FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**FC/LON/00AH/HNA/2018/0015 & 0016**
Property	**:**	**Flat 39, 5 Sydenham Road, Croydon CR0 2EX**
Applicants	**:**	**AA Homes and Housing (5 Sydenham Road) Limited (1)** **Anabow Services Limited (2)**
Respondent	**:**	**L.B. Croydon**
Present at hearing	**:**	**For the Applicants: Mr Sharkey of Counsel** **For the Respondents: Mr Gillespie**
Type of Application	**:**	**Financial Penalty - s. 249(a) Housing Act 2004**
Tribunal	**:**	**Mrs S O'Sullivan (Tribunal Judge)** **Mr M Cairns**
Date of Hearing	**:**	**3 September 2018**
Date of Decision	**:**	**18 October 2018**

DECISION

Background

1. In October 2015, the Respondent Council designated the whole of the London Borough of Croydon as a Selective Licensing area. This meant that any residential property (subject to some exemptions) let in the borough would require a licence issued by the Council. The designation came into force on 1 October 2015.

2. The First Applicant, AA Homes and Housing (5 Sydenham Road) Limited ("AA Homes") is the freehold owner of NatWest Tower or 5 Sydenham Road Croydon CR0 2EX, a former office block which has been recently converted into a block of 54 residential flats divided up into 5 storeys including a basement (the "Property").

3. On 1 April 2017 Flat 39 was let by the First Applicant to Mr Ralph Watson for a term of 6 months. It appears that the letting was arranged through Anabow Services Limited ("Anabow'), the Second Applicant.

4. On 13 September 2017, the Property was inspected by a representative from Croydon Council following a referral from the London Fire Brigade. Flat 39 at the Property was found to be occupied by a Mr Walsh paying a rent of £900 per calendar month. Flat 39 was one of 36 flats out of a total of 54 at the Property in respect of which, as at 5 September 2017, the Council was not in receipt of a duly made application for a selective licence.

5. By letters dated 22 February 2018 the Council sent to the First and Second Applicants notices of intention to issue financial penalties of £26,000 and £12,000 respectively for failing to licence Flat 39. The notices invited representations and representations were duly received by the Council dated 23 March 2018 from Blackmores Solicitors acting for both Applicants. Final notices dated 13 April 2018 were sent to the First and Second Applicants imposing the fines in the amounts set out in the Notices of Intention.

6. On or about 16 May 2017 Blackmores Solicitors acting for both Applicants made an application to the tribunal to appeal against the penalties.

7. The Council opposes the appeals and says the penalties are just and proportionate and represent a proper application of the relevant sentencing guidelines.

8. On 21 May 2018 the tribunal issued directions on the application. The directions provided for both parties to serve statements of case. In particular, the Applicants were directed to serve an expanded statement of the reasons for the appeal, any witness statements of fact and any other documents to be relied on at the

hearing. The Applicants failed to comply with the direction and on 14 August 2018 the tribunal directed that unless the Applicants complied with the direction by 21 August 2018 they would be debarred from relying upon any evidence on his application. A small bundle of documents was subsequently served. This contained several emails and a skeleton argument served on the Applicants' behalf. No witness evidence was relied upon by the Applicants and no-one appeared to give evidence on their behalf.

The hearing and the evidence

9. We heard the application on 3 September 2018. What follows is necessarily a summary of the evidence heard.

10. The Applicants were represented by Mr Gillepsie of Counsel. Also attending for the Applicants were Ms Richardson of Blackfords LLP and Mr Carol Oran and Dr Anwar Ansari, directors of the appellant companies.

11. The Council was represented by Mr Sharkey of Counsel with Ms Slattery of the legal department also attending. In addition, Mrs Fuller, a HMO team manager attended together with Mr Gracie-Langrick, a qualified Environmental Health Officer and the Selective Licensing and Housing Manager for the Respondent. He had made a witness statement dated 4 July 2018 and appeared to give oral evidence for the Respondent. In his witness statement, Mr Gracie-Langrick set out the matters referred to in the 'Background' section of this decision. Also attending to give evidence for the Respondent were Mr Daniel Rosling and Mr Jon Robbins of the London Fire Brigade.

12. It was confirmed by Mr Gillespie that the Applicants' challenge was limited to the amount of the financial penalties imposed.

13. Mr Gracie-Langrick confirmed that the Council's involvement arose on receipt of a priority referral from the London Fire Brigade on 5 September 2017. A letter was sent on 7 September 2017 to the tenants and owners requesting access and an inspection took place on 13 September 2017.

14. An application in respect of Flat 39 was subsequently uploaded on the Croydon "My Account" system and a payment of £350 made by the Applicants. However, this contained a number of errors including the insertion of an incorrect tenancy date which allowed the Applicants to secure a lower "first time letting discount". However, it became clear on 10 November 2017 from documentation provided, that the tenancy in fact commenced on 1 April 2017 and the incorrect fee had been paid. The correct fee was not received until 26 March 2018. Issues surrounding the identity

of the proposed licence holder, property manager and mortgage lender and other interested parties also required clarification. Two separate invitations were made to an interview under caution both of which were declined. There was some criticism made of this but the Council now accepts that the Applicants were entitled to decline to attend an interview in such circumstances.

15. The Council confirmed that this was the only property known to them owned by the First Applicant which had been purchased for £11.7 million.

16. The Council arrived at the penalties of £26,000 and £12,000 in respect of the First and Second Applicants respectively by using a matrix that it had compiled. That matrix has a five stage process; Stage 1- banding the offence in relation to the culpability of the offender and the level of harm; Stage 2 amending the penalty based on aggravating factors; Stage 3 Amending the penalty based on mitigating factors; Stage 4 a Penalty review to ensure it is proportionate and achieves the aims of the Crown Prosecution sentencing principles and ensuring the total penalties are just and proportionate; Stage 5 Totality Principle said to be a consideration of whether the enforcement action is against one or multiple offences and ensuring the total penalties are just and proportionate to the offending behaviour. A score is set for each factor producing a total score which automatically determines the level of fine.

17. In the First Applicant's case the factors were scored by the Council as follows:

Stage 1 culpability and harm:	9	(high)
Stage 2 aggravating factors:	3	
Stage 3 mitigating factors:	0	
Stage 4 Penalty Review:	1	
Stage 5 – totality:	2	
Total points =	15	

18. In the Second Applicant's case the factors were scored by the Council as follows:

Stage 1 culpability and harm:	9	(high)
Stage 2 aggravating factors:	1	
Stage 3 mitigating factors:	0	
Stage 4 Penalty Review:	0	
Stage 5 – totality:	0	
Total points =	10	

19. Mr Gracie-Langrick expanded on the reasoning behind the scoring in his witness statement.

20. The tribunal also heard evidence from Daniel Rosling and Jon Robbins of the London Fire Brigade.

21. Mr Rosling confirmed that he is the Fire Safety Inspecting Officer for the Croydon, Sutton and Bromley Borough Team. The tribunal heard that he inspected the Property on 5 September 2017 after some fire safety concerns had been raised. His evidence was that there were multiple fire safety failings within the premises and that these were of a serious nature. These included the front door at the base of a single (means of escape) stair being locked by a key, a single staircase with no dedicated ventilation, very high fire loading in the basement with a single door which did not close fully into its frame. If a fire broke out the door would allow heat and smoke to compromise the only available staircase for emergency exit for occupants and firefighter access.

22. There was also a vertical open void running the full height of the building between the basement and roof space. This void was not fire stopped giving the potential for unseen smoke, heat and flame spread throughout the height of the building. These and other issues he listed were so serious that a prohibition order was considered. This was prevented as it was agreed that a waking watch of two people would be implemented on a 24-hourly basis. An Enforcement Notice was subsequently served. In terms of seriousness the conditions here were ranked by Mr Rosling as 10/10.

23. Mr Robbins confirmed that he is a Fire Safety Team Leader within Croydon Borough Council. Her had also inspected the Property and observed the same serious fire risks. He confirmed that this remained an ongoing investigation and that there might be a future prosecution due to the serious risks found at the Property.

24. The Applicants say that the following factors should be taken into account in mitigation; the First Applicant's acknowledgement of its failure, its co-operation with the Council and eventual compliance with the scheme and the fact that changes have been implemented in relation to training and the employment of internal and external lawyers and a post having been created to deal specifically with licensing matters.

25. It is accepted by the Applicants that an upward adjustment can be made to ensure that the penalty has an impact on the First Applicant but it is said this must be proportionate.

26. The Applicants do not accept that the Council was entitled to take into account other breaches at the Property when the Financial Penalty refers specifically to Flat 39. It is accepted however that

the was a failure to licence a total of 36 flats at the property as at 5 September 2017.

27. The Applicants did not rely on any witness evidence and relied solely on the limited documentation provided and Counsel's submissions.

Decision

28. We considered whether the Applicants had been guilty of an offence under section 95(1) Housing Act 2004 by being the person managing and in control of the Flat on 5 September 2017. The Applicants accepted that they were guilty of such an offence. Accordingly, we conclude (beyond reasonable doubt) that the Applicants committed the offence.

29. We then went on to consider the matrix used by the Council. Before we consider the points awarded by the Council we consider it worthwhile making some broad points. The matrix is based on the guidance issued by the Department for Communities and Local Government ('DCLG'). The matrix is divided into 5 Stages; Stage 1 relates to the culpability of the landlord and Level of Harm (for the tenant and community), in Stage 2 the penalty can be amended based on aggravating factors, and at Stage 3 on the basis of mitigating factors. At Stage 4 the Council is to review the penalty to ensure that the case can be made and that the chosen response is proportionate. Finally, at Stage 5 the Council considers the "totality principle". In principle we found it on the whole to be a logical method of applying that guidance to arrive at a view of the seriousness of an offence and the appropriate financial penalty to be imposed. However, we did have some reservations in relation to the category of "aggravating features" at Stage 2 as it was our view that this did involve some risk of double-counting. A better approach may be that adopted by some other local authorities of doubling the score of "harm" as this is viewed as a particularly important consideration.

30. Likewise, we are not persuaded that the Stage 5 Totality entitles the Council to stand back and make adjustments to the overall score. Rather, having considered the Council's own guidance, this stage appears to apply solely to instances where a Council is intending to impose more than one Financial Penalty and this Stage aims to ensure that the offender is not penalised for the same offence twice.

31. We then considered the weightings given in the matrix by the Council in this particular case. It should be noted that the weightings were amended after representations were received

from the Applicants' solicitors but the level of the penalty was maintained.

32. First, in relation to AA Homes the Council had assessed the level of culpability at Stage 1 as high taking into account the failure to apply for a licence prior to the start of the tenancy agreement despite being aware of the scheme, inaccurate information being given once the application was made and slow progress and risk was taken. The impact on the tenant and wider environment was likewise rated as high as the property inspections found some issues with the fire precautions and risk assessment at the Property. Further it was considered that failure to licence undermined the whole licensing scheme and that not licensing a property meant that all parties would not benefit from the requirements imposed by the conditions. Aggravating factors were considered at Stage 2, in particular the First Applicant not licensing a total of 36 flats within the Property until such time as the Council inspected despite having been previously aware of the requirement to licence. In addition, issues such as the application not being made in respect of the Flat until 5 months after the tenancy had commenced and the application including important errors. There remained 5 flats which were non-compliant.

33. At Stage 3 mitigating factors were taken into account such as AA Homes recognising its mistake with the details in the applications, trying to co-operate to correct mistakes with payments and confirming that it was to make changes in an effort to eliminate further administrative errors. A total of 12 points was applied. At Stage 4 the Council reviewed the penalty to ensure it was proportionate to the office, achieved the aims of the Crown Prosecution Service sentencing principles and was sufficiently high to have a negative impact, remove the reward for criminal activities and act as a deterrent to bad practice. The penalty was increased by a score of one point at Stage 4. The aggravating factors took the penalty from a Band 3 to Band 4 offence and the Council increased the score by one point to a total of 15 to reflect the wider non-compliance and actual rental income. The rent received for the Flat for the total period of non-compliance was £9,900. The total revenue received for flats within the Property which were no-compliant on 9 February 2018 was £215,034.90. In considering the totality principle the Council decided that a further 2 points should be added to bring the total to 15 points.

34. It was accepted that although AA Homes had initially been criticised for their failure to attend an interview under caution they had the right to decline to attend and should not be penalised in this regard.

35. Similar points were taken into account in relation to Anabow. The scoring for Anabow resulted in 10 penalty points being assessed

resulting in a Band 3 fine of £12,000. Similar points were relied upon by Mr Gillespie as in relation to AA Homes and therefore we do not repeat them.

36. We went on to consider for ourselves, with reference to the DCLG guidance, what the appropriate financial penalties should be.

37. First, we would point out that we had extremely limited evidence about the financial position of the First Applicant save that it owns the freehold interest in the Property purchased for £11.7 million and the fact we were told it would face no issue in paying the fine at its current level. Faced with such scarce evidence it is assumed that the First Applicant is: (a) making a profit from that portfolio; (b) aware of the regulatory requirement in the lettings market given it has previously applied for licenses in relation to a small number of flats in the block. Second, we consider that there was a glaring omission to licence in circumstances that suggest that the First Applicant was well aware, or should have been well aware of the need to licence. Third, we accept the Respondent's evidence and that of the witnesses from the London Fire Brigade that there were serious fire safety issues at the Property and accordingly there was serious harm or potential harm to the tenants in the failure to licence. Fourth, we agree that there had been a wholesale failure to licence as many as 36 flats out of a total of 52 is a relevant factor to be weighed against the Applicants. Fifth, we considered the issues of punishment of the offender, deterrence of the offender and the removal of any financial benefit. We note that the in the matrix used by the Council, they scored only 1 point at stage 4 – it could be argued on the background and facts of this matter that the more serious section in the matrix could have been applied.

38. However, we have to stand back and look at the matter weighing all the relevant circumstances; the scoring on the Council's matrix is only one matter to be taken into account.

39. Dealing with the points relied on by the Applicants;

- The fact that the licensing was overlooked is not an excuse. An owner or agent of a property has a responsibility to have systems in place for matters like this and the failing of such systems is not an excuse;
- The tribunal accepts that although a penalty can be increased to ensure it has an impact on the offender, in this case we had no information on the financial standing of AA Homes. In the absence of any evidence to the contrary the tribunal is entitled to assume the offender is able to pay a penalty up to the maximum;

40. The fine imposed on AA Homes of £26,000 is towards the top of the range.

41. We agreed with the Council that at Stage 1 the culpability of AA Homes should be assessed as "*high"*. We considered however that taking into account the very serious fire issues at the Property the harm to tenant and the community should be rated higher as *"significant*". Those ratings meant that total penalty points of 12 should be applied at Stage 1. We have already expressed our concern that Stage 2 *"aggravating factors"* might involve some risk of double counting. We are satisfied that we have properly taken into account those factors which the Council relied on under Stage 2 under Stage 1 and therefore add no further points at this stage.

42. We were not persuaded that we should make any deduction in relation to mitigation. First, we simply had no evidence from the Applicants in relation to their mitigation. The only document with which we had been provided was a letter from their solicitors which referred to steps they planned to take. However, this seemed to us to be somewhat unsubstantial with no timeframe for when changes would be implemented and by whom. Had we heard evidence from one of the directors of the First Applicant our decision may well have been different but, in the circumstances, we found we could place very little reliance upon it. Second; the factors relied on otherwise in mitigation did not in our view support a deduction. The fact that there was *"eventual compliance"* with the scheme is in our view to be expected as is co-operation with the Council. As far as Stage 4 was concerned we agreed with the applicants that a score of one point was appropriate bringing the total penalty points to 13. We did not agree that any further points should be added at Stage 5, the Totality Stage, as currently drafted in the Council's own guidance, appeared aimed at instances where a Council is intending to impose more than one Financial Penalty and this Stage aims to ensure that the offender is not penalised for the same offence twice.

43. This brings the total penalty points to 13 in respect of AA Homes which results in a penalty of £20,000 which we consider to be proportionate in the circumstances of this case.

44. The fine imposed of £12,000 on Anabow is at the lower end of the scale and we believe it is at the correct level given the severity of the offence (particularly the harm or potential harm to the tenants), the fact that the Second Applicant clearly did know or should have known that Flat 39 required licensing– all of this balanced against the other factors that we have referred to in this decision.

45. We would like particularly like to thank Mr Gracie-Langrick for this evidence during the hearing which we found to be considered and entirely straightforward.

46. Accordingly, our decision is as follows;

a) We vary the financial penalty notice served on AA Homes, by decreasing the financial penalty from £26,000 to £20,000.

b) We dismiss Anabow's appeal against the financial penalty notice in the sum of £12,000;

Sonya O'Sullivan, Deputy Regional Tribunal Judge

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.