



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

Case References	:	MAN/00CK/HNA/2019/0088,0089,0090 and 0091
Properties	:	56 Cavendish Place, Newcastle upon Tyne NE2 2NH and 62 Buston Terrace Jesmond, Newcastle upon Tyne NE2 2JL
Applicants	:	Mr Andrew Huskins and Ms Theresa Ball
Respondent	:	Newcastle City Council
Type of Application	:	Appeal against financial penalties – Section 249A Housing Act 2004
Tribunal Members	:	Judge WL Brown Mr IR Harris, MBE FRICS
Date of Tribunal	:	29 November 2019

DECISION

The appeals are dismissed and the Tribunal confirms the Penalty Charges for each of the Properties in the sums of £642 for Mr Andrew Huskins and of 642.50 for Ms Theresa Ball respectively.

Introduction

1. These are joined appeals with similar facts and evidence. The Applicants made application (the “Application”) dated 20 April 2019 to the Tribunal appealing a financial penalty imposed on them by the Respondent for operating each of the Properties without an HMO licence between 28 August 2018 and 17 November 2018 in the sums for each of the Properties of £642 for Mr Andrew Huskins and of 642.50 for Ms Theresa Ball.

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 12 September 2019.
5. Neither party requested a hearing and the Tribunal convened on 29 November 2019 in Newcastle upon Tyne to make its determination. The Applicant and Respondent presented written representations and produced their bundles of documents.
6. The Tribunal understood the Properties both to be three storey 6-bedroom houses.

Facts

7. It was not in dispute that each of the Properties meets the standard test (section 254 of the Housing Act 2004) for a house in multiple occupation and meets the licensing criteria under the Licensing of Houses in Multiple Occupation (prescribed Description) (England) 2018. Therefore, each of the Properties requires a licence under part 2 of the Housing Act 2004, section 61.
8. The licences held by Mr Huskins expired on 27th August 2018. Mr Huskins submitted his licence applications on 18 November 2018 and the applications subsequently were approved.
9. The process of the formalities leading to the issuing of the Penalty Notices was not in dispute.

Law

10. 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.”

11. The “relevant housing offence” alleged is under s72 Housing Act 2004, which states:

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

Evidence and submissions

The Applicant

12. Mr Huskins based his appeal upon his understanding that an application for the relevant licence would have been refused by the Respondent, so he had not applied promptly. He said that his decision arose because he had been informed by the Respondent’s officer that the absence of internal doors at the Properties with particular fire protection would mean his applications would be refused.
13. In responding to the Respondent’s Civil Penalty Intention notices (see below) Mr Huskins stated that not applying for the HMO licences was an “oversight”.
14. Mr Huskins stated that he had received numerous correspondences from the Respondent’s Environmental Health Officer seeking the proof of fire protection of the internal doors. He stated that he had sought professional advice on the fire worthiness of the doors and had provided all details to the Officer. He did not wish to use unsightly fire doors in Victorian properties, when his professional advice was that the existing doors were fully compliant with all regulations and legislation. He asserted that the Respondent had changed its position on whether the existing doors would remain as acceptable.
15. He stated that it was not until an inspection of the Properties on 10 July 2018 that he became aware of the potential issue. He provided the fire alarm and gas certificates a month before the licence ran out. He asserted that the Respondent’s apparent change of standpoint stopped him from applying to renew the licences. He denied receiving letters dated 25 August 2018 prompting him to renew the licences. He said that he had been led to believe that resolution of the fire-protection matter was necessary as without it he would not be granted the licences. The same Officer of the Respondent was involved in both issues. He invited discussion without response and he assumed that “.....the clock would have stopped whilst we were resolving the issues at hand.”

The Respondent

16. Mr Huskins has managed the Properties and has been the licence holder for each since 2008. The Respondent established from a search at Land Registry on 16 January 2019 that the Applicants were joint owners of the Properties. Ms Ball was not identified as an interested party on the HMO licence applications. A council tax search was carried out on the same date which confirmed that the liable parties for council tax are the Applicants.
17. The Respondent set out the four-stage approach for it to determine a Civil Penalty:

Stage 1 determines the penalty band for the offence. Each penalty band has a starting and maximum amount. This stage considers the landlord's culpability for the offence, and the seriousness of harm risked to the tenants or visitors to the property.

Stage 2 determines how much will be added to the penalty amount as a result of the landlord's income and track record.

Stage 3 is where the figure from stage 2 are added to the penalty band from stage 1.

Stage 4 considers any financial benefit the landlord obtained from committing the offence. This amount will be added to the figure from stage 3.
18. None of the defences for operating an HMO without a licence set out in section 72 of the Housing Act 2004 were asserted or relied upon. No Temporary Exemption notice had been applied for and no application had been submitted for the time period relating to the civil penalty to be extended for either property.
19. The Respondent records that no financial gain has not been applied to allow the tenants of the Properties to apply for rent repayment orders.
20. The Respondent recorded its chronology in this matter, which is the same for both Properties, beginning on 14 June 2018 when a letter was sent to Mr Huskins to remind him to renew the licence upon its expiry on 27 August 2018 if the relevant property was to remain a HMO. A letter was also sent to Mr Huskins on the 25 August. No response was received to these letters. On 15 November 2018 Mr Huskins was invited to attend an interview under caution, or to respond to a questionnaire. No response was received.
21. Separately, on 11 July 2018 an officer of the Respondent inspected the Properties and under Regulation 4 of the Management of Houses in Multiple Occupation (England) Regulations 2006 asked for certification that the internal doors would resist fire for 30 minutes. Various email exchanges were made between the officer and Mr Huskins. It is accepted that in an email dated 19 September 2018 an Officer of the Respondent stated that a failure in the management regulations could lead to a prosecution or a civil penalty. That was in relation to the fire protection standard of the internal doors. There was no discussion regarding the HMO licences. Two separate officers were dealing with the issue of the fire doors and the issue of no HMO licences and as such the issues were not mixed in communications. None of the communications state that a licence for each of the

Properties could not be submitted or would not be granted as a result of the ongoing dispute regarding fire safety

22. Mr Huskins sent an email to the Respondent on the 21 November 2018 advising that the HMO applications had been submitted and the failure to renew upon expiry of the previous licences had been an “oversight”.
23. On 4 February 2019 Mr Huskins sent to the Respondent tenancy agreements which confirmed there were six tenants in occupation of each of the Properties who had started their tenancy on 1 July 2018. The rent for each of the Properties was recorded as £363 per month.
24. Applying the process outlined above the following arose for each of the Properties regarding the imposition on Mr Huskins of two Civil Penalties:

Stage 1

It was decided that Mr Huskins fell between the low and medium bands of the level of culpability because of the absence of the licence and his failure to attend for interview and if the offence is between two bands the Respondent’s policy is to choose the higher band. Therefore, Mr Huskins’s culpability was medium.

In deciding the harm level, the tenants had informed the Respondent that there were no issues with the Property and therefore were not suffering serious harm. The level of harm was decided at level C, the lowest.

A medium culpability and a harm level of C sets the penalty level at 2 which equates to the penalty band being £1,200 to £3,000.

Stage 2

A figure of £85 which is the rental income per week of one tenant was added. The amount added is a lower figure than the total rental income received by Mr Huskins which would be £508.37. This was due to an error in calculation. There were no previous convictions or relevant notices served on Mr Huskins, so no additional sums were added.

Stage 3

There was no additional sum added to the penalty from this stage.

Stage 4

This is a matter of calculating the final amount by adding the starting amount to the additional amounts. In this case the starting amount was £1,200 with the rental income of £85 which gives a civil penalty amount of £1,285.00.

25. Applying the process outlined above the following arose for each of the Properties regarding the imposition on Ms Ball of two Civil Penalties:

Stage 1

Ms Ball as joint owner failed to licence a property operating as an HMO. Ms Ball did not attend an interview to provide any mitigation. The decision was that Ms Ball fell into the low band of culpability as Mr Huskins had been the licence holder. As the Respondent had no information to confirm that Ms Ball was involved with the day to day management of the Property it was felt that Ms Ball was also liable, but at a lower culpability.

As for Mr Huskins, the level of harm was decided at level C.

A low culpability and a harm level of C sets the penalty level at 1 which equates to the penalty band being £600 to £1,200.

Stage 3

There was no additional score added to the penalty from this stage.

Stage 4

The starting amount was £600 and half the rental income of £85 (which is £42.50) was added, making a civil penalty amount of £642.50.

26. On 27 May 2019 Mr Andrew Huskins submitted representations regarding the Civil Penalty Intention Notices, stating that not applying for a HMO licence was an “oversight”. The Respondent understood that Mr Huskins believed that when its Officer asked for fire certification for the internal doors Mr Huskins wrongly assumed it would mean that he would be unsuccessful in a licence renewal application. Mr Andrew Huskins’ culpability level was dropped to low and final notices were issued on 26 June 2019 for a lower penalty amount each of £642.00. Ms Theresa Ball was issued with final notices of penalty each of £642.50.
27. When Mr Huskins subsequently made his applications on 18 November 2018 the applications were accepted without fire door certification.

Decision

28. The same criminal standard of proof is required for a civil penalty as for prosecution. This means that before taking formal action, a local housing authority should satisfy itself that if the case were to be prosecuted in the Magistrates Court, there would be a realistic prospect of conviction. In order to actually achieve a conviction in the Magistrates Court, the local housing authority would need to be able to demonstrate beyond reasonable doubt that a relevant offence has been committed. Similarly, where a civil penalty is imposed and an appeal is subsequently made to the Tribunal, the local housing authority needs to be able to demonstrate beyond reasonable doubt that the offence had been committed.
29. It was not disputed that each of the Properties is a house in multiple occupation and required a licence. The Applicants did not deny that they did not hold HMO licences for the Properties from the previous licence expiring on 28 August 2018 and renewal applications were not submitted until 18 November 2018. Prima facie

there is the commission of a relevant housing offence regarding each of the Properties.

30. The appeal relies upon the belief by Mr Huskins that renewals would be declined while an issue was unresolved as to whether internal doors required particular fire-proofing. He invites the Tribunal to take account of him assuming the two issues of fire safety and the need to renew the licences were linked and that the issue of the fire safety standards was a legitimate excuse for failure to apply for a licence in a timely manner. The Tribunal found after reviewing all of the evidence that while this may have been an honestly held belief it was erroneous and was neither caused nor encouraged by the Respondent. There was no persuasive evidence that Mr Huskins was misled as to whether there he would be justified in delaying the applications to renew the licences, that there would be no adverse consequence if he did delay, or that in any event any such application would be denied because of the fire-proofing issue. While Mr Huskins outlined his understanding to those effects, there was no corroboration, no writing to that effect or independent supporting evidence. In addition, his representations explained that he was a landlord of 20 years' experience and had held the relevant licence for each of the Properties for 10 years, from which the Tribunal found that he was not ignorant of the licensing regime and of the adverse implications for him by not holding a current licence. Therefore, the Tribunal finds in the circumstances that his belief was not reasonably held, but more particularly it also determines that such a belief if reasonably held would not be a defence to the imposition of a civil penalty in this case – although it may go to mitigation. The Respondent is justified in imposing a sanction regarding the offence concerning each of the Properties.
31. If Mr Huskins thought the HMO licence applications would not have been accepted due to the fire doors, he should have still made an application and allowed the Respondent to accept the application or refuse it. In fact, Mr Huskins submitted his HMO licence applications on 18 November 2018, without the fire door certificate and the applications were successful.
32. While it is not clearly within the appeal request the Tribunal has considered the level of the penalty. The Tribunal considered the MHCLG Guidance. It found that the Respondent's policy on calculating civil penalties to be in line with the MHCLG guidelines, as to which 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.

33. 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'. The Tribunal found that assessment as low - "Offender did not fall far short of their legal duties.....Failings were minor and occurred as an isolated incident" (per the Respondent's Civil Penalty Enforcement Document) - was appropriate. Mr Huskins did make an application, although it remained unduly made for almost 3 months. Mr Huskins was the current licence holder and so was aware of his legal obligations, or ought to have known. The Respondent issued reminders and even if one was not received, as Mr Huskins alleges, he was on notice of the need to renew by application. We do not consider that his failure to respond to the questionnaire or to be interviewed under caution an aggravating factor. The Respondent reduced the level of culpability to the lowest level for both Applicants – for Mr Huskins after his written representations. In consequence the Tribunal was prepared to accept that the appropriate band for the facts of this matter to be low level of culpability. The Respondent's finding of the lowest level of harm ("C") was not inappropriate for the reasons it explained as recorded in paragraph 24. Therefore the Tribunal approves the starting point for the penalty as £600.
34. As to adjustments for financial gain by the Applicants (stage 4 of its calculation process) the Respondent for the offence for each property has taken the rather illogical step of allocating only £42.00 of rent to Mr Huskins and £42.50 of rent to Ms Ball. The Tribunal finds that it would be in line with the Respondent's own policy and within the MHCLG Guidelines for the sum to be referable to the full rent received in the period without licence. That would be from the previous licence expiring until actual renewal. However, the Respondent's calculation is favourable to the Applicants and the Tribunal sees no reason to interfere with it.
35. Ms Ball played no direct part in the proceedings or matters preceding them other than to inform the Respondent by email in February 2019 that she was collecting information and then to make her appeals. However, the Tribunal found that as a result of her co-ownership of the Properties she was a person in control of each of them in accordance with section 72 Housing Act 2004. In consequence she should have been a joint applicant for the licences or procured that she be noted on the licences as an interested person. She is equally culpable as Mr Huskins for the commission of the relevant housing offence and the same factors as above have been taken into account regarding the Tribunal's determination as to her liability.
36. Therefore the Tribunal approves the civil penalties applicable to each of the Properties of £642 for Mr Andrew Huskins and of 642.50 for Ms Theresa Ball respectively and the appeals are dismissed.