



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

Case Reference : **BIR/44UF/HNA/2019/0002**

Property : **8 Palmer Road, Whitnash, Leamington Spa,
CV31 2HP**

Applicant : **Mr G Gamblin**

Representative : **Mr A Arnold**

Respondent : **Warwick District Council**

Representative : **Paul Hughes MCIEH CEnvH**

Type of Application : **An appeal under paragraph 10 of Schedule 13A
to the Housing Act 2004 against a decision by
the Local Housing Authority to impose a
Financial Penalty.**

Tribunal Members : **V Ward BSc (Hons) FRICS
D Jackson Regional Judge
R Chumley - Roberts MCIEH, J.P.**

Date of Decision : **5 June 2019**

DECISION

Introduction

1. This is the Tribunal’s determination on an appeal made by Mr Glenn Gamblin (“the Applicant”) against the decision of Warwick District Council (“the Respondent”) to impose a Financial Penalty under section 249A of the Housing Act 2004 (“the Act”) relating to 8 Palmer Road, Whitnash, Leamington Spa CV31 2HP (“the Property”).
2. The Applicant is the owner of the Property.
3. On 6 December 2018, the Respondent served a Notice of Intention to issue a Financial Penalty on the Applicant under paragraph 1 of schedule 13A to the Act. The Notice was issued as the Respondent was satisfied beyond reasonable doubt that the Applicant had committed an offence relating to the licensing of a house in multiple occupation (“HMO”).
4. On 17 January 2019, in the absence of any representations from the Applicant, a Final Notice of Decision to impose a Financial Penalty was served by the Respondent on the Applicant. Pursuant to schedule 13A to the Act, the Notice imposed a Financial penalty of £13,000.00. The Notice stated that the Respondent was satisfied beyond reasonable doubt that the conduct of the Applicant amounted to an offence, more specifically that the Applicant, as a person having control of the Property, had committed the following offences (the element of the penalty attributed to each offence is shown alongside):

Failure to Licence – Breach of section 72 of the Act	£10,000.00
Breach of Reg 4 (4) HMO Management Regulations (inadequate means of escape)	£1,000.00
Breach of Reg 6 (1) HMO Management Regulations (failure to supply gas certificate)	£1,000.00
Breach of Reg 6 (3) HMO Management Regulations (failure to supply electrical certificate)	£1,000.00
<u>Total</u>	<u>£13,000.00</u>

5. On 25 February 2019, the Applicant applied to the Tribunal.

Inspection

6. The Tribunal inspected the Property on 10 July 2018, in the presence of the Applicant and his representative Mr Adam Arnold. Present on behalf of the Respondent was Mr Paul Hughes, employed as a Senior Environmental Health Officer.
7. The Tribunal found the Property to be a large semi-detached house with accommodation arranged over two floors. The Property is located approximately 2 miles from Leamington Spa town centre in an area known as Whitnash.
8. The accommodation offered by the Property is as follows:

Ground Floor

Hall
Sep WC
Bedroom 1
Communal Lounge/Kitchen
Utility Room/Rear Lobby
Shower room
Bedroom 2

First Floor

Landing with access off to
Bedroom 3
Bedroom 4
Bedroom 5
Bathroom with full suite including shower in separate enclosure.

Externally, the Property has a parking area to the front elevation and a large rear garden area.

9. The Property benefits from gas fired central heating and double glazing.

The Hearing

10. A hearing was held later that same day at Warwick Justice Centre, Newbold Terrace, Leamington Spa.
11. Present at the hearing were those who had attended the inspection.
12. The submissions made on behalf of the parties both in writing and in person at the hearing were briefly as follows.

Submissions of the Respondent

13. Initially, the Tribunal found it convenient to invite the Respondent to give the background to serving the Notice.
14. The Property first came to the Respondent's attention on 30 October 2018, following an enquiry by a tenant if the Property was licensed as a HMO. The Respondent's own records indicated that the Property was only occupied by 4 individuals however arrangements were made with the letting agents for the Property, Ignite Properties, to view the same on 1 November 2018.
15. The inspection revealed the Property to be a shared house type HMO and the letting agent confirmed there was a single assured shorthold tenancy agreement signed by 5 individuals.
16. The inspection also revealed that the Property was generally in good condition. In terms of fire safety, none of the internal doors were fire rated although all but one of the bedrooms had escape type windows deemed adequate as an alternative to providing internal escape. The bedroom without the escape window was located on the ground floor and was approached via the utility room/rear lobby. The presence of several white goods in the utility area meant that escape via this area could be problematic.
17. The agent confirmed that they were offering a let only service and any concerns regarding the Property were referred to the Applicant.
18. On 7 November 2018, the Respondent wrote to the Applicant stating that the Property was a HMO operating without a licence contrary to section 72 of the Act and also requesting gas and electrical certificates. The Applicant was also invited to an interview under caution on 14 November 2018 at which he confirmed that he was managing the Property himself but was unaware of the necessity to obtain a HMO licence and would have expected his letting agent to advise him of this requirement. The Applicant also promised to provide the gas and electrical certificates by the end of the week. At the interview, the Applicant was also given a HMO licence application pack.
19. On 6 December 2018, the Respondent issued the Notice of Intent referred to above. As there was no response to this Notice and also due to the fact that a licence application had not been received nor the promised gas and safety certificates, the decision was taken on 17 January 2019 to issue a Final Notice for a Civil Penalty.
20. Following the issue of the Final Notice, the Applicant visited the offices of the Respondent on 18 January 2019 and gave to Mr Hughes a licence application and

the requested certificates. At this time, Mr Hughes advised the Applicant on procedures to appeal the fine.

21. On 20 January 2019, the Applicant emailed Mr Hughes and explained that the reason for delay in making the application was due to an illness and a family member had failed to deliver the forms as promised. The Applicant confirmed that some improvements had been made to the Property including new fire doors and that the new window (presumably the missing escape window) was due to be fitted shortly.

22. On 22 January 2019, Mr Hughes emailed the Applicant advising of issues with the licence application:

The ground floor bedroom off the hallway required an interlinked smoke detector.

The gas certificate did not cover the gas hob.

Several appliances had failed the PAT test and were still available for the tenants to use in the Property.

23. On 24 January 2019, Mr Hughes again emailed the Applicant informing him that following an internal consultation and consideration of the Applicant's illness and willingness to now co-operate, the Fixed Penalty could be reduced to £6,500.00 provided that payment was made by 1 February 2019, proof of the illness was provided and also that the deficiencies noted above in 22. were remedied by a similar date.

24. Following that email on 21 February 2019, Mr Hughes again visited the Property following contact from a tenant. Mr Hughes noted that the fire doors and escape window had been installed but the appliances that had failed the PAT test were still present.

25. At the time of the hearing a gas safety certificate covering the gas hob remained outstanding which was preventing the processing of the HMO licence.

Submissions by the Applicant

26. The principal strand of the Applicant's appeal was that he was not a person in control of or managing a HMO as per section 72 (5) of the Act and that his agent, Ignite Properties were the party in control. He stated that the gross rental of £1695.00 per calendar month was collected by Ignite of which they retained £195.00 per calendar month as their fee whilst the remainder was passed to the Applicant. A further indication was that Ignite had attended the inspection with

Mr Hughes on 1 November 2019, which in the opinion of the Applicant, was not indicative of a let only arrangement.

27. The Tribunal had directed prior to the hearing that the Applicant provide a copy of his contract/agreement with Ignite Properties however this was not forthcoming and when questioned at the hearing, he advised that there was no written agreement in place.
28. Continuing, the Applicant said that if the Tribunal determined that an offence had been committed he requested that the following be taken into account in respect of the amount of the penalty:
 - a) His means. As a scaffolder he has an income of around £300 per week.
 - b) The severity of the offence. The Applicant did not consider this a serious offence and produced examples of other fines reported in the local press where the fines were significantly less – around £2,500 – for seemingly more serious offences.
 - c) The culpability and track record of the offender. The Applicant had not previously been the subject of any previous action by the Respondent in respect of the Property. The Applicant noted that many other Landlords on the Respondent's database had been informed of the legislative change that from 1 April 2018, all HMO properties with 5 or more occupiers (irrespective of the number of storeys) needed to be licenced prior to 1 October 2018. The Applicant asserted that if he had been informed of the need to licence either by the Respondent directly or his agent, he would have unquestionably made the application.
 - d) The harm (if any) caused to a tenant. No harm was caused to a tenant and further the Respondent had themselves commented that the Property was in good condition.
 - e) The need to punish the offender, to deter repetition of the offence. The Applicant commented that he has only one property and the works required by the Respondent had been carried out, there was "zero" chance of a repeat offence.
 - f) The need to remove any financial benefit the offender may have obtained as a result of committing the offence. In the opinion of the Applicant there had been no financial gain from what was simply a late application which could have been made in time had the Respondent or his agent advised him of the need to licence in time.

29. Summarising, the Applicant stated that this matter could have been avoided had the Respondent decided to simply issue a caution and felt that as a responsible landlord he was being made a scapegoat. The Applicant invited the Tribunal to quash the penalty or, failing that, to reduce it significantly.

The Law

30. Paragraphs 1 to 10 of Schedule 13A to the Housing Act 2004 state as follows:

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.

31. Section 263 of the Act states

263 Meaning of “person having control” and “person managing” etc.

(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), or who would so receive it if the premises were let at a rack-rent.

(2) In subsection (1) “rack-rent” means a rent which is not less than two-thirds of the full net annual value of the premises.

(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; and
(ii) in the case of a house to which Part 3 applies (see section 79(2)), persons who are in occupation as tenants or licensees of parts of the premises, or of the whole of the premises; or

(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.

(4) In its application to Part 1, subsection (3) has effect with the omission of paragraph (a)(ii).

(5) References in this Act to any person involved in the management of a house in multiple occupation or a house to which Part 3 applies (see section 79(2)) include references to the person managing it.

The Tribunal's Determination

32. The Tribunal then considered the appeal in three parts:

- a) Whether the Tribunal was satisfied, beyond reasonable doubt, that the applicant's conduct amounted to a "relevant housing offence" in respect of premises in England (see sections 249A (1) and (2) of the Housing Act 2004);
- b) Whether the local housing authority 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); and/or
- c) Whether the financial penalty was set at an appropriate level, having regard to any relevant factors, including:
 - (i) the offender's means;
 - (ii) the severity of the offence;
 - (iii) the culpability and track record of the offender;
 - (iv) the harm (if any) caused to a tenant of the premises;
 - (v) the need to punish the offender, to deter repetition of the offence or to deter others from committing similar offences; and/or
 - (vi) the need to remove any financial benefit the offender may have obtained as a result of committing the offence.

Did the Applicant's conduct amount to a relevant housing offence?

33. It was not contested by the Applicant that the Property requires a HMO licence.
34. In respect of the Applicant's claim that he was not in control under section 72 (5) of the Act, the Tribunal considered section 263 of the Act which is reproduced above and which provides a definition of a "person having control". As will be noted the person in control is one who receives the rack rental of the premises; the rack rental is a rent not less than two thirds of the net annual value of the premises. This was put to the Applicant at the hearing who could not deny that on that basis he received the rack rental. In terms of his relationship with Ignite Properties, no management agreement could be produced as apparently one does not exist. The Tribunal was presented with an email from Mundeep Dhaliwal, the proprietor of Ignite Properties, to Mr Hughes which stated that Ignite did not manage the property.
35. The Tribunal is satisfied beyond reasonable doubt that the alleged offence was committed and that the Applicant was the "person in control".

Whether the local housing authority complied with all of the necessary requirements and procedures relating to the imposition of the financial penalty?

36. There was no challenge by the Applicant in this element of the appeal and the Tribunal determines that the procedural requirements for the imposition of the Financial Penalty were satisfied.

Whether the financial penalty was set at an appropriate level?

37. The methodology by which the penalty amount was calculated was by the Respondent Council's Civil Penalties Policy which includes a matrix which had been set in partnership with the vast majority of local authorities in the West Midlands region to establish a consistent framework. This sets out the penalty amount for each type of offence and adjustments for particular circumstances which are not relevant to this matter. The Tribunal considers this policy simplistic, for instance the penalty for the failure to licence is set at £10,000, however there is no mechanism to adjust this for the period of the offence or for discretion to allow for mitigation for factors such as here, the illness of the Applicant.
38. The Property is a 2 storey extended semi-detached house. Accordingly, the Property was only required to be licensed from 1 October 2018 in accordance with the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2018. The Local Authority published details of the changes to the

HMO Licensing regime on its website on 29 March 2018. At page 5 of his statement, Mr Hughes on behalf of the Local Authority indicated that although the Property was on its database as an HMO it was understood not to require an HMO Licence because records indicate that it was occupied by less than 5 persons. Mr Hughes told us that all landlords whom the Local Authority believed owned properties which would require an HMO Licence following the regulatory reform from 1 October 2018 were sent a letter in April/May 2018 advising them to apply for an HMO Licence. As Local Authority records showed the Property to be occupied by less than 5 persons, no letter advising him to apply in advance of 1 October 2018 was sent to the Applicant. We should stress that whilst there is no obligation on the Local Authority to send a warning letter that is a matter that should have been taken into account when determining the level of the financial penalty. The Local Authority should also have taken account of the fact that the Applicant retained a local Agent whom he could reasonably have expected to notify him of the 1 October 2018 changes.

39. We find that the Applicant was not aware of the changes introduced by the 2018 Regulations until the Local Authority's inspection of 1 November 2018 and letter of 7 November (see appendix C to Statement of Mr Hughes). Thereafter the Applicant delayed in applying for an HMO Licence until 18 January 2019 (page 13 of Mr Hughes' Statement). It is significant that the Applicant hand delivered his HMO Licence application the day after the Final Notice was issued on 17 January 2019 (Appendix J of Statement of Mr Hughes).
40. We accept entirely that the Applicant has significant medical issues relating to a spinal tumour for which he underwent surgery in May 2018 and April 2019. One of the effects of his tumour is headaches and migraine. We take the Applicant's medical condition into account. Nevertheless, the requirement for an HMO Licence having been brought to his attention at the beginning of November 2018 the Applicant took no action for 2 ½ months and did not make application for HMO Licence until mid-January having been prompted to do so by the issue of the Final Notice.
41. All these matters are relevant considerations which the Local Authority should have taken into account in the exercise of its discretion in determining the amount of any Financial Penalty rather than slavishly following its Civil Enforcement Policy without giving any consideration to the circumstances surrounding the offence.
42. On the basis of the above, the Tribunal calculates the Penalty as follows:
 - a) The Applicant receives £1,500.00 per calendar month by way of rent from the Property. His Mortgage payments are £490.00 per calendar month. His "profit" is approximately £1,000.00 per calendar month. The Applicant owns

GOW Scaffolding Limited. He pays himself £300.00 per week (say, £1,200.00 per calendar month) and he and his partner in the business pay themselves a bonus of £5,000.00 each twice a year. Accordingly, the Applicant's income is approximately £3,000.00 per month before tax. We have considered the matters listed above and for the offence under section 72 of the 2004 Act we vary the amount of the Financial Penalty to the sum of £2,500.00 (equivalent to 2 1/2 months net rent).

- b) The breaches of Reg 4 (4) and 6 (3) of the HMO Management Regulations, inadequate means of escape and failure to supply electrical certificate, were both remedied relatively quickly. The Tribunal therefore reduces the penalties in respect of these offences from £1,000.00 each to £500.00 each.
- c) The breach of Reg 6 (1) of the HMO Management Regulations, failure to supply gas certificate, was not satisfied until the time of the hearing albeit that the Tribunal has subsequently been advised that the original inspection by the gas engineer did include the hob. This should have been investigated more quickly by the Applicant, the penalty for this offence is thus left at £1,000.00

Decision

- 43. The Tribunal varies the Financial Penalty under paragraph 10(4) of Schedule 13A Housing Act 2004 to £4,500.00 (Four thousand five hundred pounds).

Appeal

- 44. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

Vernon Ward
Chairman