FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BC/HNA/2019/0041**
Property	**:**	**Flat 1, 8 Holstock Road, Ilford, Essex IG1 1LG**
Applicant	**:**	**Tizero Limited**
Representative	**:**	**Michael Labinso, director of Applicant company**
Respondent	**:**	**London Borough of Redbridge**
Representative	**:**	**Yasir Afzal (Enforcement Legal Officer) and Anand Punj (Senior Enforcement Officer)**
Also in attendance	**:**	**Ade Ogunkoya and Kay Williams (in support of Mr Labinso) and Norma Pink and Tarkan Bouokbashi (Council Enforcement Officers)**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A of, and Schedule 13A to, the Housing Act 2004**
Tribunal Members	**:**	**Judge P Korn** **Mr A Harris FRICS FCIArb LLM**
Date and venue of Hearing	**:**	**28th June 2019 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**4th July 2019**

DECISION

Decision of the tribunal

(1) The tribunal cancels the final notice and therefore the financial penalty is not payable at all.

(2) Pursuant to paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 the tribunal orders the Respondent to reimburse to the Applicant its application fee of £100.00 and the hearing fee of £200.00.

Introduction

1. The Applicant has appealed against a financial penalty imposed on it by the Respondent under section 249A of the Housing Act 2004 ("**the 2004 Act**").

2. The Respondent introduced a selective licensing scheme on 13th July 2017. One of its investigating officers visited the Property on 9th November 2018 and witnessed what she considered to be a breach of section 95(1) of the 2004 Act in that the Property was a house required under section 85(1) of the 2004 Act to be licensed but was not so licensed.

3. The Respondent then served on the Applicant a "Notice of Intent to Issue a Financial Penalty" on 8th January 2019 on the basis that the Applicant was managing the Property. The proposed financial penalty was £5,000.00. The Applicant made written representations on 10th January 2019 and the Respondent then served a "Final Notice to Issue a Financial Penalty" on the Applicant on 28th February 2019. The Final Notice confirmed the penalty at £5,000.00 but the Respondent later offered to reduce the penalty to £1,000.00.

Applicant's position

4. The Applicant accepts that as at the date of the Respondent's notice of intent the Property was not licensed and that it should have been licensed. The Applicant also accepts that at the relevant time it was *"a person having control of or managing"* the Property for the purposes of section 95(1) of the 2004 Act.

5. Mr Labinso states in written submissions that he was not aware that the Property required a licence and that nor did the letting agents who found the tenant. He also argues that the imposition of the financial penalty goes against the Respondent's own Private Sector Housing Enforcement Policy. He further argues that the scoring used in the final notice is inconsistent.

6. The Applicant has also provided a timeline summarising its dealings with the Respondent.

7. At the hearing Mr Labinso asked the Respondent's representatives how they had calculated that a penalty of £1,000.00 was payable, and the Respondent's scoring system was discussed.

Respondent's position

8. In response to the Applicant's written grounds, the Respondent states in written submissions that it complied with the legislation as regards the designation of a selective licensing area and it argues that the Applicant's ignorance that an offence was being committed is no defence, especially as Mr Labinso describes himself as a managing agent. The Respondent also states that it has obtained the letting agents' standard terms of business and that these prompt landlords to consider whether they require a licence for their property.

9. The Respondent accepts that it has deviated from its own policy but states that there is no legal obligation to follow policy. As regards the scoring used to determine the level of penalty, its matrix was redeveloped in response to feedback from the First-tier Tribunal in previous cases and the matrix provides enforcement officers with the flexibility to select a score which accurately reflects the circumstances of each case.

10. At the hearing, in response to a question from the tribunal, Mr Punj said that the Respondent's written policy was always to try to resolve issues informally before taking any punitive action. For a period of a few weeks – including the period in which the notice of intent and the final notice were served on the Applicant – this policy was informally reversed by the Head of Consumer Protection and Licensing before then being reversed back again.

Follow-up discussion at hearing

11. In response to the Respondent's statement that it had obtained the letting agents' standard terms of business, Mr Labinso showed to the tribunal and to the Respondent's representatives copies of signed terms of business which did not contain any prompt for the landlord to consider whether a licence was required for the Property. He also pointed out that the letting terms of business were entered into on 2nd March 2017, which was several months before the Respondent introduced its selective licensing scheme.

12. With the tribunal's agreement, there was some negotiation between the parties direct with a view to their trying to reach a settlement. After some discussion, the Respondent's representatives offered to reduce

the penalty to £500.00 but were not prepared to go any lower. This offer of £500.00, which the Applicant would have had to pay on top of the application fee and hearing fee (a further £300.00 in aggregate), was rejected by the Applicant and the hearing continued.

Tribunal's analysis

13. We will begin with what we consider to be the relevant aspects of the factual background. The first contact that the Respondent made with the Applicant was when it served the notice of intent on the Applicant, notifying it of the Respondent's intention to impose a £5,000.00 penalty. In response, the Applicant immediately applied for a licence for the Property.

14. In subsequent correspondence the Applicant offered to settle the matter by paying the licence fee plus interest for late payment. The Respondent then made a counter-offer of £1,000.00 which was not accepted by the Applicant. There was also some correspondence regarding the basis of the Respondent's calculations of the amount of the penalty. Then on 21st May 2019 the Respondent proposed mediation but the Applicant did not respond directly to this, focusing instead on what the Applicant considered to be a lack of clarity in the Respondent's responses to the Applicant's requests for information as to how the penalty had been calculated.

15. At the hearing the Applicant stated, and the Respondent's representatives accepted, that there were no problems with the Property itself, that there had been no prejudice to the tenant, and that no issues had been identified previously in relation to the Property.

16. We also accept, on the basis of the evidence that was before us, that Mr Labinso (acting through his company, the Applicant) was not a professional agent and was simply helping his mother to manage the Property. We also accept, on the basis of the evidence that was before us and on the balance of probabilities, that the Applicant was not aware of the need to license the Property prior to receiving the notice of intent. This does not mean that no offence was committed, but the above factors are nevertheless relevant background to the level of seriousness of the offence and to the appropriateness and proportionality of the steps taken by the Respondent.

17. Based on the Applicant's written submissions, which were not contradicted by the Respondent's written submissions or by the oral submissions made by the Respondent's representatives, the relevant sections of the Respondent's Private Sector Housing Enforcement Policy read as follows:-

*"**4.2 Informal Action***

Officers will always try and resolve the issues informally in the first instance … Informal action to secure compliance with legislation may be given in the form of:

- *Verbal Advice/Warnings*
- *Writen requests for action or advice*
- *Issuing a Hazard Awareness Notice …*

4.3 Formal Action

Should the informal approach fail to prompt action by the owner, then the next stage will be statutory action …".

18. As candidly admitted by the Respondent's representatives at the hearing, the Respondent did not follow its own written and published policy in this case. This is a policy which was approved in Cabinet after consultation and is formally reviewed at regular intervals. Instead of following its own written and published policy the Respondent's enforcement team decided, for just a period of a few weeks, secretly and informally to reverse that policy, based solely (it appears) on the views of the Respondent's Head of Consumer Protection and Licensing. This informal change of approach was very short-lived, as after that very short period of just a few weeks the Head of Consumer Protection and Licensing and/or other members of the enforcement team seem to have changed their minds as to the wisdom of applying this informal and unpublished change of approach as the Respondent then reverted to its published policy.

19. The published policy states that officers will always try to resolve the issues informally in the first instance, but that did not happen in this case. The published policy goes on to state that should the informal approach fail to prompt action by the owner then the next stage will be statutory action, but in this case the very first stage was statutory action.

20. It is not disputed that the Applicant has committed an offence under section 95(1) of the 2004 Act. However, we do not accept that it was appropriate or reasonable for the Respondent to ignore its published policy and instead to apply an informal reversal to the Cabinet-approved policy even though the reversal in policy did not have the approval of Cabinet and had not been published. There was therefore no due process and no possible way that the Applicant could have known that this was the current policy. The later reversal of this secretive, informal policy after only a few weeks does rather suggest

that the Respondent's enforcement team realised either that the change in policy was not a reasonable one or that in order to change the policy the Respondent needed to go through a proper process.

21. It is not open to the Respondent to argue that this was a particularly serious case where there were important aggravating factors. On the contrary, whilst it is important not to lose sight of the fact that an offence was committed, the circumstances are such that the offence was at the very mildest end of the scale. The evidence shows that Mr Labinso was not an experienced property agent but was merely helping his mother to manage the Property and did not know that the Property needed to be licensed. The Respondent had discovered no other issues in relation to the Property and had no evidence of any prejudice to the tenant and yet it served a notice of intent to impose a very significant (£5,000.00) financial penalty on the Applicant, contrary to its own published policy, and then pursued the matter through to issuing a final notice and then not withdrawing that notice, albeit that it subsequently offered to reduce the amount of the penalty.

22. Having considered all the circumstances, our conclusion is that the Respondent has failed to justify its departure from its own published policy, as it has not advanced any grounds – let alone any reasonable grounds – for having done so. We are therefore of the view that the Respondent was not entitled to impose a financial penalty on the Applicant, having failed to go through a proper process, and that therefore the final notice should be cancelled.

23. We must, though, emphasise, that this is a very fact-specific decision. First of all, the Applicant did commit an offence, and there is a legislative system in place to deter people from committing offences under the 2004 Act. Had the Respondent first gone through a proper process it could then have been entirely appropriate, if for example the Applicant had not responded appropriately, for the Respondent then to impose a financial penalty.

24. The other point that needs to be emphasised is that we are not making a determination as to what the Respondent's policy should be. There may well be a case for arguing that local housing authority's written policies should not assume that (in the absence of particular aggravating factors) the first stage will necessarily always be to communicate informally with the property owner, as such a policy might be insufficient to deter people from offending. However, the proper way to arrive at such a policy is to debate it transparently, and then for Cabinet to approve it and then for the policy to be published.

Cost applications

25. The Applicant applied at the end of the hearing for the Respondent to be ordered to reimburse to the Applicant its application fee of £100.00

and the hearing fee of £200.00 pursuant to paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

26. For the reasons already given, in our view the Respondent should not have gone straight to the stage of issuing a notice of intent without going through any informal stages and without otherwise communicating with the Applicant. However, if having received the Applicant's objections the Respondent had then agreed to waive the financial penalty, the application to the tribunal would not have been necessary but the Respondent would still thereby have managed to impress upon the Applicant in a formal manner the risks of failing to comply with the selective licensing scheme. Yet the Respondent decided to press on with the imposition of a fine on the Applicant in circumstances where it should not have done so.

27. The Respondent should not have imposed the penalty on the specific facts of this case without first trying to resolve the issues informally and, then having served the notice of intent, should not have continued with enforcement action in the light of the Applicant's speedy application for a licence and there being no other issues of concern in relation to the Property. It follows that the Respondent should not have forced the Applicant to make the application to the tribunal and to incur the application and hearing fees. Whilst it is true that at a late stage the Respondent suggested mediation, what it should have done instead – on the specific facts of this case – was to withdraw the notice imposing the financial penalty.

28. Therefore, it is appropriate for the Respondent to be ordered to reimburse to the Applicant the application fee of £100.00 and the hearing fee of £200.00.

Name: Judge P Korn **Date:** 4th July 2019

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.

Appendix of relevant legislation

Housing Act 2004

95

(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.

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—

(a) section 30 (failure to comply with improvement notice),

(b) section 72 (licensing of HMOs),

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

(d) section 139(7) (failure to comply with overcrowding notice), or

(e) section 234 (management regulations in respect of HMOs).

(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) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.

(8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.

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

SCHEDULE 13A

FINANCIAL PENALTIES UNDER SECTION 249A

Appeals

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

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.

(3) An appeal under this paragraph – (a) is to be a re-hearing of the local 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.