FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AU/HNA/2020/0047**
HMCTS code (paper, video, audio)	:	**V: CVPREMOTE**
Property	:	**31A Stroud Green Road, London, N4 3EF**
Applicant	:	**Tanvir Hussain**
Representative	:	**Mr Griffin of Counsel**
Respondent	:	**London Borough of Islington**
Representative	:	**Miss Cafferkey of Counsel**
Type of application	:	**Appeal against a financial penalty imposed pursuant to section 249A Housing Act 2004**
Tribunal members	:	**Tribunal Judge I Mohabir** **Mr M Cairns MCIEH**
Reconvene	:	**26 February 2021**
Date of decision	:	**5 May 2021**

DECISION

© CROWN COPYRIGHT

Covid-19 pandemic: description of hearing

This has been a remote video hearing, which has been consented 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 that we were referred to are in the hearing bundles prepared by the Appellant and the Respondent, the contents of which we have noted. The order made is described at the end of these reasons.

Introduction

1. Unless stated otherwise, any page references are to the Appellant's bundle [AB] and the Respondent's bundle [RB].

2. This is an appeal made by the Appellant against the financial penalty imposed on him by the Respondent pursuant to section 249A of the Housing Act ("the Act") regarding the property known as 31A Stroud Green Road, London, N4 3EF ("the property").

3. It is common ground that following an inspection of the property on 8 May 2019 by Mr Roderick Birtles, a Senior Environmental Health Officer employed by the Respondent, served a notice of intent on the Appellant dated 23 October 2019 [RB/193-204]. The notice alleged that the property was a house in multiple occupation (HMO) and that the Appellant had specifically breached Regulations 3, 4(1)-(3), 6(1)-(2) and 7(2)(e)-(f) of The Management of Houses in Multiple Occupation (England) Regulations 2006 ("the Regulations") and thereby committed an offence by virtue of section 234(3) of the Act. The proposed level for the financial penalty was £14,999, which would be reduced to £11,999.20 if the alleged breaches were remedied within 28 days after service of the notice.

4. Following representations made by the Appellant, the Respondent served final notice on him dated 20 February 2020 in which the level of the financial penalty had been reduced to £10,624.88 because 7 of the 8 alleged breaches had been addressed. It is not necessary to set out the details of the alleged breaches here, as they are dealt with below.

5. On 18 March 2020, the Appellant made this application to appeal the final notice.

6. The Appellant's grounds of appeal can be summarised as follows:

   (a) the primary ground of appeal relied on is that the property was not an HMO at the time the notice was served and the Regulations did not apply. Therefore, no financial penalty is payable.

(b) in the alternative, there had been no breach of the Regulations.
(c) in the alternative, the financial penalty is excessive.

(d) that the notice of intent and the final notice are invalid.

7. These grounds are dealt with in turn below.

Hearing

8. The remote video hearing took place on 15 January 2020. The Appellant and Respondent were represented by Mr Griffin and Miss Cafferkey of Counsel respectively.

9. For the Appellant, the Tribunal heard oral witness evidence from the Appellant himself and his brother, Mr Jangeer Hussain. On behalf of the Respondent, oral witness evidence was heard from Mr Birtles and Miss Curd, who was one of the former occupants of the property. The salient parts of their evidence are referred to in this decision.

Decision
Was the Property an HMO?

10. In this instance, the property is an HMO if:

(i) it consists of one or more units of living accommodation not consisting of self-contained flat or flats;
(ii) the living accommodation is occupied by persons who do not form a single household;
(iii) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying;
(iv) their occupation constitutes the only use of the accommodation;
(v) two or more of the households who occupy the living accommodation share one or more of the basic amenities.

11. It is common ground that the property was let under an assured shorthold agreement dated 3 November 2015 granted by the Appellant to a Mr Millen, Miss Johnston, Miss Harvey and Miss Morris for a term of 12 months commencing from that date ("the tenancy agreement").

12. The freehold of the property is/was owned by the Appellant's brother, Mr Jangeeer Hussain. However, it was being "managed" at the time by Liberty Estate Agents ("Liberty"). The limited scope of their instructions was to attend to the execution of the tenancy agreement, protect the tenancy deposits paid and collect the rent, which was paid to the Appellant less a rent collection fee. Save for these matters, the Appellant was responsible for the repair and maintenance of the property [RB/71].

13. Subsequently, the occupation of the property changed to Mr Millen, Miss Curd, Miss Hope and Miss Ardern. By the time Mr Birtles

inspected the property on 8 May 2019, there were 6 occupiers, namely, Mr Millen, Miss Logan, Miss Curd, Mr Richards, Miss Marshall and Miss Russell.

14. It is the Appellant's case that, save for Mr Millen and (possibly) Miss Curd who cohabited with him as a single household, the other occupants of the property were there unlawfully in breach of clause 9 of the tenancy agreement because the Appellant had not consented to an assignment, subletting or otherwise parting with possession.

15. Therefore, as a matter of law, it was submitted that the definition of an HMO requires, among other things, that "the living accommodation is occupied by persons who do not form a single household": section 254(2)(b) of the Act.

16. In this context, the term 'occupied' can only refer to lawful occupation. The definition of 'occupier' is a person who occupies premises "as a tenant or other person having an estate or interest in the premises or as a licensee": section 262(6)(b) of the 2004 Act. It follows that Parliament cannot have intended that a building occupied by trespassers could fall within the definition of an HMO and the Tribunal should only consider whether the lawful occupants of the Property formed a single household, and ought to disregard any trespassers, which includes unlawful sub-tenants: see ***Moore Properties (Ilford) Ltd. v McKeon [1977] 1 All ER 262***.

17. The Tribunal did not accept this submission as being correct. The difficulty faced by the Appellant is that no direct evidence was adduced in support of it.

18. The only "evidence" in relation to the occupation of the property was in the form of a without prejudice letter from Liberty dated "14th June", which simply makes a bare assertion that the property is not an HMO and "we have a contract for four tenants to legally occupy the property as one household". This letter was not in the form of a witness statement or supported by a statement of truth and the Tribunal attached no weight to it.

19. In addition, on the Appellant's own case, he operated a "light touch" in relation to this duties as the landlord named in the tenancy agreement despite operating a commercial business from the ground floor premises below the subject property.

20. His evidence was, save for receiving the rent(s) from Liberty, he did not visit or inspect the property at all. He did not see anyone enter or leave the premises. He left the management entirely to Liberty and any repair or maintenance matters were dealt with by his employee named 'Ravi' who was not called to give any evidence regarding the occupation of the property. Mr Jangeer Hussain simply confirmed in evidence that he left all matters regarding the property to his brother as he was residing in the USA at the time.

21. It follows that the Tribunal was faced with the uncontroverted evidence adduced by the Respondent regarding the occupation of the property.

22. Written section 9 statements were made by Miss Curd, Mr Millen and Miss Logan independently [RB/250-256]. The statements corroborated each other in relation to the letting and occupancy of the property from the commencement of the tenancy. Their evidence was that the tenancy was originally granted to 6 people and the property had 5 bedrooms. It had never been occupied by less than 6 people. In cross-examination, Miss Curd did not resile from her evidence about the occupation of the property. The internal living arrangements were also corroborated by the section 9 statement prepared by Mr Birtles dates 7 October 2020 following his inspection of the property on 8 May 2019.

23. As to the tenants expressly named on the tenancy agreement, the Tribunal accepted the uncontroverted evidence of Miss Curd and Mr Millen that Liberty had insisted from the outset that only 4 tenants were named on the agreement. Miss Curd also said that when the tenancy agreement was signed, they were advised by Liberty that there was no limit on the number of people who could occupy the property. The agents advised they were happy for new people to live there in place of those who departed and said that the tenancy agreement would only have to be updated if one of the people who signed the written tenancy agreement left.

24. Taken together, the Tribunal found this witness evidence to be both highly consistent and credible. It was not rebutted by any evidence from the Appellant. The inferences to be drawn from this were that, at all material times, Liberty were acting with the express or ostensible authority of the Appellant and that the naming of 4 tenants only on the tenancy agreement was to create a sham agreement to circumvent the HMO regulatory provisions.

25. The Tribunal had little difficulty in finding that from the commencement of the tenancy that:

    (a) the property was let to not less than 6 persons who had the use of 5 bedrooms.
    (b) the letting had been done by Liberty with the actual or ostensible authority or consent of the Appellant and, therefore, none of the occupants were trespassers in breach of clause 9 of the tenancy agreement.
    (c) the tenancy agreement was in fact a sham agreement.

26. It follows that the Tribunal was satisfied that the property was an HMO within the meaning of section 254 of the Act and was, therefore, subject to the Regulations.

Person Managing

27. Section 234 of the Act imposes various duties on the person managing a house in respect of repair, maintenance, cleanliness, and good order of the house and facilities.

28. The "person managing" is defined by section 263(3) as being an owner or lessee who:

> (a) receives the rents or other payments from
> (i) in the case of a HMO, the persons who are in occupation as tenants or licensees of parts of the premises, or
> (ii) would so receive those rents or other payments but for having entered into an arrangement with another person who is not the owner or lessee by virtue of which of which that other person receives the rent and includes, where those rents are received through another person as agent or trustee, that other person.

29. Under s.262(1), 'lease' and 'tenancy' have the same meaning. Both expressions include (a) a sub-lease or sub-tenancy (s.262(2)(a)). The expression 'lessor' and 'lessee' and 'landlord' and 'tenant' are to be construed accordingly: s.262(3).

30. "Occupier" means a person who (a) occupies the premises as a residence, and (b) so occupies them whether as a tenant or as a licensee, and related expressions are to be construed accordingly: s.262(6). Accordingly, the phrase occupier extends to sub-tenants and sub-licensees.

31. The Appellant submitted that, as a matter of law, he could not be the person managing for two reasons. Firstly, there can only be one person managing and that was plainly Liberty who received the rent directly from the tenants. Secondly, the Appellant was not a trustee as there was no intention to create a formal trust between himself and his brother.

32. The Tribunal did not accept the submission that Liberty was the only "person managing" within the meaning of section 263(3) by the mere collection of the rent and the letting of the premises. In the Tribunal's judgement, the clear intention behind the section was to make the person managing subject to the obligations created by section 234.

33. Therefore, the legal obligation for the repair and maintenance of the property is highly relevant. On the Appellant's own case Liberty's role was simply limited to the collection of the rent on his behalf and the letting of the property from time to time. Indeed, Liberty has never accepted at any stage that it was responsible for the repair and

maintenance of the property. Contractually, it was the Appellant who was obliged to do so and it seems that this was done at the Appellant behest by 'Ravi" who was employed by him in some capacity. There was no evidence that Liberty had in fact arranged for any repairs or maintenance to be carried out.

34. As to the submission that the Appellant was not a trustee, it was the Appellant's evidence that he collected the rent for his brother. It was transferred by the agents to Mr Hussain's bank account so that he could cover his brother's expenses and outgoings, later to account to his brother with regard to the balance. This was done because his brother was residing in the USA at the time and he was unable to manage the building. It was described as an informal family arrangement.

35. The Tribunal accepted the Respondent's submission that on the basis of this evidence, a trust relationship did exist between the Appellant and his brother. The Tribunal accepted that the formality of an intention to create a trust was not necessarily required for one to exist. The inclusion or omission of the word "trust" is not conclusive. The Court or Tribunal must construe the substance, against the background of any relevant circumstances. The parties need not even understand that they have created a trust relationship: see Snell's Equity, para 2-013.

36. Furthermore, this was not a case where the Appellant's brother gifted the rental monies to him or allowed him to keep the money as if it were a loan to be paid back later.

37. Based on this evidence, the Tribunal concluded that a trust relationship did in fact exist between the Appellant and his brother. Therefore, the Tribunal was satisfied that the Appellant was the "person managing" the property within the meaning of section 263(3) of the Act.

Specific Breaches of the Regulations

38. The generality of the Appellant's evidence in relation to the alleged breaches set out in the notice of intent and the final notice was to either deny the breaches had occurred or that he was not responsible for it occurring. The Tribunal considered that this stance was difficult to maintain given that there was no evidence the Appellant had visited or inspected the property during the tenants' occupation. In other words, he could not give direct evidence about the alleged breaches.

39. This has to be contrasted with the detailed, credible and uncontroverted evidence given by Mr Birtles in his witness statement about the alleged breaches found on his inspections. This was corroborated in cross-examination by Miss Curd and, in particular, that the breaches had existed from the commencement of the tenancy. The Tribunal, therefore, accepted the evidence of Mr Birtles without qualification and found beyond reasonable doubt that the following breaches of the Regulations had occurred:

Regulation 3
The name, address and contact manager had not been displayed in the common parts at the times Mr Birtles inspected the property. There was no evidence provided by the Appellant of when his photographic evidence of such a notice was taken. In any event, the purported notice was not compliant because the Appellant's contact details were not stated on it.

Regulation 4(1)
The means of escape route was not kept clear of obstructions and a particular concern was a landing area within the means of escape which was piled high with storage including many combustible items. That storage also prevented access to a window on that landing. These matters were readily apparent in the photographic evidence provided by Mr Birtles.

Regulation 4(2)
The top (third) floor fire alarm had not been maintained in good working order. However, the Tribunal could not make a finding that the second floor smoke detector was incorrectly sited because this is not covered by the Regulations.

Regulation 4(3)
No means of escape from fire notices had been displayed.

Regulations 6(1) & (2)
No gas or electrical appliance test certificates had been provided to the Respondent within 7 days of the request being made. There was no evidence to support the Appellant's assertion that he had done so.

Regulation 7(2)(e)
The regulation requires that the common parts are fitted with "adequate light fittings that are available for use at all times." There was no working artificial light to the landing on Mr Birtles inspections and the fitting there was also difficult to access due to its high position over the stairway and by the piles of stored furniture and other obstructions preventing ready maintenance/replacement of bulbs.

40. However, the Tribunal found that Regulation 7(2)(f) had not been breached by the Appellant. This provides that the fixtures, fitting or appliances used in the common parts had to be maintained in good and safe repair and in clean working order. Mr Birtles said in cross-examination that when he revisited the property on 17 October 2019, the boiler was providing hot water to 99% of the property. The difficulty, it seems, was the supply of hot water to the downstairs bathroom. Therefore, the boiler appeared to operate correctly by heating the water. The Tribunal was satisfied that the delivery of the hot water was not a function of the boiler *per se*.

Level of Penalty

41. Much criticism was made in the Appellant's written closing submissions about the inconsistent application of the Respondent's policy when calculating the level of the financial penalty.

42. However, the Tribunal was satisfied that this criticism was not justified having regard to the careful and detailed calculation and justification carried by Mr Birtles using the scoring matrix described in his statement from paragraph 28 onwards.

43. In particular, the Tribunal also had regard to the facts that the Appellant was an experienced professional landlord who jointly owned several properties with his brother in and around the Stroud Green Road area. The Appellant accepted that a number of those properties had been subject to a similar intervention by the Respondent as the present case. *Prima facie*, this would appear to show that the Appellant either had a scant regard for or was reckless about the regulatory regime for HMO's. This would appear to find support by the fact that the breaches made out against the Appellant here were long standing.

44. The Tribunal was satisfied that these material considerations should be reflected in a significant financial penalty being awarded against the Appellant. However, given that there had been no material breach of Regulation 7(2)(f) by the Appellant, the Tribunal reduced the financial penalty to £10,000.

Validity of Notice of Intent and Final Notice

45. The Appellant submitted that both of the notices were procedurally flawed because they failed to state with any degree of clarity the reasons for imposing a financial penalty or was inaccurate in a number of respects.

46. The Tribunal rejected this submission because it was satisfied that the stated breaches were sufficient for the purpose of paragraph 3(b) in Schedule 13A to the Act. In the Tribunal's judgement, they made it clear why the Respondent was imposing a financial penalty and that is all that is required. There is no express requirement in the Schedule for the Respondent to provide the level of detail and/or disclosure contended for. The reasons need be no more than generic in nature as to each of the alleged breaches. The extent of the breaches is irrelevant for the purpose of the notices. They only go to the level of the financial penalty, if any. Even if the Tribunal is wrong about those matters, it was also satisfied that it did not result in any procedural unfairness to the Appellant. He was offered an opportunity to make oral and written representations to the Respondent and did so before the final notice was served on him.

47. Accordingly, the appeal is dismissed and the Appellant is ordered to pay the sum of £10,000 by way of a financial penalty to the Respondent within 28 days of service of this decision on him.

Name: Tribunal Judge I Mohabir **Date:** 5 May 2021

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).