FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/HNA/2021/0046**
HMCTS Code	:	**V: FVHREMOTE**
Property	:	**Flat 41, Frognal Court, London NW3 5HG**
Appellant	:	**MAPESBURY & CO LIMITED**
Appellant's Representative	:	**Mohammed Amin, director**
Respondent	:	**LONDON BOROUGH OF CAMDEN**
Respondent's Representative	:	**Paul Bernard, legal officer**
Type of application	:	**Appeal against financial penalty** Section 249A and Schedule 13A, paragraph 10 of the Housing Act 2004
Tribunal members	:	**Judge T Cowen** **Ms S Coughlin MCIEH**
Date of hearing	:	**7 February 2022**
Date of decision	:	**22 February 2022**

DECISION

The Tribunal orders that:

The following orders are made on the Appellant's appeal against final notices numbers 045730 and 045731 both dated 10 August 2021

1. **Final Notice number 045730** dated 10 August 2021 is varied to the following extent: the amount of the financial penalty in respect of the offence contrary to **section 72(1)** of the Housing Act 2004 **is reduced from £2,500 to £1,500**.

2. **Final Notice number 045731** dated 10 August 2021 in respect of the alleged offence contrary to **section 234(3)** of the Housing Act 2004 **is cancelled**.

Covid-19 pandemic: description of hearing

This has been a remote video hearing to which the parties have not objected. The form of remote hearing was V: FVHREMOTE. 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 before the tribunal at the hearing were in the form of electronic bundles from the Applicant and from the Respondent.

REASONS FOR ORDER

The Property and the Parties

1. The Property is a 3 bedroom flat on the second floor of a purpose built block.

2. The Appellant is a company which trades as Mapesbury Estate Agents

3. The Respondent is the local authority for the area in which the Property is situated.

The Final Notices

4. On 10 August 2021, the Respondent ("the Council") imposed financial penalties on the Appellant by means of the following Final Notices:

    4.1. Final Notice number 045730 imposed a penalty of £2,500 on the following grounds:

> "That you, on or about 8 December 2020, being a person in control of or managing a house in multiple occupation

at Flat 41, Frognal Court, Finchley Road, London, NW3 5HG did commit an offence, in that the said house in multiple occupation which was required to be licensed under Part 2 of the Housing Act 2004 was not so licensed, contrary to section 72(1) and (6) of the said Act.

4.2. Final Notice number 045731 imposed a penalty of £1,250 on the following grounds:

> "That you [the Appellant], on or about 8 December 2020, being a person in control or managing a house in multiple occupation at Flat 41, Frognal Court, Finchley Road, London, NW3 5HG did without reasonable excuse fail to comply with regulation 4 of The Management of Houses in Multiple Occupation (England) Regulations 2006, in that you failed to take all such measures as are reasonably required to protect the occupiers of the HMO from injury having regard to the design, structural conditions and number of occupants in the HMO and to ensure that the means of escape from fire in the HMO was kept free from obstruction and maintained in good order and repair:
>
> - There was no fire separation between the kitchen and the hallway.
> - The interlinked smoke alarms to the front middle bedroom and the hallway were covered with plastic, the head to the alarm in the kitchen area was missing, and the smoke alarm to the rear right bedroom was detached from the ceiling.
> - There was a lock to two bedroom doors and the flat door that required a key to exit
>
> Contrary to section 234(3) of the Housing Act 2004."

5. On 8 September 2021, the Appellant appealed to this Tribunal against both of the said Final Notices.

6. Paragraph 10 of Schedule 13A to the Housing Act 2004 provides that a person to whom a final notice is given may appeal to the First-tier Tribunal against the decision to impose the penalty or the amount of the penalty. In this case, the Appellant appeals against the decision to impose both of the penalties and in the alternative against the amount of those penalties.

7. By paragraph 10(3) of Schedule 13A, the appeal is to be a re-hearing of the Council's decision and the Tribunal may have regard to matters of which Council was unaware. By paragraphs 10(4) and 10(5), the Tribunal may confirm, vary or cancel the final notices, but the Tribunal may not increase the amount of any penalty contained in a final notice.

8. The Council's power to impose a financial penalty comes from section 249A of the Housing Act 2004 which allows the penalty to be imposed if the Council is "satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England." The offences cited in the final notices are:

   8.1. Section 72(1) of the Housing Act 2004; and

   8.2. Section 234(3) of the Housing Act 2004.

9. They are both relevant housing offences within the meaning of section 249A of that Act. The maximum penalty for each offence is £30,000.

10. Section 72(1) provides as follows:

> "A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed."

11. The elements of this offence can therefore be listed as follows:

   11.1. Is the Property an HMO at the material time?

   11.2. If so, was the Property required to be licensed at the material time?

   11.3. If so, was the Property licensed at the material time?

   11.4. If not, was the Appellant a person having control of the HMO at the relevant time?

   11.5. Or, was the Appellant a person managing the HMO at the relevant time?

12. Section 72(5) provides that it is a defence if the person in question had a reasonable excuse.

13. Section 234 of the 2004 Act provides (amongst other things) for regulations to impose duties on the person managing an HMO in respect of repair, maintenance cleanliness and good order.

14. Section 234(3) provides as follows:

> "A person commits an offence if he fails to comply with a regulation under this section."

15. The elements of the offence in section 234(3) can therefore be listed as follows:

15.1. Was the Property an HMO at the relevant time?

15.2. If so, was the Appellant a person managing the HMO at the relevant time?

15.3. If so, did the Appellant fail to comply with a regulation made under section 234 of the 2004 Act?

16. In this appeal, therefore, in order to conduct a rehearing of the Council's decision, the following issues arise for determination by the Tribunal:

16.1. Was the Council right to be satisfied, beyond reasonable doubt, that the Appellant committed the s72(1) offence of being a person having control of or managing an unlicensed HMO?

16.2. Was the Council right to be satisfied, beyond reasonable doubt, that the Appellant committed the s234 offence of being a person managing a house who fails to comply with a relevant regulation?

16.3. If the answer is yes to either of those questions, then should be penalty awarded by the Council be reduced?

The Hearing

17. At the hearing, the Council was represented by Mr Paul Bernard, who called oral evidence from Janet Wade, an environmental health officer for the Council. The Appellant was represented by its director Mohammed Amin, who also gave evidence on behalf of the Appellant. Ms Elaine Wallace also attended the hearing on behalf of the Appellant but did not give oral evidence.

18. We had the benefit of a bundle of documents prepared by the Appellant and a bundle prepared by the Council.

19. In making this decision, we have taken account of all of the evidence given and submissions made at the hearing, together with all of the documents to which we were referred during the hearing.

Matters which were undisputed

20. The following matters were given in evidence by the Council and were not challenged by the Appellants:

20.1. An additional licensing scheme for HMOs was imposed by the Council across the whole borough as from 8 December 2015. The scheme was renewed for a further five years as from 8 December 2020.

20.2. The Property is within the borough of Camden. Therefore on the date of the alleged offences, 8 December 2020, the Property was in an area in which HMOs were required to be licensed.

20.3. The Property was not licensed on that date and no application for a licence was pending on that date.

21. The next question is whether the Property was an HMO on the relevant date. That was disputed.

First Disputed Issue: Was the Property an HMO?

22. There was a dispute between the parties as to whether the Property was an HMO on that date.

23. The definition of an HMO is contained in section 254 of the Housing Act 2004. The Council allege that the Property satisfies the "self-contained flat test" in subsection 254(3). This requires that the Property is a self-contained flat and satisfies paragraphs (b) to (f) of section 254(2). The Appellant did not challenge that the Property was a self-contained flat nor that paragraphs (c) to (f) of the test were satisfied. The only paragraph in dispute was s254(2)(b), which (as adapted by paragraph 3(b)) reads as follows:

> "the [self-contained flat] is occupied by persons who do not form a single household (see section 258)"

24. So in order for the Property to be an HMO, it is enough that the number of single households is more than one.

25. As indicated, section 258 provides the definition for a single household. The relevant parts of section 258 are as follows:

> "(2) Persons are to be regarded as not forming a single household unless–
>
> (a) they are all members of the same family, or
>
> (b) their circumstances are circumstances of a description specified for the purposes of this section in regulations made by the appropriate national authority.[1]

[1] There was no evidence that any of the relationships between the occupants fell within the additional exceptions prescribed by regulations 3 and 4 of the Licensing and Management of Houses in Multiple Occupation and Other Houses (Miscellaneous Provisions) (England) Regulations 2006/373 (which deal mainly with various types of live-in staff such as chauffeurs and housekeepers) and the Appellants did not submit otherwise.

(3) For the purposes of subsection (2)(a) a person is a member of the same family as another person if–

(a) those persons are married to, or civil partners of, each other or live together as if they were a married couple or civil partners;

(b) one of them is a relative of the other; or

(c) one of them is, or is a relative of, one member of a couple and the other is a relative of the other member of the couple.

(4) For those purposes–

(a) a "couple" means two persons who fall within subsection (3)(a) ;

(b) "relative" means parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, niece or cousin;

(c) a relationship of the half-blood shall be treated as a relationship of the whole blood; and

(d) the stepchild of a person shall be treated as his child."

26. In effect, therefore, a single household is comprised of people who are either blood relatives or are married or are living as if they were married.

27. The evidence for the Council was based on an inspection of the Property on 8 December 2020 by Janet Wade together with documents obtained subsequently by the Council. That evidence showed:

27.1. The Property consisted of four rooms which were used as bedrooms together with one kitchen and one bathroom.

27.2. There were four occupants present at the time of Janet Wade's visit and one further occupant who was not present, but whose name appeared on a tenancy agreement subsequently obtained by the Council.

27.3. From the evidence of Janet Wade, the written statements given to her by the occupants and the tenancy agreements she later obtained, the five occupants of the Property on the relevant date were as follows:

Name	Start of occupation	Room occupied	Present at 08.12.2020 visit?
Daniele Bissichia	07.09.2018	Front middle room	Yes
Simone Cosimo Ragusa	07.09.2018	Front middle room	Yes
Sohail Al-Mahri	11.08.2020	Rear m right room	Yes
Cameron Robertson	11.08.2020	Rear right room	Yes
Matteo Cecchinel	14.08.2020	Unknown	No

27.4. Janet Wade noted that the first two named occupants were sharing the same room. She stated that she did not know whether they were living as if they were married so as to form one household.

27.5. The written statements given by the four occupants to Janet Wade were in a standard form and they all stated: "I am not related to any of the other occupiers." The Council also invited us to take account of the fact that the occupiers had different surnames (many of which indicated different national origins) and moved in on three separate dates. It was not impossible that they were all related to each other within the meaning of section 258, but the Council invited us to infer that they were not. The Appellants did not assert that they were related to each other and there was no other evidence to indicate that they were. Taking that together with the occupants' own written statements, we were satisfied beyond reasonable doubt that they were not related to each other to form one family household.

27.6. Janet Wade's evidence was that the five people therefore formed at least four separate households, in the event that the two people sharing a room were living as if they were married. Or if the evidence of the fifth absent person was not accepted then the four people present formed at least three households

27.7. On the basis of that evidence, the Council submitted that the Property was an HMO on the relevant date within the meaning of section 254 of the 2004 Act.

28. The Appellants did not dispute that the first four named people were occupying the rooms specified in the Property on the date of Janet Wade's visit.

29. They submitted, however, that the Council had not proved beyond reasonable doubt that the four occupants witnessed by Janet Wade formed at least three households. They contended that some of the other occupants might be living as if they were married in which case there would be fewer households.

30. It is possible, as the Appellants submitted, that some of the people who were occupying the Property were living as if they were married. But even if they were, it is impossible for the Appellants to be able to rely on this exception to establish that all of the occupants formed a single household. In order to do so, (and in the absence of any family relationships as discussed above) the Appellants would have to show that all of the four or five occupants were married to each other or living together as if they were all married to each other.

31. It is, of course, impossible, as a matter of English law, for more than two people to be in a marriage or in a civil partnership with each other. And taking together subsections 258(3)(a) and 258(4)(a), only two people can be regarded as living together as if they were married.

32. Since the minimum number of households formed by four or five unrelated people is more than one, we have reached the conclusion, beyond reasonable doubt, that the Property was an HMO at the time of the alleged offence.

33. In the light of all of the above, we are therefore satisfied beyond reasonable doubt that, at the date of the alleged offence, the Property was an HMO, was required to be licensed and was not licensed.

34. In respect of both of the offences cited in the Final Notices, the next question which arises is whether, on the relevant date, the Appellant was either (a) a person having control of the Property (for the purposes of section 72 of the 2004 Act) or (b) a person managing the Property (for the purposes of section 72 and section 234 of the 2004 Act).

Second Disputed Issue: Was the Appellant a person having control of and/or managing the Property?

35. This issue was heavily contested by the parties. The Council submitted that the Property was managed and controlled by the Appellant. The Appellant submitted that they acted in a very limited capacity simply to arrange the letting and thereafter to collect rent. The Appellant claimed that they did not provide any other service in relation to the Property to their client, Mr Babikir.

36. The phrases “person having control” and “person managing” are defined in section 263 of the 2004 Act. We shall set out the relevant parts of that section below during our discussion of the issues.

37. Before doing so, it is necessary first to describe the letting arrangements of the Property at the relevant time.

Mr Babikir's title

38. The Property is held under a 120 year registered lease dated 19 May 1975 (title number NGL263554) by Babikir Ahmed Babikir and Shahida Babikir who have owned that leasehold title since 2002.

The Tenancy Agreement of 1 May 2020

39. There is a tenancy agreement of the Property dated 1 May 2020 which names the landlord as "Mr Ahmed Babikir" and gives his address as "c/o Mapesbury House 84 Walm Lane". That is the address of the Respondent company. The front page of the tenant agreement says: "Tenancy Arranged By Mapesbury Estate Agents" and gives the same address.

40. The tenant under the tenancy agreement is Mr Moreno Pericolo. No address is stated for him, only an email address and a mobile telephone number.

41. The tenancy agreement on its face grants a tenancy of 12 months from 1 May 2020 at a monthly rent of £2,250.

42. The tenancy agreement of 1 May 2020 was signed by Mr Pericolo as tenant. The question of who had signed on behalf of the landlord, and in what circumstances, was heavily contested at the hearing. We heard and saw the following evidence on that issue:

    42.1. Each page of the tenancy agreement was initialled. The space for the landlord was initially by what looks like the letters "Mr" or "Mv" or "MY" none of which are anything close to the initials of Mr Ahmed Babikir. After those initials appears the printed words "(Landlord) or signed for and on behalf of landlord".

    42.2. The final page of the tenancy agreement is signed by a signature which is unreadable and is followed by the printed words "By, or for and on behalf of, the LANDLORD". That signature is witnessed by someone who has handwritten their name as "Antonino Consoli". There is also a rent deposit document signed on behalf of both parties. The landlord's section has a signature which looks very similar to the landlord's signature on the tenancy agreement. Printed next to it are the words: "Landlord name: Mr Ahmed Babikir". Under those words is printed: "Or on behalf of landlord" and a handwritten tick has been placed next to those latter words. That makes it look as if the person who added the tick is indicating that the signature is "on behalf of" the landlord rather than being the signature of the landlord himself. Mr Amin submitted that this

tick was showing Mr Babikir where to sign. But we noted that there were no ticks at any other place where Mr Babikir would have needed to sign.

42.3. Mr Babikir gave a statement to the Council on 22 December 2020 under section 16 of the Local Government (Miscellaneous Provisions) Act 1976 ("Section 16 Statement"). That statement is signed. The signature on that Section 16 Statement is completely different from any of the signatures which appear on the tenancy agreement and the rent deposit document dated 1 May 2020. Mr Amin for the Appellant said that Mr Babikir had two signatures: one using the English alphabet and one using Arabic script. The signature on the Section 16 Statement was Mr Babikir's Arabic signature and the signature on the tenancy agreement was Mr Babikir's English signature. It is possible that Mr Babikir had two such signatures, but Mr Babikir did not give evidence before us and there was no evidence to corroborate either of these signatures. The only thing we were able to see was that the signatures on the tenancy agreement and rent deposit documents were completely different from the signature on the Section 16 Statement.

42.4. We were also left with the fact that the text surrounding the landlord's signatures on the tenancy agreements were at least ambiguous as to whether those were the signatures of the landlord himself or of someone signing on behalf of the landlord. The latter possibility was not unlikely considering that the tenancy agreement was arranged by a letting agent, who was already acting as the landlord's agent for the purposes of the letting. It was therefore within the realm of likely possibility that the Appellant agent was authorised to sign the tenancy agreement on the landlord's behalf. There was no admissible evidence from anyone at the Appellant company who was present at the signing of the tenancy agreement.

42.5. The person who signed as witness for the landlord's signature was identified as Antonino Consoli, a business associate of Mr Pericolo, the tenant. It is worth pointing out at this stage that Mr Pericolo was known to the Appellant and to the Council as someone who operated a lettings business which involved taking lettings of residential property and subletting it by the room - ie operating HMOs. The Appellant insisted that the letting of this Property was, as far as the Appellant believed, for the purposes of Mr Pericolo's personal residence (together with an employee of his) and not for his HMO room letting business. The Appellant submitted that Mr Consoli acted as a witness for the landlord because he happened to be visiting the Appellant's offices in connection with Mr Consoli's own private residence and not at all in connection with Mr Consoli's involvement in Mr Pericolo's room letting business. It is also worth repeating that the Appellant

did not call evidence from anyone who was present during the signing of the tenancy agreement dated 1 May 2020.

42.6. The only other relevant piece of evidence is an email from Mr Babikir to Janet Wade dated 14 June 2021 in which Mr Babikir said in relation to the 1 May 2020 tenancy agreement: "If you noticed I didn't sign the contract the agency did."

42.7. Putting all of this together, we find that there is no evidence that Mr Babikir signed the tenancy agreement and rent deposit document himself and the most likely explanation is that someone at the Appellant letting agency signed it on Mr Babikir's behalf.

43. Clause 2.1 of the tenancy agreement provided that: "The Rent shall be paid by the Tenant by STANDING ORDER to the landlord agent" (capitals as in original).

44. Relevant parts of clause 5 of the tenancy agreement provided that:

"The Tenant agrees to the following terms:

1. To occupy the premises as the Tenant's principal residence.

…

7. Where there are more than four occupiers including children, unless they are members of a single family group, the tenant must gain the Landlord's written consent.

8. To provide to the Landlord (or his Agent) on demand, a list of all inhabitants.

25. Not to sub-let the premises or take in lodgers or paying guests at all or either to family and friends"

45. On its face, therefore, the tenancy agreement of 1 May 2020 appears to be for the purposes of Mr Pericolo's personal occupation as his residence. He was prohibited from sub-letting and was required to give the landlord a list of inhabitants up to a maximum of four non-family members (unless he obtains consent for more).

The sub-lettings to the occupiers

46. In fact, it appears that Mr Pericolo did not live in the Property on the date of the alleged offence. He instead granted sub-tenancies or licences of rooms to the various people listed in the table above who moved in in August 2020. Those sublettings would be in breach of the terms of the tenancy agreement (unless consent had been given by or in behalf of Mr Babikir). It also appears that two of the occupants claim to have been in the Property since September 2018.

47. Mr Pericolo gave a Section 16 Statement. He stated in a covering email that "one room was already there when I took the mazagemten over." We take that to mean that one room was already occupied when he took over what he regarded as the management of the Property (but which was in fact a tenancy agreement) in May 2020.

48. Mr Pericolo provided copies of two occupancy agreements: one for Matteo Cecchinel dated 14.08.2020 and one dated 11.08.2020 for Sohail Al-Mahri. In the covering email, Mr Pericolo also explained that another occupier moved in during lockdown and never had an opportunity to sign an agreement.

49. Mr Babikir also gave a Section 16 Statement to the Council. In a covering email dated 25 December 2020, he said that he had no idea that there were five people living in the flat. He said that his understanding was that the flat was rented to a company for two of their employees. In the body of the statement, he said: "I would like to state that I have given responsibility to the [e]state agent to rent my flat for me. Therefore it is he who choses the tenants and collect the rent from them. I have no contact with the tenants and all their needs are fulfilled by the agent." Mr Babikir gave the name "Mr Moreno Pozicolo" as the only occupier of the Property. We presume he was intending to refer to Mr Moreno Pericolo.

The Letting Arrangements

50. In summary therefore, the letting arrangements can be described, and we find, as follows:

    50.1. The head landlord was Mr Babikir - owner of a long leasehold title.

    50.2. At the time of the May 2020 letting, at least two people already occupied the Property. They had been there since 2018.

    50.3. Mr Babikir appointed the Appellants as his agent to let the Property.

    50.4. Mr Babikir (through the Appellant, his agents) let the Property as a whole to Mr Pericolo under a one year tenancy agreement dated 1 May 2020.

    50.5. Mr Pericolo sublet individual rooms to three additional occupants from August 2020.

Financial Penalties: Mr Babikir and Mr Pericolo

51. In relation to the same facts which are alleged against the Appellant, the Council imposed financial penalties on:

    51.1. Mr Babikir in the total amount of £3,750 (the same amount as imposed on the Appellant); and on

    51.2. Mr Pericolo in the total amount of £15,000.

52. This reflected the Council's understandable view that Mr Pericolo was the principal offender.

53. We have not considered any appeal against the financial penalties imposed on Mr Babikir and Mr Pericolo.

The Appellant's case on "person having control" and "person managing"

54. The Appellant is appealing the financial penalty imposed on it partly on the grounds that it was not a person "having control of" or "managing" the Property at all. The Appellant's case is that they did no more than arrange the letting to Mr Pericolo and collect the rent from Mr Pericolo. They did not collect rent from the occupants and did not deal with the occupants. They did not have anything to do with the maintenance of the Property. According to Mr Amin's written responses to Janet Wade's letter of 8 April 2021, they visited the Property on 1 May 2020 "to let the property". They did not visit the Property after the tenancy agreement was signed. Once the letting agreement of 1 May 2020 was signed, they simply received the money from Mr Pericolo and passed it on to Mr Babikir.

55. The Appellant relied on its "Terms and Conditions of Business Lettings and Sales Service" to prove that Mr Babikir only hired them to do a rent-collecting lettings service, not to manage the Property. They produced a copy which had all the details of the Property and the details of Mr Babikir printed on it, but it was not signed by anyone. The Appellant said that as far as they were aware, Mr Babikir had never signed it. It was also the case that there were a number of boxes to complete in the "Landlord Instruction Form" section of the document. Some of those were to indicate which service the client required and other boxes were to indicate that the client would undertake gas and electrical safety certificates and an Energy Performance Certificate for the Property and provide copies of these certificates to the Appellant. None of those boxes were completed. The document was therefore of very little weight as evidence of the nature of the relationship between the Appellant and Mr Babikir.

56. The Appellant also gave a Section 16 Statement, signed by Elaine Wallace, in which they stated that their interest in the Property was as letting agent and that they arranged the letting, received rent from the occupiers of the

property (the plural "occupiers" is the wording of the Council's question in the section 16 form) and passed it on to Mr Babikir. They also stated that the sole occupier of the Property was Mr Pericolo who occupied all of the Property. This was consistent with their position that they did not think that there were any occupiers other than Mr Pericolo and that they therefore thought that they were receiving rent from his as sole occupier.

"Person having control" and "Person Managing": Discussion

57. It is for the Council to prove beyond reasonable doubt that the relevant element of the offence has been committed.

58. The phrases "person having control" and "person managing" are defined in section 263 of the 2004 Act.

59. The relevant parts of those definitions are as follows:

> "(1) In this Act "person having control", in relation to premises, means (unless the context otherwise requires) the person who receives the rack-rent of the premises (whether on his own account or as agent or trustee of another person)…"

60. It is common ground in this case that the rent paid in respect of the Property by Mr Pericolo to Mr Babikir was a rack rent within the meaning of section 263(2).

61. "Person managing" is defined by section 263 as follows:

> "(3) In this Act "person managing" means, in relation to premises, the person who, being an owner or lessee of the premises–
>
> (a) receives (whether directly or through an agent or trustee) rents or other payments from–
>
> (i) in the case of a house in multiple occupation, persons who are in occupation as tenants or licensees of parts of the premises; …
>
> (b) would so receive those rents or other payments but for having entered into an arrangement (whether in pursuance of a court order or otherwise) with another person who is not an owner or lessee of the premises by virtue of which that other person receives the rents or other payments;
>
> and includes, where those rents or other payments are received through another person as agent or trustee, that other person."

62. The Appellant has admitted in correspondence and orally at the hearing that it received the rent for the Property from Mr Pericolo (the tenant of the Property) as agent for Mr Babikir (the landlord) and that the rent received was the rack-rent. We note that the definition in section 263(1) does not require the rent to have been received directly from the occupiers in order for a person to be regarded as having control. It is also possible for more than one person to receive the rack-rent from the same premises at the same time - for example an intermediate landlord, a head landlord and both of their agents could all be "persons having control" in respect of the same premises at the same time.

63. We therefore have no hesitation in finding, beyond reasonable doubt, that the Appellant received the rack-rent for the Property as agent for Mr Babikir. Therefore on the date of the alleged offence, the Appellant was a person having control of an HMO which was required to be licensed but was not so licensed.

64. **The Respondent has therefore proved all of the elements for the offence under section 72(1) of the 2004 Act against the Appellant, subject to the issue of reasonable excuse (see below)**.

65. We turn to the offence under section 234(3). It is an offence of failing to comply with a regulation under the section. The regulations are limited in section 234(2) to being those which impose duties on "the person managing a house…" and "persons occupying a house". The Appellants clearly were not occupying the Property, so the section 234(3) offence could only have been committed by them if they can be regarded as a "person managing" the Property.

66. The most relevant parts of the definition of "person managing" in section 263(3) above can be summarised as follows. A person is "managing" an HMO only if they are (or if they are the agent of the owner or lessee of the property who is):

    (a) receiving rents or other payments from persons who are in occupation; or

    (b) receiving rents or other payments, through an agent or trustee, from persons who are in occupation.

67. In our judgment, the Appellant was not receiving rent directly from the occupiers. The Appellant was receiving rent directly from Mr Pericolo who, at the date of the alleged offence, was not in occupation.

68. In addition, the Appellant was not receiving rent from the occupiers through an agent or trustee, because although the Appellant was receiving rent from the occupiers through Mr Pericolo, he was not an agent or trustee. He was an intermediate landlord.

69. We therefore find that the Appellant was not a "person managing" the Property and therefore cannot be guilty of the alleged offence under section 234(3).

70. It is therefore not necessary for us to consider the individual regulations under section 234(3) or the alleged breaches of those regulations.

71. Therefore, in order to determine whether the Appellant is guilty of the offence under section 72(1) of the 2004 Act, the only remaining issue is the defence of reasonable excuse.

Reasonable excuse

72. Section 72(5) provides as follows:

> "In proceedings against a person for an offence under subsection (1), (2) or (3) it is a defence that he had a reasonable excuse–
>
> (a) for having control of or managing the house in the circumstances mentioned in subsection (1), or
>
> (b) for permitting the person to occupy the house, or
>
> (c) for failing to comply with the condition,
>
> as the case may be."

73. The particular terms of the reasonable excuse defence in section 72(5) came under scrutiny in *Palmview Estates Limited v Thurrock Council* [2021] EWCA Civ 1871. In that case, the Court of Appeal (at paragraphs 33 and 34) made the following important points:

73.1. Section 72(1) creates an offence of strict liability. That means that it does not matter whether the Appellant knew that the property they had control of was an HMO which required to be licensed. That strict liability nature of the offence is part of the statutory context in which the reasonable excuse defence should be construed and applied.

73.2. The defence of reasonable excuse is not framed in terms of failure to apply for a licence - it is framed expressly in terms of the offence itself. In other words: "a person may have a perfectly reasonable excuse for not applying for a licence which does not (everything else being equal) give that person a reasonable excuse to manage or control those premises as an HMO without that licence." (paragraph 34 of *Palmview*)

74. In this case, the Appellants say that they did not know that the Property was an HMO. They say that they let the Property in May 2020 to Mr Pericolo for his own occupation and they believed that he was planning to

occupy with an employee of his. They say that they only received rent from Mr Pericolo and passed it on to Mr Babikir. They say that they did not know that Mr Pericolo was not occupying the Property and they did not know that other people had moved in.

75. In essence, the Appellants say that not knowing that the Property was an HMO was a reasonable excuse. In our judgment, accepting that as a reasonable excuse by itself would essentially strip the offence of its strict liability nature, as observed by the Court of Appeal in *Palmview*.

76. We think that the Appellant needs to show more than simply that they did not know the Property was an HMO. They would need to show some good reason why they had that belief. One example of a good reason is the excuse in the case of *D'Costa v D'Andrea* [2021] UKUT 144 in which the landlord tried to apply for a licence but was told (wrongly) by the council that she did not need one and that her continuing use of the HMO was lawful.

77. So, in our judgment, it is not enough for the Appellant simply to turn a blind eye and say that they did not inspect and they did not know.

78. But in this case, in addition, there were many reasons indicating that the Appellant did know, or at least should have known, that the Property was being used as an HMO, and that it was not reasonable for them to believe that Mr Pericolo was occupying it as his residence:

    78.1. The Appellant had had previous dealings with Mr Pericolo and knew that he ran a business of taking lettings and then subletting them on a room by room basis.

    78.2. It was therefore at least highly probable that a Property with that number of rooms would have been occupied by more than two people. In other words, it was not enough for the Appellant simply to believe Mr Pericolo when he said that he was going to occupy the Property with one other person.

    78.3. The Appellant's evidence (in the email from Mr Amin cited above) was that they did inspect the Property prior to the May 2020 letting. So they would or should have seen that it was already occupied by at least two people who had been there since 2018.

    78.4. The appearance of Antonino Consoli (a business associate of Mr Pericolo) as a witness to the signing of the May 2020 tenancy agreement, would have made it apparent that the whole arrangement was part of Mr Pericolo's room letting business and not the letting of a flat for Mr Pericolo's personal occupation. We do not believe the evidence of the Appellant that Mr Consoli coincidentally happened to be visiting the Appellant's offices at the time to organise his own personal residence.

78.5. Mr Babikir never signed the Appellants' terms and conditions. The Appellant never checked that Mr Babikir had not ticked the checklist of gas and electricity safety certificates or the energy performance certificate and did not chase him up for these certificates to be provided. The Appellant said that this was an inadvertent oversight. Even if that is true, it is not impressive for a professional lettings agency. Carrying out the proper checks (according to their own standards) may also have alerted them to the HMO status of the Property.

78.6. The Appellant is a professional lettings agency. Its director Mr Amin claimed to have been in the lettings business for 19 years.

79. As a result of the above, we have reached the conclusion that the Appellant had no reasonable excuse to be in control of the Property in circumstances where the Property was an unlicensed HMO.

80. **It follows that we find, beyond reasonable doubt, that the Appellant did commit the offence under section 72(1) of the 2004 Act as alleged and the Council was entitled to impose a financial penalty in respect of that offence.**

Amount of penalty

81. The final matter which falls for consideration is the amount of that penalty. The amount imposed by the Council in respect of the section 72(1) offence was £2,500.

82. The Council calculated that penalty by reference to the fact that it is the first offence for the Appellant, that the Appellant needs to be deterred from the commission of further offences and to inform them as to what is legally required. We also gathered that the Council took the view that the Appellant played a much lower role in the offence overall than Mr Pericolo (against whom a £15,000 penalty was imposed).

83. We note, however, that the penalty imposed against the Appellant was the same as the penalty imposed against the head landlord, Mr Babikir. We do not think that is appropriate. Mr Babikir was the landlord who was responsible for the letting to Mr Pericolo and had the ultimate power to regulate and enforce the covenants under the tenancy agreement. Mr Babikir was also in a position to profit from the letting. The Appellant played a more minor role which involved simply collecting rent and passing it on.

84. Also we take into account that it is the Appellant's first offence and that Appellant says it has now stopped taking on rent-collecting work and has taken immediate steps to improve its procedures to ensure this will not happen again.

85. We have decided that a more appropriate penalty to impose against the Appellant in these circumstances is the sum of £1,500 and we therefore vary the financial penalty accordingly.

Dated this 22nd day of February 2022

JUDGE TIMOTHY COWEN

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).