



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

**Case Reference** : **LON/00AC/HNB/2021/0004**

**Type of hearing** : **V;CVP**

**Property** : **Flat 4, 655 High Road, London N12  
oDZ**

**Applicant** : **Mr Nathan Carlswell Hylton**

**Representative** : **Elizabeth Fisher of Counsel**

**Respondent** : **The London Borough of Barnet**

**Representative** : **Tara O’Leary of Counsel**

**Type of Application** : **Appeal against a financial penalty –  
Section 249A of, and Schedule 13A  
to, the Housing Act 2004**

**Tribunal Members** : **Judge P Korn  
Mr D Jagger  
Ms J Dalal**

**Date of Hearing** : **15<sup>th</sup> and 16<sup>th</sup> November 2021**

**Reconvene for decision  
following closing  
written submissions** : **8<sup>th</sup> December 2021**

**Date of Decision** : **11<sup>th</sup> January 2022**

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**DECISION**

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## **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:CVP**. A face-to-face hearing was not held because it was not practicable in the context of the ongoing pandemic and all issues could be determined in a remote hearing. The documents to which we have been referred are in a series of electronic bundles, the contents of which we have noted. The decision made is set out below under the heading “Decision of the tribunal”.

## **Decision of the tribunal**

The aggregate financial penalty imposed on the Applicant is reduced from £52,800 to £40,000.

## **Introduction and background**

1. The Applicant has appealed against a combination of five financial penalties imposed on him by the Respondent under section 249A of the Housing Act 2004 (“**the 2004 Act**”) in relation to the Property.
2. The financial penalties were imposed for the following alleged offences:-
  - (i) failure to license a House in Multiple Occupation (“**HMO**”) in breach of section 72(1) of the 2004 Act;
  - (ii) failure to comply with Regulation 3 of the Management Regulations (*duty of manager to provide information to occupier*) in breach of section 234 of the 2004 Act;
  - (iii) failure to comply with Regulation 4 of the Management Regulations (*duty of manager to take safety measures*) in breach of section 234 of the 2004 Act;
  - (iv) failure to comply with Regulation 6 of the Management Regulations (*duty of manager to supply and maintain gas and electricity*) in breach of section 234 of the 2004 Act; and
  - (v) failure to comply with Regulation 8(2)(a) of the Management Regulations (*duty of manager to maintain living accommodation*) in breach of section 234 of the 2004 Act.
3. The Applicant is both a leaseholder owner of the Property and the landlord of the tenants/occupiers, and the Property is a second floor flat in a converted house. The Applicant has owned the Property since 2007.

4. On 17<sup>th</sup> October 2019 the Respondent carried out an inspection of the Property due to concerns about the number of people living there and it found that 6 people were (according to the Respondent) in occupation. A representative of the Respondent also met with the Applicant and with his agent, Mr Isaac, on 15<sup>th</sup> January 2020. There was then correspondence between the parties, culminating in the Respondent sending the Applicant notices of intention to impose financial penalties dated 16<sup>th</sup> April 2020. Final notices dated 18<sup>th</sup> March 2021 were sent after representations were made on behalf of the Applicant.
5. The parties have each made extensive written submissions and to some extent have approached the case from different angles in different sets of submissions. Whilst we will summarise below what appear to us to be the salient points, it is not considered practical to summarise every point made nor to summarise every detail in the parties' respective chronologies.

### **Grounds of appeal**

6. The issues on appeal, as set out by the Applicant, are as follows:-
  - (a) whether the Property was an HMO;
  - (b) whether the Respondent had authority to impose a penalty;
  - (c) whether the Applicant has a statutory defence; and
  - (d) the amount of the penalty for each proven breach.

### **Applicant's case**

#### **Whether the Property was an HMO**

7. The Applicant states that a property is only an HMO in the circumstances of this case if (amongst other criteria) it is occupied by at least 4 or 5 persons and that there is insufficient evidence to show that the Property was in fact occupied by at least 4 or 5 persons. While the Applicant concedes that there might have been 4 or more persons present at the time of the Respondent's inspection, the Respondent has provided insufficient evidence that all of those persons were in occupation. The Applicant also states that for a property to be an HMO the persons in occupation must be from at least 2 different households, and again he states that there is insufficient evidence of this.

Whether the Respondent had authority to impose a penalty

8. The Applicant asserts in the alternative that the Respondent had no authority to impose a financial penalty as the Property was not an HMO.

Statutory defence

9. The Applicant notes that under section 72(5) of the 2004 Act: *“In proceedings against a person for an offence under subsection (1) [controlling or managing a licensable but unlicensed HMO] ... it is a defence that he had a reasonable excuse ... for having control of or managing the house in the circumstances mentioned in subsection (1)”*. He submits that in this case he had a reasonable excuse as he was not aware that the Property was being occupied by more than 3 people. He had a tenancy agreement with three named persons dated 5<sup>th</sup> April 2019 for a 12-month fixed term, the tenancy agreement did not allow the tenants to assign, sublet, underlet or part with or share possession of the Property with any person not named in the agreement, and the tenancy did not allow occupation by more than 4 people unless they were from a single-family group. Also, in January 2020, about 3 months after the inspection on 17<sup>th</sup> October 2019, there were only two people at the Property. The Applicant quotes the Upper Tribunal decision in *Thurrock v Duaodi [2020] UKUT 209 (LC)* as authority for the proposition that ignorance can give rise to a defence of reasonable excuse. It is the Applicant’s case that he was reliant on his agent and did not know the true position.
10. The Applicant also states that he attended the Property in August 2019 at the behest of the freeholder, that concerns were raised, and that the Applicant informed the freeholder that to his knowledge there should only be three tenants in the Property. Upon further inspection the Applicant became aware of a dividing wall that had been erected and sought for his managing agent to have this removed. The Applicant’s case is that he was assured this was done and he relied on the words of his agent. He also states that prior to January 2020 he was not aware of the specific content of correspondence purported to have been sent to him by the Respondent.
11. The Applicant has also provided detailed chronology setting out his case as to what happened in his dealings with the Respondent and others.

Whether (in the alternative) the level of penalty has been correctly calculated

12. The Applicant submits that the Respondent failed to follow the relevant published guidance for local authorities and/or to take into account all the facts of the case. The Respondent incorrectly categorised the

severity of the licensing offence as extreme. There is, in the Applicant's submission, nothing to suggest that the tenants were vulnerable or discriminated against or that there was an impact on neighbouring properties. The initial delay by the Applicant in responding does not justify the highest category of severity, and the Applicant denies being disingenuous and states that he clearly engaged with the Respondent given the amount of correspondence exchanged. While there were hazards identified, there were no concerns about fire escape routes. There is no evidence to justify the conclusion the Applicant's actions in failing to license the Property were deliberate or reckless, as he was not aware of the alleged occupation by 6 people.

13. The Applicant also submits that the Respondent failed to take into account the track record of the Applicant, including the fact that no similar offences had been committed by the Applicant previously. There was in addition a failure to consider mitigating factors, including the short period of time of the offence, that the Applicant did not seek or receive a high level of profit or financial benefit, that there was a professional letting agent involved, that the Applicant was unaware of the alleged occupation, that no harm was caused to the tenants by the licensing offence and that the alleged offence has been rectified. The Respondent also failed to take other relevant matters into account including whether the individual penalty was proportionate to the offence, the Applicant's financial means, the totality of all the penalties and whether together the total of £52,800 is proportionate to the offences which arose out of the same facts.
14. In relation to the alleged breaches of Regulations 4 and 8(2)(a), the Respondent unjustifiably categorised the severity of the offence in each case as substantial. In relation to the alleged breaches of Regulations 3 and 6, the Respondent should have categorised the level of culpability in each case as moderate. The Applicant also notes that in *Sutton v Norwich City Council [2020] UKUT 90 (LC)*, the Upper Tribunal concluded that on the facts of that case the addition of a penalty under Regulation 3 would be pointless, given the other financial penalties that had been imposed. It was held only to be a technical breach and, looking at the totality of all penalties, the Respondent should have reduced if not extinguished this penalty altogether.

### **Respondent's case**

#### **Whether the Property was an HMO**

15. On his inspection on 17<sup>th</sup> October 2019, Kevin Gray found that the Property contained three bedrooms, one shared bathroom and one shared kitchen/dining room. Mr Gray met and spoke with three people who told him that six persons in total were in occupation. The front right bedroom was occupied by Amarildo Jahaj who stated that he moved into the Property about a month earlier and shared the room

with his brother Sandri Jahaj and that they paid £550 per month. This room contained two single beds and a spare single mattress; it was affected by damp staining in the ceiling consistent with a roof leak. The front left bedroom was occupied by Ervin Bullaj who stated that he moved in during December 2017, shared his room with his cousin Lino Bullaj and paid £550 per month. This room contained a double and a single bed and was very badly affected by significant water ingress, damp and mould. An inner bedroom opening off the kitchen was occupied by Edlir Llanaj who stated that he had moved in about a year earlier and shared the room with his friend Arrid Ymeri, who paid £500 per month. The room contained two single beds. All of the occupants stated they had no written tenancy agreement. They were co-operative with Mr Gray, who was able to take photographs of five identity documents (the sixth person, Edlir Llanaj, was present but did not have identity documents available).

16. The Respondent submits that the Property met the self-contained flat definition of an HMO. There does not appear to be any dispute that the Property formed part of a larger, four-storey building, that the whole of the Property lay above some other part of the building and that all three “basic amenities” (kitchen, toilet and personal washing facilities) were available for the exclusive use of its occupants. If the Respondent is wrong in that analysis, then it argues in the alternative that the Property was part of a building which consisted of a unit of living accommodation which was not a self-contained flat such as to satisfy the first limb of the standard test definition of an HMO in any event.
17. To meet the second limb of the test the Respondent notes that the occupants must not form a single household. In its submission, for this criterion to be made out it is only necessary for one occupant to be unrelated to any of the others. In this case the Respondent submits that it has provided evidence that the occupants formed 4 households. The occupants told Mr Gray that the Property was occupied by a pair of brothers (Amarildo and Sandi Jahaj) and a pair of cousins (Ervin Bullaj and Lino Bullaj). Amarildo Jajah confirmed that he and his brother were not related to the other occupants although they were all Albanian. These four individuals thus formed two households, and that alone is sufficient to meet the test. However, Mr Llanaj also told Mr Gray that he and his room-mate Mr Ymeri were friends, which would constitute two further households.
18. The Respondent notes that the Applicant disputes that 6 persons were actually occupying the Property on 17<sup>th</sup> October 2019. However, the Respondent makes the point that in order to meet the criteria for a licensable HMO under the **additional licensing** designation, only 4 persons need to have been in occupation of the Property. The Respondent also makes the point that section 262(6) of the 2004 Act defines an ‘occupier’ merely as a person who (a) occupies the premises as a residence and (b) (subject to the context) so occupies them whether as a tenant or other person having an estate or interest in the premises

or as a licensee. The Respondent submits that occupation 'as a residence' merely requires that a person must be in possession of the premises for residential purposes, namely engaging in all the usual activities inherent in residential use such as cooking, washing, sleeping, storing their belongings etc. There is no requirement that persons must occupy with any particular degree of permanence or for any minimum period of time.

19. All 3 of the occupants to whom Mr Gray spoke confirmed that they and their room-mates lived at the Property and had resided there for weeks (Amarildo and Sandri Jahaj) or years (Ervin and Lino Bullaj, Edlir Llani and Arrid Ymeri). Two of the occupants (Amarildo Jahaj and Edlir Llanas) expressly stated that they and their room-mates had no other residence or address in the United Kingdom. Each of the rooms contained personal belongings including clothing, and the beds were made up with bedding. Five of the occupants kept their identity documents including passports and driving licences at the Property. There was food in the kitchen and locks on at least one bedroom door. Nobody had ever suggested that any of the occupants were trespassers. Rather, it appeared that they were tenants or subtenants holding under oral tenancy agreements or as a minimum enjoyed licences, as they plainly entered and occupied the Property with the permission of either the tenants named on the tenancy agreement or possibly Mr Isaac as managing agent.
20. Ervin Bullaj told Mr Gray that he contacted 'the landlord' by a mobile number which was the same as Mr Isaac's number, that he called him 'boss' and that he came to collect the rent every month. The Respondent asserts that there is no evidence to suggest that any of the occupiers were mere visitors or were lying or had any other reason or motive to mislead the Respondent. There is no requirement that in order to qualify as occupiers they each needed to pay rent, or that any payment had to be made to or by any particular person, or that any payment by an occupier must constitute rent rather than a licence fee.
21. Under the 2018 regulations, the Property was licensable if it was occupied by at least five persons comprising two households. Under the additional licensing designation, it was also licensable if occupied by at least four persons comprising two households and if the flat was located on at least the second storey of the building.

#### Statutory defence

22. On 3<sup>rd</sup> July 2019 the Respondent first received a report that the Property was occupied by 6 to 8 people and was in poor condition. The complaint included contact details for the landlord, i.e. the Applicant. The Respondent opened an investigation and took immediate steps to contact the Applicant but had very considerable difficulty locating and contacting him, which eventually took six months to achieve. Officers

also wrote to the freeholder, Mr Khatib, who then later spoke to Ryan Lawlor of the Respondent and told him that he was aware the Property was rented to multiple families and that there were unlawful partitions in the bedrooms. Mr Khatib emailed Belinda Deller of the Respondent to state he had spoken to the Applicant and had asked him to contact the Respondent. Mr Khatib also provided a number for the Applicant's property agent, Mr Isaac.

23. After the inspection on 17<sup>th</sup> October 2019 the Respondent resumed the process of trying to locate and contact the Applicant. The Respondent made extensive enquiries, including from two other local authorities, wrote to the Applicant at a number of different postal and email addresses, and attempted to call him on several mobile numbers. On 23<sup>rd</sup> October 2019 Mr Gray telephoned one of the Applicant's telephone numbers, received no answer and left a voicemail message. On 5<sup>th</sup> November 2019 Mr Gray sent an email to the Applicant's 'Yahoo' email address and included copies of letters which, amongst other matters, explained the findings of the inspection on 17<sup>th</sup> October 2019, warned the Applicant that he might have committed an offence, and enclosed a section 235 notice requesting copies of documents relating to the occupation of the Property.
24. On 6<sup>th</sup> November 2019 Mr Khatib confirmed that his contact details for Mr Hylton were the 'Yahoo' email address and mobile telephone numbers used by the Respondent to contact the Applicant. On 7<sup>th</sup> November 2019 Mr Gray wrote to the Applicant by post to 109 Doidge Road, B23 7SQ which was thought to be a family address as it was occupied by a Jordan, Vicklin and Lorna Hylton. On 22<sup>nd</sup> November 2019 Mr Gray served Improvement Notices requiring works to address the fire risks and disrepair at the Property by pinning copies to the front door and also emailed copies to the 'Yahoo' email address. On 13<sup>th</sup> December 2019 Mr Gray received a voicemail message from the Applicant from the same telephone number that Mr Gray had been using to try to contact him. Mr Gray returned his call on 20<sup>th</sup> December 2019 but received no answer and left a voicemail. The Applicant made no other attempts to contact the Respondent prior to Mr Gray telephoning him again about 2 weeks later.
25. On 3<sup>rd</sup> January 2020 Mr Gray called the Applicant again and finally managed to speak to him. The Applicant confirmed that he had received 'paperwork' but did not explain at which address he had received it and would not provide a current postal address, but he stated he was living in the West Midlands with friends. He confirmed that the 'Yahoo' email address used by the Respondent to contact him was the correct email address but did not offer any reason for failing to reply to the Respondent's emails. He said he had a property agent but would not provide the agent's name. He denied that there were 6 occupants at the Property but accepted that he was aware of the partition in the kitchen.



26. On 15<sup>th</sup> January 2020 Mr Gray and his colleague David Long visited the Property with the Applicant and Mr Isaac who was introduced as the Applicant's cousin. The Applicant stated that he intended to recover possession of the Property, that he held no copies of any tenancy agreements and that he was not receiving payment of rent. He claimed that his previous agent had let the Property to 3 individuals who had unlawfully allowed additional people to live there.
27. The Respondent has referred to the decision of the Upper Tribunal in *IR Management Services Ltd v Salford CC [2020] UKUT 0081 (LC)* and in particular to the Deputy President's statement regarding the defence of reasonable excuse. In that case the Deputy President stated that if the controller/manager of premises knew or "ought to have known" that those premises were being used as an HMO, the tribunal might be entitled to conclude that such person's excuse for failing to comply with the 2004 Act was not a reasonable one.

Whether (in the alternative) the level of penalty has been correctly calculated

28. To the extent that the Applicant is arguing that the Respondent failed to give adequate reasons for its assessment as to severity and/or culpability, the Respondent argues, based on the Upper Tribunal decision in *LB Waltham Forest v Younis (2019) UKUT 0362 (LC)*, that the tribunal should not lightly find a local authority's reasons defective as long as they are tolerably clear.
29. The statutory guidance on civil penalties requires seriousness to be assessed by reference to the offender's culpability and the harm or risk of harm to which occupants were exposed. In the Respondent's submission the potential impact of the offences justified different assessments of severity, e.g. 'extreme' for the section 72(1) offence of failing to license versus 'moderate' for the offence of failing to provide information. As regards subsequent compliance with statute or remediation of disrepair, this should in the Respondent's submission be taken into account only at 'stage two' when mitigating factors are applied. The Respondent did just that, applying a maximum reduction of 30% to each penalty to reflect the Applicant's works of compliance and accreditation with a landlord scheme. It submits that if the tribunal were now to further reduce the penalties it would in the Respondent's submission lead to an element of 'double counting'.
30. As regards vulnerability of occupants, the Respondent accepts that the occupants did not seem particularly vulnerable but submits that the tribunal should bear in mind they were immigrant workers paying low rents who found themselves living in dreadful conditions (particularly the Bullaj cousins who lived in the worst affected room). As for its assessment of the Applicant's culpability, the Respondent argues that it was amply justified in treating his ownership of other properties and

undoubted knowledge of HMO licensing requirements as an aggravating factor.

31. As for the relevance of the Applicant's means, the Respondent's enforcement policy requires it to check that the provisional assessment is proportionate and will have an appropriate impact and that this step should take account of the offender's income and assets. The Applicant's evidence is that he owns four properties and that whilst they are mortgaged he owns a considerable percentage of equity in each. The Respondent submits that the Applicant is not impecunious and that he is a businessman running a rental portfolio as a professional operation on a full-time basis.

### **Witness evidence**

#### **Belinda Deller**

32. Ms Deller is an HMO Enforcement Officer. In her witness evidence she describes the receipt of a complaint about the Property being in multiple occupation, the steps taken by her to contact the owners of the Property, the response from the freeholder and some limited engagement from the Applicant's agent.
33. In cross-examination it was put to her that her evidence contained insufficient details in relation to the complaint made. She was also unable to recall how she had obtained the Applicant's email address.

#### **Ryan Lawlor**

34. Mr Lawlor is a Technical Support Officer in the Private Sector Housing Team. In his witness statement he states that he received a telephone call from the freeholder, Mr Khatib, on 22<sup>nd</sup> August 2019 who told him that the Applicant had been creating lots of problems and that, as far as he was aware, the Property was rented out to 8 people. Mr Khatib also told him that the bedrooms had been partitioned using MDF board, in contravention of the Applicant's lease, and that the Applicant had not paid the ground rent for 7 years.
35. In cross-examination it was put to him that he had not exhibited any documentation to his witness statement, such as a note of the telephone conversation. It was also put to him that the freeholder might have an 'axe to grind' in relation to the ground rent and might therefore have been trying to incriminate the Applicant.

### Kevin Gray

36. Mr Gray is a Principal Environmental Health Officer. His witness statement is very lengthy with many exhibits and it covers his visits to the Property, his discussions with the occupiers, his attempts to contact the Applicant, the notices served by him, the eventual exchanges with the Applicant and with Mr Isaac when contact was finally made and his meeting with them at the Property. The witness statement also contains a summary of the information that led him to serve the five penalty notices on the Applicant.
37. In cross-examination Mr Gray accepted that he did not explore the details of how Mr Jahaj paid the rent, that Mr Jahaj did not tell him how many people were in occupation and that he did not ask for proof of occupation other than copies of tenancy agreements. It was put to him that the people he questioned at the Property might have been confused, and whilst he accepted that this was possible he did not believe them to be confused. He added that the identity documents showed different surnames and it was put to him that they could still have been related. In response to another question he said that he was satisfied that there was more than one household “on the balance of probabilities”.
38. In relation to Mr Yemeri, Mr Gray said that he would have asked him whether he was related to the other occupiers but he was unable to confirm for certain that he asked the question. However, Mr Yemeri did refer to one of the other occupiers as his best friend which in Mr Gray’s view indicated that they were not related.
39. In relation to the question of how much rent the Applicant received and who was managing the Property, Mr Gray emphasised the fact that the Applicant was very hard to contact and then was very reluctant to answer questions. It was put to Mr Gray that at least from the time of their meeting the Applicant was engaging properly with the Respondent but Mr Gray did not accept this at all.
40. Various points were put to Mr Gray questioning his scoring of the severity of the alleged offences and the Applicant’s level of culpability but he stood by his approach.

### Arthur Hughes

41. Mr Hughes is also a Principal Environmental Health Officer and he accompanied Mr Gray on the inspection of the Property on 17<sup>th</sup> October 2019. In his witness statement he describes what he saw on inspecting each room, including his perspective on who was in occupation and on the condition of the interior of the Property (including matters such as the absence of a smoke detector).

42. In cross-examination he accepted that he did not have his own notes of the interviews with alleged occupiers, but he commented that it was apparent to him from the circumstances that there were at least 5 people in occupation.

#### David Long

43. Mr Long is a Senior Housing Technical Officer and he accompanied Mr Gray on a visit to the Property on 15<sup>th</sup> January 2020 where they met with the Applicant and Mr Isaac. Mr Gray had brought copies of the documents and notices that he had served on the Applicant and went through them with the Applicant. Mr Gray also pointed out that there were insufficient fire detectors.

#### Richard Pixner

44. Mr Pixner is a Team Leader in the HMO Licensing Team and his witness statement summarises the written and telephone communication between himself and the Applicant.

#### Belinda Livesey

45. Ms Livesey is a Group Manager in the Private Sector Housing Team. In her witness evidence she confirms that from the information produced by Mr Gray and by reference to the Respondent's enforcement policy she authorised the issuing of five separate penalty notices and that she also – following receipt of representations on the Applicant's behalf – authorised the reply to those representations.
46. In cross-examination she said that any concerns that she might have had about the level of detail provided by Mr Gray would have been flagged at the time. Her view was that the penalty notices contained sufficient information.

#### Nathan Hylton (the Applicant)

47. The Applicant has given a detailed witness statement setting out his narrative of events, including his relationship with the Property, and giving details of the properties owned by him.
48. In cross-examination he accepted that his equity in the property at 20 Hill Crest Grove is now about £80,000 and that his valuations of his other properties were merely his rough assessments. He accepted that he had not checked whether his agent was regulated and that he had no written agreement with the agent. He accepted that he received £1,150 per month in rent from the Property out of which a management fee of £100 per month was deducted.

49. The Applicant said that HMO licensing was not discussed with the agent, and he was unable to say whether it was agreed to be his or the agent's responsibility to check compliance or to check any changes in the law. It was put to him that there was nothing to indicate whether he or the agent was responsible for maintenance and that he was not proactive in checking things with the agent; in response he said that it was agreed that the agent would deal with gas safety.
50. The Applicant conceded that historic efforts to carry out repairs, particularly to the roof, had not been effective and that therefore he had invested a lot of money but still been left with a problem roof. He was asked why then did he not monitor the condition of the Property very proactively once he knew the problems, to which he replied that he thought that the roof would now be okay. As to why he did not carry out annual inspections, he said that this was the agent's responsibility. He accepted that he did not visit the Property for 3 years but said that he had a lot going on.
51. When he finally did visit the Property and saw a partition and a locked door he said that he thought that it was a separate lounge but now accepted that it may have been a bedroom. It was also put to him that the other bedrooms were also locked, and he admitted that he would not expect a single family to lock all the rooms. Regarding the removal of the partition, he said that he had contacted Mr Isaac to ask him to remove it but he accepted that there was no written evidence of this.
52. The Applicant accepted that the emails sent by the Respondent were sent to his 'Yahoo' email address. In particular he accepted that the Respondent had emailed him referring to the possible need for an HMO licence and that he had not contacted the Respondent in response to that email. He also accepted that the fire safety works only began after his meeting with Mr Gray at which Mr Gray advised him of the need for these works. In relation to the three separate emails warning him of impending legal action, he said that he did not see any of them because he was very busy.
53. The Applicant accepted that he had refused to give Mr Gray contact details for Mr Isaac. He also accepted that the Property was in a bad state when he inspected it and that he could have discovered this earlier. He confirmed that he and Mr Isaac are not related, that Mr Isaac had claimed that they were related but that he (the Applicant) had done nothing to correct this untruthful statement. As regards the concerns expressed by the Applicant about Mr Isaac, he was unable to explain why he had not sacked him as his agent.
54. The Applicant was also asked about a transcript of a meeting at the Property on 24<sup>th</sup> August 2020 between him, Pauline Thomas and Claudio Marongelli (one of the occupiers). He accepted that Mr Marongelli had told him that there were 4 occupiers and that the

occupiers had described themselves as friends (and not as being related to each other). Other points of detail were also put to him.

### Pauline Thomas

55. Ms Thomas has given a witness statement in support of the Applicant. She is the owner of Creative Green Energy which provides services to property and construction professionals. She states that she was approached by the Applicant last year in connection with a leak at the Property and in connection with correspondence received from the Respondent regarding alleged breaches of regulations.
56. Ms Thomas states that she spoke to someone at the Property who told her that the Applicant had showed him a list of people alleged by the Respondent to be in occupation of the Property, following the inspection on 17<sup>th</sup> October 2019, and that the Applicant had told him that many of those people were visitors, not occupiers. That same person told her that many of the names were incorrectly noted down and that some of the people who gave their names spoke very little English and did not understand the purpose of the Respondent's officers' visit to the Property. Her impression was also that they did not understand the legal definition of whether two people were related to each other. Ms Thomas also understood the tenants to have no knowledge of the Applicant's connection with the Property and to believe that his agent was their landlord.
57. Ms Thomas' understanding was that the Applicant did not believe the Property to be an HMO and that, in any event, control of the Property was with his agent. She also commented on certain legal points and on certain issues relating to the condition of the Property and compliance with housing standards.
58. In cross-examination Ms Thomas accepted that she was neither a legal expert nor a surveyor. She also accepted that she did not know anything about the Applicant's agent nor anything about the Respondent's inspection nor anything about its investigation other than what she had been told by the Applicant.
59. In relation to the transcript of the meeting at the Property on 24<sup>th</sup> August 2020, it was put to her that the occupiers had described themselves as friends (and not as being related to each other). She did not fully accept that they were just friends but was unable to articulate why.

### **Follow-up points**

60. On the question of whether the Respondent has proved beyond reasonable doubt that the Property was an HMO, Counsel for the

Applicant asserts that the Respondent essentially relies on the evidence of Kevin Gray and his inspection of the Property in October 2019 and she submits that Kevin Gray was an evasive witness who struggled to answer simple and straightforward questions.

61. The Applicant also claims that there are inconsistencies in the Respondent's account as to the number of occupiers as initially it was alleged that there were 7 occupiers but then this was then reduced to 6. None of the alleged occupiers was asked directly how many people lived there. There was no attempt by Mr Gray to obtain documents to verify that the people he suspected occupied the Property actually did occupy the Property. The Applicant also states that it was apparent from Mr Gray's evidence that he did not directly ask any of the occupants if they were related to anyone else in the Property.

### **Tribunal's analysis**

#### **Preliminary point**

62. Under Schedule 13A to the 2004 Act, this appeal is a re-hearing of the Respondent's decision but may be determined having regard to matters of which the Respondent was unaware.

#### **Whether the Property is an HMO**

63. Section 254(1) of the 2004 Act provides the statutory definition of an HMO. Amongst other categories, a building will be an HMO if it meets the 'self-contained flat test' prescribed by s.254(3). A part of a building meets the self-contained flat test if all of the following conditions are satisfied:
  - (a) it is a "self-contained flat" as defined by section 254(8).
  - (b) the living accommodation is occupied by persons who do not form a single household within the meaning of section 258.
  - (c) the living accommodation is occupied by those persons are their only or main residence or they are to be treated as so occupying it under section 259.
  - (d) their occupation of the living accommodation constitutes the only use of that accommodation.
  - (e) rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.

(f) two or more households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

64. A “self-contained flat” is defined in section 254(8) as meaning a separate set of premises, whether or not on the same floor – (a) which forms part of a building; (b) either the whole or a material part of which lies above or below some other part of the building; and (c) in which all three “basic amenities” are available for the exclusive use of its occupants.
65. Section 258(2) provides that persons are to be regarded as not forming a single household unless either they are all members of the “same family”, or their circumstances are circumstances of a description specified by the Secretary of State (none of which appear to be material to this case). Section 258(3) defines persons who are a “member of the same family”. This includes persons who are married to each other, who live together as husband and wife, who are in an equivalent relationship in the case of persons of the same sex, or who are “relatives” either of each other or of one of the members of a “couple”. A “relative” means a “parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin”. “Basic amenities” are defined by section 254(8) as including a toilet, personal washing facilities and cooking facilities.
66. The Respondent submits that under the additional licensing designation the Property was also licensable if occupied by at least four persons comprising two households and if the flat was located on at least the second storey of the building, and the Applicant does not dispute this analysis.
67. Applying the facts to the relevant legislation, the points in dispute are (a) whether there were at least 4 people in occupation at the relevant time and (b) whether the occupiers formed a single household.
68. The relevant burden of proof on factual issues in this case is the criminal burden of proof, and therefore we are required to be satisfied beyond reasonable doubt. However, as noted by Counsel for the Respondent, these remain civil proceedings and they are therefore only subject to the lesser evidential constraints of civil proceedings, as was stated by Judge Elizabeth Cooke in the Upper Tribunal’s decision in *AA Homes & Housing Ltd v LB Croydon (2019) UKUT B1 (LC)*. The tribunal can therefore, for example, rely on hearsay evidence if it considers that evidence to be reliable.
69. Having considered all of the written and oral submissions we find the Respondent’s evidence sufficiently persuasive to demonstrate beyond reasonable doubt that there were at least 4 people in occupation at the relevant time and that they did not between them form a single



household. Contrary to the picture drawn by the Applicant and his advisers, we found Mr Gray to be a credible witness and are satisfied that he took extensive steps to check the factual position. Whilst it is true that at one point during the cross-examination of Mr Gray he referred to his being satisfied “on the balance of probabilities” rather than the correct test of “beyond reasonable doubt”, he is not an expert on legal terminology and this comment was made towards the end of a long and gruelling cross-examination in which his evidence had generally stood up very well to the questions put to him.

70. Mr Gray’s account of his discussions with the various people that he spoke to at the Property is persuasive evidence both (a) that at least 4 people were in occupation of the Property at the relevant time as their only or main residence and (b) that they constituted more than one household. His account is further bolstered by his and his colleagues’ evidence as to what they found at the Property, including locks on rooms, partitioning, and other practical evidence of occupation by the people to whom they spoke. In addition, the Respondent’s case is strengthened by the extensive efforts that Mr Gray and others made to contact the Applicant and the Applicant’s clear reluctance and failure to engage with the process. This included a failure on the Applicant’s part to provide plausible explanations to counter Mr Gray’s conclusions or to take effective action in relation to the evidence of multiple occupation having seen that evidence at the Property with his own eyes.
71. The transcript of the conversation between the Applicant, Pauline Thomas and Claudio Marongelli, far from confirming the Applicant’s narrative, contains statements which seem to us to confirm that the occupiers did not consider themselves to be living as one household. On the basis of the information before us, we also do not regard as plausible the suggestion that the occupiers interviewed by Mr Gray did not understand the questions being put to them.
72. We also note that Mr Gray looked at five sets of identity documents, asked to see copy tenancy agreements and generally took – in our view – appropriate steps to satisfy himself beyond reasonable doubt as to the factual position. In relation to the witness evidence given by the other members of the Respondent’s team, whilst Mr Gray was clearly the key witness it is worth commenting briefly on the evidence of the others insofar as relevant. Mr Hughes’ and Mr Long’s accounts of the inspections on which they accompanied Mr Gray are consistent in each case with their having had a secondary role at the relevant inspection, and both offer a degree of corroboration as to the number of occupiers. Mr Lawlor’s evidence was not at all detailed but still offers a very modest degree of corroboration as to the number of occupiers.
73. By contrast with Mr Gray’s evidence, we did not find the Applicant’s evidence in the main to be credible, and much of his evidence was undermined on cross-examination. In any event, his key claim seems

to be ignorance of the situation, but – even if true – this does not constitute evidence that the Property was not being used as an HMO. As for Ms Thomas’s evidence, it relies mostly on an impression formed by her in conversation with an unnamed person and it is not particularly persuasive, especially when compared to the much more solid evidence of Mr Gray as well as key passages in the transcript referred to above.

74. We note the point made by Counsel for the Applicant that some witnesses made reference to notes which were not exhibited to their witness statements, and we also note the point that Mr Gray did not ask the alleged occupiers every possible question that might have been asked. However, even allowing for these points we are satisfied that the Respondent’s evidence – taken as a whole – is sufficient to demonstrate beyond reasonable doubt that the Property was being used as an unlicensed HMO in breach of section 72(1) of the 2004 Act.
75. For the sake of completeness we note that the Applicant is not arguing that the Property did not meet the other elements of the ‘self-contained flat test’, and we are satisfied on the basis of the evidence before us that it did. We are therefore satisfied beyond reasonable doubt that the Property was an HMO under the ‘self-contained flat’ test.

#### Whether the Respondent had authority to impose a penalty

76. The Applicant’s argument on this point seems to rely on the assertion that the Property was not an HMO. As we have concluded that it was an HMO, this argument falls away.

#### Statutory defence

77. The Applicant submits that he had a reasonable excuse under section 72(5) of the 2004 Act as he was not aware that the Property was being occupied by more than 3 people. He had a tenancy agreement with 3 named parties and the tenancy agreement did not allow the tenants to assign, sublet, underlet or part with or share possession of the Property with any person not named in the agreement and did not allow occupation by more than 4 people unless they were from a single-family group. Counsel for the Applicant quotes the Upper Tribunal decision in *Thurrock v Duaodi [2020] UKUT 209 (LC)* as authority for the proposition that ignorance can give rise to a defence of reasonable excuse, and she asserts that he was reliant on his agent.
78. We do not accept the Applicant’s argument. Whilst it is true that there exist circumstances in which ignorance can be part of a defence of reasonable excuse, on the facts of this case the Applicant has not in our view come even close to establishing a ‘reasonable excuse’ defence.

79. As noted above, we did not find the Applicant's evidence in the main to be credible, and much of his evidence was undermined on cross-examination. Whilst it may be true that he was ignorant as to the precise number of occupiers, the evidence indicates that he made no serious attempt to find out the true position and that even when expressly alerted by the Respondent as to the factual position he ignored – or at the very least did not take remotely seriously – the correspondence received from the Respondent or his duties as the person in control of and/or managing the Property.
80. We note the Deputy President's statement in giving the Upper Tribunal's decision in *I R Management Services Ltd v Salford CC [2020] UKUT 0081 (LC)* that if an HMO controller/manager knew or ought to have known that the premises were being used as an HMO a tribunal might be entitled to conclude that his excuse for failing to comply with the 2004 Act was not a reasonable one, and we do conclude on the facts of this case that at the very least the Applicant ought to have known and that his excuse was not a reasonable one. The Applicant has a significant property portfolio and has less excuse for a failure to act than would somebody with no previous knowledge of property issues. Either it is simply untrue that he was ignorant as to the true position or at best it was an extraordinary abdication of responsibility on his part to rely totally on an agent who he did not know well without any form of written agreement. That abdication of responsibility was then exacerbated by his persistent attempts to avoid engaging with the local housing authority and then his failure to take seriously the threat of legal action against him.
81. As for Ms Thomas's evidence, as noted above in a different context it relies mostly on an impression formed by her in conversation with an unnamed person and it is not particularly persuasive, especially when compared to the much more solid evidence of Mr Gray as well as key passages in the transcript referred to above.
82. In relation to the witness evidence of the other members of the Respondent's team, whilst Mr Gray was clearly the key witness it is worth commenting briefly on their evidence insofar as relevant. Mr Pixner's evidence suggests some attempt on the Applicant's part to engage with the process but in our view reinforces the narrative that his engagement with the process was very late, and it does nothing to demonstrate that he had a reasonable excuse for non-compliance. Ms Deller's evidence is not particularly detailed but offers some limited corroboration of the Applicant's failure to engage.
83. In conclusion, therefore, we do not accept that the Applicant had a reasonable excuse for the purposes of section 72(5) of the 2004 Act.

Whether (in the alternative) the level of penalty has been correctly calculated

84. We have noted the various points made by and on behalf of each party. First of all, as a general point we do not agree with the Applicant that the Respondent's reasons for arriving at the level of penalty in each case has been insufficient. As stated by the Upper Tribunal decision in *LB Waltham Forest v Younis*, tribunals should not lightly find a local authority's reasons defective as long as they are tolerably clear, albeit that clarity is obviously not the only issue. In a case such as this, where there is a detailed factual narrative, there is clearly a balance to be drawn and we are satisfied that the Applicant had sufficient information as to the basis for each penalty calculation. In addition to the formally documented reasons, the Applicant was given detailed information by the Respondent (particularly by Mr Gray) in writing and in person during the period leading up to the service of the formal notices. We also note Ms Livesey's role in reviewing the penalty notices and also in reviewing Mr Gray's response to representations as further evidence of a professional approach to the matter.
85. We turn now to the detailed points made. The Respondent has scored the severity of the offence of failing to license an HMO as 'Extreme'. However, much of the reasoning relates to the Applicant's failure to engage and his failure to apply for a licence in a timely manner, and it appears to us that the Respondent has perhaps confused 'severity' here with 'culpability'. We accept that there were some significant hazards present which were relevant to severity, that certain of the occupiers appear to have had some language issues (thereby making them more vulnerable than someone with perfect English) and that certain repair issues could have affected neighbouring premises. However, even taking into account the expanded reasons given during Mr Gray's oral evidence we do not accept that the Respondent has made a case for the severity being 'Extreme' and we consider that it should be downgraded to 'Substantial'.
86. As for the Applicant's arguments in relation to the level of culpability, we do not accept these and we are satisfied that the level of culpability is 'Extreme' in relation to the failure to license. The Applicant had a property portfolio, he went to extreme lengths to avoid engaging with the Respondent even when the Respondent was threatening legal action, he took no interest in what was happening at the Property until very late and even then he failed to take effective action. We are also comfortable with the Respondent's assessment that the Applicant's level of culpability was merely 'Substantial' in relation to the failure to provide information (Regulation 3), the failure to provide gas and electricity (Regulation 6) and the failings in relation to internal repair (Regulation 8) but 'Extreme' in relation to the failure to take safety measures (Regulation 4), as there is scope for arguing that the first three are issues that a property owner might expect to delegate to a greater extent without checking the position personally on a frequent basis.

87. Equally the different scoring for severity as between the different offences properly reflects the different level of severity of each offence.
88. In relation to the track record of the Applicant, we note that for each offence the Respondent has increased the penalty by £1,000 on the basis that there exists one aggravating factor. However, in our view that is to understate the position. The Applicant owns a number of properties, he committed the offence over a period of time which was not particularly short and the evidence suggests that he made a reasonable profit. He also appears to have a degree of experience of being a landlord and there is reason to believe that he is a businessman running a rental portfolio as a professional operation on a full-time basis and therefore should know his responsibilities. Allowing for the fact that the Applicant is not at the extreme end in relation to any of these four categories, we consider that it would be appropriate in aggregate to apply a £2,000 increase in respect of each offence rather than just £1,000.
89. Subject to one further point, we are satisfied with the remainder of the Respondent's scoring and we prefer the Respondent's reasoning on those points to that of the Applicant, including in relation to the question of whether the Respondent should have accepted any mitigating factors. Therefore, the starting penalty for the failure to license should be £20,000, not £25,000, after downgrading the level of severity to 'Substantial'. It is then necessary to add a further £1,000 for each offence on the basis of our assessment of the Applicant's track record. Therefore, applying the discounts in the same manner as the Respondent has done, the penalty for each offence – before taking into account the point contained in the next paragraph – is as follows:-

• failure to license an HMO	£15,400
• failure to comply with Regulation 3	£4,900
• failure to comply with Regulation 4	£15,400
• failure to comply with Regulation 6	£4,900
• failure to comply with Regulation 8(2)(a)	£11,900
	_____
PROVISIONAL TOTAL	£52,500

90. We turn now to the question of whether the overall penalty is proportionate, taken as a whole. Counsel for the Applicant argues that the Respondent has failed to consider this question and that its policy

requires it to take a global assessment of the totality of the penalty. She further argues that he did not receive any real financial benefit from the Property being without a licence and that the penalty is unnecessarily punitive. She also mentions that the Applicant is or was going through a divorce and has a young family.

91. Counsel for the Respondent re-emphasises the reasons for the Respondent's conclusions as to severity and culpability in relation to each offence. In relation to the Applicant's means she states that he owns four properties and has considerable equity in each, and she describes him as a businessman running a rental portfolio as a professional operation on a full-time basis.
92. We do not consider the Applicant a credible enough witness to accept at face value his assertions as to the amount of income derived by him from the Property. As to the family issues, the circumstances described to us are not in our view such as to form a proper basis for a reduction of the overall penalty. However, we do agree with the Applicant that the Respondent does not appear properly to have engaged with the question of whether the aggregate penalty is proportionate. This may be because the Respondent felt that it had already been through this exercise by agreeing to discounts following representations, but those discounts were for very specific reasons, namely the eventual carrying out of works of compliance and the Applicant booking himself on to an accreditation course.
93. Looking at the offences as a whole, it is clear that they arose out of the same – or at least overlapping – circumstances. This does not mean in this case that the more minor offences should simply be ignored and subsumed into the most serious one, nor that the more minor offences are unimportant. However, bearing in mind the approach of the Upper Tribunal in *Sutton v Norwich City Council*, it does in our view make the overall amount (whether £52,800 as assessed by the Respondent or £52,500 as provisionally assessed by the tribunal) disproportionate when one looks at the pattern of offending taken together. As to the question of how much the overall penalty should be reduced by in order to make it proportionate, we consider that it should be reduced to £40,000 so as to take account of the overlapping circumstances in which each offence was committed.

### Conclusion

94. Pursuant to Schedule 13A to the 2004 Act we therefore hereby vary each of the final notices so as to reduce the aggregate financial penalty to a total of £40,000.

## **Cost applications**

95. If either party wishes to make any cost application it must make such application in writing to the tribunal within **14 days** after the date of this decision, with a copy to the other party. The legal basis and justification for any such cost application must be clearly stated. If either party wishes to respond to a cost application made by the other party it must submit that response in writing to the tribunal within **28 days** after the date of this decision, again with a copy to the other party.

**Name:** Judge P Korn

**Date:** 11<sup>th</sup> January 2022

## **RIGHTS OF APPEAL**

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.

## **Appendix**

### **Housing Act 2004**

#### **72 Offences in relation to licensing of HMOs**

- (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 ... but is not so licensed.
- (5) In proceedings against a person for an offence under subsection (1) ... it is a defence that he had a reasonable excuse ... for having control of or managing the house in the circumstances mentioned in subsection (1)  
... .

#### **234 Management regulations in respect of HMOs**

- (1) The appropriate national authority may by regulations make provision for the purpose of ensuring that, in respect of every house in multiple occupation of a description specified in the regulations – (a) there are in place satisfactory management arrangements; and (b) satisfactory standards of management are observed.
- (2) The regulations may, in particular – (a) impose duties on the person managing a house in respect of the repair, maintenance, cleanliness and good order of the house and facilities and equipment in it; (b) ...
- (3) A person commits an offence if he fails to comply with a regulation under this section.
- (4) In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation.  
...

#### **249A Financial penalties for certain housing offences in England**

- (1) 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.
- (2) In this section “relevant housing offence” means an offence under—
  - (a) section 30 (failure to comply with improvement notice),
  - (b) section 72 (licensing of HMOs),
  - (c) section 95 (licensing of houses under Part 3),
  - (d) section 139(7) (failure to comply with overcrowding notice), or
  - (e) section 234 (management regulations in respect of HMOs).



- (3) Only one financial penalty under this section may be imposed on a person in respect of the same conduct.
- (4) The amount of a financial penalty imposed under this section is to be determined by the local housing authority, but must not be more than £30,000.
- (5) The local housing authority may not impose a financial penalty in respect of any conduct amounting to a relevant housing offence if— (a) the person has been convicted of the offence in respect of that conduct, or (b) criminal proceedings for the offence have been instituted against the person in respect of the conduct and the proceedings have not been concluded.
- (6) Schedule 13A deals with—
  - (a) the procedure for imposing financial penalties,
  - (b) appeals against financial penalties,
  - (c) enforcement of financial penalties, and
  - (d) guidance in respect of financial penalties.
- (7) The Secretary of State may by regulations make provision about how local housing authorities are to deal with financial penalties recovered.
- (8) The Secretary of State may by regulations amend the amount specified in subsection (4) to reflect changes in the value of money.
- (9) For the purposes of this section a person's conduct includes a failure to act.

## **SCHEDULE 13A**

### **FINANCIAL PENALTIES UNDER SECTION 249A**

#### *Appeals*

**6** If the authority decides to impose a financial penalty on [a] person, it must give the person a notice (a “final notice”) imposing that penalty.

#### **10**

- (1) A person to whom a final notice is given may appeal to the First-tier Tribunal against – (a) the decision to impose the penalty, or (b) the amount of the penalty.
- (3) An appeal under this paragraph – (a) is to be a re-hearing of the local authority’s decision, but (b) may be determined having regard to matters of which the authority was unaware.
- (4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.