FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/HNA/2019/0009**
Property	**:**	**Flat 19 Embassy House, West End Lane, London NW6 2NA**
Applicant	**:**	**B&BLEO Ltd**
Respondent	**:**	**London Borough of Camden**
Type of application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge Nicol** **Mr M Cairns MCIEH**
Date and venue of hearing	**:**	**12th April 2019** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**14th May 2019**

DECISION

The appeal is dismissed and so the penalty of £7,000 imposed on the Applicant stands.

Relevant legislation is set out in an Appendix to this decision.

Reasons

1. The subject property is a flat in a 5-storey purpose-built block. When the Respondent inspected it on 1st August 2018 they met 4 of 5 occupants, Mr Mattia Falconi, Ms Eleanora Favilla, Ms Naomi Grotessi and Mr Cameron Fennessy, all of whom had assured shorthold tenancies granted by the Applicant (dated variously 13th December 2017 and 21st May 2018). Since the Respondent had introduced an additional licensing scheme on 8th December 2015, all such houses in multiple occupation (HMOs) had to be licensed. The subject property was not

covered by a licence. Further, the Respondent noted fire safety concerns and penetrating damp which appeared to be long-standing.

2. The Respondent identified the following as being involved with the property:

   (a) Chandni Vora and Mitesh Vekaria are the long leaseholders of the property. On 10th June 2016 they granted a tenancy to Vera Accommodation Ltd whose principal, Mr Michael Zanon, stated in a letter dated 10th September 2018 that they had sublet the property on a single tenancy;

   (b) Sow & Reap Ltd are the managing agents for Chandni Vora and Mitesh Vekaria; and

   (c) The Applicant is purportedly the assignee of the tenancy granted to Vera Accommodation Ltd.

3. In line with its enforcement policy for HMOs, the Respondent concluded that the threshold for prosecution for having control of or managing an HMO which should be licensed but is not under section 72(1) of the Housing Act 2004 had been passed but that a Civil Penalty Notice was the most appropriate course of action, taking into account that this would be the Applicant's first offence. Their policy suggested a fine starting at £10,000 but the Respondent felt that culpability was divided so that the fine should be split:

   (a) The Applicant: £7,000

   (b) Sow & Reap: £4,000

   (c) Mssrs Vora and Vekaria: £1,000 each.

4. On 19th October 2018 the Respondent issued notices to these parties of their intention to impose these penalties. Sow & Reap responded with an application for a licence, received on 15th November 2018. The Applicant did not respond and the Respondent served them with a final penalty notice on 6th December 2018.

5. The Applicant and the Respondent exchanged emails about the subject property and met on site on 17th January 2019. In their emails, the Applicant complained that they had not received the notice of intention. The Respondent considered this but decided not to withdraw the final notice.

6. The Applicant appealed to the Tribunal on 31st December 2018. Their appeal was heard on 12th April 2019. The Applicant was represented by Mr Andrew Walker, attended by Mr Ermon Mazzardi, a director of the Applicant company who also provided a witness statement. Mr Edward Sarkis represented the Respondent. The Tribunal heard evidence from Mr Vincent Arnold (an Operations Manager in the Respondent's housing team) and from two of the tenants, Mr Falconi and Ms Favilla. There were also witness statements from two more of the tenants, Ms Grotessi and Mr Fennessy.

7. The Applicant asserted that no offence had been committed. It was submitted that they had tried to apply for the licence in 2017 but were ultimately stymied by a lack of co-operation from Mssrs Vora and Vekaria whose consent they needed. Therefore, they further asserted that they could not be regarded as a person "having control of or managing" an unlicensed HMO within the meaning of sections 72(1) and 263 of the Act.

8. This problem appears to have arisen from the problematic nature of the assignment of the tenancy from Vera Accommodation to the Applicant. It supposedly took place on 23rd August 2017, after the expiry of the one-year term on 9th June 2017. Since the tenancy had already expired by the effluxion of time, there wasn't actually anything to assign. However, it appears that Sow & Reap consented to the Applicant becoming the tenant and Messrs Vora and Vekaria accepted rent from them. It is possible that Messrs Vora and Vekaria now wish to deny the Applicant any rights in the property because they arranged for a notice to quit to be served on Vera Accommodation on 6th December 2018. The Tribunal cannot see how this can have any effect on or relevance to the current appeal, given that Vera Accommodation have not had a tenancy of the property since 9th June 2017.

9. While the Tribunal can understand the Applicant's frustration at their inability to obtain a licence in these circumstances, it provides no excuse. The fact is that, whatever the status of the "assignment", the Applicant let the property out to a number of tenants. They didn't have to. They shouldn't have done since they knew that the property was not licensed. Of course, not letting out the property would cause financial problems since they would not have a rental income from which to meet their own rental liability but their remedies would lie against Vera Accommodation and/or Mssrs Vora and Vekaria. The solution is not to commit a criminal offence at the expense of their tenants.

10. The process of letting out premises and entering into obligations under a tenancy agreement demonstrates having control of and managing premises. The Applicant pointed out that they could not carry out repairs or comply with some of the HMO regulations without the consent of Mssrs Vora and Vekaria but it is not an all-or-nothing situation – having limitations on their ability to manage the property does not mean they had no control or management at all.

11. The definition of a person having control of premises under section 263 of the Act includes that they receive the rack-rent. The Applicant pointed out that Mssrs Vora and Vekaria received a rack-rent and argued that this meant they did not. However, there is no reason why more than one person cannot receive a rack-rent from the same property. In an email dated 25th September 2018, the Applicant responded to the Respondent's question, "How much rental income is received by B&BLeo Limited from the property on a monthly basis?" with the answer, "£2380.00 per month". That is a rack-rent.

12. The Applicant also argued that their tenants were not occupying the property as their "only or main residence" which is part of the definition of an HMO in section 254 of the Act. They said that their intention was to let the property out on short-term or holiday lets and so they incorporated a break clause into each tenancy, allowing any tenant to leave at short notice. However, the existence of the break clause was the only evidence in support of this submission other than Mr Mazzardi's bare assertion of his intentions. The tenants themselves, as shown in the live evidence from Mr Falconi and Ms Favilla clearly regarded the property as their sole residence for the time being.

13. The tenants had one-year fixed term assured shorthold tenancies. Even with the break clause, this is inconsistent with a short-term or holiday let. The Applicant asserted that they used tenancies rather than licences due to the Respondent's guidance but the distinction between tenancies and licences is a red herring here. Under paragraph 9 of Schedule 1 of the Housing Act 1988, a holiday let may be excluded from statutory protection. If the Applicant had truly wanted to grant holiday lets, they could have made express reference to this provision, although that would have allowed tenants to query whether this was an accurate description of their occupation. In the circumstances, the Tribunal is satisfied that the tenancies were not short-term or holiday lets but that the tenants occupied the property as their only or main residence.

14. The Applicant let out the property as an HMO while it was not licensed as it should have been. The Tribunal is satisfied beyond a reasonable doubt that the Applicant thereby committed a criminal offence under section 72(1) of the Act.

15. The Applicant asserted that they should nevertheless not be subject to a penalty due to a flaw in the procedure, namely that they did not receive the notice of intention required under paragraph 1 of Schedule 13A to the Act. In fact, the provision requires such a notice to be "given". This implies receipt as well as sending but the Tribunal requires more than a mere assertion of non-receipt because, otherwise, it could be used to avoid any and all penalties.

16. The Tribunal is satisfied that the Respondent sent the notice of intention to the correct address – Mr Arnold said he sent it himself by first class post to the Applicant's registered office. There is no reason to think that it was not received other than the Applicant's assertion. No possible explanation as to why it might have gone astray has been suggested. The Applicant's credibility has also been undermined by their submissions about short-term lets which had so little in the way of support. In the circumstances, the Tribunal is satisfied that the Respondent did give the Applicant the requisite notice.

17. The Applicant asserts that, if they are to pay a penalty, it has been set at an amount which is too high. They pointed out that the applicant in *thecityrooms.com Ltd v LB Camden* (6th July 2018) LON/00AG/HNA/2018/0010 only had to pay £4,000 for a similar offence. However, even

if the Tribunal were bound by previous decisions, which it is not, it is required to look at the individual circumstances of each case in the light of the Respondent's reasons for the level of the penalty and the degree of guidance which may be obtained from other cases, with their own individual circumstances, is extremely limited.

18. The Applicant claims it is being punished more harshly for the fact that one of their directors, Ms Bouilly, has a past association with Mr Zanon, a director of Vera Accommodation, whose companies have been fined in the past for breaches of the law relating to HMOs. However, the Respondent has never suggested that they increased the level of the penalty for any reason of this nature. They found out about the property when investigating whether there were other properties which should be looked at due to Mr Zanon's association with them. They also found out that he was a signatory to the Applicant's bank account and so were sceptical of the Applicant's protestations that he was not involved. However, there is no evidence that this impacted the level of the penalty.

19. The Applicant asserted that the penalty should be lower in the light of the lack of prejudice suffered by the tenants. In the Tribunal's opinion, this fails to understand the gravity of the offence. The system of licensing is in place to protect tenants who are in a weak bargaining position in the current housing market. This particular property had inadequate fire safety measures and a penetrating damp problem which the Applicant was making no meaningful effort to resolve. The Tribunal is satisfied that the penalty imposed by the Respondent is proportionate with the gravity of the offence.

20. The Applicant eschewed any suggestion that the penalty should be reduced due to their financial circumstances. The Tribunal is satisfied that the Respondent's reasoning for setting the penalty at £7,000 is sound – it could have been more but it is the Applicant's first offence and they were not the only ones involved with the circumstances which gave rise to the penalty.

Name: NK Nicol **Date:** 14th May 2019

Appendix of relevant legislation

Housing Act 2004

72 Offences in relation to licensing of HMOs

(1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

(2) A person commits an offence if–

(a) he is a person having control of or managing an HMO which is licensed under this Part,

(b) he knowingly permits another person to occupy the house, and

(c) the other person's occupation results in the house being occupied by more households or persons than is authorised by the licence.

(3) A person commits an offence if–

(a) he is a licence holder or a person on whom restrictions or obligations under a licence are imposed in accordance with section 67(5), and

(b) he fails to comply with any condition of the licence.

(4) In proceedings against a person for an offence under subsection (1) it is a defence that, at the material time–

(a) a notification had been duly given in respect of the house under section 62(1), or

(b) an application for a licence had been duly made in respect of the house under section 63,

and that notification or application was still effective (see subsection (8)).

(5) In proceedings against a person for an offence under subsection (1), (2) or (3) 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 permitting the person to occupy the house, or

(c) for failing to comply with the condition,

as the case may be.

(6) A person who commits an offence under subsection (1) or (2) is liable on summary conviction to a fine.

(7) A person who commits an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(8) For the purposes of subsection (4) a notification or application is "effective" at a particular time if at that time it has not been withdrawn, and either–

(a) the authority have not decided whether to serve a temporary exemption notice, or (as the case may be) grant a licence, in pursuance of the notification or application, or

(b) if they have decided not to do so, one of the conditions set out in subsection (9) is met.

(9) The conditions are–

(a) that the period for appealing against the decision of the authority not to serve or grant such a notice or licence (or against any relevant decision of the appropriate tribunal has not expired, or

(b) that an appeal has been brought against the authority's decision (or against any relevant decision of such a tribunal) and the appeal has not been determined or withdrawn.

(10) In subsection (9) "relevant decision" means a decision which is given on an appeal to the tribunal and confirms the authority's decision (with or without variation).

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.

254 Meaning of "house in multiple occupation"

(1) For the purposes of this Act a building or a part of a building is a "house in multiple occupation" if–

(a) it meets the conditions in subsection (2) ("the standard test");

(b) it meets the conditions in subsection (3) ("the self-contained flat test");

(c) it meets the conditions in subsection (4) ("the converted building test");

(d) an HMO declaration is in force in respect of it under section 255; or

(e) it is a converted block of flats to which section 257 applies.

(2) A building or a part of a building meets the standard test if–

(a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;

(b) the living accommodation is occupied by persons who do not form a single household (see section 258);
(c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
(d) their occupation of the living accommodation constitutes the only use of that accommodation;
(e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation; and
(f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

(3) A part of a building meets the self-contained flat test if–
(a) it consists of a self-contained flat; and
(b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat).

(4) A building or a part of a building meets the converted building test if–
(a) it is a converted building;
(b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);
(c) the living accommodation is occupied by persons who do not form a single household (see section 258);
(d) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);
(e) their occupation of the living accommodation constitutes the only use of that accommodation; and
(f) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.

(5) But for any purposes of this Act (other than those of Part 1) a building or part of a building within subsection (1) is not a house in multiple occupation if it is listed in Schedule 14.

(6) The appropriate national authority may by regulations–
(a) make such amendments of this section and sections 255 to 259 as the authority considers appropriate with a view to securing that any building or part of a building of a description specified in the regulations is or is not to be a house in multiple occupation for any specified purposes of this Act;
(b) provide for such amendments to have effect also for the purposes of definitions in other enactments that operate by reference to this Act;
(c) make such consequential amendments of any provision of this Act, or any other enactment, as the authority considers appropriate.

(7) Regulations under subsection (6) may frame any description by reference to any matters or circumstances whatever.

(8) In this section–
"basic amenities" means–
(a) a toilet,
(b) personal washing facilities, or
(c) cooking facilities;

"converted building" means a building or part of a building consisting of living accommodation in which one or more units of such accommodation have been created since the building or part was constructed;
"enactment"includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30);
"self-contained flat" means a separate set of premises (whether or not on the same floor)–

(a) which forms part of a building;
(b) either the whole or a material part of which lies above or below some other part of the building; and
(c) in which all three basic amenities are available for the exclusive use of its occupants.

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.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

SCHEDULE 13A
FINANCIAL PENALTIES UNDER SECTION 249A

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").

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.