FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FY/HNA/2022/0014**
Properties	**:**	**79 Alderney Street, Nottingham, NG7 1HD**
Applicant	**:**	**Nottingham Lettings Ltd**
Representative	**:**	**Mr Richard Clarke, counsel**
Respondent	**:**	**Nottingham City Council**
Representative	**:**	**Mrs Sarah Mills, Solicitor**
Type of application	**:**	**Appeal against a financial penalty under section 249A of the Housing Act 2004**
Tribunal member	**:**	**Judge C Goodall** **Mr A Lavender**
Date and place of hearing	**:**	**17 May 2022 by video hearing platform**
Date of decision	**:**	**13 June 2022**

DECISION

Background

1. Nottingham City Council ("NCC") imposed a financial penalty on Nottingham Lettings Ltd, trading as Belvoir Nottingham Central ("BNC"), by a final notice dated 30 November 2021, in respect of an allegation that BNC were a "person having control of a property, namely 79 Alderney Street, Nottingham NG7 1HD" ("the Property") which it "failed to licence under section 85 of the [Housing Act 2004] which is an offence under section 95(1) of the Act". The penalty was for £3,680 on the face of that notice, but the breakdown and explanation of that amount showed the penalty as £3,870.

2. BNC appealed against the penalty out of time, but time was extended by order of Judge Barlow on 28 February 2022, who also gave directions for the future conduct of the appeal.

3. Both parties provided bundles of documents to the other and to the Tribunal. On 17 May 2022, the Tribunal conducted an oral hearing by video. BNC called evidence from Mr Lloyd Rumbold and Mr Carl Chadwick. Mr Chadwick had not submitted a witness statement. He is a director of BNC, and works on compliance issues with Mr Rumbold, who had provided a statement, and the Tribunal considered that it was in the interests of justice to allow him to supplement Mr Rumbold's evidence so that we heard BNC's full case. Ms Charlotte Cockerton, a compliance officer with NCC, gave evidence for NCC. BNC were represented by Mr Richard Clarke of counsel. NCC was represented by Ms Sarah Mills of NCC's Legal Department.

4. Closing submissions were provided in writing after oral evidence had concluded, due to time restraints.

5. The Tribunal has carefully considered the written documentation and oral evidence. Our decision on the appeal, and the reasons for it, are given below.

The Law

6. The relevant sections of the Housing Act 2004 ("the Act"), so far as this application is concerned are as follows-

> **79 Licensing of houses to which this Part applies**
>
> (1) This Part provides for houses to be licensed by local housing authorities where—
>
> (a) they are houses to which this Part applies (see subsection (2)), and

(b) they are required to be licensed under this Part (see section 85(1)).

(2) This Part applies to a house if—

(a) it is in an area that is for the time being designated under section 80 as subject to selective licensing, and

(b) the whole of it is occupied either—

(i) under a single tenancy or licence that is not an exempt tenancy or licence under subsection (3) or (4)…

85 Requirement for Part 3 houses to be licensed

(1) Every Part 3 house must be licensed under this Part unless—

(a) it is an HMO to which Part 2 applies (see section 55(2)), or

(b) a temporary exemption notice is in force in relation to it under section 86, or…

(c) a management order is in force in relation to it under Chapter 1 or 2 of Part 4.

95 Offences in relation to licensing of houses under this Part

(1) A person commits an offence if he is a person having control of or managing a house which is required to be licensed under this Part (see section 85(1)) but is not so licensed.

(2) …

(3) In proceedings against a person for an offence under sub-section (1) it is a defence that, at the material time-

…

(b) an application for a licence had been duly made in respect of house under section 87,

and that … application was still effective.

(4) In proceedings against a person for an offence under subsection (1) or (2) it is a defence that he had a reasonable excuse—

(a) for having control of or managing the house in the circumstances mentioned in subsection (1), or

(b) for failing to comply with the condition, as the case may be.

99 Meaning of "house" etc.

In this Part—

"dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling;

"house" means a building or part of a building consisting of one or more dwellings;

and references to a house include (where the context permits) any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it).

263 Meaning of "person having control" and "person managing" etc

(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) "rack-rent" means a rent which is not less than two-thirds of the full net annual value of the premises.

(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises—

(a) receives (whether directly or through an agent or trustee) rents or other payments from—

(i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; and

(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;

and includes, where those rents or other payments are received through another person as agent or trustee, that other person.

249A Financial penalties for certain housing offences in England

(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.

(2) In this section "relevant housing offence" means an offence under—

...
(c) section 95 (licensing of houses under Part 3),
...

(3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.

(4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.

(5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if—

(a) the person has been convicted of the offence in respect of that conduct, or

(b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.

(6) Schedule 13A deals with—

(a) the procedure for imposing financial penalties,

(b) appeals against financial penalties,

(c) enforcement of financial penalties, and

(d) guidance in respect of financial penalties.

...

7. Schedule 13A of the Act provides:

SCHEDULE 13A Financial penalties under section 249A

Notice of intent

1 Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").

2 (1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—

(a) at any time when the conduct is continuing, or

(b) within the period of 6 months beginning with the last day on which the conduct occurs.

(3) For the purposes of this paragraph a person's conduct includes a failure to act.

3 The notice of intent must set out—

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the financial penalty, and

(c) information about the right to make representations under paragraph 4.

Right to make representations

4 (1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ("the period for representations").

Final notice

5 After the end of the period for representations the local housing authority must—

(a) decide whether to impose a financial penalty on the person, and

(b) if it decides to impose a financial penalty, decide the amount of the penalty.

6 If the authority decides to impose a financial penalty on the person, it must give the person a notice (a "final notice") imposing that penalty.

7 The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.

8 The final notice must set out—

(a) the amount of the financial penalty,

(b) the reasons for imposing the penalty,

(c) information about how to pay the penalty,

(d) the period for payment of the penalty,

(e) information about rights of appeal, and

(f) the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

9 (1) A local housing authority may at any time—

(a) withdraw a notice of intent or final notice, or

(b) reduce the amount specified in a notice of intent or final notice.

(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given.

Appeals

10 (1) A person to whom a final notice is given may appeal to the First-tier Tribunal against—

(a) the decision to impose the penalty, or

(b) the amount of the penalty.

(2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(3) An appeal under this paragraph—

(a) is to be a re-hearing of the local housing authority's decision, but

(b) may be determined having regard to matters of which the authority was unaware.

(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed

7. There have been a number of relevant cases on the reasonable excuse defence in section 95 of the Act. Those brought to the Tribunal's attention by the parties are:

(a) Palmview Estates v Thurrock Council [2021] EWCA Civ 1871. This Court of Appeal case established that the question for the Tribunal to consider is whether there was a reasonable excuse for BNC to have had control of the Property without a licence. The key passage is:

> 31. There is no definition of "reasonable excuse" in the 2004 Act . However, it seems to me that the plain meaning of the words used in the sub-section as a whole and taken in context is that there is a defence if, viewed objectively, there is a reasonable excuse for having control of or managing an HMO without a licence. It seems to me that it is obvious, therefore, that the reasonable excuse must relate to activity of controlling or managing the HMO without a licence. It is that activity which is the kernel of the offence in section 72(1).
>
> ...
>
> 34. However, the offence to which the defence of having a reasonable excuse relates, is not framed in terms of failure to apply for a licence. The prohibited activity is controlling or managing an HMO without a licence. The reasonable excuse is framed expressly in terms of the offence itself. It must relate to the prohibited activity. As the UT Judge pointed out at [38] of her decision, not applying for a licence and controlling or managing an HMO without a licence are not the same thing. They are not logically concomitant: a person might have a perfectly reasonable excuse for not applying for a licence which does not (everything else being equal) give that person a reasonable excuse to manage or control those premises as an HMO without that licence.

(b) I R Management Services Ltd v Salford City Council [2020] UKUT 81(LC). This case established that the burden of showing a reasonable excuse is on the Appellant, on a balance of probabilities.

(c) D'Costa v D'Andrea [2021] UKUT 144 (LC), in which a reasonable excuse defence succeeded when a local authority representative informed the landlord that no licence was needed.

(d) Thurrock Council v Daoudi [2020] UKUT 209 (LC), in which judicial comment to the effect that lack of knowledge of the requirement to licence might in certain circumstances constitute a reasonable excuse.

Facts

8. On 1 August 2018, a selective licensing scheme, under section 80 of the Act, came into force in respect of a designated area in Nottingham which included the Property. By virtue of this designation, any privately rented properties under a single tenancy which is not an exempt tenancy or a licence became licensable under the scheme. This was not disputed.

9. A copy of a tenancy agreement for the Property dated 12 March 2008 was produced by the Respondent (it having been provided to the Respondent in response to a requirement to produce it, dated 2 July 2021). The agreement is for a letting of the whole of the Property for a term of six months. The tenancy agreement was signed on behalf of the freehold owner of the Property ("the Owner") whose address is given as c/o Belvoir Nottingham Central. BNC are named as the landlord's agent in the agreement. Rent is required to be paid to the Landlord's Agent.

10. Official copies from H M Land Registry confirmed that the Owner has a long leasehold interest in the Property expiring in 2083.

11. In a response to a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 from the Owner, confirmation is provided that the current tenant as at 2 July 2021 is the same tenant as was granted the tenancy under the agreement dated 12 March 2008.

12. BNC is the appointed manager of the Property, which is confirmed in a management agreement dated 9 August 2006 made between the Owner and BNC. Paragraph 4.3.1 confirms that BNC "will receive the rent on your behalf" and forward the balance after commission and any other deductions to the Owner.

13. BNC is a franchised estate agent and property manager. Two directors attended the hearing, Mr Lloyd Rumbold, and Mr Carl Chadwick. In evidence, they told the Tribunal that they employed a Branch Manager whose job was to manage the office operations, including reading and dealing with all incoming post. If the Branch Manager had a concern about any incoming post, he would escalate the item for the attention of Mr Rumbold, who would action it as necessary.

14. The Tribunal was informed by BNC that it manages around 250 properties. BNC personnel were aware of the selective licensing scheme; indeed in their written and oral evidence, Mr Rumbold, confirmed that they provided no less than seven advice guides to their clients on selective licensing between 7 February 2017 and 16 October 2018, and facilitated face to face meetings for clients with NCC on the subject, and provided a monthly newsletter. They attended all the consultation meetings held by NCC as it was planning the introduction of the scheme. Their case is that by virtue of these communications to the Owner, she would have been aware of her obligation to licence the Property.

15. Mr Rumbold's evidence was that in the first two months of the scheme coming into effect, NCC advised them that only the owner of a property could make an application to licence it - in his words, the applicant's "name had to be on the deed". He told us that at least in the early days of the scheme, NCC's procedures caused him concern. He was aware of contradictions in the requirements needed for an application for a licence. BNC could not make applications for a licence either on their own or a clients behalf because they could not make payment of the fee, as a bank card was required rather than payment being possible with a BACS payment, which would be the more likely payment procedure available to an agent. They did not possess all the information required by NCC, such as whether clients were on the sex offenders register, CRB checks, details of insurance arrangements, copies of the title deeds, and photo ID of the property owner. It seemed to be impossible to save applications on NCC's computer system, and there was no way of pre-empting all the information that was required.

16. For these reasons, BNC eventually decided, in the early days of the scheme, that they would not become involved in the actual application process, but would advise their clients of the need to licence their properties.

17. BNC produced an annual document for their clients which they describe as a "property passport". The property passport for 2021/22 for the Property has been provided to the Tribunal. It was sent under cover of a letter dated 19 May 2021. It contains information relating to selective licensing, which confirms that the Property is in an area of selective licensing, and in the reply to a box labelled "Valid Selective License Held?", the entry is "LL application".

18. BNC's evidence was therefore that from inception of the selective licensing scheme, they had informed the Owner of her obligation to licence the Property, and they had no reason to believe that she had not done so. They considered that NCC expected and required that the landlord should apply for and obtain the licence.

19. However, no evidence was before the Tribunal of any contact by BNC with the Owner regarding licensing prior to July 2021, apart from the generic

advice summarised above, the property passport, and an email of 11 March 2021 which, in the Tribunal's bundle, has no content.

20. NCC were investigating properties in the selective licensing area around the Property through a desktop study in or around June 2021. They had reason to believe, from this study and from a Council Tax search, that the Property was occupied by a tenant, and was managed by BNC, so that it might require a licence.

21. On 1 July 2021, Ms Cockerton made a phone call to BNC during which they confirmed that they managed the Property. She said there was no licence in place and an application for a licence would need to be submitted as soon as possible.

22. On 2 July 2021, NCC wrote to BNC. They sent three documents. The first was a letter, addressed to the Company Secretary or Clerk at BNC, which was headed:

> "Licensing of your Private Rented Property"

23. The first paragraph of the letter stated:

> "Enquiries have identified you as the managing agent of the above property which is required to be licensed… However, the council's records show that the property is not licensed and an application for a licence has not been received."

24. The letter continued later as follows:

> "It is a criminal offence to operate a licensable property without a licence. Failure to apply for a licence could result in a Civil Penalty Notice of up to £30,000 or a prosecution at court which could incur an unlimited fine…"

25. In bold type, made more prominent by being in a box with a heading in a large font size, the letter stated:

> "You must submit a licence application within 10 days of the date of this letter or make an application for a temporary exemption. Should you fail to do so, the Council may take enforcement action against you for the total period of time the Property has been unlicensed."

26. The other two documents were firstly a notice under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 seeking details of the nature of BNC's interest in the Property, details of all other interests in it, and details of persons who manage it and who occupy it, and secondly a Notice under section 235 of the Act seeking copies of the tenancy agreements and the management contract. The section 235 notice was addressed to BNC as "a person who has an estate or interest in the premises".

27. The letters were accompanied by a guidance note headed "Guidance Notes for Landlords" giving generic information about NCC's licensing schemes. The third scheme identified is the selective licensing scheme. The note informs landlord's that if "you" privately rent "your" property, and you are not within either of the other schemes but the property is in a selective licensing area "you" will be required to apply for a licence.

28. There is no evidence of any pro-active response on the part of BNC to the 2 July correspondence from NCC. In evidence, Mr Rumbold said he believed the letter was a copy for their information of a letter to the Owner, to whom he considered it primarily applied. BNC were not unduly concerned to hear that the Property was not licensed as they understood applications took around 16 months to process.

29. It became apparent during cross-examination that the post at BNC's office was opened by the Branch Manager and it would only be shown to Mr Rumbold or Mr Chadwick if he considered that it required escalating to director level. The letters of 2 and 22 July 2021 were not so escalated, so Mr Rumbold and Mr Chadwick were not aware of them at the time.

30. BNC were then contacted by the Owner on 5 July 2021 who said "I received a notice from NCC about producing documents for their Environmental Health Community Protection unit… The Council demand that I send them the current tenancy agreement and the management agreement for the property. I think this is something [BNC] do."

31. The BNC Branch Manager responded to the Owner the same day confirming he would send the tenancy agreement and recommending that the Owner send the property passport to NCC. In a later email that same day, the Branch Manager sent the Owner a copy of the tenancy agreement and also attached a letter "with reference to the selective licence your property requires".

32. On 6 July 2021, there were further email exchanges between the Branch Manager and the Owner. In the first, the Branch Manager reminded the Owner she needed to apply for a licence and gave a link to NCC's web-site for further information. Later that day, the Branch Manager provided copies to the Owner of an EPC and EICR and confirmed there was no need for a gas safety certificate as there is no gas in the Property. This would suggest that the Owner was, that day, at least assembling the documentation needed to apply for a licence. NCC were not copied in to these emails.

33. Mr Rumbold and Mr Chadwick told the Tribunal that the Branch Manager knew it was not possible for BNC to apply for a licence itself. It had no interest in the Property. He thought that the Owner was applying for the licence. They were critical that none of the correspondence from NCC made it explicit that BNC were "on the hook" in relation to the obligation

to licence. They accepted that their Branch Manager did not realise the seriousness of the situation. The Branch Manager did not give evidence, so the evidence given to us by Mr Rumbold and Mr Chadwick of his state of mind through this process is not direct evidence.

34. Ms Cockerton's evidence is that no application for a licence had been made by 21 July 2021, so she rang BNC for an update. She was told that they had made the Owner aware that a licence application needed to be submitted for the Property.

35. The documentary evidence suggests that NCC had also sent an email to BNC on 21 July 2021, for BNC emailed the Owner on 21 July 2021 to say "we've received the attached email from the council with regards to your selective licence." No email of that date was provided to the Tribunal and the BNC witnesses did not know of one. Whatever it said, there were two emails exchanged between the Branch Manager and the Owner about it, in which the Branch Manager recommended that the Owner should reply or he could reply "cc'ing you in". This strongly suggests there was an email.

36. What is clear is that on 22 July 2021, NCC sent further correspondence which appear to have been letters sent by post to BNC and probably to the Owner as well. Ms Cockerton said this was a "final warning letter" introduced into their normal procedure due to the Covid pandemic, giving a final opportunity to apply for a licence to avoid further enforcement action.

37. The letter is again addressed to BNC. There is no reference on it to it being a copy of a letter sent to the Owner. It is again headed "Licensing of your Private Rented Property". In large bold type, given prominence by being in a box, right at the top of the letter, the words "Action Required" appear.

38. The core content of the letter is:

> "You were given a deadline of 10 working days to submit a licence application. According to our records checked 22 July 2021 we have not received a licence application for the property, therefore the property is operating without a licence.
>
> The Authority has noted that despite previous correspondence to you regarding the requirement to licence your rental property, a licence application has still not been submitted. The Authority is providing you with a final period for you to submit a licence application, the deadline for receipt in **10 working days**. If at that point in time you have still not made an application the Council may take enforcement action against you for the total period of time the Property has been unlicensed."

39. Again, there is no evidence of a direct response by BNC to this letter.

40. The Tribunal does however have copies of emails on 6, 9 & 19 August 2021 between NCC and the Owner. BNC was not copied in to these exchanges. On 6 August 2021, NCC confirmed they had received a copy of the tenancy agreement and completed section 16 information request from the Owner, but they told the Owner that they had not received a licence application. The Owner replied on 9 August 2021 to say she had sent all the "documentation for the application" in the post.

41. On 19 August 2021, NCC emailed the Owner to say that no paper application for a licence had been received. Details of how to apply for a paper application form were given, as were detail of how to contact the licensing team directly. The Owner replied asking for information on specifically what NCC required her to do.

42. NCC responded by asking the Owner to clarify what documentation had been sent. Clearly one pack of documentation had been sent and received as acknowledged in the NCC email of 6 August. It is not possible to establish whether the Owner had sent a second pack which had been lost in the post, or whether she was referring to the pack of documents that was received when she said she had sent "all the documentation for the application" in the post. One way or another, the emails are confusing, and the Owner ended up emailing NCC on 20 August 2021 simply saying "please send a list of the documents you require".

43. NCC replied on the same date and explained that the selective licensing application is separate to the requests under section 16 and section 235 and that it can be completed online or a paper application form can be requested.

44. Whilst BNC may have been unaware of the emails exchanges between 6 and 19 August 2021 referred to above, NCC's evidence is that Ms Cockerton phoned BNC again on 19 August 2021 to inform them that a licence application had still not been received. She said she was told BNC would advise the Owner how to submit an application.

45. The BNC Branch Manager emailed the Owner on 20 August 2021 to say NCC had chased the selective licence application. He recommended that the Owner provide NCC with an update. The Owner replied to explain she had sent NCC "everything you sent me" but NCC say they didn't receive it. She said she would send it again digitally, but she is not clear what they require. She said she had asked again for a list of documents.

46. By the end of 20 August 2021, the Owner said she didn't know what documents NCC required, and NCC said they didn't know what documents the Owner was saying she had already sent. Neither was able to answer the others query. Confusion reigned.

47. The mystery of the missing documents was solved on 26 August 2021. NCC telephoned BNC to say the documents that had been sent had been

received. BNC (still under the signature of the Branch Manager) then emailed the owner with the news (cc to NCC). The email continued:

> "However they need you to complete the online licensing application, this is the main outstanding area."

48. A link to the application form was provided which leads directly to an application process for a selective licence.

49. In what we assume was the same call from NCC to BNC, NCC also requested outstanding information that had been requested in the 2 July 2021 letter. They also emailed further copies of the notices to them that day.

50. On 2 September 2021, Ms Cockerton made a phone call to BNC to tell them that no application for a licence had been made, to ask for the outstanding documentation that had been requested on 2 July 2021, and to remind them of their duty to licence as a managing agent.

51. On 6 September 2021, NCC emailed BNC to repeat their request for full compliance with the statutory notices under sections 16 and 235, and reminding them that it is an offence to fail to comply. NCC's evidence is that they received a phone call later that day to advise that the documentation would be sent that day. NCC confirmed that the outstanding documentation was received on 10 September 2021. From NCC's point of view, the crucial document was a copy of the management agreement, which confirmed that BNC receive the rack rent for the Property.

52. On 14 September 2021, NCC made a decision to take further enforcement action, having reviewed their policy and tested that decision against the Code of Crown Prosecutors evidential and public interest tests.

53. On 17 September 2021, Ms Cockerton checked to see if a licence application had been received. None had.

54. We interrupt this chronological narrative to record Ms Cockerton's generic evidence concerning licence applications. She told us that guidance on NCC's website confirms that anyone can be an applicant for a licence as long as they have the information required by NCC about the Property and personnel. A lot of applications for licences have been made by managers. Ms Cockerton confirmed that no application for a licence had been made for the Property before she started to chase an application on 1 July 2021. She confirmed that no financial penalties would have been imposed had BNC (or indeed the Owner) complied with the time limit set out in the letter of 2 July 2021.

55. Ms Cockerton confirmed that she is not part of the licensing application process team so is not aware of the detailed requirements for submission

of a licence. She accepted the possibility that a manging agents application for a licence might have to be supported by an Owner's declaration.

56. On 27 October 2021, a Notice of Intent to impose a financial penalty was served on BNC. The Notice was addressed to BNC. It stated clearly that NCC was satisfied beyond reasonable doubt that BNC had committed an offence and that a financial penalty was being imposed, the amount of which was to be £4,910.00. The specific allegation in the Notice was:

> "You as a person having control of a premises, namely 79 Alderney Street, Nottingham, NG7 1HD, failed to licence it under section 85 of the Act which is an offence under section 95(1) of the Act."

57. The Notice explained that representations could be made concerning the proposed financial penalty within 28 of the Notice. It also contained an Appendix giving reasons for NCC's decision to impose a financial penalty.

58. There is documentation in the bundles that suggests that the Owner was also served with a Notice of Intent to impose a financial penalty. The penalty sum was £6,000.00. There is no further information clarifying whether a Final Notice was served on the Owner.

59. On 3 November 2021, the Owner submitted an application to licence the Property.

60. No representations were received from BNC following the Issue of their Notice of Intent. A Notice of final decision to impose a financial penalty was served on 30 November 2021, addressed to BNC. This Notice imposed a financial penalty of £3,680.00, though an accompanying financial penalty calculation gave the penalty as £3,870.00. It also specified the offence and gave reasons for the penalty. Details of appeal rights were also given, as was information about how to pay, the time by when the penalty should be paid, and the consequences of failure to pay.

61. The calculation of the penalty was explained in Schedule B of the Final Notice. NCC considered BNC's culpability level to be High, and the seriousness of harm element to be in Band C (see NCC's policy position set out below). This placed the offence in Band 3, which carried a mid-point starting point penalty of £4,500.00. Mitigating factors reduced this to £3,000.00. Aggravating factors increased it to £3,600.00. Financial benefit was calculated as £270.00. This resulted in a penalty of £3,870.00.

62. Mr Rumbold's and Mr Chadwick's evidence was that they did not understand the Notice of Intent and the Notice of final decision to be applicable to BNC. They considered that they were copies of notifications to the Owner and they did not consider that a financial penalty was being imposed upon BNC. In fact, it was not until 12 January 2022 that BNC realised a financial penalty was being imposed, at which point they sought permission to appeal.

Submissions

63. On behalf of BNC, Mr Clarke made thorough and detailed written submissions. An overview follows which does not do justice to the detailed submissions, but we restrict the content of this decision for reasons that will be apparent below. In overview:

    (a) Between 1 August 2018 and 1 July 2021, BNC reasonably believed that the Owner was making the application for a licence, and that NCC expected licence applications to be made by landlords. BNC had made the Owner aware of her obligation to licence. NCC procedures put hurdles in the way of managing agents being able to make licence applications on their own behalf.

    (b) After 1 July 2021, BNC was doing everything it could to procure a licence application from the Owner. Only one application was required, and if the Owner made the application, there was no requirement for BNC to do so. Mr Clarke drew the Tribunal's attention to the eight interactions between BNC and the Owner between 5 July and 26 August 2021 in which she had been reminded that she needed to apply for a licence. In one of those interactions, on 6 July 2021, BNC provided relevant documents to the Owner to use in her application. Mr Clarke also pointed out that BNC's evidence established that they were never clear that a penalty was being imposed upon them until 12 January 2022.

64. NCC also made written submissions. NCC urged the Tribunal to take the view that the constituent elements of an offence under section 95 of the Act had been made out as from 1 August 2018 and the issue was whether there was a reasonable excuse for BNC failing to apply for a licence. As to the period prior to 1 July 2021, NCC referred to the failure by BNC to check whether an application had been made.

65. Regarding the period after 1 July 2021, NCC submitted that the evidence showed a failure by BNC's Branch Manager to appreciate the import of the letters received. The point was made that BNC had decided not to call the Branch Manager, who was the person who handled the correspondence and negotiations between 1 July 2021 and the imposition of the financial penalties, and the person who should have explained why BNC did not make an application for a licence.

Quantum of the financial penalty – NCC policy

66. The financial penalty imposed was either £3,680 or £3,870. Both amounts were stated in the documentation provided to the Tribunal. To understand how NCC arrived at any figure, reference must be made to the Safer Housing Enforcement Policy document setting out NCC's financial penalty model, from which the figure for a financial penalty is derived. The

Tribunal has been provided with version 2 of this policy, dated 17 December 2020.

67. The policy seeks to define a "just and proportionate" penalty for any offence, the maximum penalty for any one offence being £30,000. The maximum is reserved for the very worst offences. The level of penalty is informed by reference to seven factors, being severity (or seriousness), culpability, extent of harm, punishment, deterrence of offender, deterrence of others, and removal of financial benefit.

68. References in the policy to "landlords" include a person having control of property.

69. Two of these factors – severity and culpability -are given more detailed analysis.

70. Severity or seriousness segregates offences into three levels, being levels A, B and C. The levels use the HHSRS rating system, with Class I and Class II harms being in level A, Class III and Class IV harms being in band B, and all other cases being in Band C.

71. Four levels of culpability are identified, being Very High, High, Medium, and Low.

72. Very High culpability means a deliberate breach or flagrant disregard for the law. High means actual foresight or wilful blindness to risk of offending with a landlord being reckless as to whether harm is caused. Medium means that an offence has been committed through an act or omission which a person exercising reasonable care would not commit, such as failure to take reasonable care to implement and enforce systems to avoid the offence. Low means an offence with little or no fault on the part of the landlord.

73. The seriousness level and the culpability band selected for an offence are then used to fix a financial band into which a financial penalty will fall, with a starting point being at the mid-point in each band. There are 5 bands.

74. Further adjustments are then made to reflect aggravating and mitigating factors. A non-exhaustive list of these factors is provided.

75. Finally an addition to the financial penalty is made being a percentage of the amount of financial benefit an offender has derived from or during the commission of the offence. The percentage added depends into which of the penalty bands the offence falls, with 20% deduction for Band 1, rising to 100% for Band 5.

Discussion and determination – commission of an offence

76. A person having control of or managing a property which is required to be licensed commits an offence under section 95 of the Act if the property is not licensed.

77. In this case, there are 6 elements to the offence:

(a) That the Property must be a "house";

(b) That the Property must be in area which the local authority has designated as an area of selective licensing;

(c) That the Property is let under a single tenancy or licence that is not an exempt tenancy or licence;

(d) That the Property is not licensed;

(e) That BNC is "a person having control" of the Property;

(f) That there is no reasonable excuse for BNC having control of the Property without it being licensed.

78. The Tribunal is satisfied beyond reasonable doubt that the elements (a) to (e) in the preceding paragraph are all met, such that the offence under section 95 of the Act is made out, subject to the reasonable excuse defence.

79. BNC accepted that the Property was in an area designated for selective licensing, satisfying element (b). The evidence to support the other elements is the documentary and oral evidence. The tenancy agreement, which is a tenancy of a dwelling to a single person, confirms elements (a) and (c). The flat is part of a building, consisting of a dwelling, which therefore falls under the definition of "house" in section 99 of the Act. The Tribunal accepts the evidence of NCC that the Property was not licensed at the material times set out in the evidence, satisfying element (d). The management agreement between the Owner and BNC confirms that BNC receive the rack rent, meaning that by virtue of section 263 of the Act it is a person in control of the Property, satisfying element (e).

80. The issue is thus whether there is a reasonable excuse for failing to licence the Property (element (f).

81. The Tribunal agrees with Mr Clarke that there are two distinct periods for consideration, namely from the date the selective licensing scheme came into effect (1 August 2018) until 30 June 2021, and the period 1 July 2021 when direct contact was made with BNC until 3 November 2021 when an application for a licence was finally made.

1 August 2018 to 30 June 2021

82. Our task is to assess whether BNC had a reasonable excuse for being in control of the Property during this period without a licence in place. The

burden of establishing a reasonable excuse is upon BNC on the balance of probabilities.

83. During this period, BNC's case is that they had informed the Owner that she should apply for a licence and had no reason for believing she had not done so. Of course, had she made an application, no offence under section 95 would have been committed.

84. Not only did BNC believe that the Owner would have made an application, but their case is also that NCC was specifically eliciting applications from Owners rather than managing agents. Their evidence was to the effect that there were insuperable obstacles in the way of licensing applications by managing agents, at least in the early days of the scheme, and indeed that they were expressly told that only owners could apply for licences. Mr Rumbold's evidence in paragraph 15 provides the details of the difficulties that were being experienced.

85. BNC say they were unconcerned that the Owner had not provided evidence of having obtained a licence because licensing applications were taking significant time to process. They were unable to check directly with NCC because of data protection issues.

86. NCC's case is that there was no obstacle in the way of managing agents applications for licences. BNC should have known of the obligation for the Property to be licensed, and should have ensured a licence application was made. There were no provisions which prevented NCC informing a managing agent whether a licence application had been received.

87. In some respects, the Tribunal does not accept BNC's evidence in relation to this period. In our view it is unlikely that BNC were informed that only landlords could apply for a licence, as the Act is clear that the obligation to licence extends to a wider group, including managing agents if they receive the rack rent. BNC's evidence on this point was vague and unreliable. No date or dates when this advice was provided were given, and no person or document acting on behalf of NCC was identified.

88. Nevertheless, we considered that there was a lack of clarity on the part of NCC about the application process for managing agents, and there were hurdles placed in their way, including requiring information that was unlikely to be known by managing agents. We have therefore concluded that it was not unreasonable for BNC to have formed a view that NCC were not encouraging managing agents to apply for licences as a first resort, and were encouraging owners to apply instead. Coupled with BNC's belief that the Owner understood that she had an obligation to apply for a licence, and in the absence of any specific communication from NCC concerning the absence of a licence for the Property, we have reached a finely balanced decision that BNC had a reasonable excuse for not themselves applying for a licence in the period 1 August 2018 to 30 June 2021.

1 July 2021 to 3 November 2021

89. The Tribunal's view is that BNC's reasonable excuse for having control of the Property without a licence after 1 July 2021 requires re-evaluating following the contacts it had with NCC on and after that date.

90. Ms Cockerton's telephone call to BNC on 1 July 2021, and the NCC letters of 2 July 2021, sent to "The Company Secretary or Clerk", Belvoir Nottingham Central informed the BNC Branch Manager that the Property was not licensed. In our view, a degree of knowledge and awareness of the consequences following from the fact that the Property was unlicensed can and should be imputed to the Branch Manager and his superiors. In our view, BNC should have been aware that as a managing agent in receipt of the rack rent for the Property (and so being a person in control of the Property), they had a dual responsibility with the Owner to ensure the Property was licensed. Failure to licence it was an offence punishable by criminal conviction or a financial penalty, that offence being committed just as much by BNC as by the Owner.

91. In our view, it is significant that BNC were so integrally involved in communications to introduce the selective licensing scheme to its clients at its inception. It is reasonable to suppose that this involvement indicated good awareness of how the scheme worked, and the impact of failure to licence.

92. If it was the case that the Branch Manager did not realise the consequences of the absence of a licence, it was incumbent upon the BNC directors, in our view, to provide adequate training, or alternatively to make arrangements for letters that carried legal risk to be seen by a person who did have the appropriate knowledge of the impact of the letters.

93. We do not find that there was any real ambiguity about the meaning of the letter of 2 July 2021, and we reject the proposition that it was reasonable to construe it as a copy of a letter to the Owner, or that it failed to explain its impact upon BNC. In the first place, the letter was addressed to BNC. Secondly, it contained the phrase "Enquiries have identified you as the managing agent of the above property which is required to be licensed…". This phrase could not apply to the Owner.

94. The letter was sufficiently clear to indicate that the Property was not licensed and that BNC had some responsibility on their own account to regularise the position. We are not persuaded that there was any real ambiguity about other phrases in the letter, such as the reference to "your private rented property", that would result in an interpretation by BNC, as a reasonably competent professional managing agent with knowledge of the selective licensing legislation, to the effect that the letter did not apply to it.

95. In our view, the 2 July 2021 letter alerted BNC to a significant commercial and legal risk, and to avoid committing an offence, it was at that point

incumbent upon them to ensure a licence application was made within the time limit given in the letter of 2 July 2021, namely 10 days from the date of the letter (i.e. 12 July 2021).

96. BNC had two routes available to ensure the Property was licensed. They could apply for a licence themselves, or they could ensure that the Owner applied herself. We reject the suggestion that BNC was incapable of applying for a licence itself at this point. There were undoubtedly hurdles to overcome, including the need for some information only in the possession of the Owner, but we have seen no evidence that BNC sought this information from the Owner, which they could have done. While there may have been concerns over making an application online there was the opportunity to make a paper application. Alternatively, they could have pro-actively worked with the Owner to ensure that she completed her application. There is no evidence that BNC offered to meet the Owner to progress the application together, or sought full details of the problems the Owner was having with her application, which they could have done.

97. It is very telling to us that at no point did BNC engage proactively with NCC on their own behalf to explain the hurdles either they or the Owner were having with the application process. Our view of this case may well have been very different had BNC written to NCC to say they were aware that the Property should have a licence, that they were potentially liable to obtain it, but that despite their best endeavours, they were unable to complete a licence application, and to explain the reasons for this.

98. In our view, after 12 July 2021, there was no reasonable excuse for BNC to continue to have control of the Property without a licence having been applied for (which of course is the point at which any offence ceases, by virtue of section 95(3)(b) of the Act).

99. The facts show that BNC were then made aware that no licence had been applied for no less than seven times after 2 July 2021, being a telephone call from NCC on 21 July 2021, an email on 21 July 2021, the letter dated 22 July 2021, an email on 19 August 2021 and a phone call on the same dated, a telephone call on 26 August 2021, and another telephone call on 2 September 2021.

100. It does not appear to the Tribunal that the BNC staff member who handled this case was sufficiently aware of the requirements of the selective licensing scheme to have realised the consequences of taking the very relaxed approach he did. Unfortunately, he made assumptions to the effect that the correspondence and telephone calls referred to in the evidence did not have an impact upon BNC. Sadly, these assumptions were erroneous.

101. In our view the eight contacts BNC had with the Owner between 5 July and 26 August 2021 were illustrative of BNC's failure to understand their position. Merely reminding the Owner that she should apply for the licence missed the point. For a reasonable excuse defence to work in that

situation, in our view, would have required much more urgent and intense interactions, designed to make sure and certain that a licence application was made. To us, BNC should have realised that the Owner was really struggling with her application. They should have intervened positively and decisively to identify what was required to complete an application, and they should have become involved in positively assisting the Owner, rather than merely reminding her she needed to apply for the licence.

102. It was open to BNC to pro-actively contact NCC to confirm whether the property had been licenced or whether an application had been received. We do not consider that GDPR requirements would have prevented such information being provided by NCC. Since this incident it was given in evidence that BNC have changed their policy from accepting assurances that a landlord has applied for a licence at face value, to requiring documentary evidence of such an application being made.

103. Our view is that there was no reasonable excuse for BNC to have failed to ensure a licence application was submitted, so as to ensure that the Property was not unlicensed, after 12 July 2021.

104. Our conclusion is that between 12 July 2021 and 3 November 2021, BNC committed an offence under section 95 of the Act that, being a person having control of a property, namely 79 Alderney Street Nottingham, it failed to licence the property under section 85 of the Act. The defence of reasonable excuse under section 95(4) of the Act did not apply during those dates.

Amount of the financial penalty

105. The Tribunal determines that, an offence under section 95 of the Act having been committed, it is appropriate to impose a financial penalty upon BNC.

106. The Tribunal is satisfied that paragraphs 1 to 8 inclusive of Schedule 13A to the Act were complied with by NCC. No issues regarding these procedural requirements was raised by BNC.

107. We have to consider the imposition of a financial penalty by way of re-hearing. We must confirm, vary, or cancel the final notice.

108. Having heard the evidence and representations of BNC during the hearing, we take a different view from NCC as to the final amount to impose by way of financial penalty.

109. Our conclusion above concerning the reason that BNC committed the offence under section 95 was that it failed to fully comprehend the extent of the legal obligation it had to ensure that the Property was licensed. Our view is that failure was a lack of knowledge or training on the part of the office staff, and a lack of adequate systems to bring legal risk to the attention of the directors of BNC. We do not consider that there was a

deliberate flouting of the licensing law, or that BNC was reckless in relation to its legal obligations. We do consider that there was a failure to take reasonable care to implement and enforce proper systems to manage risk and avoid committing an offence.

110. Applying NCC's policy to this case, we agree that the seriousness of harm falls within level C in the policy. We do not agree that culpability fell within the "High" category; the appropriate category in our view is "Medium". Our conclusion in paragraph 109 above is one of the distinct criteria within the definition of cases that fall into the Medium category.

111. Using NCC's table for penalty bands, the band for a level C category for seriousness, and category "Medium" for culpability is £1,200 - £3,000, with a starting point of £2,075. We adopt the starting point.

112. Adjusting for aggravating factors, though the list is non-exhaustive, we have not strayed beyond it. The only aggravating factor relevant, in our view, is that poor management practice is indicated, this again being in respect of the failure to put adequate risk management practices in place and to ensure that staff are fully aware of the law. We add £350 to reflect this factor.

113. So far as mitigating factors are concerned, we agree with NCC that some reduction in the financial penalty is appropriate to reflect the lack of hazards at the Property, eventual compliance with statutory notices, and existence of the required certification to show that installations at the Property were in a safe working condition. We decrease the penalty by £700, being the same proportion of the starting point that NCC used in their own calculation.

114. Finally, we add a sum to deprive BNC of financial benefit for the period of the commission of the offence (12 July to 3 November). Rent for the Property was £395 per month. BNC's commission was 10%. Vat on the fees has not been taken into account. This is on the basis that vat is paid or remitted to the Government on behalf of the buyer. Therefore, the company does benefit directly from the vat. The deprivation rate, according to the NCC policy, is 40% for a Band 2 offence. We calculate the addition to be £63.20.

115. The financial penalty is therefore varied to £1,788.20, calculated as follows:

Starting point tariff	2,075.00
Add for aggravating factors	350.00
Deduct for mitigating factors	(700.00)
Add for financial benefit	63.20
Total	1,788.20

Summary

116. We find that BNC committed an offence under section 95 of the Act between the dates 1 July 2021 and 3 November 2021.

117. We vary the financial penalty imposed by NCC to the sum of £1,788.20.

Appeal

118. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)