



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/45UN/HNA/2021/0015

Property : 5 Western Place, Worthing, West Sussex
BN11 3LU

Applicant : Raouf Properties Ltd

Representative : Dr Layth Raouf

Respondents : Worthing Borough Council

Representative : Ms Beverley Rayner, Worthing Borough
Council

Type of Application : Appeal against a financial penalty –
s.249A Housing Act 2004

Tribunal Member(s) : Judge Mark Loveday
Mr Bruce Bourne MRICS

**Date and venue of
hearing** : 28 September 2021, The Ardington Hotel,
Steyne Gardens, Worthing, West Sussex
BN11 3DZ

Date of Decision : 31 October 2021

DETERMINATION

Decision

1. This is an appeal against a financial penalty under s.249A of the Housing Act 2004 (“the Act”). For the reasons given below, the tribunal finds that:
 - (a) A financial penalty should be imposed.
 - (b) The penalty of £2,000 should be upheld.

The Law

2. The Housing Act 2004 (“the 2004 Act”) defines a house in multiple occupation and establishes a licensing regime. The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 (“the 2018 Order”), which came into force on 1 October 2018, says which HMOs have to be licensed.
3. Section 68(6) of the 2004 Act states that “A licence may not be transferred to another person”. As explained by the Upper Tribunal (Lands Chamber) in Taylor v Mina An Ltd [2019] UKUT 0249 (LC) at [3]:

“This means that the purchaser of a tenanted house which requires, and has, an HMO licence cannot rely on the existing licence; the purchaser must apply to the local authority for his or her own. A purchaser who does not do so is committing an offence”.
4. Section 72(1) of the Act defines the offence of having control of an unlicensed HMO:

“(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.
5. There is, in addition, a special statutory defence at s.72(5):

“(5) In proceedings against a person for an offence under subsection (1) ... it is a defence that he had a reasonable excuse ...for hav-

ing control of or managing a house in the circumstances described in subsection (1).”

But it is important to understand the nature of the s.72(5) defence. The issue is whether the relevant person has a reasonable excuse for continuing to manage and control it without a licence. The defence is not made out if there is simply an excuse for not applying for an HMO licence: Thurrock v Palm View Estates [2020] UKUT 355 (LC) at [34].

6. Section 249A of the 2004 Act states 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.” Subsection 249A(2) states that a “relevant housing offence” includes an offence under s.72 of the 2004 Act (licencing of HMOs).
7. Under Sch.13A to the 2004 Act, a financial penalty may be appealed to the tribunal. The tribunal can impose a penalty only if it is satisfied, to the criminal standard of proof (i.e., beyond reasonable doubt), that the offence was committed. By paragraph 34(2) of Sch.13A, such an appeal is to be by way of re-hearing, but it may be determined having regard to matters of which the authority was unaware. The appeal is a “complete rehearing”, but not one which disregards entirely the decision of the local housing authority: London Borough of Brent v Reynolds [2001] EW-CA Civ 1843. The tribunal’s powers are to confirm, reverse or vary the decision of the local housing authority.

Background

8. The appeal relates to premises at 5 Western Place, Worthing, West Sussex BN11 3LU. The tribunal did not inspect the premises, but it was common ground they comprise an end of terrace house c.1900 comprising 5 bedrooms, office and shared kitchen/living area.

9. There was also no dispute that at all material times the premises were occupied by up to five people, and that it was necessary for an HMO licence to be in place under the 2018 Order. On 17 May 2019, the Respondent granted an HMO licence for the premises to DB Investments Ltd for the period 1 October 2018 to 31 September 2023. The 2019 HMO licence was not produced to the tribunal, but it was apparently subject to certain conditions, with a list of required works in Sch.3. The Applicant acquired the premises on 3 September 2019.
10. Subsequent events were dealt with in evidence given to the tribunal by Mr Bruce Reynolds (Private Sector Housing Manager with Adur and Worthing Councils) and by Mr James Elliott (Senior Environmental Health Officer with the Respondent). Dr Raouf cross-examined both witnesses with the help of the tribunal, but little of their evidence of fact was challenged. The chronology below is largely therefore taken from the witness statements of Mr Reynolds and Mr Elliott dated 12 August 2021. Where facts were disputed, the tribunal notes these and sets out its findings of fact .
11. On 2 September 2019, Dr Raouf spoke to Mr Elliott and told the officer the Applicant had bought the premises. Mr Elliott's evidence is that he explained to Dr Raouf that the current HMO licence held by DB Investments Ltd "was not transferable under s.68(6) of the Housing Act 2004 and he would need to apply for a licence under his name or the name of his company". At the hearing, Dr Raouf accepted this conversation took place as alleged by Mr Elliott. But in any event, on the same day, Mr Elliott emailed Dr Raouf about the premises (and other premises at 17 Ashdown Road, Worthing), enclosing a copy of an HMO licence application form. The email said two further copies of the form had been posted as well. Mr Elliott requested that "you submit the [HMO licence] application without delay and not later than within 7 days to avoid an ongoing offence (failure to hold a valid licence)".

12. It appears no immediate action was taken by either party in relation to that email. On 16 July 2020, Mr Elliott eventually sent a further email, pointing out that operating a licensable HMO without a licence was a “criminal offence”. Mr Elliott was willing to treat the failure to apply for an HMO as “an oversight” on the Applicant’s part and invited it “to submit a valid licence application by **24th July 2020**.” On 17 July, Dr Raouf responded that he had just spoken to the “landlord association solicitors on the matter”. They suggested the Respondent knew all about the property because it had an existing HMO – and that “reduced fees” should apply. On 21 July, Mr Elliott replied by email that “you are not renewing the licence, you are applying for a new licence”, and that the fees for an HMO licence could not be reduced. He warned that if an application was not submitted by 24 July 2020, an inspection would be arranged, and the Applicant would be in breach of Pt.2 of the 2004 Act. Dr Raouf promised to pass the Respondent’s email “to the landlord association solicitors as per th[eir] request”.

13. On 22 July 2020, Mr Elliott emailed Brighton & Hove City Council, and a discrete issue arises at this point about Brighton’s practice in relation to the transfer of premises subject to HMO licensing.
 - (a) In essence, para 2 of the Applicant’s Statement of Case states that Brighton does not require a new licence on transfer, and that it simply notes a change of owner on the file. Dr Raouf repeated this in his submissions at the hearing. It seems the issue was also raised by the Applicant’s managing agent in mid-2020, because Mr Elliott’s email of 22 July 2020 asks Brighton about the agent’s suggestion.
 - (b) The Respondent’s case at the hearing was that both local housing authorities have the same practice. The Respondent relies on a (heavily redacted) response to Elliott’s email from an unnamed officer at Brighton dated 22 July 2020. It states that the managing agent “may be getting confused with a change of manager/agent, which we do with a new application (after written confirmation of

the change) but not a new owner, where we would always ask for a new application, albeit at the reduced fee”.

There is only limited evidence on both sides about what is essentially a subsidiary question of fact – on one side a bald assertion by Dr Raouf, and on the other a heavily redacted email. But on balance, the Tribunal prefers the Respondent’s case. If Brighton’s practice is simply to note a change of ownership (rather than requiring a new licence application), this is hard to reconcile with s.68(6) of the 2004 Act. There is no obvious reason why Brighton would dispense with the important requirements in the Act relating to the personal qualities of the licensee. It is more likely Brighton’s email is correct, and that the agents had become confused between a change of *ownership/control* and change of *management*.

14. Returning to the chronology, Mr Reynolds inspected on 27 July 2020. He noted the premises were generally well managed with a member of staff being present. But he noted the works specified in Sch.3 to the 2019 HMO licence had not been completed. These included fire safety improvements to ensure that residents had a protected fire escape route. However, once again, there was apparently no immediate follow up to the inspection.
15. Mr Elliott next gives evidence about two conversations with Dr Raouf on 16 November and 2 December 2020. Mr Elliott suggests Dr Raouf recalled being told to apply for a licence on 2 September 2019, that Dr Raouf said he did not need a licence, but that he agreed to apply for one anyway. On the second occasion, Dr Raouf suggested the Applicant’s managing agent was applying for the HMO but that the Respondent was wrong in requiring a licence application. Although neither conversation was supported by any file note made by the *Respondent*, Mr Elliott produced a screenshot of a text message dated 16 November 2020 provided by the *Applicant*. The text message was sent to the Applicant’s managing agents, and stated that “Unfortunately james elliot[t] insist[s] that we

must apply for HMO licence for 5 western road worthing” and asked that the “managers start the application”. The tribunal is therefore satisfied the conversation on 16 November 2020 took place as alleged.

16. On 7 January 2021, Mr Elliott again emailed the Applicant to say “I remind you that failure to hold a valid licence for a property that requires a licence is an offence as set out in Part 2 of the Housing Act 2004. I am therefore informing you that the Council is now considering what action it will take in respect of this breach”.
17. The Respondent issued a s.249A Notice of Intent on 13 January 2021. This gave notice that the Respondent intended to impose a financial penalty of £6,000 for of offences under s.72 of the 2004 Act. The assessment of the financial penalty was made jointly by Mr Elliott and Mr Reynolds and is set out below in greater detail. Dr Raouf replied by email, enclosing the screenshots referred to above. On 28 January 2021, an application for an HMO was made by the Applicant’s managing agents.
18. Notwithstanding the submission of the application for a new HMO licence, on 28 April 2021, the Respondent confirmed the imposition of a financial penalty, albeit reduced to £2,000. The circumstances in which this decision was made are one of the main issues raised in the Applicant’s appeal, and it is therefore necessary to set out these events in slightly greater detail.
19. The Applicant owns several properties in the area, including another HMO at 4b Bath Place, Worthing. The tribunal in this matter is familiar with 4b Bath Place, having determined an appeal against an Improvement Notice in a decision dated 12 August 2021 (CHI/45UN/HIM/0014). An inspection of 4b Bath Place took place on 27 April 2021, and both Dr Raouf and Mr Reynolds were present. Mr Reynolds’s account was that Dr Raouf was very agitated and was shouting. He further alleged that Mr Reynolds was corrupt, that the officer did not have the

technical capability or qualifications to assess safety in a building. The main issue seemed to be whether a notice of entry had been sent to the Applicant. After some time, Dr Raouf eventually told the tenants to let the housing officers into the flats. But Mr Reynolds did not consider the “confrontation” to be an argument. By contrast, the Applicant suggests Mr Reynolds inspected 4b Bath Place, without giving email notice as is the practice of the Private Sector Housing team with all their inspection appointments. The Applicant had made a complaint under the Council’s complaints procedures. The Respondent had confirmed a “heated” argument took place.

20. Although the nature of the events at 4b Bath Place on 27 April 2021 were the subject of detailed cross-examination at the hearing, the tribunal does not really consider there is any material difference between the parties about the incident on 27 April 2021. It is always a matter of subjective impression as to whether a discussion becomes an “argument”, a confrontation” or a “heated argument”, and whether emphatic language turns to shouting, etc. Suffice it to say the tribunal is satisfied that a confrontation took place at Bath Place, that both sides pressed their respective positions forcefully, and that it had nothing to do with the issues of the HMO at 5 Western Place.

21. Of perhaps more significance is what happened immediately after the incident at 4b Bath Place, and this is something on which there is no dispute. Mr Reynolds’ witness statement states that:

“14. On my return to the office at Portland House, Richmond Road, Worthing, I reviewed the evidence in respect of 4B Bath Place and took the appropriate action in respect of the ongoing conditions.

15. I then reviewed the other case files for Raouf Properties Limited and noted that a decision had yet to be made on the possible financial penalty in respect of the failure to licence the Property at 5 Western Place.”

At the hearing, Mr Reynolds was questioned about this by Dr Raouf, with the help of the tribunal. Mr Reynolds fully accepted the decision to impose the financial penalty in this matter was made immediately after the incident at 4b Bath Place, and that it was part of a general assessment of outstanding matters at the Applicant's other properties. Dr Raouf suggested to Mr Reynolds that the financial penalty for 5 Western Place was "in retaliation" for the events at 4b Bath Place. Mr Reynolds denied this and considered the Applicant attached too much significance to the incident. The tribunal put to Mr Reynolds that the decision to look into other files, and then impose a financial penalty within hours of the incident at Bath Place might give rise to a *perception* of partiality. But Mr Reynolds did not accept this.

22. The tribunal deals below with the issue of 'retaliation'. But for present purposes, it is only necessary to make a single finding of fact. The tribunal finds the financial penalty was not (as a matter of fact) imposed in retaliation for the incident at 4b Bath Place on 27 April 2021. The Respondent had already warned it was considering its options on 7 January 2021 and issued a s.249A notice of intent on 13 January 2021 (which expired 11 February 2021). Indeed, having heard from Mr Reynolds, the tribunal considers he is of sufficiently robust disposition not to be influenced by an altercation of the kind which took place on 27 April 2021. Putting it another way, the decision made on 28 April 2021 to impose a financial penalty was not (in fact) influenced by any improper motive.
23. Returning to the chronology of facts, the present appeal was issued on 15 May 2021. On 5 June 2021, the Respondent granted the Applicant an HMO licence for the premises (valid for 5 years from 28 January 2021). Mr Reynolds explained that the works listed in Sch.3 to the 2021 licence were identical to those in Sch.3 to the 2019 HMO licence. The works were repeated because none of the 2019 works had been carried out.

24. Finally, it should be said that when questioned by the Respondent and the tribunal at the hearing, Dr Raouf accepted he received all the emails referred to above.

The Applicant's case

25. Although Ms Rayner opened the case for the Respondent at the start of hearing, it is perhaps more convenient to set out the Applicant's arguments first.
26. Dr Raouf relied on the application dated 15 May 2021 and the Applicant's statement of case dated 15 July 2021. He expanded upon both at the hearing.
27. The Applicant owns about 13 separate properties in Worthing and Brighton including HMOs, and it can fairly be described as a "professional landlord". The Applicant had carried out extensive works at the premises, and very recently it had completed all the works in Sch.3 to the HMO licence.
28. In relation to the present appeal, the Applicant's first argument was that the financial penalty was issued as a reprisal and retaliation for the argument which took place between Dr Raouf and Mr Reynolds on 27 April 2021 at 4b Bath Place.
29. Secondly, there was a reasonable excuse under s.72(5) of the 2004 Act. Dr Raouf was informed that a license was needed on 2 September 2019 and on 16 November 2020 the Applicant agreed to apply for the license. The reason for the time lapse was that the Applicant sought legal advice from the solicitors to the Southern Landlords Association as to whether a licence was required. When the property was bought, the Applicant believed the existing licence continued to apply. This was in the light of the Applicant's experience with HMO licensing in Brighton & Hove. The legal advice was that a new license application was required. On 2 December 2020, the Applicant instructed the managing agent to apply, and an application was made on 28 January 2021. The Applicant submitted that the procedure adopted by the Respondent was "bureaucratic and artificial".

30. Finally, the tribunal asked the Applicant about the approach to be the Council's *Private Sector Housing Enforcement Policy*. Understandably, Dr Raouf had limited experience of the application of the various criteria set out in the policy, but his observations are recorded below.

The Respondent's case

31. Ms Rayner referred to the Respondent's Statement of Case dated 16 August 2021 which she expanded upon at the hearing. The Applicant had committed a "clear offence" and there were powerful reasons for enforcing the licensing regime.
32. As to the "retaliation" argument, the Applicant had assigned too much significance to the incident at 4b Bath Place. The Respondent had already issued a Notice of Intention to issue a financial penalty on 13 January 2021 and the covering letter to the Notice of Intent made it clear that the submission of an application would only mitigate the offence and that the service of the penalty was always anticipated. It was therefore erroneous to argue that the issuing of the penalty was in retaliation or reprisal. But the argument did not amount to a defence in any event.
33. The Applicant did not have any "reasonable excuse" for committing the offence:
- (a) The Applicant was informed clearly and accurately when it acquired the premises that it had to apply for a new HMO licence.
 - (b) The Applicant did not mention asking for legal opinion until 17 July 2020, more than 10 months after it was told by the Respondent to apply for the HMO licence. The Applicant states that this legal opinion was not received until 2 December 2020, which was four months later, and 16 days after the Applicant had already informed its management company by text of the need to apply on 16 November 2020. These delays were both unreasonable.

(c) The prohibition on a licence being transferred is clearly set out in s.68 of the Act and even the most overworked landlord's association solicitor could have produced a definitive answer within a week.

34. As to the decision to impose a civil penalty and the level of penalty, Ms Rayner submitted the Tribunal should have regard to the Respondent's reasons as set out by Mr Reynolds's in his evidence. Those individual observations are dealt with below.

Discussion – the substantive offence

35. The tribunal is satisfied the Applicant committed an offence under s.72(1) of the 2004 Act. The Applicant was “a person having control of or managing an HMO” which was required to be licensed under the Act. Moreover, it is satisfied that the effect of s.68(6) is that the purchaser of a tenanted house with an HMO licence cannot rely on that licence. The purchaser must apply to the local housing authority for its own HMO licence. If it does not do this, the purchaser commits an offence.

36. The Applicant's answers can be dealt with in turn.

Retaliation

37. The first answer to this is that an improper motive may well be a ground for judicial review of the Respondent's decision to impose a civil penalty, but the Tribunals Courts and Enforcement Act 2007 does not confer any judicial review jurisdiction on the Property Chamber of the First-tier Tribunal. Moreover, an abuse of power by a local housing authority cannot be said to be a defence under s.72(5) of the 2004 Act. Section 72(5) provides a statutory defence where there is a “reasonable excuse ...for having control of or managing a house”. The “excuse” must therefore relate to *the management of a house without an HMO licence*, not an “excuse” for *the imposition of a penalty*. If the Applicant wished to argue an

abuse of process, it ought therefore to have applied for judicial review in the usual way – not appeal the financial penalty.

38. The second answer is the finding of fact above that the Respondent's decision was not influenced by any improper motive. The tribunal accepts it was imprudent for Mr Reynolds to approve a financial penalty for one property, immediately after being involved in an altercation about another property. A reasonable observer might assume there was a connection between the two, and indeed even Mr Reynolds accepts the post-7 April 2021 file review led directly to the imposition of the financial penalty in this matter. But the tribunal does not in fact find there was any improper motive for the imposition of the penalty.

Reasonable excuse

39. As explained above, the s.72(5) defence does not involve the question whether there is a reasonable excuse for not applying for a licence, but rather whether there is a reasonable excuse for continuing to manage and control premises without a licence.
40. The tribunal finds any misunderstanding about the legal position was not a reasonable excuse:
- (a) The Applicant's case essentially deals with the wrong question, namely the reasons for not applying for an HMO licence. The legal requirements were made clear by the Respondent as early as 2 September 2019, in the email of the same day, on 16 July 2020, on 21 July 2020, on 16 November 2002, on 2 December 2020 and on 7 January 2021. It was not until the Notice of Intent was served on 13 January 2021 that an HMO licence was put in place. The Applicant was aware it could not control premises without an HMO licence even before it acquired the premises, and it continued to control the premises for over 15 months without an HMO licence, despite numerous warnings.

- (b) In any event, the provisions of s.68(6) of the Act about transfers are clear. The well-known maxim “ignorance of the law is no excuse” applies.
- (c) In some circumstances, it may be a reasonable excuse for a person to delay matters to obtain legal advice. Controlling an HMO without a licence for (say 1-2 weeks) to obtain legal advice might well provide a reasonable excuse. But the Applicant is a professional landlord with access to solicitors through the Southern Landlords Association, and it was aware of the issue as early as 2 September 2019. The need to seek legal advice cannot reasonably excuse over 15 months of default. In any event, as Ms Rayner points out, the Applicant did not mention asking for advice until 17 July 2020, more than 10 months after it was told by the Respondent to apply for the HMO licence.
- (d) In some circumstances, it may also be a reasonable excuse for a person to rely on its managing agents to apply for a licence. But again, the Applicant is a professional landlord with other HMOs. It cannot reasonably delegate this important requirement to others – especially in the face of repeated warnings about the consequences. In any event, the Applicant produced evidence to show it only instructed its managing agents to apply for an HMO licence in November 2020. That was simply too late, and there is no evidence a professional landlord chased its agent to ensure an application was made speedily. There were lengthy and unexplained delays in regularising the position.
- (e) It was no reasonable excuse to rely on practice at Brighton & Hove City Council. The finding of fact above is that Brighton’s practice was no different to that of the Respondent. In closing submissions, Dr Raouf also suggest the Respondent’s general approach was bureaucratic and artificial. But the tribunal does not find there was any procedural difficulty with the Respondent’s application process. Indeed, the Applicant was able to make an

HMO licence application in 2021, and there was no suggestion that process was either bureaucratic or artificial.

41. In short, there is no defence under the 2004 Act.

The option to impose a civil penalty

42. The tribunal must consider whether a penalty ought to be imposed for the breach of the duty to obtain an HMO licence, and if so, what the penalty should be. When undertaking that exercise, the tribunal must have regard to the objects of the civil penalty legislation and the policy applied by the Respondent in its area.

43. The tribunal was referred to the *Guidance on Civil Penalties* issued to local authorities by the Ministry of Housing, Communities and Local Government under the Housing and Planning Act 2016 which contains a list of factors that may be relevant to the quantum of a civil penalty. The Guidance requires local housing authorities to draw up their own policy on civil penalties. In Sutton v Norwich CC [2020] UKUT 90 (LC) the Upper Tribunal summarised the proper approach at [245]:

“If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the Tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability of the appellant in reaching its own decision”.

44. The Respondent’s policy on civil penalties appears in its *Private Sector Housing Enforcement Policy* (“the PSHEP”) a copy of which was included in the hearing bundle. Para 7.4 of the PSHEP states that the options available to the Council include:

- To take no action;
- To take informal action;
- To take formal action;

- To issue a Civil Penalty Notice;
- To prosecute;
- Simple caution;
- Execution of work required by statutory notice where the recipient has not complied (Works in default); and
- Rent Repayment Orders.

45. Ms Rayner submitted that in April 2021, the main available options were that the Respondent could do nothing, it could prosecute in the criminal courts, or it could issue a financial penalty notice. The ‘do nothing’ option would be irresponsible: It would undermine enforcement actions taken under the Housing Act 2004 if landlords believed that failing to licence a licensable HMO had no consequences or that they could ignore continued written and verbal warnings with impunity. Action to prosecute the Applicant in the courts was possible, but a financial penalty was considered more likely to ensure it did not benefit from its failure to comply with the licensing requirements and provide safe accommodation. Moreover, a financial penalty would still allow the Applicant to act as the licence holder for the HMO.

46. Dr Raouf did not directly address these options or the decision to impose a financial penalty, although he did suggest the Respondent was “stricter than others”.

47. Giving weight to the Respondent’s decision, the tribunal considers it was appropriate to impose a financial penalty, and adopts the reasons given by Ms Rayner above.

The level of penalty

48. Paragraph 3.5 of *Guidance on Civil Penalties* states that ‘The actual amount levied in any particular case should reflect the severity of the offence, as well as taking account of the landlord’s previous record of offending’. The same paragraph lists several factors that should be tak-

en into account to ensure that the civil penalty is set at an appropriate level in each case:

- Severity of the offence. The more serious the offence, the higher the penalty should be.
- Culpability and track record of the offender. 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.
- The harm caused to the tenant. This is a very important factor - when determining the level of penalty. The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty.
- Punishment of the offender. A civil penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a high enough level to help ensure that it has a real economic impact on the offender and demonstrates the consequences of not complying with their responsibilities.
- Deter the offender from repeating the offence. The ultimate goal is to prevent any further offending and help ensure that the landlord fully complies with all of their legal responsibilities in future. The level of the penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.
- Deter others from committing similar offences. While the fact that someone has received a civil penalty will not be in the public domain, it is possible that other landlords in the local area

will become aware through informal channels when someone has received a civil penalty. An important part of deterrence is the realisation that (a) the local housing authority is proactive in levying civil penalties where the need to do so exists and (b) that the level of civil penalty will be set at a high enough level to both punish the offender and deter repeat offending.

- Remove any financial benefit the offender may have obtained as a result of committing the offence. The guiding principle here should be to ensure that the offender does not benefit as a result of committing an offence, i.e., it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

49. The approach adopted by the Respondent largely follows that recommended by the Secretary of State's Guidance. Part 1 involves a five-stage assessment:

- Stage One: Banding the offence. The initial civil penalty band is decided following the assessment of two factors, culpability of the landlord and/or agent; and the level of harm that the offence has had or may have. The scores are multiplied to give a penalty score which sets the base level of financial penalty. If more than one party is involved in the commission of the offence the banding will be considered in terms of each person's culpability. Any penalty will then be calculated based on each party's involvement and level of culpability.
- Stage Two: Amending the penalty band based on aggravating factors.
- Stage Three: Amending the penalty band based on mitigating factors.
- Stage Four: A Penalty Review. To review the penalty to ensure it is proportionate and reflects the landlord's ability to pay, but that the penalty is not less than it would have cost the landlord to comply in the first place.

- Stage Five: Totality Principle. A consideration of whether the enforcement action is against one or multiple offences, whether recent related offences have been committed and ensuring the total penalties are just and proportionate to the offending behaviour.

The assessment is made on a Civil Penalty Reference Form. Two such forms were completed by Mr Reynolds in this case - one for the Notice of Intention and one for the s.249a Notice itself. The two differed only in the final assessment stage.

50. At the hearing, The Tribunal asked Mr Reynolds to take it through the details of the final Civil Penalty Reference Form, cross referencing each consideration (where necessary), with the relevant guidance. Understandably, Dr Raouf had only a limited input into this process, but the tribunal sought to test the evidence of Mr Reynolds where possible.
51. The tribunal adopts and applies the same scheme set out in the Respondent's Guidance and gives weight to the decision of the Respondent on each element of the scoring. The descriptions of "stages" and "steps" in the Guidance and Civil Penalty Reference Forms are not always easy to reconcile. The tribunal adopts those referred to in the forms.

Step 1: Culpability

52. Culpability is assessed in one of four levels, namely "low", "moderate", "high" or significant". Mr Reynolds assessed this as "high", which the Guidance states applies where the landlord had "actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken".
53. Mr Reynolds referred to the fact that the Applicant was a professional landlord with several HMOs and should have been aware of the licensing requirements. There were repeated warnings in this case, but it failed to comply over a period of 16 months.

54. The tribunal considered whether these factors might more readily fall within the “moderate” band for culpability (“Offence committed through act or omission which a landlord exercising reasonable care would not commit”). But there were express and detailed warnings given by the Respondent over a long period of time. The tribunal therefore agrees with Mr Reynolds culpability assessment as “high”.

Step 2: Level of harm

55. The level of potential or actual harm is assessed is also assessed as “low”, “moderate”, “high” or significant”. A Scoring Matrix is then used to arrive at a banding. Mr Reynolds assessed the level of harm as “moderate”, which the Guidance states applies where there is a moderate risk of an adverse effect on individuals (not amounting to “low” risk) or where the public is misled but there is little or no risk of actual adverse effect on individuals.
56. Mr Reynolds accepted the occupants of the property were running and managing the property well, although there are issues (including fire safety issues) required under Sch.3 to the 2019 HMO Licence, which had to be addressed under the 2021 HMO Licence. The refusal to apply for a licence is also undermining the process, which in place to control the increased risks presented by this type of accommodation. In his closing submissions, Dr Raouf did not agree there were any remaining fire safety issues at the premises.
57. The tribunal considered whether these considerations might more readily fall within the “moderate” band for actual or potential harm (“low risk of an adverse effect on individuals” or “public misled but little or no risk of actual adverse effect on individuals”). The safety issues may well have now been remedied (although the Respondent had been able to check whether or not this is the case). But the fact remains that there was a risk of harm (including arising from fire safety issues) which existed for over 16 months. Moreover, the absence of an HMO licence removed an

important means for the Respondent to enforce housing standards for over a year. The tribunal therefore agrees with Mr Reynolds culpability assessment as “moderate”.

58. The scoring matrix in the Guidance translates a high level of culpability with a moderate level of harm into a Civil Penalty Score of 6. The table in the Guidance provides for a civil penalty of £6,000 for a Civil Penalty Score of 6.

Steps 3(a) and (b): Aggravating and mitigating features

59. A variety of potential aggravating and mitigating factors are identified in the policy. Aggravating factors include previous convictions, a financial motive, obstruction of the Council's investigation or deliberate concealment. Mitigating factors include cooperation with the Council's investigation and “any voluntary steps taken to address issues”.
60. The tribunal considered whether there were any particular aggravating features as listed in the Guidance. It could be said that there was a “refusal to accept offer of, or respond to the Councils’ advice regarding responsibilities, warnings of breach or learned experience from past action or involvement of the Councils or other Regulatory Body. But the failure to deal with matters despite warnings are already factored into the scoring.
61. The tribunal also considered whether there were mitigating features in this case. the tribunal agrees with Mr Reynolds that there are no relevant aggravating or mitigating features, subject to the next point made below.
62. Part 2 of the final Civil Penalty Reference Form records the following:

“The text to Sussex Property was sent on 16 November 2020, which is some 14 months after the application should have been made. Dr Raouf only chased the application after a further 2 months when issued with the notice of intent. The application was finally received on 28 January 2021. Since Dr Raouf can demonstrate that he requested the form to be completed and the fact that the appli-

cation has now been made, the level of fine [sic] can be reduced to £2,000 to reflect the offence of failing to hold an HMO licence and the time and resources committed by this Council in resolving this issue”.

63. The treatment of this adjustment of 2/3 as part of the final assessment is slightly puzzling. It does not readily fall within any of the considerations at stages 4 or 5 of the Guidance. Notwithstanding the way it is put, the Tribunal therefore treats it as a mitigating feature under Step 3(b). If so, the relevant Guidance allows the Respondent to take into account “Steps voluntarily taken to remedy problem” as mitigating features.
64. In his evidence, Mr Reynolds considered the 2/3 end adjustment was appropriate because the Applicant eventually complied with the requirement for a licence. In his closing submissions, Dr Raouf suggested the reduction should be as much as 90%. The tribunal has little doubt that the discount in this case should not be as high as 90% - indeed, it is arguable that an application for a licence ceases to be “voluntary” if made under the threat of enforcement action. Although the tribunal considers a two-thirds discount is at the higher end of the discount ‘bracket’ for a case such as this, it gives weight to the Respondent’s assessment and affirms the discount of 2/3.

Steps 5 and 6: asset check and review

65. Neither party suggested these affected the level of financial penalty.

Conclusions

66. The tribunal finds that the Applicant's defences are not made out. Having reviewed the level of the penalty, it confirms the decision of the local housing authority to impose a financial penalty of £2,000.

Judge Mark Loveday
31 October 2021

Appeals

1. 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.
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.