FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BJ/HNA/2020/0076**
HMCTS	**:**	**V: CVPREMOTE**
Property	**:**	**11 Toland Square, Roehampton, London, SW15 5PA**
Applicant	**:**	**Sharing and Living Limited**
Representative	**:**	**Ayo Gordon**
Respondent	**:**	**London Borough of Wandsworth**
Representative	**:**	**Laura Curror**
Type of Application	**:**	**Appeal against a financial penalty – Section 249A & Schedule 13A of the Housing At 2004**
Tribunal Members	**:**	**Judge Robert Latham** **Louise Crane MCIEH** **Mr O Miller**
Date and Venue of Hearing	**:**	**26 May 2021 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**7 June 2021**

DECISION

Decision of the Tribunal

(i) The Tribunal allows the appeal against the financial penalty of £15,000 in respect of the offence under section 72(1) of the Housing Act 2004 and reduces the fine to £6,000.

(ii) The Tribunal makes no order in respect of the reimbursement of the tribunal fees paid by the Applicant.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Tribunal had regard to the application form, the directions and the documents specified in paragraph 3 below.

The Application

1. This is an appeal by Sharing and Living Limited, the Applicant, against the imposition of a financial penalty ("FP") by the London Borough of Wandsworth ("Wandsworth") under Section 249A & Schedule 13A of the Housing At 2004 ("the Act"). The Final Notice to impose a Financial Penalty is dated 27 May 2020. The offence specified is one under section 72 of the Act, namely an offence of control or management of an unlicenced HMO at 11 Toland Square, Roehampton, London, SW15 5PA ("the Property").

2. On 9 June 2020, the Tribunal received the Applicant's application. The sole ground of the appeal is that the FP was excessive.

3. On 5 February 2021, the Tribunal gave Directions:

   (i) The Applicant has filed brief written representations in support of its appeal (3 pages);

   (ii) The Respondent has filed an extensive bundle in 11 attachments. This includes a Bundle of documents which totals 344 pages broken down into six files. The Respondent also provided a number of tenancy agreements and por forma statements from occupants of the Property.

4. Both parties agreed to mediation and an appointment was held on 3 March 2021. Both parties agreed to the tribunal being informed of the outcome of the mediation. In other circumstances, this would have been privileged. Wandsworth agreed to reduce the FP to £10,000. The Applicant, appearing through Mr Ayo Gordon, stood out for a reduction to £6,000. After the mediation, Wandsworth agree to meet the Applicant in the middle and accept £8,000. Mr Gordon contacted Wandsworth to say that he was not happy that the Applicant would appear on the GLA database. The dispute was therefore unresolved.

The Hearing

5. My Ayo Gordon appeared for the Applicant Company. He is the sole director. He was accompanied by Mr Stuart Mansell, a friend. Mr Gordon gave evidence. He is involved in the property market. He has developed a number of properties. He also mentors others who wish to develop properties. He is a member of the "Property Network". The Applicant Company managed three properties at the time of the offence. It now only manages one. Mr Gordon had previously been the sole director of Yellow House Sales Limited, a company which had managed a small number of properties. He put this company into administration when it was in financial difficulties.

6. Ms Laura Curror, an Environmental Health Practitioner, appeared for the Respondent, the London Borough of Wandsworth ("Wandsworth"). She was accompanied by Ms Lola Adepoju, the Private Sector Housing Team Manager. They both had difficulty in joining the video link. The hearing was adjourned until 11.00 and they joined by telephone. They were both able to fully participate in the hearing.

7. Ms Curror confirmed that Wandsworth were no longer seeking to uphold the FP of £15,000, but were rather asking the Tribunal to confirm a FP of £8,000. Wandsworth's Enforcement Policy specifies a FP of between £10,000 and £17,500 for an unlicenced HMO with between six to ten occupants. However, Wandsworth considered that there were exceptional circumstances to adopt a lower figure having regard to the personal circumstances of the Applicant Company and Covid-19.

8. The appeal is by way of a re-hearing. The Tribunal is entitled to have regard to matters of which Wandsworth was previously unaware. The Tribunal must determine this application on the basis of the evidence adduced before us. Wandsworth did not adduce any evidence from Mr and Mrs Stewart (the owner of the Property), or from Sequence (UK) Ltd (who trade as Barnard Marcus) who managed the property on behalf of the owners. On 7 May 2020, Wandsworth imposed a FP of £12,500 on Sequence (UK) Ltd. This had been reduced from £15,000 having regard to the representations which it made in response to the Notice of Intention. Wandsworth did not include the papers relating to this in the Bundle of Documents. Our findings might have been different had we heard evidence from the owners or their managing agent.

The Background

9. The property at 11 Toland Square is a three storey terraced property in Roehampton. Originally, this was a four bedroom house with two bedrooms on each of the first and second floors and a bathroom on the first floor. There had been two living rooms, a shower/bathroom and a kitchen on the ground floor. However, for a number of years, the two ground floor living rooms have been used as additional bedrooms.

10. On 22 February 2008, Mr Duncan and Mrs Niamh Stewart purchased the Property for £362k as a buy to let investment. At some stage, they decided to let it out as six separate lettings. In 2012, Mr Stewart applied for an HMO licence. On 1 June 2012, Wandsworth granted an HMO licence for five years permitting the Property to be occupied by up to six people in six households.

11. On 7 June 2016, Mr and Mrs Stewart granted an assured shorthold tenancy ("AST") to Asa Mytil and Isaac Hung for a term of 12 months from 7 June 2016 at a rent of £1,900 per month. The landlords gave an address in Leighton Buzzard. By paragraph 8.1 of Schedule 1 of the tenancy agreement, the tenants covenanted "to use the Property as a private residence for the occupation of the "Tenants and any other occupiers named in this agreement". Mr Mytil and Mr Hung were named as the permitted occupiers. Mr Gordon stated that Mr Hung was no more than a guarantor for the rent and did not occupy the Property.

12. At some unspecified date, Mr and Mrs Stewart moved to Canada. They arranged for Barnard Marcus to manage the Property. The tenants paid the rent of £1,900 to Barnard Marcus who took a commission of 4.85%. Provided that this rent was paid, both freeholder and Barnard Marcus seem to have been content. It is unclear whether Mr Mytil ever occupied the Property or when the Property was first occupied by six tenants. It is most unlikely that Mr Mytil and Mr Hung were ever the sole occupants of the Property. Neither freeholder or managing agent checked who were the "permitted occupiers" at any time.

13. Mr Hung introduced Mr Gordon to the Property. The tenants had been subletting the six rooms all of which had locks. One tenant was in arrears and another was causing problems. Mr Hung was minded to surrender his tenancy. Mr Gordon rather volunteered to pay the rent of £1,900 to Barnard Marcus and to assume responsibility for managing the Property. Mr Gordon took responsibility for the council tax and utilities. He initially managed the property through Yellow House Sales but transferred this to the Applicant Company when the former company was put into administration.

14. Mr Gordon referred the Tribunal to an email, dated 10 June 2016 (at p.223) from Barnard Marcus (Hannah Swift) sent to "Jason" at "ASAP Services":

> "OK so I have spoken again with the landlord and she is happy for you to have your permitted occupiers reside in the property under the existing HMO licence. She has also confirmed it is actually a 5 year HMO licence which she will renew when and if necessary"

15. On 1 June 2017, the HMO licence expired. Ms Curror told us that in September 2017, Wandsworth had contacted Mr Stewart about the expiry of the HMO licence. On 17 October 2017, Mr Stewart had confirmed that

Barnard Marcus had been instructed that only 3 or 4 people were to occupy the Property.

16. Mr Gordon stated that Barnard Marcus should have inspected the Property at least twice a year. Complaints were made of disrepair, but this was not remedied. There were only occasional visits. The staff member rarely went upstairs. However, even a cursory inspection of the ground floor should have confirmed that the two living rooms were being used as bedrooms. There were locks on the doors of the six bedrooms. The individual might not have obtained access to these rooms. However, the fact that a door to a living room was locked, must have raised questions. Mr and Mrs Stewart, as landlord, were liable to keep the property in a proper state of repair. Barnard Marcus had been appointed to ensure that the landlord complied with their contractual and legal obligations in respect of the Property. Ms Curror stated that Barnard Marcus had conceded to Wandsworth that they had "taken their eye off the ball".

17. In October 2019, Wandsworth received complaints from the tenants about the condition of the Property. On 22 October and 1 November 2019, two officers from Wandsworth had inspected the Property. On the first inspection, they found that five households were occupying the Property. Room 5 was occupied by a tenant and her 14 year old son. One room had been empty. On the second visit, all the rooms were occupied.

18. On 24 October 2019, Wandsworth sent a number of letters under (i) Section 16 of the Local Government (Miscellaneous Provisions) Act 1976 requiring information relating to the ownership of the Property (see p.52); and (ii) Section 235 of the Housing Act 235 seeking a copies of a gas safety certificate, electrical report and an tenancy agreements (see p.71). These letters did not make any reference to any possible offence under section 72(1) of the Act, namely the control or management of an unlicenced HMO.

19. Wandsworth received a number of responses to their Section 16 Notices:

    (i) Mr Gordon responded on 8 November (p.81). He described himself as managing agent. He stated that Barnard Marcus would be able to provide details of the freeholder. He gave details of five tenants.

    (ii) Mr Stewart responded on 25 November (at p.89). He gave his address in Toronto. He referred to the AST granted to Mr Mytil and Mr Hung. Rent was being paid to Barnard Marcus.

    (iii) Barnard Marcus (Karina Salmon) responded on 26 November (at p.85). They stated that they were receiving rent on behalf of Mr and Mrs Stewart. She referred to the AST granted to Mr Mytil and Mr Hung.

20. Mr Gordon stated that in the light of Wandsworth's concern about disrepair, he no longer wanted to be involved with the property. He

arranged for the tenants to leave and ceased to be involved in the management of the Property in January 2020. This evidence was accepted by Wandsworth.

21. Over the subsequent months, Wandsworth sought to interview Mr Gordon. He cancelled a number of appointments. Wandsworth cancelled one appointment because of Covid-19. Mr Gordon stated that he was under a lot of pressure at this time. He had to deal with a relationship breakdown. A family member was not well. In retrospect, he accepts that he should have engaged with Wandsworth.

22. Wandsworth's policy document "Procedures for Establishing the Level of Financial Penalties" is at p.277-287. There are four Bands of Financial Penalty (p.277): Band 1: £600-£1,000; Band 2: £2k to 8k; Band 3: £10k to £17.5k; and Band 4: £20k to £30k. In respect of an offence under section 72(1), only three bands are applicable: (i) Band 2: where 5 persons reside in the HMO at the time of the offence; (ii) Band 3: where 6 or 7 reside in the HMO; and (iii) Band 4 where 8 or more persons reside in the HMO.

23. On 3 March 2020, Wandsworth served a Notice of Intention to Impose a Financial Penalty on Barnard Marcus (Sequence (UK) Ltd) in the sum of £15,000. On 18 March 2020, Wandsworth reduced this to £12,500 in the light of representations which they received. On 13 May 2020, Barnard Marcus paid this FP of £12,500. The Tribunal have not been provided with the papers relating this FP.

24. On 6 April 2020 (at p.205), Wandsworth served a Notice of Intention to Impose a Financial Penalty on the Applicant in the sum of £15,000. They assessed the severity as "high" with 20 points. The points were computed as follows: (a) Culpability: 4 (offence was deliberate action or failure to act by a sole person who was or should have been aware of their legal obligations); (b) History of Offences: 1 (no previous history); (c) Harm to Tenants: 3 (reflecting items of disrepair); (d) Mitigating Factors: 4 (none); (e) Proportionality: 4 (a large portfolio of six or more properties) and (f) Impact of Fine: 4 (subject is wealthy).

25. On 6 April 2020 (at p.219), Freeman Solicitors made representations on behalf of the Applicant. This enclosed the email, dated 10 June 2016, and asserted that the Applicant understood that the superior landlord would take responsibility to renew the HMO licence. The letter also addressed the allegations of disrepair. The Respondent was invited to interview Mr Gordon.

26. On 18 May 2020 (at p.243), Wandsworth affirmed their intention to impose a FP in the sum of £15,000. They still assessed the severity as "high", but reduced their score to 16 points. The points were computed as follows: (a) Culpability: 4 (offence was deliberate action or failure to act by a sole person who was or should have been aware of their legal obligations); (b) History of Offences: 1 (no previous history); (c) Harm to Tenants: 2 (accepting that the impact of the disrepair was less severe); (d) Mitigating Factors: 4 (none); (e) Proportionality: 2 (a small business with

two or three properties); and (f) Impact of Fine: 3 (subject is comfortably well off).

27. On 27 May 2020 (at p.253), Wandsworth served a Final Notice to Impose a Financial Penalty on the Applicant in the sum of £15,000. On 9 June 2020, the Applicant issued its appeal.

The Tribunal's Determination

28. Mr Gordon argued that the FP was excessive. He reasonably believed that the freeholder and their managing agent had obtained a licence and would renew it when it expired. He did not seek to argue that he had a reasonable excuse for failing to obtain a licence, accepting that he failed to make adequate inquiries. After Wandsworth had intervened, the Applicant had sought to divest itself from its role in managing the Property. It had done so in January. Neither of the letters which Wandsworth had served on 24 October 2019 had referred to the absence of an HMO licence. He complained that Wandsworth gave him insufficient time to rectify the situation. Had he been informed that there was no HMO licence, an application would have been made.

29. Ms Curror confirmed that Wandsworth accepted that the FP should be reduced from £15,000 to £8,000. She accepted that the score should be reduced to 10, namely (a) Culpability: 2 (the offence was careless or negligent); (b) History of Offences: 1 (no previous history); (c) Harm to Tenants: 2; (d) Mitigating Factors: 2 (more than a little); (e) Proportionality: 1 (Applicant now only manages one property); and (f) Impact of Fine: 2 (subject has serious financial problems. However, this was a Band 3 offence as there were 6 or 7 people residing at the Property. The lowest fine in Band 3 is £10,000. However, Wandsworth were prepared to reduce this to £8,000 having regard to the Applicant's personal circumstances and Covid-19.

30. The Tribunal is satisfied to the criminal standard of proof that the Applicant committed the offence of control or management of an unlicenced HMO. However, there were a range of people who could have held the HMO licence and the Tribunal does not consider that the Applicant was the most appropriate person. The Applicant was managing the Property on behalf of Mr Mytil and Mr Hung who had been granted a 12 month AST on 7 June 2016. On the expiry of the fixed term, this had continued as a statutory periodic tenancy. Many local housing authorities will not grant a HMO licence to a person holding less that a five year term, this being the usual duration of a licence (see *Rakusen v Jepsen* [2020] UKUT 298 (LC) at [59]).

31. The appropriate person to hold any HMO licence would be the freehold owner or their managing agent. Given that the freeholders were living in Canada, Barnard Marcus would have been the more suitable licence holder. The Tribunal is satisfied, on the basis of the evidence that we have heard, that Barnard Marcus knew, or should have known that this was

being operated as an HMO. Wandsworth has imposed a FP of £12,500 on Barnard Marcus, the person whom we consider to be the appropriate person to hold any HMO licence.

32. The Applicant also committed an offence under section 72(1) of the Act. We are satisfied that Mr Gordon should have made further inquiries about the existence of a licence. He knew from the email, dated 10 June 2016, that this was a five year licence. It is also apparent that the living conditions at the Property were unsatisfactory. However, Wandsworth has not taken any statutory action in respect of this.

33. We are therefore satisfied that the FP imposed on the Applicant should be at the lower end of the scale. Ms Curror rightly accepts that there should be some flexibility in the application of the policy (see *Marshall v Waltham Forest LBC* [202] UKUT 35 (LC); [2020] 1 WLR 3187). We are satisfied that Wandsworth's policy does not make adequate provision where more than one person is guilty of an offence under section 72(1). A lower penalty should be imposed on the person is not the most appropriate person to hold the HMO licence. Having regard to all the circumstances, we consider that the FP should be reduced to £6,000.

Refund of Fees

34. The Applicant has paid tribunal fees of £300. We do not make an order for the refund of the tribunal fees of £300 pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Although the Applicant has succeeded in reducing the fine, this has largely been because we have had regard to facts which were not known to Wandsworth when they imposed the FP. Mr Gordon should have engaged with Wandsworth early in 2020 when the authority sought to interview the Applicant.

Judge Robert Latham
7 June 2021

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.