



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

Case reference : **MAN/00EY/HNA/2020/0010-13**

Property : **65, 67, 69 & 71 Station Road, Blackpool,
Lancashire FY4 1EU**

Applicant : **Mr Z Rafiq
(represented by Mr Craggs of counsel)**

Respondent : **Blackpool Borough Council
(represented by Mr Pearson, solicitor)**

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

Tribunal Members : **Mr J Rimmer
Mr S Wanderer
Mr J Faulkner**

Date of hearing : **21st March 2022**

Date of Decision : **11 May 2022**

DECISION

DECISION : The Applicant's appeal against financial penalties imposed in respect of 65-69, Station Road, Blackpool are allowed for the reasons set out in paragraphs 42-46 herein

BACKGROUND

- (1) The Tribunal has received 4 appeals from the Applicant against financial penalties imposed under section 249A of the Housing Act 2004. The relevant procedures for imposing financial penalties and appeals against them are set out in Schedule 13A of that Act. Both section 249A and Schedule 13A have been inserted into the Housing Act 2004 by section 126 and Schedule 9 of the Housing and Planning Act 2016.
- (2) Those penalties relate to two housing offences that the local housing authority considers to have been committed in respect of each of the properties at 65-71, Station Road, Blackpool. Those offences are the same in relation to each property, namely breaches of management regulations applicable to houses in multiple occupation (HMOs) being offences under Regulations 5 (duty of the manager to take safety measures) and 8 (duty of the manager in respect of common parts) of the Licensing and Management of (additional provisions) Regulations 2007.
- (3) After completing the process for determining to impose penalties the Respondent concluded that the appropriate amount in respect of the offences was £7,000.00 in respect of each of the first offences and £4,500.00 in respect of each of the second offences. The total amount therefore amounting to £46,000.
- (4) This appeal is by way of a re-hearing of the local housing authority's decision to impose those penalties and/or the amounts in question, but it may be determined having regard to matters of which the authority were previously unaware.
- (5) When deciding whether to confirm, vary or cancel the final notice imposing the financial penalty, the issues for the Tribunal to consider will or may include:
 - (i) Whether the tribunal is satisfied, beyond reasonable doubt, that the applicant's conduct amounts to a "relevant housing offence" in respect of premises in England (see sections 249A(1) and (2) of the Housing Act 2004);
 - (ii) Whether the local housing authority has complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty (see section 249A and paragraphs 1 to 8 of Schedule 13A of the 2004 Act).
 - (iii) If the appeal relates to more than one financial penalty imposed on the applicant, whether or not they are in respect of the same conduct and/or-

- (iv) Whether the financial penalty is set at an appropriate level, having regard to any relevant factors, which may include, for example:
 - (a) the offender's means,
 - (b) the severity of the offence,
 - (c) the culpability and track record of the offender,
 - (d) the harm (if any) caused to a tenant of the premises,
 - (e) the need to punish the offender, to deter repetition of the offence or to deter others from committing similar offences; and/or
 - (f) the need to remove any financial benefit the offender may have obtained as a result of committing the offence.
- (6) The tribunal may have regard to any official guidance relating to financial penalties (also known as "civil penalties") that may be published from time to time by the Secretary of State for Housing, Communities and Local Government, but the Tribunal is not to be bound by such guidance when making its decision.
- (7) The parties are referred to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for guidance on how the application has been dealt with.
- (8) The appeal itself has had a somewhat lengthy history, by reason of the difficulties the various staff of the Respondent have experienced in joining in the video hearings, apparently caused by the efficacy of a computer firewall, and also the development by and on behalf of the Applicant of additional arguments before the various aborted hearings.
- (9) By 11th August 2021 the parties were ready to proceed, although the various discussions between the parties suggested that an inspection by the Tribunal might need to be undertaken, notwithstanding the current guidance in the Covid crisis to avoid these wherever possible.
- (10) A skeleton argument was also produced to the Tribunal on the Applicant's behalf by Mr Cragg, to be read alongside that previously submitted on behalf of the Respondent. This raised four matters which Mr Cragg submitted were the significant issues that the Tribunal should consider, although he subsequently conceded that one was proposed in error, owing to his confusion over dates about which he had been mistaken.
- (11) In relation to one of the grounds it had been possible for the parties to agree that in the light of information relating particularly to 71, Station Road, the appeal in respect of that property would be successful and the Respondent indicated that it would not be opposed. The Tribunal has previously noted formally that the appeals in respect of both penalties relating to number 71, Station Road should be allowed.
- (12) There remained three further grounds of appeal relating to the offences concerning 65-69, Station Road:

- (i) The inspections conducted by the Council at those properties were conducted without the notifications required by the Housing Act 2004, Section 239.
 - (ii) The structure, design and layout of the properties were such that they were not Houses in Multiple Occupation and therefore not subject to the financial penalty regime applied by the Council.
 - (iii) The improvement notices were invalid as no date, or dates, were specified for the completion of the works (although the financial penalties being considered by the Tribunal related to breaches of management regulations in respect of HMOs, rather than breaches of the notices). Subsequently this argument was not pursued by the Applicant.
- (13) In view of the particular issue then being made as to whether these properties constituted HMOs, it was proposed by both parties that further enquiries should be made and discussions held between the parties to clarify the situation. In view of the history of the appeal and the lateness of the Applicant's arguments, together with the view of the Tribunal that a fundamental matter was being raised and an inspection possibly being assistive, this was considered an appropriate step.
- (14) It was however common ground that the parties were able and willing to argue before the Tribunal the first matter raised by Mr Cragg in his skeleton: that there had been no notice given to the Appellant of the inspection of the properties and therefore the Respondent could not rely on the inspections to found subsequent proceedings to impose a financial penalty.
- (15) The Tribunal was satisfied that it was appropriate to consider that argument immediately and handed down its decision on 11th October 2021 to the effect that in the circumstances in which the inspection of the properties came about there was no requirement of notice to be given and the penalties, from that perspective were properly imposed.
- (16) It is now possible for the Tribunal to hear the further arguments of the Applicant that the three remaining properties, 65-69, Station Road, are not houses in multiple occupation and therefore not subject to the regime under which the financial penalties have been imposed.

The law

- (17) The regime for imposing a financial penalty, or penalties, is set out in section 249A of the Act as an alternative to criminal proceedings in respect of one or more relevant housing offences.
- (18) There are a significant number of offences that fall to be considered as relevant housing offences, but those with this Tribunal are concerned are those identified by the Respondent for the purposes of imposing financial penalties against which the Applicant brings this appeal. They relate to offences in respect of HMOs.

- (19) Sections 72, 95, and 234(3) of the Act refer specifically to the offences of operating an unlicensed HMO (section 72), operating a house that is unlicensed but is required to be licensed (section 95) and offences against HMO management regulations (section 234(3)).
- (20) Section 257 Housing Act 2004 deals with the situation in which it is possible for the three properties to become HMOs by virtue of their conversion into flats
- (1) For the purposes of this section a “converted block of flats” means a building or a part of a building which-
- (a) Has been converted into, and
- (b) 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 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...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 section 1 of the Building Act 1984...

Submissions and evidence

- (21) It was on this test that the Applicant, through Mr Cragg, now based his case. It was not part of the original arguments put forward in the appeal on behalf of the Mr Rafiq. Its genesis occurred during the time that lapsed from the difficulties experienced by the Respondent’s staff in engaging with the Tribunal by video link. The Tribunal had previously indicated that against that background it was prepared to hear the argument.
- (22) Allied to this contention was an argument as to the manner in which the Borough Council chose to impose council tax liability in respect of the occupation of the properties. This appeared to suggest a recognition of the

dwellings within the building being separate flats, but greater reflection upon this issue crystallised the inconsistencies between an HMO regime under section 257 of the Act and a council tax regime for revenue purposes to the extent that treatment under the latter could not provide any persuasive evidence to resolve the question as to the existence of HMOs.

- (23) To assist the Tribunal the parties submitted a supplementary bundle of documents in addition to the bundle submitted earlier in the proceedings. Further skeleton arguments were provided to give further assistance to the Tribunal.
- (24) Within the bundle are two statements provided by Mr Rafiq which are relatively short, but exhibit considerable documentation which he claims supports the contention that the three properties are not HMOs.
- (25) Those exhibits may be considered to suggest the following circumstances, for which copious hand written annotations provide assistance:
 - (1) Prior to 2003 the properties contained a total of 18 flats, not all of which were self-contained and that lack of self-containment extended over all three buildings.
 - (2) Proposals were then made to convert them to contain 20 flats, all of which would be self-contained.
 - (3) Some enquiries were made as to whether there was a need for planning permission to be applied for, but the ultimate view of the Council was that there was no change of use as the existing flats had been in existence for a considerable time and the conversion was not a material change of use.
 - (4) A letter from the council official dated 8th July 2005 appears to provide an appropriate snapshot of the position at that date of 3 HMOs being renovated to provide 20 self- contained flats.
 - (5) There then appear, at some considerable distance further on in the bundle (pages 682 to 686), 5 “certificates of completion of work” provided by The Council.
- (26) The first is dated 7th November 2005 and bears building regulations plan number 02/03636. It refers to refurbishment of existing flat units at 65, Station Road. It further refers to a full plans application under the Building Regulations made under Section 1(3) Building Act 1984. An inspection was made by the Council on 7th November and certifies compliance with Part B of Schedule 1 (fire safety) of the Building Regulations.
- (27) The other 4 certificates are of like kind, save and except:
 - The second, of the same date, refers to internal alterations of existing flats at 67-69, Station Road. It is numbered 02/04083
 - The third, dated 9th June 2005, bearing the same number and referring to an inspection on 28th April, again relates to 67-69 Station Road and

is in respect of internal works to existing flats (69, station Road only), A hand-written note adjoining states “flat 2-8”.

- The fourth is dated 7th November (with inspection on that date) and refers to change of use to ground floor to form 3 permanent flats with garaging to rear, alterations to front elevation to remove “shop” windows. It is numbered 03/03840.
- The fifth is dated 9th June with Inspection on 28th April in respect of 65-69, Station Road and refers to change of use to ground floor to form three permanent flats with garaging to rear, alterations to front elevation to remove “shop” windows (69 Station Road only) a handwritten note adjoining states “flat 1”. It bears the same number as that above.

- (28) All the above certificates bear a caveat at paragraph 6 which is headed “Limitations of certificate” which states that the certificate relates only to the work stated in the certificate and not in the case of extension or instillation of fittings, to any work carried out to which regulations did not on this occasion apply e.g. the existing building not affected by the extension or the work of repairs or the replacement of fittings etc.
- (29) Paragraph 3 of each certificate refers to a full plans application in each case, those plans being deposited under the Building Regulations.
- (30) A further statement in support of the Applicant’s position was supplied by Andrew Michael Craft, a qualified environmental health officer and a member of the Chartered Institute of Environmental Health. His evidence has not been considered in view of the matters that the Tribunal has taken into account in reaching its decision, as set out below.
- (31) On behalf of the Respondent Council Ms Bracken, the Council Enforcement Manager provides two statements. The second deals principally with the relevance or otherwise of the manner in which council tax is levied on the buildings and their several parts. Conceivably, this may be why that matter is not pursued with any vigour by the Applicant.
- (32) Ms Bracken also refers in that statement to the exhibit MRZ3 contained in Mr Rafiq’s statement which contains fire completion certificates relating to plan 03/03840. These appear to be two copies of one document.
- (33) Ms Bracken’s earlier statement deals at some length with the council’s perception of the planning history, as summarised in paragraph 24 and disagreement as to the number of flats. Their element of self-containment and length of use. Ms Bracken also refers to a further completion certificate from 2010 relating to fire escape works and which is referred to in the first statement of the Applicant.
- (34) Reference is also made to the inspection in 2018 that revealed serious deficiencies in the fire safety and protection provision within the properties that would cast doubt upon any continued compliance with the regulations.

The hearing

- (35) On 21st March 2022 the Tribunal was able to conduct a full video hearing to which both Mr Craggs of Counsel and Mr Pearson on behalf of the Council had provided skeleton arguments in advance of the hearing.
- (36) It was clear from both those documents that the definition of a House in Multiple Occupation was critical to the determination that was to be required and although the issue of council tax assessments is still addressed the thrust of both arguments is directed at compliance or otherwise, and sufficient proof of such, in relation to building regulations at the time of conversion to 20 self-contained flats.
- (37) Mr Craggs, as propounder of the argument that Section 257 of the Act did not apply to these three buildings, suggested the following:
- (1) These buildings, although they contained converted flats, were not ones that had failed to comply, and continued to fail to comply, with Building Regulations.
 - (2) There was clear evidence, in the form of the various certificates produced by Mr Rafiq, that all three buildings, in relation to their refurbishment, conversion, alteration, change of use and provision of fire escape, were compliant.
 - (3) The test for complying is firstly applied at the time conversion. The further test that they continue to fail to comply is only relevant if there is initial non-compliance.
 - (4) It is the relevant work to which the certificates relate that must comply, nothing else relating to conversion, refurbishment etc.
 - (5) Evidence suggests that if full plans were produced there was a clear basis upon which a subsequent certificate could be granted.
 - (6) Mr Rafiq incurred considerable cost in improving the properties and apparently in securing local authority approval so far as such documents as are now available to him suggest.
 - (7) The evidence that he adduces appear to outweigh the evidence adduced by the Respondent.
 - (8) The application to licence no 71, Station Road, but not 65-69, was consistent with the view the latter were not HMOs.
 - (9) It is accepted that if Mr Rafiq fails to satisfy the Tribunal that the three buildings are not within the ambit of section 257 then his appeals against both offences in respect of each property must fail.
- (38) Mr Pearson, for the council, pointed out that the evidence surrounding the precise nature of the buildings prior to 2005 is confusing. The certificates only relate to the work carried out in pursuance of the applications in 2005. The planning history prior to that is, he suggests, instructive in that the application to establish lawful use was based upon the pre-existing use of the buildings to provide self-contained flats.

- (39) Particular reference is made to the Statutory Declaration made by Mr Rafiq and dated 21st June 2005. It contains the following pertinent paragraphs;
- 3 The upper floors of the Properties have been flats for a considerable length of time. Number 65 has six flats on the upper floors, and numbers 67 and 69 both have seven flats making a total of 20 flats altogether.
- 4 These were already self-contained flats at the time when I purchased them and appear to have been so for a long time.
- (40) The inference to be drawn is that the properties had contained 20 flats for some time prior to the 2005 works. It is equally clear that prior to the conversion there were 18 flats, not all self-contained, and the buildings were HMOs. There can be no certainty now as to what works were taking place in relation to the various parts of the three buildings in 2005. The certificates will however relate to what works were carried out, but not to conversion to self-contained flats as that work had already been carried out.
- (41) If that is the case then Mr Rafiq cannot be said to establish that the works effecting the conversion benefit from such certificates as he is able to produce and is therefore unable to rely on Section 257 to exclude the three buildings from being HMOs.

The determination

- (42) It is clear to all parties and the Tribunal that in order for there to be a situation in which a financial penalty, or penalties may be imposed under the provisions of Section 249A of the Act there must be a relevant offence or offences.
- (43) Although the Tribunal is not a court exercising a criminal jurisdiction it is nevertheless considering whether a criminal offence or offences have been committed. As such they must be established to the criminal burden of proof, whereby the Tribunal is so satisfied that it is sure that the Applicant has committed any particular offence.
- (44) As the party suggesting that offences have been committed by Mr Rafiq the Council, in making its decision to impose financial penalties, must satisfy that burden of proof, initially to itself and then to the Tribunal if an appeal is brought. The Tribunal conducts a rehearing, the burden does not shift to the Applicant to establish that no offence has been committed.
- (45) The offences upon which the financial penalties are based relate to the 3 buildings being regarded as HMOs according to the test set out in Section 257 of the Act. It is axiomatic that this appeal stands or falls upon the determination as to whether they are, or are, not HMOs by virtue of that section, given that all flats within the three buildings are now established as being self-contained.

- (46) Examination of such documentation as has been provided, almost entirely from Mr Rafiq, is sought by him to show that Building Regulations were complied with at the time of the conversion and that the relevant works were those contained in the certificates referred to in paragraph 26, above.
- (47) That cannot be the case if the conversion work was carried out at some time prior to 2005 which would mean that those certificates related to some work other than the conversions and so could not be relied upon to support compliance with the regulations for the conversions.
- (48) Mr Rafiq's Statutory Declaration of 21st June 2005, referred to at paragraph 38, above, is identified by the Respondent as indicating prior conversion to 20 flats. The Tribunal notes, however, the date of the declaration. It is made at a date very close to the completion of whatever works were being carried out at that time and reference to 20 flats in the present tense is not incorrect.
- (49) Paragraph (4) of the declaration does then however suggest that 20 flats may have existed at some time before the making of the Declaration, although the number 20 is not repeated there. To that extent the declaration does not serve Mr Rafiq well.
- (50) It may however be the case that it is ambiguous and/or poorly drafted. It can be noted from the bundle of documents at page 602 that a handwritten endorsement attached to the planning application for a certificate of lawful use refers to a Building Regulation survey in 2002 revealing 18 flats, not all of which are self-contained. There were certainly not 20 at that time.
- (51) Thereafter a memo, dated 8th July 2005, from a lady by the name of Katie Foulkes-Williams, refers to the properties being empty from 2002 whilst renovation works take place. It informs us that the work in question is work to convert to 20 flats and due for completion by the end of that month.
- (52) Those documents together, suggest the following to the Tribunal.
- (1) The Statutory Declaration of 21st June 2005 may not be the most reliable document from which to form any accurate view.
 - (2) 18 flats, some of which were not self-contained, were in existence in 2002 at the time of an inspection.
 - (3) At which point the flats were unoccupied whilst renovations took place.
 - (4) By 2005 there were 20 self-contained flats.
- They may then be combined with other identified documents to suggest further:
- (5) The full plans applications for approval to which the 5 certificates relate are considerably more likely than not to refer to the ongoing works referred to by Ms Foulkes-Williams and include the conversion to 20 self-contained Flats.

- (6) As stated, the applications were based upon full plans and relate to all completed works, there being separate certificates in relation to fire safety in the new flats which replaced retail units.
- (53) Nothing adduced by the Respondents would appear to contradict that analysis and the Applicant appears to have done his best to provide such information as he had to support the view that regulations were complied with for the relevant works in 2005.
- (54) The Tribunal is satisfied that that is the appropriate time to apply the test. It is only if the regulations were not complied with at the time of conversion that there is a need to consider any subsequent compliance.
- (55) Against that evidential background the Tribunal is not satisfied that the Respondent can establish that the Buildings are HMOs in accordance with the Section 257 test. It cannot therefore satisfy the Tribunal that offences relating to HMOs have been committed.
- (56) It may be that the Applicant is extremely fortunate that the delays in bringing this appeal to a conclusion have enabled him to avail himself of arguments that have only crystallised in the course of the proceedings. The Tribunal would offer no criticism of the Council's officers in seeking to act appropriately to deal with those risks that were identified when originally called to the property on 3rd July 2018 and protect the occupants from potential significant harm.

J R Rimmer
Tribunal Judge
11 May 2022