



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

Case Reference : **LON/00BB/HNA/2021/0035**

HMCTS code (paper, video, audio) : **V: FVH REMOTE**

Property : **52 Wyatt Road, Forest Gate London E7 9NE (“the Property”)**

Appellant/applicant : **Christopher Paul Day**

Representative : **William Allen**

Respondents : **Newham Council**

Representative : **Vivienne Sedgley of Counsel**

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

Tribunal Members : **Judge Professor Robert Abbey and Ms Sue Coughlin MCIEH (Professional Member)**

Date of Hearing : **11 January 2022**

Date of Decision : **14 January 2022**

DECISION

- This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as FVHREMOTE - use for a hearing that is held entirely on the Ministry of Justice FVH platform with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to are in two bundles of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it a pair of non-paper-based digital trial bundles of documents prepared by the respondent, in accordance with previous directions.
- However, the applicant failed to submit any documents other than the original application. The applicant did not submit a trial bundle but simply confirmed that he was prepared to use and refer to the documents and trial bundle as submitted by the respondent. The result of his failure to provide any further documentation including any statement of case was that he was limited to making representations on the grounds set out in his application only and the material filed by the Respondent.

Decision

1. The decision by the respondent to impose a financial penalty is upheld but subject to a reduction in the total sum. The total of the penalty originally amounted to a sum of £2500. For the reasons set out below the Tribunal has determined that the financial penalty of £2500 should be subject to a reduction of 20% to £2000.
2. In the light of the above, the appeal by the appellant against the imposition of a financial penalty by the respondent under section 249A and schedule 13A of the Housing Act 2004 is therefore allowed in part as set out above.

Introduction

3. This is the hearing of the applicant's application regarding **52 Wyatt Road, Forest Gate London E7 9NE** ("the Property"), pursuant to Schedule 13A of the Housing Act 2004 ("the 2004 Act"), to appeal against a financial penalty imposed by the respondent under s249A of the 2004 Act. A financial penalty of £2,500 has been imposed on the applicant by the respondent in a Notice dated 8 July 2021 for having control of a house in multiple occupation (an HMO) which was not licensed and therefore committing an offence under section 72(1) of the Housing Act 2004. The applicant was the freeholder of the property

and the respondent is the local authority responsible for the locality in which the property is situate.

The Hearing

4. The appeal was set down for hearing on 11 January 2022 when the applicant was not represented but Mr William Allen who co-owned the property spoke on his behalf. Ms Vivienne Sedgley of Counsel appeared for the respondent. This hearing is a re-hearing of the local authority decision, see paragraph 10(3)(a) of Schedule 13A to the 2004 Act. The Tribunal is therefore to consider whether to impose a financial penalty afresh, and is not limited to a review of the decision made by the respondent.
5. The imposition of the financial penalty was imposed on the basis that the Applicant committed an offence under s.72(1) of the 2004 Act by being a person in control of an HMO which was required to be licensed under Part 2 of the 2004 Act but was not so licensed. The applicant is one of two freehold owners of the Property.
6. At all material times the applicant held a selective licence (under Part 3 of the 2004 Act) and so the Property was licensed for one household only of up to 12 people. The Property was not licenced as an HMO. In any event, if the applicant was not already aware, the need for an HMO licence was communicated to the applicant by the respondent on 08 August 2019 and again on 26 September 2019, following complaints from members of the public. The applicant must have received at least one of these, because he engaged in email correspondence with the Respondent about the need for an HMO licence from 28 October 2019 because the borough had an Additional Licensing Scheme which covered most HMO's within the borough including the area the property was situated in This scheme ran from January 2018 for 5 years.
7. There followed a period of negotiation with the Applicant who, when finding that he would probably not get planning permission for an HMO, decided he would in future let to one family only. From early 2020 he let to a group of 6 people who claimed they were related to each other.
8. Following further complaints about the property the Respondent's officer Ms Shehi inspected the house without notice on 8 April 2021 and found it to be a 3 storey HMO occupied by at least 5 and probably up to 8 people, in poor condition and with inadequate fire separation and fire precautions for a property of this type. The applicant required an HMO licence on 08 April 2021 because the Property satisfied the standard test under Part 2, s.77(a) and s.254(2) of the 2004 Act namely that it consisted of one or more units of living accommodation not

consisting of a self-contained flat or flats: it was occupied by three or more persons who were not members of the same household: it was occupied by those persons as their only or main residence or they were to be treated as so occupying it: their occupation constituted the only use of that accommodation: rents were payable or other consideration was to be provided in respect of at least one of those persons' occupation: and two or more of the households who occupy the living accommodation shared one or more basic amenities (i.e. a toilet, personal washing facilities or cooking facilities.)

9. The level of occupation on the day of inspection meant that the property should have been licensed as a mandatory HMO under s.55 (2) of the Housing Act 2004 regardless of the existence of the Additional Licensing Scheme. The applicant was a person having control of or managing the Property (s.72(1) of the 2004 Act) because he received the rack rent of the premises (s.263(1) of the 2004 Act) and/or as owner of the premises he received (whether directly or through an agent or trustee) rent or other payments from persons who are in occupation as tenants or licensees of parts of the premises (s.263(3)(a) of the 2004 Act).
10. As a result of the above an offence was committed under s.72(1) of the 2004 Act. It is not necessary to establish that the defendant knew the property was an HMO which was required to be licensed; the offence is one of strict liability: *R. (Mohamed) v Waltham Forest LBC* [2020] EWHC 1083 (Admin). The Divisional Court clarified that the offence of managing or having control of an unlicensed house in multiple occupation, contrary to s.72(1) of the 2004 Act, is a strict liability offence, which does not require proof of a defendant's *mens rea*.
11. In this case Dingemans LJ found that, the Council had been right to treat the offence created by s.72(1) of the 2004 Act as one of strict liability. The offence did not require proof of *mens rea* nor, more particularly, that the Claimants knew they had control of or were managing properties that were occupied as HMOs and required a licence. Such matters might be relevant to any "reasonable excuse" defence advanced under s.72(5) of the 2004 Act, but were not an element of the offence created by the 2004 Act. In this respect, the Court held, its decision was consistent with recent decisions of the Divisional Court in *Thanet v Grant* [2015] EWHC 4290 (Admin) and *IR Management Services v Salford CC* [2020] UKUT 81.
12. Subsequent to the inspection the Respondent, on 17 May 2021, served a Notice of Intention to impose a Financial Penalty in the amount of £2500 under s. 249A on Mr Day. Although Mr Allen responded to this notice and arranged a joint inspection of the property because he did not believe it was an HMO neither he nor Mr Day made any representations regarding the amount of the penalty. The Financial

Penalty Notice was served on 8 July 2021 in the same terms as the Notice of Intention

13. The crux of the Applicant's argument in his Application was that he had let the property to a single family and he had not known that they were subletting it. , however during the trial the Tribunal noted an oral admission by the applicant that he accepted that there was an offence that had been committed and that his appeal was only in relation to the amount of the penalty. This being so the Tribunal did not need to consider reasonable excuse, the breach having been admitted in the oral evidence given by the applicant.
14. At the hearing the applicant maintained that the level of the financial penalty was too high given the circumstances of the tenancy, the consequences of the COVID-19 pandemic and the willingness of the applicant to comply with the requirements of the Council. On the other hand, the respondent considers that the financial penalty should remain as imposed. As the respondent has an enforcement policy in place the Tribunal must take that as its starting point and implement that policy, (see *Marshall v Waltham Forest London Borough Council* [2020] UKUT 35 (LC) at §52 and §74.)

Decision and Reasons

15. From the evidence before it and the admission mentioned above, the Tribunal was satisfied that the applicant was in breach of the requirements of HMO licencing scheme. The applicant did say that the effects of the Covid pandemic lock down had restricted what they could do in relation particularly to inspecting the property and the conduct of the tenant also militated against appreciating that the property was in multiple occupation.
16. With regard to the effects of the COVID-19 pandemic The Tribunal noted that the time of the first national lockdown did occur during the timescale of this dispute. The country entered the lock down in mid-March and the restrictions were not lifted until July. During this time the applicant said that he found it very difficult to make visits to the property.
17. On the other hand, it is the case that the Covid pandemic will have had an effect but Government Guidelines made it clear that there was still an expectation on landlords to carry out important inspections/repairs such as those required in this dispute even in the midst of the pandemic. Accordingly, with regard to this first ground, the Tribunal was not persuaded by the effects of the national lockdown as it was clear from the Guidance from the Government that there was an expectation that important and necessary inspections and or repairs would nevertheless be required and should have been carried out.

18. With regard to the conduct of the tenant it seemed to be accepted by the parties that there was some evidence that when the property was jointly inspected the tenant had made some effort to disguise the use of the property by moving furniture. Indeed, there were other potentially misleading actions on the tenant's part that were mentioned in evidence.
19. Finally, the Tribunal considered the level of the penalty. The applicant says the level of the penalty is excessive as they tried at all times to cooperate with the respondent. The respondent says it has a policy and a fee matrix that dictates how and why a financial penalty might be imposed and at what level. As has been noted previously as the respondent has an enforcement policy in place the Tribunal must take that as its starting point and implement that policy, (see *Marshall v Waltham Forest London Borough Council* [2020] UKUT 35 (LC) at §52 and §74.).
20. The Council produced to the Tribunal a copy of the respondent's detailed enforcement policy. The Tribunal noted that regrettably it had been supplied by the respondent with an out-of-date scoring system that was at the core of the policy. The Tribunal was troubled by the absence of the correct document (and indeed by the absence of a copy of the tenancy agreement from the Trial Bundle prepared by the respondent). The Tribunal found it very difficult to follow or apply the matrix calculation table supplied by the respondent so that in many ways it seemed to the Tribunal that the scores could have been increased or indeed decreased depending on what view was taken of the unhelpful guidance set out in the matrix. The Enforcement Policy provided no additional guidance on the pithy and sometimes ambiguous descriptions which were in the matrix
21. Although we consider that the amount set by the respondent in the sum of £2500 would be a reasonable amount for an offence of this type, since the local authority scored the matrix with leniency (according to their Counsel) it seems that they accepted there were mitigating circumstances in this case. For example, the potentially misleading conduct of the tenant. Of course, the failure of the applicant to submit evidence clearly hindered his case presentation. Mitigating circumstances usually result in a percentage reduction. The Tribunal thought that a 20 % reduction would be in line with other deductions it had encountered in similar appeals regarding financial penalties such as this one.
22. Therefore, the Tribunal thought that the penalty set by the respondent was not appropriate or proportionate as it did not take into account the mitigating circumstances touched on above. It therefore applied a discount of 20% giving a final figure in this regard of £2000 in place of the figure set by the respondent.

23. Consequently, in the light of the above, the appeal by the appellant/applicant against the imposition of the financial penalty levied by the respondent under section 249A and schedule 13A of the Housing Act 2004 is allowed in part.

24. Rights of appeal are set out in the annex to this decision.

Name: Judge Professor Robert
Abbey

Date: 14 January 2021

Annex
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).

Appendix

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.

254 Meaning of “house in multiple occupation”

(1) For the purposes of this Act a building or a part of a building is a “house in multiple occupation” if—

- (a) it meets the conditions in subsection (2) (“the standard test”);
- (b) it meets the conditions in subsection (3) (“the self-contained flat test”);
- (c) it meets the conditions in subsection (4) (“the converted building test”);
- (d) an HMO declaration is in force in respect of it under section 255; or
- (e) it is a converted block of flats to which section 257 applies.

(2) A building or a part of a building meets the standard test if—

- (a) it consists of one or more units of living accommodation not consisting of a self-contained flat or flats;
- (b) the living accommodation is occupied by persons who do not form a single household (see section 258);
- (c) the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see 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; and
- (f) two or more of the households who occupy the living accommodation share one or more basic amenities or the living accommodation is lacking in one or more basic amenities.

(3) A part of a building meets the self-contained flat test if—

- (a) it consists of a self-contained flat; and
- (b) paragraphs (b) to (f) of subsection (2) apply (reading references to the living accommodation concerned as references to the flat).

(4) A building or a part of a building meets the converted building test if—

- (a) it is a converted building;
- (b) it contains one or more units of living accommodation that do not consist of a self-contained flat or flats (whether or not it also contains any such flat or flats);

(c)the living accommodation is occupied by persons who do not form a single household (see section 258);

(d)the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it (see section 259);

(e)their occupation of the living accommodation constitutes the only use of that accommodation; and

(f)rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation of the living accommodation.

(5)But for any purposes of this Act (other than those of Part 1) a building or part of a building within subsection (1) is not a house in multiple occupation if it is listed in Schedule 14.

(6)The appropriate national authority may by regulations—

(a)make such amendments of this section and sections 255 to 259 as the authority considers appropriate with a view to securing that any building or part of a building of a description specified in the regulations is or is not to be a house in multiple occupation for any specified purposes of this Act;

(b)provide for such amendments to have effect also for the purposes of definitions in other enactments that operate by reference to this Act;

(c)make such consequential amendments of any provision of this Act, or any other enactment, as the authority considers appropriate.

(7)Regulations under subsection (6) may frame any description by reference to any matters or circumstances whatever.

(8)In this section—

“basic amenities” means—

(a)a toilet,

(b)personal washing facilities, or

(c)cooking facilities;

“converted building” means a building or part of a building consisting of living accommodation in which one or more units of such accommodation have been created since the building or part was constructed;

“enactment” includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30));

“self-contained flat” means 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.

Schedule 13A

Notice of intent

1 Before imposing a financial penalty on a person under section 249A the local housing authority must give the person notice of the authority's proposal to do so (a "notice of intent").

2(1) The notice of intent must be given before the end of the period of 6 months beginning with the first day on which the authority has sufficient evidence of the conduct to which the financial penalty relates.

(2) But if the person is continuing to engage in the conduct on that day, and the conduct continues beyond the end of that day, the notice of intent may be given—

(a) at any time when the conduct is continuing, or

(b) within the period of 6 months beginning with the last day on which the conduct occurs.

(3) For the purposes of this paragraph a person's conduct includes a failure to act.

3 The notice of intent must set out—

(a) the amount of the proposed financial penalty,

(b) the reasons for proposing to impose the financial penalty, and

(c) information about the right to make representations under paragraph 4.

Right to make representations

4(1) A person who is given a notice of intent may make written representations to the local housing authority about the proposal to impose a financial penalty.

(2) Any representations must be made within the period of 28 days beginning with the day after that on which the notice was given ("the period for representations").

Final notice

5 After the end of the period for representations the local housing authority must—

- (a) decide whether to impose a financial penalty on the person, and
- (b) if it decides to impose a financial penalty, decide the amount of the penalty.

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

7 The final notice must require the penalty to be paid within the period of 28 days beginning with the day after that on which the notice was given.

8 The final notice must set out—

- (a) the amount of the financial penalty,
- (b) the reasons for imposing the penalty,
- (c) information about how to pay the penalty,
- (d) the period for payment of the penalty,
- (e) information about rights of appeal, and
- (f) the consequences of failure to comply with the notice.

Withdrawal or amendment of notice

9(1) A local housing authority may at any time—

- (a) withdraw a notice of intent or final notice, or
- (b) reduce the amount specified in a notice of intent or final notice.

(2) The power in sub-paragraph (1) is to be exercised by giving notice in writing to the person to whom the notice was given.

Appeals

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.

(2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(3) An appeal under this paragraph—

- (a) is to be a re-hearing of the local housing 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.

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed.

Recovery of financial penalty

11(1) This paragraph applies if a person fails to pay the whole or any part of a financial penalty which, in accordance with this Schedule, the person is liable to pay.

(2) The local housing authority which imposed the financial penalty may recover the penalty or part on the order of the county court as if it were payable under an order of that court.

(3) In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate which is—

(a) signed by the chief finance officer of the local housing authority which imposed the penalty, and

(b) states that the amount due has not been received by a date specified in the certificate,

is conclusive evidence of that fact.

(4) A certificate to that effect and purporting to be so signed is to be treated as being so signed unless the contrary is proved.

(5) In this paragraph “chief finance officer” has the same meaning as in section 5 of the Local Government and Housing Act 1989.

Guidance

12A local housing authority must have regard to any guidance given by the Secretary of State about the exercise of its functions under this Schedule or section 249A