



**First-tier Tribunal
Property Chamber
(Residential Property)**

Case Reference : **MAN/00CH/HNB/2020/0021V
MAN/00CH/HNB/2021/0004V**

Property : **63 Hyde Park Street, Gateshead, NE8 4QB**

Appellant : **PNE Management Ltd.**

Respondent : **Gateshead Council**

Type of Application : **Under paragraph 10 of Schedule 13A to the
Housing Act 2004 – appeals against two
financial penalties under s.249(a)**

Tribunal Members : **Judge P Forster
Mr I D Jefferson FRICS**

Date of Decision : **13 August 2021**

DECISION

© CROWN COPYRIGHT 2021

DECISION

Decision

- (1) The Tribunal is not satisfied beyond reasonable doubt that the Appellant breached condition 7a of the Licence and therefore finds that no offence was committed under s.95(2)(b) of the Housing Act 2004. The appeal is allowed. (MAN/00CH/HNB/2020/0021V)
- (2) The Tribunal is satisfied beyond reasonable doubt that the Appellant breached condition 1f of the Licence and that an offence was committed under s.95(2)(b) of the Housing Act 2004 for which the Appellant is liable to pay a financial penalty of £3,800.00 under s.249A of the 2004 Act. (MAN/00CH/HNB/2021/0004V)

Introduction

1. PNE Management Ltd., the Appellant, appeals against two decisions dated 25 September 2020 made by The Borough Council of Gateshead, the Respondent, to impose financial penalties under s.249A of the Housing Act 2004 (“the 2004 Act”) in respect of 63 Hyde Park Street, Gateshead, NE8 4QB (“the Premises”).
2. The area in which the Premises are situated was designated as a selective licensing area on 25 January 2018. The Premises has been licenced since 11 October 2018. The Respondent is the licence holder and Joseph Posen is the named responsible person. Mr Posen is the sole director of the Respondent company and the sole director of Offor Investments Ltd. which owns the Premises. The licence is subject to a number of conditions. The Appellant appeals against two separate financial penalties imposed for the breach of conditions 1f and 7a.
3. The Respondent served the Appellant with two notices of intent dated 27 April 2020 to impose financial penalties in respect of the Premises. These were followed on 25 September 2020 by two final notices each imposing a penalty of £3,800.00. The total amount of the penalties was £7,600.00.
4. The first appeal is in respect of the alleged breach of condition 7a and the second appeal is in respect of the alleged breach of condition 1f.
5. The Tribunal issued Directions on 14 April 2021 in respect of both appeals that provided for the Respondent to address the issues raised by the appeals and to provide a bundle of documents for use at the hearing. The Appellant was also directed to provide a bundle of documents, to include an expanded statement of the reasons for the appeals.
6. The hearing was held remotely by video link on 22 July 2021 without an inspection of the Premises. The Appellant represented himself and the Respondent was represented by Mr Currie, a solicitor from the Council’s legal department. The Tribunal heard oral evidence from the Appellant and from Mr Weaver, a Technical Officer within the Councils’ Private Sector Housing Team.

The Appellant's case

7. The Appellant's case was stated succinctly in the notice of appeal:

“The fines are manifestly excessive for what is in essence an allegation that there may have been some waste in the bins when the tenant moved in...and for obtaining verbal instead of written references. For this overlooked small misdemeanour & a further alleged infraction the council deem it appropriate to fine a total of £7,600.00...This despite the fact that no harm was done to anyone”.
8. The Appellant made a further written submission in which it was stated that the penalties were not justified “regarding their inception/issue” and not justified in their amount. Mr Posen expanded on this at the hearing. He stated that the Respondent had tried to paint him [the Appellant] as an irresponsible landlord, which he is not. Mr Posen said that he had managed hundreds of properties for many years without issues or complaint. The Respondent falsely claimed that he does not deny the offences, which he certainly does. The tenant, Ms Heritage, made false statements to the Council and she left the property without giving notice, leaving large arrears of rent behind. Mr Posen submitted that in these circumstances it was disingenuous of the Council to rely on her statement. He said that the Respondent cannot prove any of the alleged offences to the required standard.

The Respondent's case

9. The Respondent's case is set out in the statement of case prepared by Mr Weaver and in his witness statement dated 5 May 2021 and in the statements of Claire Cole, Lesley Craig, Rachel Crosby and Stuart Christer who work in the Council's Private Sector Housing Team. The supporting documents are exhibited to the witness statements.
10. The licence conditions provide a framework for effective property and tenancy management and act as a guide to licence holders. Licence holders are supported by the Council to help them comply with the licence conditions.
11. Conditions 7a – g in the Appellant's licence address the issue of refuse and waste. Ms Heritage's evidence is that when she moved into the Premises on 31 January 2019 the recycling bin was full of non-recyclable rubbish and in the rear yard there was a sofa, a rug, empty containers, crates of old tools and toys. She asked the Respondent to clear the items and was told to contact the Council. On 17 January 2020, photographs were taken of the rear yard showing that the items described by Ms Heritage were still there and the refuse bins were full, 3 months after she had left the Premises.
12. Condition 1f requires the licence holder to obtain references from prospective tenants before the tenancy commences and evidence of this must be made available to the Council on request. Ms Heritage's evidence is that she inspected the Premises on 31 January 2018 and was given the keys the same day. She was not asked for any references. Mr Posen stated at the PACE interview that reference “would have been done”. He was subsequently asked to provide the references but he failed to do so.
13. The Premises was inspected in July 2018 as part of the licensing scheme and category 1 and 2 HHSRS hazards were identified and the landlord was asked to undertake specified works within 28 days. When the Premises was inspected again in November 2018 it was found that not all the works had been completed. The landlord was informed about this but did not respond.

14. On 21 February 2020, the Respondent accepted a formal caution in respect of breaches of conditions 1e, 4a and 7f in respect of both 63 Hyde Park Street and another property managed by the Respondent, 40 Saltwell Place, Gateshead. The circumstances relating to 40 Saltwell Place were very similar to those of 63 Hyde Park Street.
15. Having concluded that offences had been committed by the Appellant in respect of conditions 1f and 7a, the Respondent applied its own Civil Penalties Enforcement Guidance to calculate the amount of the penalties to be imposed.

The Law

Commission of Relevant Offences

16. All references are to the Housing act 2004.
17. A 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 (s.249A(1)).
18. An appeal against the imposition of a financial penalty is to be a re-hearing of the local authority's decision (para 10(3) to Schedule 13A). The Tribunal must therefore similarly be satisfied, beyond reasonable doubt, that such an offence has been committed.
19. Local authorities are empowered to designate areas within their district as a selective licencing area under s.81(1). A "relevant housing offence" includes an offence under s.95. A person commits an offence under s.95(2)A if he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with s.90(6) and he fails to comply with any condition of the licence.
20. A statutory defence is set out in s.95(4) where there is a reasonable excuse for failing to comply with the licence condition.

Amount of Penalties

21. A person who commits a relevant offence is liable on summary conviction to an unlimited fine (s.95(5)). Under s.249A, a local authority may impose a civil penalty instead of bringing a prosecution. The penalty cannot exceed £30,000 (s.249A(4)). Under the Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017, it is clear that the purpose of imposing such penalties is to allow the local authority to meet the costs and expenses incurred in, or associated with, carrying out any of its enforcement functions in relation to the private rented sector (reg.4(1)).

Guidance

22. The Secretary of State published guidance in 2016 (Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Housing Authorities), which was re-issued in 2018 and is relevant to offences under section 95 of the 2004 Act. Pursuant to Schedule 13A, a local housing authority is to have regard to any guidance given by the Secretary of State about financial penalties. In accordance with the Act, the Respondent has published its own guidance: "Civil Penalties Enforcement Guidance".

Reasons for the decision

23. The Premises is a first-floor pre-1919 Tyneside flat with three bedrooms. When the licencing scheme commenced on 30 October 2018 the Premises were already let to another tenant and occupied by her and her family. A licence was issued to the Appellant on 11 October 2018. At the time of the alleged offences, the Premises was let to Rebecca Heritage who was in residence between 31 January 2019 and October 2019. The Appellant Company manages between 50 and 60 properties. Mr Posen is the sole director of the Company and at the time was a full-time property agent. He is also the sole director of Offor Investments Ltd. which owns 63 Hyde Park Street.

Condition 7a

24. The Respondent alleges that the Appellant breached condition 7a of the licence which provides that:
“At the start of any new tenancy the licence holder must ensure there is no refuse or waste left inside the property or within the curtilage from the previous tenant”.
25. There is a question about whether the powers of "management" in s.90(1) extend to refuse or waste left in the Premises. In the context of Part 3 of the Act, the purpose for which powers are conferred is to enable the local housing authority to address the problems that justified the designation of a selective licence area, namely low housing demand and anti-social behaviour. The powers conferred are confined to including conditions for that purpose. S.90(5) does not confer a residual discretion to impose conditions. Authority for this found in Brown v Hyndburn [2018] EWCA Civ 242. In his evidence, Mr Weaver explained that complaints about refuse and waste are very common and make up a large part of the Council's time. The deposit of refuse and waste is a form of anti-social behaviour. The Tribunal is satisfied that there is a link between the statutory test for the designation of a selective licensing area and the imposition of conditions to regulate refuse and waste in the area.
26. The Respondent's case is primarily based on Ms Heritage's evidence. She states in her witness statement dated 9 December 2019 that when she moved into the Premises on 31 January 2019 the recycling bins were full of non-recyclable rubbish. She also says that in the yard there was a sofa, a rug, empty containers and crates of old tools and toys. Ms Heritage states that she contacted the Respondent by WhatsApp and asked for the items to be removed but she was told to contact the Council herself to get them taken away. She did not do this because she would have had to pay for the service. Ms Heritage has provided a second statement dated 21 July 2021 to which she attaches a photograph taken on 4 February 2019. This shows the living room, and a fridge with broken pieces of wood on top and boxes and metal poles next to the fire surround which she says had been left behind by the previous tenant. There are other items in the photograph which belong to Ms Heritage. There are no photographs of the rear yard. Ms Heritage confirmed at the hearing what she had said in her witness statements.
27. The photograph of the living room taken on 4 February 2019 produced by Ms Heritage shows an untidy room with many items that belonged to her including a mattress. There is a fridge/freezer in the corner of the room and a fridge in the centre of the room. It has pieces of broken wood on top of it. Mr Posen was asked about this at the hearing and he said that items like the fridge left by a previous tenant would be left in place and offered to the new tenant. That contradicts his statement that the property would be cleared before the new tenant moved in. Overall, the photograph does not provide conclusive evidence.

28. On 17th January 2020, whilst attending another property, Stuart Weaver, noted the rear gates of 63 Hyde Park Street were open and when he looked in, he found the items described by Ms Heritage in the yard. The refuse bins were also full and had not been emptied three months after Ms Heritage had moved out. Photographs are produced showing the rear yard and the items found in it. These show the yard a year after Ms Heritage moved into the Premises. As well as the items described by Ms Heritage other items can be seen as well. The Tribunal gives limited weight to this evidence. For the purposes of this appeal, to the relevant standard of proof, it cannot be sure who left the items in the yard.
29. The Appellant accepted a caution in respect of the breach of condition 7c – the failure to provide written information to occupiers on waste responsibilities. This is an admission by the Appellant that it failed to provide the tenant with information and in respect of conditions 1e and 4a for which a caution was also accepted, that the terms of its tenancy agreement failed to comply with the requirements imposed by the licence. The acceptance of a caution in respect of these breaches does not constitute an admission in respect of condition 7a.
30. The Respondent denies that there was a breach of condition 7a. Mr Posen says that Ms Heritage has lied and that she left the property without giving notice and leaving arrears of rent behind. These are not matters for the Tribunal but they could explain Ms Heritage's evidence.
31. The Tribunal has to be satisfied beyond reasonable doubt that an offence has been committed. This is a high standard to prove and goes beyond the civil standard of the balance of probabilities. On the evidence presented to the Tribunal, doubt remains and it cannot conclude that the Respondent breached condition 7a and that an offence was committed.

Condition 7f

32. The Respondent alleges that the Appellant breached condition 1f of the licence:
“The licence holder must obtain valid references in relation to potential tenants, in order to make an informed decision regarding their occupancy of the property before the tenancy commences. References should include details of previous and recent housing history. Evidence of these references and checks must be made available to the Authority upon request”.
33. S.90(1) of the Housing Act 2004, gives the Respondent the power to impose “such conditions as the local housing authority consider appropriate for regulating the management, use or occupation of the house concerned”. Sub-paragraph (4) provides that a licence must include the conditions required by Schedule 4. Paragraph 2A of Schedule 4 states that a licence under Part 3 “must include conditions requiring the licence holder to demand references from the persons who wish to occupy the house”.
34. The Appellant denies that it breached condition 1f. It claims to have obtained a verbal rather than a written reference. On 22 January 2020, the Respondent sent an email to Mr Posen asking for evidence of the reference obtained for Ms Heritage. Mr Posen replied stating that the reference was taken verbally. The Respondent asked for confirmation of this and on 23 January 2020 Mr Posen sent an email stating, “I have every reason to assume that she (member of staff) carried out all vetting correctly which will no doubt have included obtaining references, albeit it seems this was verbal as I cannot find a written copy”.

35. Mr Posen was interviewed under caution on 15 January 2020. He stated (line 27, page 10) that the procedure when letting a property was to “get a reference, either verbal or written”. He was asked if references had been taken when the Premises was let to Ms Heritage. Mr Posen replied (line 20, page 13) that “references would have been done, and I’ll have to check the file, see if we’ve got a record of that”. He agreed to check his records and provide a copy.
36. At the hearing, Mr Posen stated that he had spoken to the former member of staff but she was unable to remember if she had asked for a reference. Mr Posen could only say that a reference “would” have been taken but he conceded that there was no record on the Appellant’s file that a verbal reference was taken up. Mr Posen was very dismissive about references and does not believe they have any value. He did accept that a landlord’s main concern is to ensure that the prospective tenant can pay the rent. Mr Posen was unable to produce any evidence that financial references were obtained from Ms Heritage. She viewed the property on the morning of 31 January 2019 and was given the keys that afternoon. This is very unusual in the Tribunal’s experience and indicates that the process of letting the Premises to Ms Heritage was rushed and done without the formalities that would be expected.
37. Ms Heritage gave evidence that after contacting the Respondent about the property, she met a woman who showed her around and she met the same woman again at the Respondent’s offices to collect the keys on the same day. Miss Heritage stated she was not asked for any references and only provided a driving licence as ID.
38. It is clear to the Tribunal that the Appellant did not obtain a reference for Ms Heritage. The Tribunal is satisfied beyond reasonable doubt that the Respondent breached condition 7f and that an offence was committed.
39. The Appellant has not put forward a defence of reasonable excuse under s.95(4) for its failure to obtain a reference from Ms Heritage. On the evidence, the Tribunal is satisfied that there is no reasonable excuse.

Penalty

40. When considering the amount of the penalty to be imposed, the Tribunal is required to pay great attention to the Respondent’s policy on financial penalties and it should be slow to depart from it. The burden is on the Appellant to persuade the Tribunal to do so - Waltham Forest LBC v Marshall [2020] UKUT 35 (LC) endorsed by the Court of Appeal in Sutton v Norwich [2021] EWCA Civ 20.
41. The Respondent found that the Appellant was in breach of licence conditions 1e; 4a and 7c in respect of both 63 Hyde Park Street and 40 Saltwell Place. The circumstances of the breaches in both properties were very similar in the way that the tenancies were set up. On 21 February 2020, the Appellant accepted formal cautions in respect of these breaches.
42. The Respondent decided to impose financial penalties in respect of the breaches of conditions 1f and 7a. This was consistent with the Council’s Civil Penalties Enforcement Guidance, the Crown Prosecution Service Code for Crown Prosecutors and the Council’s Communities and Environment Enforcement Policy. The Respondent took into account the seriousness of the offences and the culpability of the landlord and concluded that there was sufficient evidence to proceed with a prosecution and that it was in the public interest to take action. Whilst the offences were serious, the Respondent decided to deal

with the offences by way of a financial penalty because the occupier had not suffered any harm, was not considered to be vulnerable and the breach was not detrimental to the neighbourhood or a nuisance.

43. Under the Respondent's Civil Penalty Enforcement Guidance there are two distinct components. The first is the penalty calculation where the severity of the offence, the landlord's culpability and track record and the landlord's income, if deemed appropriate, are considered. The second considers the amount of financial benefit, if any, which the landlord obtained from committing the offence. These two components are added together to determine the amount of the penalty.
44. The Respondent's policy mandates the use of a matrix to determine the amount of the penalty. The matrix is divided into 5 penalty levels, providing an indicative minimum and maximum charge with the amount being adjusted to consider other relevant factors.
45. Culpability: the Respondent assessed the Appellant's culpability as "negligent and failing to take reasonable care". This is described in the Guidance as "Offender fell short of their legal duties in a manner that falls between descriptions in 'high' and 'low' culpability categories. Systems were in place to manage risk or comply with legal duties, but these were not sufficiently adhered to or implemented". The Tribunal must make its own assessment on the basis of the evidence and applying the Enforcement Policy.
46. Relevant factors were:
 - The conditions are set out clearly in the Respondent's licence. The Appellant must have been aware of its legal responsibilities and knew that a reference was required from prospective tenants. Mr Posen attended a licence holder meeting with the Respondent before the licence was issued when the conditions were discussed and explained. If Mr Posen was in any doubt about the licence conditions he was able to contact the Respondent for advice. Mr Posen also attended the Respondent's accredited landlord training course where specific guidance was given about the licence conditions.
 - The Appellant stated in the licence application that it had adequate systems in place to meet the conditions of the licence.
 - The Appellant manages between 50 and 60 properties. Mr Posen is a full-time property agent with many years' experience.
47. The Appellant was at fault. Little or no effort was made to address the requirements of condition 1f. The failure to obtain a reference was a breach of a mandatory condition and cannot be properly described as minor. At the more serious end of the scale, the Appellant's conduct cannot properly be described as reckless or wilful within the definition in the Enforcement Policy. The Tribunal concludes that the correct level of culpability within the Policy is "negligent and failing to take reasonable care".
48. Track record: under the Enforcement Policy 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 legal obligations.

49. The relevant factors that apply here are:
- The offences were not isolated incidents. On 21 February 2020, the Appellant accepted a formal caution for breaches of conditions 1e; 4a and 7c in respect of both 63 Hyde Park Street and 40 Saltwell Place. The circumstances of the breaches in both properties were very similar in the way that the tenancies were set up.
 - The Appellant failed to obtain a valid reference for a former tenant of 40 Saltwell Place
50. Harm: The Respondent assessed the level of harm as low because there is no direct evidence that harm was caused to the tenant or the community as a result of the breach of condition 1f. This is generous interpretation of the Policy but is within the band level as described in the Policy. The Tribunal adopts the Respondent's assessment on this point.
51. The Matrix: Applying these findings about culpability and harm to the matrix in the Enforcement Policy produces the following result: the range of penalty is between £2,000 and £4,000 with the starting point being set midway at £3,000. This allows for any aggravating or mitigation factors to increase or reduce the penalty to the top or lower end of the range, subject to a maximum addition or reduction of £1,000.
52. The Appellant's financial position: the Respondent did not undertake a financial investigation because it assessed the offences as "moderate". The Appellant manages between 50 and 60 properties in the North East, 6 of which are in Gateshead. These are likely to generate a substantial income for the Appellant. The Respondent has chosen not to introduce evidence on this point which leaves the Tribunal to adopt the same position.
53. Aggravating factors and mitigating factors: a points system is applied by the Respondent when assessing both aggravating and mitigating factors. A maximum of 50 points can be applied resulting in a maximum increase or decrease of £1000. Applying the same process, the Tribunal added 20 points for the 4 occasions the Council took action under Part1 of the 2004 Act. This relates to 4 Improvement Notices served on the Applicant. These Notices were not appealed. An additional 5 points were added because the Respondent was a "Priority Landlord". The priority landlord status is confirmed due to a high number of requests the Council receives for help from tenants with housing related problems. 5 points were added for the breaches of licence conditions for 63 Hyde Park Street and 40 Saltwell Place. A total of 11 breaches were recorded. Taken together, this increased the penalty by 30 points.
54. 5 points are to be deducted because the Appellant has taken steps to stop the offence from reoccurring by passing the properties onto another managing agent to be the licence holder. The reduction reduced the number of points to 25 which results in an increase in the penalty of £500.00.
55. Financial benefit from committing the offence: a guiding principle of financial penalties is that they should remove any financial benefit that the landlord may have obtained as a result of committing the offence. No financial gain can be attributed to the breach of condition 1f and therefore no amount stands to be added in this respect.
56. Costs the Enforcement Policy provides for the costs of investigating the offence and preparing the case for formal action to be included in the calculation of the penalty. The Respondent has calculated the Investigative costs for each of the offences by determining the average number of hours taken to complete the work and the hourly rate of the

officers involved. The costs are then broken down into three levels, low, medium and high – as presented in the Councils Enforcement Policy. The cost band in respect of the two financial penalties imposed was assessed as High - £600, spread between the two final notices that were served on the Appellant. The Respondent has split the costs equally between the two appeals. The Tribunal adopts the same approach. The Appellant has won one of the appeals and lost the other and so it is appropriate to include costs of £300 in the calculation of the penalty to be imposed for the breach of condition 1f.

57. The Calculation of the penalty to be imposed, based on the Enforcement Policy is as follows:

Penalty starting point	£3,000.00
Changes due to offender's income	£0.00
Reduction for mitigation / Addition for aggravation (25 points)	£500.00
Financial benefit	£0.00
Costs	£300.00
Total	<u>£3,800.00</u>

58. The Tribunal therefore imposes a penalty of £3,800 on the Appellant for the breach of condition 1f of the licence.

P Forster
Tribunal Judge
13 August 2021

RIGHT OF APPEAL

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional Office, which has been dealing with the case.

The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

If the person wishing to appeal does not comply with the 28-day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.