FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/HNA/2020/0116**
HMCTS code (video)	**:**	**V: CVPREMOTE**
Property	**:**	**385a Kentish Town Road, London NW5 2TJ**
Applicants	**:**	**Amir Atefi**
Representative	**:**	**In person**
Respondent	**:**	**London Borough of Camden**
Representative	**:**	**Mr Arnold (Operations Manager)**
Type of application	**:**	**Appeal against a financial penalty - Section 249A & Schedule 13A to the Housing Act 2004**
Tribunal	**:**	**Tribunal Judge I Mohabir** **Mr C Gowman MCIEH MCMI BSc**
Date of Decision	**:**	**21 February 2022**

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 them by the Respondent pursuant to section 249A of the Housing Act 2004 ("the Act") regarding the property known as 385a Kentish Town Road, London NW5 2TJ ("the property").

3. The Property consists of a commercial unit and a one bedroom flat on the ground floor, a self-contained studio flat on the first floor, a one bedroom self-contained flat on the second floor and a self-contained bedsit on the third floor. Each of the flats was let by the Appellant under an assured shorthold agreement. There was no dispute that the Appellant was the "person managing" and/or the "person having control" within the meaning of sections 263(1) and (3) of the Act in relation to the tenancies.

4. The Appellant purchased the freehold interest on 6 January 2020 and was registered as the proprietor at the Land Registry on 26 February 2020.

5. On 7 November 2019, the London Fire Brigade (LFB) sent an email to the Respondent expressing concerns about fire safety in the premises particularly the means of escape. Subsequently, on 20 November 2019 it issued a Prohibition Order under the Regulatory Reform Order (Fire Safety) 2005 due to stated concerns that "there is insufficient fire resisting separation between the means of escape for the residential accommodation on the upper floors and the commercial premises. There is also insufficient means of detecting a fire and giving warning to those sleeping on the premises. Any fire in the premises will result in heat and/or smoke filling the escape route and other parts of the premises, potentially overcoming people while they sleep or preventing them from making a safe escape from the premises".

6. The order prohibited or restricted the premises from the same date from being used as residential accommodation above the ground floor of the premises (including sleeping accommodation) until the matters

identified above as giving rise to serious risk have been remedied.

7. Ms Harman, an Environmental Health Officer (EHO) employed at the time by the Respondent, was instructed to investigate the property further. At the time of the hearing, she was no longer employed by the Respondent and the Respondent's evidence is set out in the witness statement of Mr Adekoya, who is also an EHO employed by the Council.

8. On 27 November 2019, Ms Harman sent a letter by email to the then freeholder, Farsi London Ltd, informing it that the property may be a House in Multiple Occupation ("HMO") and if, so, the legal requirement for it to be licensed. Apparently, the email contact details provided to the Respondent by the LFB included the email address of the Appellant.

9. Ms Harman physically inspected the property on 10 February 2020 accompanied by the Appellant. Having done so, she made the following findings:

"Ground Floor
Commercial unit is under development with extensive works in progress and to the right of the shop front is the street entrance level for the residential flats above. The compartmentation between the shop and the flats above does not appear to be in compliance with building regulation.

Communal Hall way and stairs to Flats: No emergency lighting in the common area.

Wood panelling on the wall does not appear to be in compliance with building regulation.

The electric storage water heater is located in the common area at the third floor level: the installation of the boiler and its enclosure do not appear to meet fire regulations.

The compartmentation between the flats and common area does not appear to be in compliance with building regulation.

First Floor Flat – this is one bedroom unit.
Entrance to this flat is to the bedroom from the common staircase. The bedroom is located to the rear of the property. Kitchen/living space is to the front. Bathroom accessed from Kitchen/living space. Kitchen/living space is accessed from the bedroom.

Entrance door: The entrance door to the flat is not a fire door, No smoke seal installed, and hinges do not appear to be fire rated, in addition, it does not appear to be closing properly.

No lobby appears to have been provided to the common staircase.

Living/Kitchen room: AFD (Automatic Fire Detection) unit was removed.

Double doors facing the front of the property, is wooden and single glazed with a deadlock.

Heating: No fixed source of heating. Tenant is currently using mobile oil-filled electric radiator.

Bedroom: The rear window is blocked with ply. This affects the ventilation for this room.

Bathroom: Confirmation is required if there is an extractor fan and if it has an over run of 15 minutes discharging to external air.

Kitchen: The extractor fan is not discharging to the external air.

Floor boards appear to be visible.

The recessed lights are not fire rated.

Floor compartmentation between the flats does not appear to be in compliance with building regulation.

Second Floor Flat – this is a one bedroom flat arrangement.
Bedroom located to the rear of the property with kitchen diner to the front and bathroom located centrally.

Entrance door: Front entrance door to this flat is not fire checked and has not been fitted with smoke seals or correct hinges. No self-closer appears to have been fitted.

Internal lobby: No smoke detector in the lobby.

Living-room/Kitchen: Smoke detector was covered up, (the owner removed the cover).

Wall between kitchen/lounge and internal lobby is possibly not of robust construction and may not provide half hour fire resistance.

Front wall to lounge area is heavily stained as a result of possible water penetration.

Kitchen fan extraction was not discharging to the external environment.

Heating: No fixed heating and is provided with an oil filled radiator.

Bathroom extractor fan may not be running with an over-run of 15 minutes and discharging to external air.

Floor boards appears to be visible.

Confirmation is required if the recessed lights are fire rated.

Floor compartmentation between the flats does not appear to be in compliance with building regulation.

Third Floor Flat – this is a studio flat arrangement with bathroom kitchen/diner area and sleeping area.

No lobby protection to common staircase.

Entrance door: Not self-closing half hour fire resisting construction and no smoke seal.

Kitchen Area AFD unit fitted to the ceiling does not work.

No evidence of kitchen fan extracts to external environment.

The extractor fan in the shower area does not appear to extract externally or has an over run of 15 minutes.

Floor compartmentation between the flats does not appear to be in compliance with building regulation."

10. Ms Harman concluded that the property was an HMO because the property did not meet the requirements of Building Regulation 1991 and/or the latter the Building Regulations in force at the time the property was converted into flats.

11. In addition, the property was inspected by a Building Control Officer on 6 and 10 December 2019 and on 24 February 2020. This confirmed that the property did not meet the requirements of Building Regulation 1991 and/or the latter Building Regulations in force at the time the property was converted into flats.

12. On 11 February 2020, Ms Harman served the Appellant with a Notice pursuant to section 16 of the Local Government (Miscellaneous Provisions) Act 1976 requiring him to provide particulars of his interest in the property. This was followed by a letter and an email to the Appellant on 12 February 2020 containing allegations of the offence of not having an HMO licence.

13. On 14 February 202, Ms Harman served the Appellant with a Notice pursuant to section 235 of the Act requiring him to provide documents regarding the person who might be obliged to hold an HMO licence, their estate or interest in the property, who is or might be in control or managing the property and regarding the occupation of it.

14. On 18 February 2020, Ms Harman spoke to the Appellant on the telephone and advised him to apply immediately for an HMO licence. Apparently, he refused to do so.

15. In the light of Ms Harman's findings about the property's various

building regulation failures and the category 1 and 2 hazards identified by her during her inspection, she served the Appellant with an Improvement Notice dated 4 March 2020.

16. On 30 June 2020, the Appellant applied for a Temporary Exemption Notice following the Respondent having served him with a Notice of Intention to Impose a Financial Penalty dated 2 June 2020 by reason of the property not being licensed as an HMO. This was refused by the Respondent primarily on the basis that the Appellant had not taken sufficient steps to ensure that the house was no longer required to be licensed and he already had ample time to start the regularisation process or apply for a HMO licence. The decision was not appealed by the Appellant.

17. Eventually, by a letter dated 13 October 2020, the Respondent issued the Appellant with a Final Notice to Impose a Financial Penalty in the sum of £10,000.

18. On 9 November 2020, the Appellant made this application to appeal the final notice.

19. The Appellant's grounds of appeal fall into two parts. Firstly, he advanced the defence of reasonable excuse[1] for not obtaining an HMO licence for the following reasons:

(a) The Applicant had owned the Property for less than three weeks prior to the Respondent's initial letter dated 12 February 2020 detailing its concerns and the non-compliance with building regulations.

(b) The Applicant had not been made aware by his conveyancing solicitors when purchasing the Property that such issues existed. The Applicant was surprised by the Respondent's letter and was ignorant, by no fault of his own, of the breach of building regulations and failure of the previous owner to obtain an HMO license.

(c) The Applicant acted promptly in dealing with the Respondent's complaints. By the email date 25 February 2020, the Applicant confirmed to the Respondent through MSK that "we believe the most appropriate step would be to achieve a regulations certificate for the entire building…Considering this, the status of the residential units will remain as flats rather than a HMO, and the premises will not in our opinion be deemed in contravention of section 257 of the Housing Act 2004. In this scenario we should like clarity on what Mr Atefi is now required to do…In the meantime I can confirmed that Mr Atefi has already commenced remedial works to the items listed in your letter requiring action I anticipate that these will now become matters for the

[1] see ***IR Management Services Ltd v Salford City Council*** [2020] 8 UKUT 81(LC) and ***Thurrock Council v Khalid Daoudi*** [2020] UKUT 209 (LC) at paragraphs 26-27

Building Control Inspector to address however this can be witnessed on site should you visit."

(d) It was confirmed to the Applicant by Ms Harmon (formally) of the Respondent at the first inspection, that making a Building Regulations Application would result in the building not requiring an HMO license. This was further confirmed to the Applicant in subsequent telephone conversations with Ms Harmon.

(e) It was clear at this stage (only two weeks after the Applicant had initially been informed of the breaches) that he intended to comply and act upon any remedies sought by the Respondent and a number of items had already been remedied by 25 February 2020.

(f) As a result of the email dated 25 February 2020, the Respondent failed to follow up and attend the Property for a site visit and inspect the remedies already carried out by the Applicant. Instead the Respondent issued the Improvement Notice on 12 March 2020.

20. Secondly, in the alternative, the Applicant submitted that the Respondent has not correctly assessed the level of penalty under its own policy entitled 'The London Borough of Camden's Policy Statement on Enforcement in relation to Private Sector Housing Teams (PSH)'. It sets out in the Civil Penalties Matrix how officers should determine the level of civil penalty to be issued.

21. Whilst it is accepted that the failure to obtain an HMO licence is regarded as being a moderate band 2 offence under the Respondent's policy attracting a civil penalty of between £5-10,000, there were no aggravating features to this offence and it should have been correctly categorised as the highest category of harm being moderate and any penalty should fall within Bands 1 or 2 attracting a fine of £0 - £10,000.

22. Furthermore, the Respondent failed to take into account at the time of the Final Notice all of the works that were recommended by the Respondent were carried out by the Applicant in or about May 2020. This was not a case where all of the hazards identified in February 2020 still existed at the time of the Final Notice. If the Respondent had undertaken a site visit, it may have been satisfied with the works undertaken so far and no further action for the time being may have been taken.

23. It was submitted, therefore, that the financial penalty should be reduced for these reasons.

24. The issues to be determined by the Tribunal are:

    (a) was the property let as an unlicensed HMO within the meaning of section 257 of the Act at the relevant time;

(b) if so, is the defence of reasonable excuse available to the Applicant; and

(c) if not, are the level of the penalties appropriate.

Hearing

25. The remote video hearing took place on 17 November 2021. The Appellant appeared in person. The Respondent was represented by Mr Adekoya.

26. The Tribunal had in evidence before it, the witness statements for the Applicant and Mr Adekoya for the Respondent together with their disclosure contained in their respective hearing bundles.

Was the Property an Unlicensed HMO?

27. Section 257 of the Act provides:

"257 HMOs: certain converted blocks of flats
(1)For the purposes of this section a "converted block of flats" means a building or part
of a building which—
i. has been converted into, and
ii. consists of, self-contained flats.
(2)This section applies to a converted block of flats if—
(a)building work undertaken in connection with the conversion did not comply with the appropriate building standards and still does not comply with them; and
(b) less than two-thirds of the self-contained flats are owner-occupied.
(3) In subsection (2) "appropriate building standards" means—
(a)in the case of a converted block of flats—
(i) on which building work was completed before 1st June 1992 or which is dealt with by regulation 20 of the Building Regulations 1991 (S.I. 1991/2768), and
(ii) which would not have been exempt under those Regulations,
building standards equivalent to those imposed, in relation to a building or part of a building to which those Regulations applied, by those Regulations as they had effect on 1st June 1992; and
(b) in the case of any other converted block of flats, the requirements imposed at the time in relation to it by regulations under section 1 of the Building Act 1984
(4) For the purposes of subsection (2) a flat is "owner-occupied" if it is occupied—
iii. by a person who has a lease of the flat which has been granted for a term of more than 21 years,
iv. by a person who has the freehold estate in the converted block of flats, or
v. by a member of the household of a person within paragraph (a) or (b).

(5)The fact that this section applies to a converted block of flats (with the result that it is a house in multiple occupation under section 254(1)(e)), does not affect the status of any flat in the block as a house in multiple occupation.
(6)In this section "self-contained flat" has the same meaning as in section 254."

28. In summary, a property falls within the definition of an HMO within the meaning of section 257 for a building converted into self-contained flats if the conversion works do not meet the standards of the 1991 Building Regulations (or any after version), and less than two-thirds of the self-contained flats are owner-occupied. For the purposes of the additional licensing scheme in the London Borough of Camden this condition was modified to 50% or more of the flats are rented.

29. Mr Adekoya confirmed that the contents of his witness statement were correct. However, in chief, he added that he had visited the property on 25 May 2021 accompanied by the Applicant. He found the condition to still be the same as described in his witness statement. There had been no significant change apart from ongoing work to the commercial premises. In cross-examination, he said that the Applicant did not apply for an HMO licence until May 2021.

30. Until the hearing the Applicant did not challenge the fact that, at the time the improvement notice was served on him by the Respondent, the property did not comply with the Building Regulations 1991 and/or the Building Regulations in force at the time the property was converted into flats, or self-contained accommodation.

30. At the hearing, the Applicant resiled from the admission contained in paragraph 31 of his grounds of appeal that the property was an HMO at the relevant time. His initial position was that he had sought, primarily, to rely on the defence of reasonable excuse and then attempted to carry out some of the works required by the improvement notice.

31. He asserted that only the first and second floor flats were tenanted and had building control approval for their conversion. Therefore, no HMO licence was required.

32. The Tribunal found Mr Adekoya to be a credible and consistent witness. Although the majority of his evidence was hearsay based on the steps taken by Ms Harmon, the Tribunal attached significant weight to it.

33. The Tribunal, therefore, had little difficulty in finding beyond reasonable doubt that:

    (a) the property was let as a let as 3 self-contained flats on the first, second and third floors under assured shorthold tenancies by the Applicant and were, therefore not owner occupied within the meaning of section 257(4)(2) of the Act

(b) that the conversion of the property into the 3 self-contained flats had not been carried out in accordance with the Building Regulations 1991 and/or the Building Regulations in force at the time the property was converted into flats, or self-contained accommodation.

34. The Tribunal was, therefore, satisfied that the property was an HMO within the meaning of section 257 of the Act and was required to be licensed, which it was not.

Defence of Reasonable Excuse

35. The Tribunal was satisfied that the Applicant's failure to apply and obtain an HMO licence was not reasonable in the circumstances and/or that his ignorance of this fact availed him of the defence of reasonable excuse. We considered his conduct bore a high degree of culpability.

36. The Tribunal had regard to the fact that, by an email dated 7 November 2019 sent by the LFB to the former freeholder and the Applicant raising serious concerns about the fire safety, he was on notice that the property conversion possibly did not comply with Building Regulations. This should have alerted the Applicant to instruct his conveyancing solicitors to investigate as part of the pre-contract enquiries. Indeed, any prudent purchaser would have to be satisfied on this point before exchange of contracts took place.

37. The Tribunal was also satisfied that the Applicant's, conduct when viewed overall, was to obfuscate rather than meaningfully address the remedial works set out in the improvement notice. This is so even if allowance is made for any delay caused by the effect of the Covid-19 lockdown in 2020.

38. The Applicant, whether by himself or through his agent MSK, sought to argue that the property was not an HMO and did not require a licence. That was the only engagement made by the Applicant. He maintained this position up to the hearing when the factual evidence from Ms Harmon and Mr Adekoya indicated otherwise.

39. Furthermore, the Applicant's assertion that he was attempting to comply with the remedial work set out in the improvement notice was not borne out by Mr Adekoya's inspection on 27 May 2021. For the avoidance of doubt, the Tribunal accepted his evidence that there had been no significant change in the condition of the property since the improvement notice had been served on the Applicant. Indeed, it took the Applicant approximately 15 months before he made an application for an HMO licence.

40. Taken together, this lends credibility to Ms Harmon's assertion that the Applicant told her he was not going to apply for a licence in their telephone conversation on 18 February 2020.

39. Accordingly, the Tribunal concluded that the Applicant's conduct could not be regarded as being reasonable in the circumstances nor could he properly shelter behind and purported ignorance to properly advance a defence of reasonable excuse.

Level of Penalty

41. Having regard to the Applicant's conduct set out above, the Tribunal could not disagree with the Respondent's submission that it amounted to an aggravating feature resulting in a moderate offence attracting the highest fine within Band 2 of £10,000. It follows that the Tribunal did not accept the Applicant's submission that the Respondent had failed to correctly assess the level of penalty in accordance with its own policy.

45. Accordingly, for the reasons given, the appeal is dismissed and the Tribunal confirms both the decision of the Respondent to impose the financial penalty for the amount of £10,000 pursuant to paragraph 12 in Schedule 13A to the Act.

Name: Tribunal Judge I Mohabir **Date:** 21 February 2022

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).