle City Council, who took the matter up with Mr Kosmas and eventually granted the necessary licences for his houses within their selective licensing area. Mr Kosmas confirmed that Newcastle City Council did not take any formal enforcement action.

26. Having decided on formal action, Ms Wilkie completed the Respondent’s “Checklist for Assessing Prosecution vs Civil Penalty Charge Notice”. This form lists factors such as the existence of any resulting harm, obstruction by the tenant, previous housing offences, the history and extent of the landlord’s property ownership, and whether the landlord is on the Rogue Landlord’s Database. The result of this exercise was that prosecuting the Applicant would be inappropriate.
27. Ms Wilkie told the tribunal – and repeated this on being questioned about it – that she had decided on imposing a civil penalty rather than prosecuting because “this was a first offence and the evidence was not sufficient to go for prosecution”. She said that the next step had been to determine the level of the civil penalty, followed by the issue of Notice of Intention and the Final Notice. Prior to issue of the Final Notice Ms Wilkie reviewed the file with her manager. They concluded that Mr Kosmas had been aware of selective licensing in Newcastle but had possibly not known of the selective licensing scheme at Gateshead. They reduced the Applicant’s culpability from “negligent” to “failure to take reasonable care”, ie failure to carry out sufficient research, and this resulted in the imposition of a lower penalty in the Final Notice.
28. In cross examination Ms Wilkie said that she had considered issuing a caution, but that the evidence (in the light of the Crown Prosecution Code) and the public interest test meant that in the circumstances a civil penalty was most appropriate. She had

decided against a caution because the Selective Licensing Scheme had been established for some time prior to the offence, and due diligence undertaken before and after the purchase and/or contact with the council would have shown the Applicant that a licence was required.

29. Finally Ms Wilkie confirmed that she had little knowledge of the process of buying a property at auction and said that it was not for the Respondent to decide who the Applicant employed to undertake work for him but “the onus is on the Applicant to do due diligence.”

FINDINGS

30. The Tribunal finds that

- despite its published policy of taking informal action wherever possible quoted at paragraph 17 above, the only alternative to prosecution or a civil penalty considered by the Respondent was a caution. This was confirmed by Ms Wilkie in evidence and also demonstrated in her first letter to the Applicant dated 23 November 2020, which states *“Operating without a licence in a designated licensing area is an offence. The Local Authority can consider several actions to respond to unlicensed properties in designated landlord licensing areas. These range from a simple caution, a financial penalty per property or a formal prosecution.”*
- Ms Wilkie did not follow the Respondent’s published policy in that the informal action described in its Guidance was not considered, and her letter dated 23 November 2020 was not adopted as the appropriate course of action although it led to an immediate application and grant of the licences.
- until Ms Wilkie telephoned Mr Kosmas on 23 November 2020 he was unaware that selective licensing schemes applied to houses other than houses in multiple occupation
- it was entirely reasonable in the circumstances for Mr Kosmas to rely on his professional advisers to prepare an adequate report on properties he was considering buying, but he was not informed of the need to apply for a licence prior to letting the houses

- on a balance of probabilities, the Applicant would have established the statutory defence under section 95(4) of the 2004 Act.
- Ms Wilkie demonstrated a fundamental lack of understanding of the Respondent's powers when she said that a civil penalty was imposed because there was insufficient evidence for a prosecution.

CONCLUSION

31. The Applicant had a defence which on a balance of probabilities would have succeeded had it been prosecuted. It follows that a civil penalty cannot be imposed.
32. The Respondent's own Guidance as to informal enforcement was sufficiently followed when the Applicant was advised by letter of the need to apply for a licence.
33. The Applicant is a reputable landlord whose investment in housing should be – and indeed was – encouraged by the grant of a selective landlord licence. In accordance with the Respondent's published policy, even if the Applicant had been unable to rely on a statutory defence the imposition of a civil penalty would have been unnecessary to achieve the objects of the licensing regulations.

Tribunal Judge A Davies

10 May 2022