FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BH/HNA/2019/0064**
HMCTS code	**:**	**V:VIDEO**
Property	**:**	**24 Eastfield Road, Walthamstow, London E17 3BA**
First Appellant	**:**	**Rosewall Properties Ltd**
Second Appellant	**:**	**LMSL Property Management Ltd**
Representative	**:**	**Imran Khan & Partners, solicitors**
Respondent	**:**	**London Borough of Waltham Forest**
Representative	**:**	**Sharp Pritchard, solicitors**
Type of application	**:**	**Appeal against a financial penalty - Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Judge Pittaway** **Mr P Roberts DipArch RIBA**
Date of hearing	**:**	**19 November 2020**
Date of decision	**:**	**1 December 2020**

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the tribunal at the hearing, the contents of which the tribunal has noted, were;

1. The appellants' bundle (105 pages)
2. The final respondent's bundle (868 pages)
3. Appellants further submissions dated 2 October 2020 (2 pages)
4. Appellants' updated submissions in response updated 18 November 2020 (7 pages)

In addition the tribunal were referred to the decisions in

Waltham Forest LBC v Marshall [2020] 1 WLR 3187 ('***Marshall***')
Sutton v Norwich CC [2020] UKUT 90 (LC) ('***Sutton***')
Rollco Screw and Rivet Co.Ltd. and others [1999] 2 Cr. App. R (S) (***'Rollco***')

Decision

1. The tribunal upholds the decision of the London Borough of Waltham Forest (the '**Council**') to impose financial penalties in the sum of £20,000 against each of the First Appellant and the Second Appellant.

Application

2. By an application dated 31 May 2019 the First Appellant and the Second Appellent (collectively the '**Appellants**') seek to challenge the imposition by the council of a financial penalty of £20,000 on the First Appellant, and of £20,000 on the Second Appellant.

Background

3. Rosewall Properties Ltd is the freehold owner of the property, which is managed by LMSL Property Management Ltd. The directors of both companies are Mr Lahrie Mohamed and Mrs Shehara Lahrie.

4. The property is a large three storey mid-terrace house in Walthamstow, variously described as having six or eight bedrooms.

5. At the date of the application the grounds of appeal were that the property was not a House in Multiple Occupation, that if it was (which was not admitted) the Appellants were not guilty of an offence under section 72(1) Housing Act 2004 (the '**2004 Act**') because they had a 'reasonable excuse' within the meaning of section 72(5) of the 2004 Act, and that the financial penalties imposed were excessive.

6. By 19 October 2019 the Appellants accepted that by June 2018 they were aware that the property had become an HMO for which a licence was required and that

they did not have a reasonable excuse for not applying for a licence until November 2018. Accordingly the issue before the tribunal was the quantum of the penalties.

The hearing

7. At the video hearing the Appellants were represented by Mr Madge-Wyld of counsel and the Respondent by Mr Calzavara of counsel. The following also attended the hearing; Mr Lahrie Mohamed, Mr Kiely and Mr Grierson of Sharp Pritchard, solicitors to the Council, Mr Beach, an Environmental Health Officer of the Council, Ms Travis of the in-house legal department of the Council.

8. Counsel agreed that Mr Madge-Wyld would make opening submissions, followed by Mr Calzavara. The tribunal were advised that no witnesses were going to be called. Mr Madge-Wyld said that he accepted the evidence in Mr Beach's witness statement which was in the Respondent's bundle, while not necessarily accepting the conclusions drawn by him in it.

9. Mr Madge-Wyld identified two issues for the tribunal to determine

    - Was the correct amount of each penalty £20,000?
    - Should the penalty be applied to each of the Appellants?

10. Mr Madge-Wyld drew the tribunal's attention to paragraph 3.5 of the Guidance for Local Housing Authorities in relation to Civil Penalties under the Housing and Planning Act 2016 issued by the Ministry of Housing Communities & Local Government which sets out the factors a local housing authority should take into account when deciding the level of civil penalty. Paragraph b) states that the local authority should consider the culpability and track record of the offender and that, '*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 responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations.*' In Mr Madge-Wyld's submission there was no previous record of the landlord offending in respect of this property before June 2018.

11. Mr Madge-Wyld first took the tribunal through the chronology of events from 7 April 2018 to 3 June 2018, as he submitted that this was relevant to the Respondent's case that the Appellants had deliberately flouted the law. He submitted that the burden of proof was on the Respondent to establish the offence and that there was insufficient evidence before the tribunal that the Appellants were aware of the offence before 3 June 2018. He drew the tribunal's attention to documents in the Respondent's bundle that indicated that their letting agents, Smartinvest Capital Ltd who traded as 'Victoria Knight' had been aware of the number of occupants of the property during this period, referring the tribunal to e mails, a completed form which referred to 7 occupants and 4 tenants, the defence statement of Ms Balinder Kaur Kalirai (the sole director of Smartinvest Capital Ltd), case notes of the letting negotiator and a record of a phone call with the tenants on 13 April 2018. He also referred to Victoria Knight's conviction for having recklessly provided false details of that telephone call. He submitted that Victoria Knight might have known that more than three persons occupied the property but

that they were independent of the Appellants and there was no evidence that Victoria Knight had told the Appellants of the number of occupants. He pointed the tribunal to a letter dated 21 April 2018 signed by the three tenants confirming that they would be a single household which he explained had been obtained because of the past history of tenants having committed breaches of the Housing Act, and to the tenancy agreement with the three tenants of 21 April 2018 which prohibited sub-letting. Mr Madge-Wyld accepted that after 3 June 2018 the Appellants were aware that the property was an HMO which required licensing, resulting in the correct application being made on 20 November 2018.

12. Mr Madge-Wyld then took the tribunal to the completed pro-forma reports which set out proposed financial penalties of £25,000for each of the Appellants. In each case the sum was based on an indicative minimum tariff 'Severe - band 5' of £20,000 with £5,000 added for the aggravating feature that each Appellant was familiar with the need to obtain a property licence as they were a named licence holder or manager of other, already licensed premises. The actual penalty levied in each case was £20,000, as the council applied a discount of 20% to reflect that the relevant HMO licence had been applied for in November 2018.

13. Mr Madge-Wyld accepted that the offence was a band 5 offence, as the Appellants controlled/managed a significant property portfolio, and that therefore the starting point for determining the level of penalty should be £20,000. He did not accept that a further £5000 should be added to the offence, submitting that the aggravating feature, of familiarity with the need to obtain a licence should only apply to band 3 offences which relate to landlords controlling one or two HMO dwellings. In his submission the level of the penalty should be £15,000 (to reflect the 20% discount), which he subsequently corrected to £16,000.

14. Mr Madge-Wyld then turned to the Respondent's policy and, referring to the distinction that it makes between a landlord of one or two properties (band 3) and landlords of significant portfolios of properties (band 5), submitted that a landlord of a portfolio ought to know of its obligations and that this imputed knowledge was already factored into the penalty for portfolio landlords, being at the higher band. In his submission the aggravating factor of familiarity with the need to obtain a licence should only apply to landlords being penalised at the band 3 level. He submitted that, following *Marshall*, the tribunal can depart from the council's policy if there is a good reason for doing so and that the above argument was such a good reason. He further submitted that by increasing the penalty by £5000 the council was raising the penalty to the level of that which would be applied to a property where a more serious offence was being committed, such as failure to comply with a Banning Order or where there were health and safety risks.

15. The council had imposed two penalties each of £20,000, on the First Appellant and the Second Appellant respectively. Mr Madge-Wyld accepted that two legal persons had committed the offence but submitted that as the Appellants are both group companies of the same holding company, LMSL Group Limited, the ultimate owner was being penalised £40,000 for one offence. In support of this submission he referred the tribunal to the decision in *Rollco* where Lord Bingham held (paragraph 441) that the risk of overlap (between a company and a director of that company) must be avoided. In Mr Madge-Wyld's submission, as the two companies were essentially the same, double punishment should be avoided.

16. Mr Madge-Wyld also referred to the decision in *Sutton* where he submitted that there had been one offence: the failure to licence the property committed by more than one offender. Mr Madge-Wyld argued that *Sutton* is authority for the proposition that a double penalty should not be imposed in the present case where there was one offence, the lack of a licence for an HMO. Otherwise two fines amounted to a double punishment. He also referred the tribunal to paragraph 251 of *Sutton*, in which it was held that the penalty imposed on each Appellant should have been fixed having regard not just to the statutory maximum penalty but also to the penalty imposed on the other. He did not suggest how the fine should be apportioned between the two Appellants.

17. For the Respondent Mr Calzavara set out for the tribunal the matters that were not in dispute. The 'Appellants' Expanded Grounds of Appeal' dated 16 October 2019 accepted that an HMO licence should have been applied for in June 2018 (paragraph 1), that the Respondent was entitled to levy a penalty against both Appellants (paragraph 2), that civil penalties could be imposed on both Appellants (paragraph 10), and that the Appellants accepted a starting point of £20,000 (paragraph 17). He then referred the tribunal to the 'Appellants' Further Submissions' of 2 October 2020 where it was accepted that the starting point in fixing the level of penalty is the Respondent's policy (paragraph 4) and the 'Appellants' Submissions in Response' updated on 18 November 2020 which accepted that the tribunal was not bound to apply the Respondent's policy. The policy merited respect and must be considered but was not determinative and may be departed from (paragraph 11).

18. Mr Calzavara then explained to the tribunal that the Appellants' conduct before June 2018 was not the aggravating factor which increased each penalty by £5,000. The aggravating factor was that the Appellants knew that they should have applied for an HMO licence and did not do so. Previous conduct might have been another aggravating factor, but the historic background had been included not to evidence previous conduct, but to show that the Appellants knew that there were to be more than three occupants in the property. He referred the tribunal to Ms Berry-Pike's witness statement of 24 January 2019 which at paragraph 14 referred to Let it Direct asking them how many keys over three they wanted to order for the 'other housemates', and a similar statement at paragraph 35 of Ms Cafferty's witness statement of the same date. Mr Lahrie Mohamed is a director of Let it Direct, as well as being a director of both appellants.

19. Mr Calzavara then referred the tribunal to the statutory guidance and Respondent's policy (set out paragraphs 47-61 in the Respondent's 'Consolidated Grounds of Resistance' dated 27 October 2020), the background to the appeal (set out in Mr Beach's witness statement of 13 September 2019, referring in particular to paragraphs 34-42 and 60-77), exchanges of e mails between Mr Beach and the tenants (B201, 203, 205-7 in the respondent's bundle), an e mail regarding the tenants obtaining an HMO licence (B315-6), an e mail from Let it Direct to Mr Beach of 7 June 2018 confirming the property was used as a single dwelling (C153), the witness statements of Ms Perry-Pike and Ms McCafferty as to the landlord's knowledge of the number of occupants (C488-C499) and paragraphs 95, 96, 108 and 110 of Mr Beach's witness statement to set a context for the penalties imposed and to set out the council's policy.

20. On the total amount of the fines levied on the Appellants Mr Calzavara submitted that 'totality' (the term used by Mr Madge-Wyld) applied to proportionality when there was more than one offence committed by one person. It was not applicable where more than one person commits an offence, as is the case here. It could not be correct that where two companies had the same directors the penalty levied against them be less than if the freeholder and the managing agent were not associated companies. He submitted that *Rollco* was not analogous. In this case there was no fine levied on the directors, the two fines were levied on separate companies, two distinct legal persons. In *Rollco* reference was made to avoiding the risk of overlap where the directors of a small company are likely to be the shareholders as well (paragraph 441). Mr Calzavara submitted that there was no evidence of the shareholding of either appellant before the tribunal.

21. Mr Calzavara distinguished *Sutton* (which he understood was pending appeal) in that the liability of the company, FLAL, and Mr Sutton, its director, arose through the same route. Mr Sutton was only liable because he was a director of FLAL. In this case the liabilities of the two Appellants have arisen from different routes, from one being the freeholder and from the other being the managing agent. He considered it important that Mr Sutton owned the majority shareholding in FLAL, so that *Rollco* applied.

22. Mr Calzavara directed the tribunal to paragraphs 296 and 300 of *Sutton*. The sum the of penalties in *Sutton* relating to failure to comply with the notice concerning electrical testing *(*£25,000 on Mr Sutton and £23,000 on FLAL) and the sum of the penalties relating to the failure to comply with the notice concerning fire safety (£18,000 and £14,000 respectively) in each case exceeded the maximum statutory penalty.

23. In response to the submission in the Expanded Grounds of Appeal (paragraph 11) that the manager was generally more likely to be culpable than the owner Mr Calzavara submitted that this might be the case if the directors of each company were different but here they were the same people so there was no reason to treat one more favourably than the other.

24. In response to Mr Madge-Wyld's submission that knowledge of the need for a licence was already factored into the penalty for portfolio landlords Mr Calzavara distinguished what a landlord ought to know from a landlord actually knew. He noted that Mr Madge-Wyld's Further Submissions did not claim that a landlord with a large portfolio would always know of the need for a licence, only 'almost always', and in *Sutton* it was accepted (paragraph 220) that Mr Sutton, while a director of more than 100 property companies was unaware of the need for an HMO licence. It was appropriate for the penalty to have been in band 5, as the Appellants, as large property owners, should have known of the need for an HMO. It was an aggravating factor that they actually knew of the need for an HMO licence, from at least June 2018.

25. As to the tribunal's ability to depart from the council's policy Mr Calzvara referred the tribunal to *Marshall,* which states, at paragraph 53, *'the FTT is not the place to challenge the policy about financial penalties'* and paragraph 54, *'it is the appellant who has the burden of persuading it [the FTT] to do so [depart from the*

policy]'. In his submission it is permissible for the tribunal to depart from the policy in exceptional circumstances but not as a general challenge, which is what the Appellants are seeking to do here, in arguing that an aggravating factor of knowing of the need for an HMO licence should never increase a band 5 penalty. Just as a 'large' landlord might not know of the need for an HMO licence a 'small' landlord might know of the need.

26. In his closing submissions Mr Madge-Wyld invited the tribunal to consider the weight to be given to the witness statements of Ms Berry-Pike and Ms McCafferty who had not attended the hearing. He reiterated that he accepted the evidence set out in Mr Beach's witness statement but invited the tribunal to be cautious in accepting any conclusions/ inferences that were not proven. He pointed the tribunal to evidence in the bundle (B74) that Mr Lahrie Mohamed was the shareholder of LMSL Group Limited. He accepted that describing the concept of double punishment as 'totality' was incorrect but reiterated that two penalties were inappropriate where there was only one person and one offence. He also accepted that in both *Rollco* and *Sutton* the two legal persons were in each case a company and a director of that company but that there was no difference in principle between that and this case, where the offence arises from the same facts committed by two distinct persons. He accepted that the total penalities in *Sutton* exceeded the statutory maximum but in that case there was a 'high risk of harm' and the risk in this case was not of the same magnitude. As the two persons here were the same he did not see that seeking to apportion culpability added anything. He did not accept the distinction made by Mr Calzavara a landlord who should have known and a landlord who knew. In his submission *Marshall* did not preclude the tribunal from departing from the council's policy and he had provided a good reason for such departure; the need to avoid double-counting and the need to reserve higher penalties for more offending landlords.

Reasons for the tribunal's decisions

27. The issues before the tribunal were
    - whether the sum of the two fines imposed upon the Appellants could exceed the statutory maximum for one fine; and
    - whether it was appropriate for the tribunal to depart from the council's policy of adding actual knowledge of the need for an HMO as an aggravating factor to a level 5 fine.

The sum of the two penalties

28. In this case the council has imposed two financial penalties, one on each Appellant.

29. Section 249A (1) of the 2004 Act provides that, '*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.'* In paragraph 2 of the Appellants' Expanded Grounds of Appeal dated 16 October 2019 the Appellants accepted that the Respondent was entitled to levy a civil penalty against each Appellant.

30. The tribunal do not accept Mr Madge-Wyld's submission that two penalties were inappropriate as there was only one person and one offence. This is in contradiction of the acceptance by the Appellants that the Respondent was entitled to levy a civil penalty against both Appellants.

31. In this case there are two distinct legal persons, both of whom have committed an offence. In paragraph 10 of the Appellants' Expanded Grounds of Appeal it was acknowledged that the penalty was being imposed on the First Appellant as owner and on the Second Appellant as the person managing the property. Just as in *Sutton* it was held (at paragraph 250) that the offences committed by the company and its director were distinct, although arising out of the same facts, the offence commited by the First Appellant as owner and the offence committed by the Second Respondent as manager are distinct, although arising out of the same facts.

32. The tribunal do not accept Mr Madge-Wyld's submission that because the Appellants are both group companies of the same holding company, LMSL Group Limited, whose shareholder is Mr Lahrie Mohamed, the maximum amount of the penalty levied against both appellants should not exceed £30,000. This is the maximum fine for one penalty that can be imposed by a local housing authority under section 249A(4) of the 2004 Act. Section 249A (3) provides that , *'Only one financial penalty under this section may be imposed on a person in respect of the same conduct.'* The section does not preclude the council from imposing financial penalties on more than one person in respect of the same conduct, in this case failure to licence the property as an HMO. Further, and as Mr Calzavara pointed out, in *Sutton* the sum of the penalties imposed on the company and its director exceeded £30,000.

33. That Mr Lahrie Mohamed is the shareholder of the holding company is not relevant as, distinct from *Sutton,* no financial penalty has been imposed on Mr Lahrie Mohamed in his capacity as shareholder. The tribunal accept the distinction made by Mr Calzavara in distinguishing *Sutton* from the present case. In *Sutton* Mr Sutton was held liable because he was a director of FLAL. In this case the liabilities of the two Appellants have arisen from different routes, from one being the freeholder and from the other being the managing agent. The decisions in *Rollco* and *Sutton* were both directed at the issue of whether financial penalties could be imposed on both a company and its directors, not on whether penalties could be imposed on two companies which share the same directors, or on two companies which are owned by the same holding company, as is the case with the two Appellants.

34. The tribunal therefore finds that it is open to the council to impose fines on the two Appellants and that the sum of these fines may exceed the maximum penalty that may be imposed on one person.

Council Policy

35. The tribunal sees no reason to interfere with the level of either penalty fixed by the council in accordance with its policy. That policy includes the ability to increase the penalty for stated aggravating factors and to discount it in certain circumstances. Here each offence fell within the council's band 5 (which band level was accepted by the Appellants) which attracts a penalty of £20,000. The council had then

increased each penalty by £5000 to reflect the aggravating factor of knowing of the need for an HMO licence, and then discounted the increased penalty by 20% to reflect that the Appellants had applied for the necessary HMO licence in November 2018. The level of penalty, increase and discount are all in accordance with the council's policy.

36. Mr Madge-Wyld invited the tribunal to accept that it was entitled to depart from the council's general policy in the present case because the aggravating factor of knowing of the need for an HMO was implicit in a band 5 penalty and should never be added to a fine in that band. He distinguished band 5 from band 3, where by reason of the landlord not having more than one or two properties he/it might not be aware of the need for an HMO licence.

37. The tribunal finds that Mr Calzavara is correct in his distinction between the proposition that a large landlord should know of the need for an HMO licence, which attracts the level 5 fine, and the landlord having actual knowledge of the need for an HMO licence, which under the council's policy is an aggravating factor increasing the level of penalty. It was admitted that in this case the Appellants knew of the need for an HMO licence for the property from June 2018 and did not apply for one until November 2018. Accordingly the council were entitled to increase the amount of each penalty for the aggravating factor of actual knowledge. There was no need for the tribunal to consider whether the Appellants had a history of failing to comply with their obligations in relation to HMO licensing as this was not the basis upon which the level of fine had been set, nor was it the aggravating factor which resulted in its increase by £5000.

38. The tribunal accepts Mr Calzavara's submission that, following *Marshall,* it is permissible for the tribunal to depart from the policy in exceptional circumstances but that what the Appellants are doing here is mounting a general challenge to the council's policy of financial penalities. Mr Madge-Wyld was inviting the tribunal to find that the council should in no case impose its aggravating factor of actual knowledge on a band 5 penalty. The tribunal agrees with Mr Calzavara's submission that Mr Madge-Wyld is inviting the tribunal to accept a general challenge to the council's policy, which is a course of action not open to the tribunal. *Marshall* states at paragraph 53, *'the FTT is not the place to challenge the policy about financial penalties'.*

39. Each financial penalty therefore remains £20,000.

Name: Judge Pittaway **Date:** 1 December 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the

First-tier Tribunal at the regional office which has been dealing with the case.

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.

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

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).