FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HG/HNA/2021/0001
Property	**:**	41 Mount Gould Road, Plymouth, Devon PL4 7PT
Applicant	**:**	KMS Properties Plymouth Limited
Representative	**:**	Curtis Whiteford Croker Solicitors
Respondent	**:**	Plymouth City Council
Representative	**:**	Ms. M Morris, solicitor Plymouth City Council
Type of Application	**:**	**Appeal against a financial penalty** - Section 249A & Schedule 13A to the Housing Act 2004
Tribunal Member(s)	**:**	Judge D. R. Whitney Mr K. Ridgeway FRICS
Date of hearing	**:**	11th March 2021 by CVP
Date of determination	**:**	12th March 2021

DETERMINATION

Background

1. The Applicant is the owner of 41 Mount Gould Road, Plymouth, Devon PL4 7PT. The Applicants seek to appeal a civil financial penalty notice dated 30th November 2020.

2. The Respondent is the council who issued the notice in respect of the Applicants failure to licence a house in multiple occupation in accordance with Section 72 of the Housing Act 2004.

3. The notice in dispute imposed a penalty of £14,960.87 upon the Applicant.

4. Directions were issued on 18th January 2021 which were varied. An electronic bundle was supplied in accordance with the directions and references in [] are to pages within that bundle.

5. The hearing took place remotely via CVP video. The Applicant was represented by Mr Dyke of Curtis Whiteford Croker. Ms Morris appeared for the Respondent council together with Mr Wells Senior Community Connections Officer (Housing Improvement) Plymouth City Council. The hearing was recorded.

6. Both parties' representatives had provided to the Tribunal in advance a skeleton argument which the Tribunal had read and had regard to throughout the hearing.

Hearing

7. This is a record of the most salient points of the hearing. It is not a verbatim record but a precis.

8. At various times during the hearing the representatives and the panel experienced some difficulties, but all were able to re-join. At the conclusion both Mr Dyke and Ms Morris confirmed they had opportunity to present all the submissions they wished to make.

9. Mr Dyke explained that Mr Smith the director of the Applicant company was not attending but relied upon the written witness statement he had given [46-51]. Mr Dyke confirmed the Applicant company admitted that it had committed an offence pursuant to Section 72 of the Housing Act 2004 in that it had managed an unlicenced house in multiple occupation for the period 1st June 2019 to 27th July 2019 being the date the Respondent accepted a completed application had been made.

10. Mr Dyke confirmed the issue was as to whether the level of penalty imposed was reasonable. He confirmed he took no point over the

process adopted by the Respondent or the indicative penalty reached by Mr Wells of £3,000.

11. Mr Dyke submitted more weight should have been given to the matters raised by the Applicant in its representations to the Respondent, see [373-374 and 379-381].

12. Mr Dyke accepted that the Applicant and its director were familiar with the need to hold licences in respect of HMOs and in fact held licences for two other properties. Mr Smith had believed because there was a Certificate of Lawful Use allowing the Property to be used an HMO this was sufficient. It was during the course of a re-mortgage early in 2020 he became aware his understanding was incorrect. He had then applied to the Respondent on 13th February 2020 for a licence. Mr Dyke suggested there was no history of non-compliance by the Applicant.

13. Mr Dyke acknowledged that the application did not include the correct fee or all the documents required to be provided including an Electrical Safety Lighting Certificate. Mr Smith in his witness statement had explained that he relied upon one electrician who he used for all his properties. Sadly due to the pandemic and lockdown there were delays and Mr Dyke accepted the application was not completed until 27th July 2020. In his submission given the circumstance at that time including the fact Mr Smith was looking after two children at home this delay was not unreasonable. On questioning by the Tribunal Mr Dyke did not have instructions as to why the certificates and the like were not obtained prior to the first lockdown on 23rd March 2020.

14. Mr Dyke suggested it was Mr Smith who "came clean" by applying to the Respondent for a licence. He accepted the timeline included within Mr Wells' statement [74-97] including the attempts Mr Wells made to chase up the outstanding documents and does not seek to criticize Mr Wells or the council for so doing. His client was overwhelmed by events.

15. Mr Dyke referred to Mr Wells statement [82] and the factors he said he considered in determining the penalty being punishment of the offender, deterrence of the offender and deterrence of others.

16. Mr Dyke submitted the imposition of any penalty is a punishment given Mr Smith will always have in mind that his company has committed an offence. This will act as punishment and deterrent and the fact that the Plymouth landlord community is relatively small will act as a deterrent to others.

17. Mr Dyke suggested the Applicant had been innocently negligent and any penalty should only be up until 13th February 2020 when it lodged the application.

18. As to financial circumstances in Mr Dykes submission no account should be taken of other properties. A statement of account for this Property was in the bundle [256 and 257]. In his submission given the total profit figure given for this Property was about £16,900 the level of penalty is too high. A penalty based on the period 1st June 2019 until 13th February 2020 was in Mr Dyke's submission the correct level which should be imposed.

19. Ms Morris relied upon her skeleton argument and the witness statement of Mr Wells. In her submission the Council had followed its own enforcement policy. It was accepted that an offence had been committed and the period of the offence. The issue was whether it was right to apply its policy to calculate the award having regard to the rent received for any tenants beyond 4 (i.e. those tenants which made the Property an HMO). She suggested that Mr Dyke had taken no issue with the method of calculation or the amounts but was suggesting that the Council should have taken greater account of the representations and treated these as mitigation of the amount of any penalty.

20. Ms Morris submitted that it was for Mr Smith and the Applicant company to have been aware of its obligations as a professional landlord. The offence had been committed for about 13 months.

21. Ms Morris called Mr Wells who confirmed his statement was true subject to various typographical errors which he pointed out to the Tribunal and all present noted.

22. In supplemental questions Mr Wells confirmed that he took account of the "self reporting" by Mr Smith of the Applicant company in reaching a determination that the culpability was only negligent and not reckless.

23. Mr Dyke had no questions by way of cross examination.

24. In questioning by the Tribunal Mr Wells confirmed there had been no prior contact or complaints in respect of the Applicants ownership and use of this Property. He personally had not been involved in respect of other properties owned by the Applicant and had not checked the files to see if there were any adverse matters noted against the same.

25. Mr Wells confirmed he does have some discretion in determining the penalty such as if there has been non payment of rent by tenants. In this case he was satisfied that in assessing the culpability as negligent this gave credit for the self-reporting. He did not believe there was anything else in the enforcement policy which allowed him to exercise any further discretion.

26. Ms Morris in closing explained the Council adopted its policy which followed the Government Guidance. This was an offence which had

been committed for over 60 weeks. In her submission to limit the offence to the period when the incomplete application was lodged on 13th February 2020 would be an artificial manipulation of the offence period and would be wrong.

27. She further submitted that the Applicant had been allowed to make two sets of representations prior to a Final Notice being issued to ensure fairness to the Applicant. This went beyond what was required. She suggested there was no evidence of financial hardship. As a result she suggested the penalty imposed should be affirmed by this Tribunal.

28. Mr Dyke explained the penalty he contended was correct should be from 1st June 2019 until 13th February 2020 calculated by taking the current penalty, dividing by 365 and then multiplying by 257 (being the number of days between 1st June 2019 and 13th February 2020) which gave a figure of £10,531.86.

Decision

29. In reaching its decision the Tribunal had regard to all submissions and evidence at the hearing, within the hearing bundle and the two skeleton arguments. We thank the parties' representatives for their helpful and considered submissions.

30. The Tribunal is required essentially to make up its own mind. We should start from the Council's own policy and afford respect to the same.

31. The Applicant admitted an offence pursuant to section 72 of the Housing Act 2004 for the period 1st June 2019 to 27th July 2020 was committed. Further it was accepted by the Applicant that in determining the correct indicative penalty the Council policy was adopted and that this was correct.

32. Further it was conceded by Mr Dyke that the imposition of a penalty was correct. He contended the penalty should be in the order of £10,500.

33. We are satisfied given the admission made by the Applicants that an offence for which a civil financial penalty may be imposed had been committed by the Applicant who was the legal owner of 41 Mount Gould Road, Plymouth PL4 7PT.

34. We are satisfied that the offence was committed for the period 1st June 2019 until 27th July 2020. Although application was made on 13th February 2020 a complete application including all documents required by the Respondent council and the necessary fees was not made until 27th July 2020.

35. The Tribunal records that application was made on 13th February 2020. This was following the Applicants solicitors, during the course of a re-mortgage, making him aware that the Property required a licence. We note that for the re-mortgage to proceed it was necessary for the Applicant to show an application was required.

36. Mr Smith was notified of the additional documents and the like to complete the application on 26th February 2020 (see timeline of Neil Wells [78]). Whilst Mr Smith asserts he was delayed in obtaining documents because of the Covid pandemic we note that lockdown did not take place until 23rd March 2020. Paying the fee and obtaining the certificate should have been possible in this intervening period. Mr Smith in his own statement [48] refers to the inspection being due to take place within March.

37. This Tribunal is satisfied that the imposition of a civil financial penalty is the correct approach by the Respondent given the delay in completing the application. The failure to licence was over an extended period.

38. We turn to the amount of the penalty. The Respondent applied its policy which gave an indicative penalty of £3,000. This was on the basis that the Respondent say they assessed the culpability of the Applicant as negligent which takes account of the fact the Respondent only became aware of the offence due to the Applicant making application for a licence. In the Applicants representatives terms they "came clean". We observe such a penalty is at the bottom of the scale of penalties with only an indicative penalty of £2,000 below this.

39. Thereafter the Respondent's policy is to consider what rent the Applicant received from any tenants in excess of four for the Property. This amount is limited to 12 months under the policy. The Respondent calculated this giving a figure of £14,960.87 [95]. This calculation is accepted by the Applicant as correct.

40. The Applicant contends this takes account only of the gross rents and makes no allowance for expenditure by the Applicant. The Respondent explains that the policy does not take account of expenditure effectively because this would be too hard to calculate fairly but only applies to lettings which make the property an HMO i.e. those of the fifth or more tenants. No account is taken of rental received for the first 4 tenants at a property.

41. We observe that even on the Applicant's case in its profit and loss account the amount it made for this Property exceeds the amount of the proposed penalty.

42. The Tribunal is satisfied that this is a correct and proper policy for the Respondent to adopt and apply. It was Government's intention that in applying Civil Financial Penalties those receiving the same would be deprived of any financial benefit of having committed the offence. As to how to determine this it was a matter for each local authority and we are satisfied that the policy of the Respondent council is reasonable and proper.

43. The starting point is that a civil financial penalty of £14,960.87 is correct.

44. We do not accept the arguments of Mr Dyke that this should be limited until the date of the application. We are satisfied the clock should "stop ticking" when the completed application is made. The period it took in this instance was excessive and Mr Wells had to chase the Applicant to complete the same. This process took over 5 months and notwithstanding the pandemic this period is excessive.

45. We are however mindful that no complaints were received by the Respondent about the Property or the Applicant. It is not suggested they are a body who routinely flouted the law. To the contrary they drew the offence themselves to the attention of the Respondent. Whilst we accept the re-mortgage may have necessitated this they have effectively self-reported the offence.

46. Mr Wells talked about having discretion. This must be correct or the process of allowing representations would effectively be meaningless. He believed consideration was given to the self-reporting in the culpability. However the indicative fine in this case is almost irrelevant given the calculation of the financial benefit.

47. In this Tribunals determination it would be against the rules of natural justice if some discount was not given for the self-reporting and acceptance of the commission of the offence by the Applicant. In our determination taking account of the circumstances including the period of time it took from the making of the incomplete application to a complete application we are satisfied that a discount of 20% of the maximum civil penalty allowable under the Respondent's policy is appropriate. We determine the correct penalty to be applied is one of £12,000.

48. For the above reasons the appeal is allowed in part and the Tribunal varies the penalty imposed to one of £12,000.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. 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.

3. If the person wishing to appeal does not comply with the 28 day time limit, the 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.

4. 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.